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SECURITI

17 CFR Parts 200, 201, 232, 240, 242, and 249

[Release No. 34-98845; File No. S7-14-22]

RIN 3235-AK93

Security-Based Swap Execution and Registration and Regulation of Security-Based Swap Execution Facilities

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission ("SEC" or "Commission") is adopting a set of rules 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 adopted implements an element of the Dodd-Frank Act that is intended to mitigate conflicts of interest at SBSEFs and national securities exchanges that trade SBS ("SBS exchanges"). Other rules being adopted 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 amending 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 is also adopting a new rule that, while affirming that an SBSEF would be a broker under the SEA, exempts a registered SBSEF from certain broker requirements. Further, the Commission is adopting 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. Finally, the Commission is delegating new authority to the Director of the Division of Trading and Markets and to the General Counsel to take actions necessary to carry out the rules being adopted.

DATES: *Effective date:* [INSERT DATE 60 DAYS AFTER THE DATE OF PUBLICATION

IN THE *FEDERAL REGISTER*].

Compliance dates: See section XVI (Compliance Schedule).

FOR FURTHER INFORMATION CONTACT: Michael E. Coe, Assistant Director; David Liu, Special Counsel; Leah Mesfin, Special Counsel; Michou Nguyen, Special Counsel; or Geoffrey Pemble, Special Counsel, at (202) 551-5000, Office of Market Supervision, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission is adopting new 17 CFR 242.800 through 242.835 ("Regulation SE") to create a regime for the registration and regulation of SBSEFs and to address other issues relating to SBS execution generally. Regulation SE consists of 17 CFR 242.800 through 242.835 (Rules 800 through 835). Key rules within Regulation SE include Rule 803, which establishes a process for SBSEF registration; Rules 804 to 810, which establish procedures for rule and product filings by SBSEFs; Rule 815, which establishes permissible execution methods for SBS that are subject to the SEA's trade execution requirement; Rule 816, which sets 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 implement the 14 Core Principles for SBSEFs set forth in section 3D(d) of the SEA; Rules 832 to 833, which address cross-border matters; and Rule 834, which imposes 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 adopting 17 CFR 249.1701 (Form SBSEF), which is the form that an entity will use to register with the Commission as an SBSEF; 17 CFR 249.1702 (a submission cover sheet), which will be required to accompany filings with the Commission made by SBSEFs for rule and rule amendments and for product listings; adopting 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; adopting amendments to 17 CFR 240.3a1-1 (Rule 3a1-1) 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; adopting 17 CFR 240.15a-12 (Rule 15a-12), which, while affirming that an SBSEF would also be a broker under the SEA, exempts a registered SBSEF from certain broker requirements; providing for the sunset of existing temporary exemptions from the requirement to register as a clearing agency that, among other things, applies to an entity performing the functions of an SBSEF but that is not yet registered as such, and from the requirement to register as an SBSEF or a national securities exchange for entities that meet the statutory definition of SBSEF; adopting certain new rules and amendments to 17 CFR Part 201 (Rules of Practice) to allow persons who are aggrieved by certain actions by an SBSEF to apply for review by the Commission; and adopting amendments to 17 CFR 200.30-3 and 17 CFR 200.30-14 regarding delegations of authority to the Director of the Division of Trading and Markets and to the General Counsel.

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I. BACKGROUND

The Commission is adopting Regulation SE,[1] which governs the registration and regulation of SBSEFs, as required by section 3D of the SEA.[2] Section 3D was enacted as part of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").[3] The Dodd-Frank Act was enacted, among other reasons, to promote the financial stability of the United States by improving accountability and transparency in the financial system.[4] The 2008 financial crisis highlighted significant issues in the over-the-counter ("OTC") derivatives markets, which experienced dramatic growth in the years leading up to the financial crisis and are capable of affecting significant sectors of the U.S. economy.

Section 3D(a)(1) of the SEA 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.[5] And section 3D(f) requires the Commission to prescribe rules governing the regulation of SBSEFs. In addition, 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"),

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1 The Commission proposed Regulation SE on Apr. 6, 2022. *See* Rules Relating to Security-Based Swap Execution and Registration and Regulation of Security-Based Swap Execution Facilities (Proposed Rule), SEA Release No. 94615 (Apr. 6, 2022), 87 FR 28872 (May 11, 2022) ("Proposing Release").

2 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").

3 Pub. L. No. 111-203, H.R. 4173, sec. 763(c).

4 *See* Pub. L. No. 111-203 Preamble.

5 *See infra* section VI (listing the Core Principles).

SBSEFs, and national securities exchanges that post or make available for trading SBS ("SBS exchanges").

On April 6, 2022, the Commission proposed Regulation SE, relating to the registration and regulation of SBSEFs and to SBS execution generally.[6] As discussed in the Proposing Release, the proposed rules superseded previous Commission proposals on these subjects.[7]

The SBS market is closely related to the swaps market, which is regulated by the Commodity Futures Trading Commission ("CFTC").[8] In June 2013, the CFTC adopted rules (in 17 CFR chapter I) under Title VII of the Dodd-Frank Act for swap execution facilities ("SEFs").[9] The swaps market has grown and matured within the framework established by the CFTC's rules.[10] As discussed in the Proposing Release, the SBS market is a small fraction of the overall swaps market, and the swaps market provides greater opportunities for revenue capture from

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6 *See* Proposing Release, *supra* note 1. In 2011, the Commission published for comment proposed Regulation SBSEF relating to, among other things, the registration and regulation of SBSEFs. Registration and Regulation of Security-Based Swap Execution Facilities, SEA Release No. 63825 (Feb. 2, 2011), 76 FR 10948 (Feb. 28, 2011) ("2011 SBSEF Proposal"). The Proposing Release, which contains a more detailed discussion of that and related proposals, withdrew the 2011 SBSEF Proposal. *See* Proposing Release, 87 FR at 28874.

7 *See* Proposing Release, *supra* note 1, 87 FR at 28874. However, Rule 834 of proposed Regulation SE would implement section 765 only with respect to SBSEFs and SBS exchanges. *See infra* section VIII.

8 In adopting Regulation SE, the Commission has consulted and coordinated with the CFTC and the prudential regulators, in accordance with the consultation mandate of the Dodd-Frank Act. 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." 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).

9 *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 Release").

10 In 2018, the CFTC proposed to make fundamental changes to the SEF regulatory structure. *See* CFTC, Swap Execution Facilities and Trade Execution Requirement, 83 FR 61946 (Nov. 30, 2018) ("2018 SEF Proposal"). 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." Accordingly, the CFTC withdrew the unadopted portions of its 2018 proposal. *See* CFTC, Swap Execution Facilities and Trade Execution Requirement – Proposed rule; partial withdrawal, 86 FR 9304, 9304 (Feb. 12, 2021).

swap execution as compared to SBS execution.[11] For example, as of November 25, 2022, the gross notional amount outstanding in the SBS market was approximately $8.5 trillion across the credit, equity, and interest rate asset classes,[12] while the gross notional amount outstanding in the swaps market was approximately $352 trillion across the interest rate, credit, and foreign-exchange asset classes.[13] The Commission was sensitive in the Proposing Release to the economic impact its proposed SBSEF rules could have.[14]

In addition, the Commission recognized that the entities that are most likely to register with the Commission as SBSEFs are existing, CFTC-registered SEFs, which have already made substantial investments in systems, policies, and procedures to comply with and adapt to the regulatory system developed by the CFTC. Harmonization between the Commission's SBSEF rules and the CFTC's SEF rules could facilitate the ability of entities to dually register and minimize costs by allowing incumbent SEFs to use their existing systems, policies, and procedures to comply with the Commission's SBSEF rules.[15]

Thus, in proposing Regulation SE, the Commission took 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 swaps market, necessitated differences between the Commission's rules and the CFTC's, or where the benefits of deviating from the CFTC's rules would otherwise justify the

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[11] *See* Proposing Release, *supra* note 1, 87 FR at 28874–76.

[12] *See* Report on Security-Based Swaps (Mar. 20, 2023), *available at* https://www.sec.gov/files/report-security-based-swaps-032023.pdf. *See also infra* note 815 and accompanying text (discussing security-based swap transactions data in the credit, equity, and interest rate derivatives asset classes reported by registered SBSDRs).

[13] *See* CFTC Swaps Report, *available at* https://www.cftc.gov/MarketReports/SwapsReports/L3Grossexp.html (accessed on Sept. 27, 2023).

[14] *See* Proposing Release, *supra* note 1, 87 FR at 28875.

[15] *See* Proposing Release, *supra* note 1, 87 FR at 28875.

burdens and costs associated with imposing different or additional requirements than the corresponding CFTC rule. And the Commission sought public comment on this approach.[16]

One commenter opposes this harmonization approach, and argues that it does not make sense to harmonize with the "looser" rules of SEFs, which he believes would allow "more fraud and false narratives to creep into the market," and instead advocates that the Commission start from scratch with new rules.[17] Many other commenters, however, generally support this harmonization approach.[18] Many of these commenters echo the Commission's rationale for harmonizing with the CFTC's SEF rules, and state that such harmonization would minimize the compliance burden for dually registered entities.[19] Two of these commenters also state that the CFTC's regulatory framework has been in place for almost a decade and has functioned well.[20]

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16 The comment letters are available at https://www.sec.gov/comments/s7-14-22/s71422.htm. The Commission also received comments on topics outside the scope of the proposal that are not addressed in this release. *See*, *e.g.*, Letter from Anonymous (Apr. 27, 2022) (discussing CFTC oversight and transparency); Letter from Anonymous (Apr. 20, 2022) (discussing securities financial transactions).

17 *See* Letter from Robert McLaughlin (Apr. 7, 2022).

18 *See, e.g.*, Letter from Robert Laorno, General Counsel, ICE Swap Trade, LLC, to Vanessa A. Countryman, Secretary, Commission, at 1–2 (June 20, 2022) ("ICE Letter"); Letter from Stephen W. Hall, Legal Director and Securities Specialist, and Jason Grimes, Senior Counsel, Better Markets, Inc., to Vanessa A. Countryman, Secretary, Commission, at 9–11 (June 10, 2022) ("Better Markets Letter"); Letter from Derek J. Kleinbauer, Vice-President, Bloomberg SEF LLC, and Benjamin MacDonald, Global Head Enterprise Products, Bloomberg L.P., to Vanessa A. Countryman, Secretary, Commission, at 1–2 (June 10, 2022) ("Bloomberg Letter"); Letter from Bella Rosenberg, Senior Counsel and Head of Legal and Regulatory Practice Group, International Swaps and Derivatives Association, Inc., and Kyla Brandon, Managing Director, Head of Derivatives Policy, Securities Industry and Financial Markets Association, to Vanessa Countryman, Secretary, Commission, at 1–2 (June 10, 2022) ("ISDA-SIFMA Letter"); Letter from Sarah A. Bessin Associate General Counsel, and Nicholas Valderrama, Counsel, Investment Company Institute, at 1–2 (June 10, 2022) ("ICI Letter"); Letter from Elizabeth Kirby, Head of U.S. Market Structure, Tradeweb Markets Inc., to Vanessa A. Countryman, Secretary, Commission, at 1–2 (June 10, 2022) ("Tradeweb Letter"); Letter from Williams Shields, Chairman, Wholesale Markets Brokers' Association, Americas, to Vanessa A. Countryman, Secretary, Commission, at 1–2 (June 10, 2022) ("WMBAA Letter"); Letter from Lindsey Weber Keljo, Head of SIFMA Asset Management Group, and William Thun, Associate General Counsel, SIFMA Asset Management Group, to Vanessa A. Countryman, Secretary, Commission, at 1–2 (June 10, 2022) ("SIFMA AMG Letter"); Letter from Jennifer W. Han, Chief Counsel & Head of Regulatory Affairs, Managed Funds Association, at 1–2 (June 10, 2022) ("MFA Letter"); Letter from Stephen John Berger, Global Head of Government & Regulatory Policy, Citadel and Citadel Securities (June 10, 2022) ("Citadel Letter"). While these commenters support the Commission's general harmonization approach, they also provide specific recommendations on changes to the Commission's Regulation SE proposal that they believe would improve the rules, as described in detail below in the sections discussing these individual rules. *See infra* sections II through XVII.

19 *See, e.g.,* ICE Letter, *supra* note 18, at 1–2; ISDA-SIFMA Letter, *supra* note 18, at 1–2; ICI Letter, *supra* note 18, at 1–2; Tradeweb Letter, *supra* note 18, at 1–2; WMBAA Letter, *supra* note 18, at 1–2; MFA Letter, *supra* note 18, at 1.

20 *See, e.g.,* ISDA-SIFMA Letter, *supra* note 18, at 1–2; SIFMA AMG Letter, *supra* note 18, at 1–2.

One commenter also supports the Commission's decision and rationale in withdrawing proposed Regulation MC[21] and the Commission's 2011 SBSEF Proposal.[22]

The Commission disagrees with the comment that harmonizing with the CFTC approach would allow for more fraud and false narratives in the SBS markets. Standing up a formal regulatory framework for SBSEFs where none yet exists will provide greater accountability and oversight for the SBS market and should, contrary to this commenter's views, serve to detect and deter abusive and manipulative trading practices by providing for a set of Commission rules that SBSEFs must adhere to in operating their platforms and by requiring SBSEFs to make filings with the Commission regarding the operation of their platforms and to make their rules publicly available, as described in detail in sections II through XVII below.

Given the relative size of the SBS market as compared to the swaps market, the fact that the CFTC's SEF regulation has been in place for many years now, and the cost efficiencies and reduced burdens that would result from harmonized rules for dually registered SEFs/SBSEFs, it is appropriate to generally harmonize the Commission's SBSEF regulatory framework with the CFTC's SEF regulatory framework. At the same time, where appropriate, adopted Regulation SE differs in certain targeted respects from the CFTC's regulatory framework for SEFs. This includes areas where differences in the Commission's statutory authority relative to the CFTC's statutory authority or differences in the SBS market relative to the swaps market necessitate differences between the Commission's rules and the CFTC's, or where 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. The specific approach to harmonization that the Commission has pursued, along with differences from CFTC's regime for SEFs, are described in detail in sections II through XVII below.

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[21] 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 (Oct. 14, 2010), 75 FR 65882 (Oct. 26, 2010) ("Regulation MC Proposal").

[22] *See* Bloomberg Letter, *supra* note 18, at 2.

As discussed below, the Commission is modifying the proposed provisions of Regulation SE regarding the definition of "block trade,"[23] the treatment of package transactions,[24] the treatment of SBS transactions that are intended to be cleared but are not accepted for clearing by a registered clearing agency,[25] permitting SBSEFs to contract with designated contract markets ("DCMs") to provide services to assist in complying with the SEA and Commission rules thereunder,[26] the content and timing of the Daily Market Data Report,[27] an exception to ownership and voting restrictions for SBSEFs,[28] the application of deadlines and standard of review for Commission review of SBSEF actions,[29] and the applicability of electronic filing and structured-data requirements with respect to specific SBSEF filings.[30] Otherwise, the rules of Regulation SE are generally being adopted as proposed, in some instances with minor or technical modifications, which are described in more detail below.[31]

II. INTRODUCTORY PROVISIONS OF REGULATION SE

A. Rule 800—Scope

Proposed Rule 800 is based on 17 CFR 37.1, which provides that part 37 of the CFTC's regulations applies to every SEF that is registered or applying to become registered as a SEF under section 5h of the CEA. Proposed Rule 800 would provide that the provisions of Regulation SE apply to every SBSEF that is registered or is applying to become registered as an SBSEF under section 3D of the SEA.

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23 *See infra* section V.E.1(c).

24 *See infra* section V.E.4.

25 *See infra* section V.E.7.

26 *See infra* section VI.B.5.

27 *See infra* section VI.H.

28 *See infra* section VIII.B.

29 *See infra* section XIV.E.

30 *See infra* section XIII.

31 *See infra* note 32.

The Commission received no comments on Proposed Rule 800 and is adopting Rule 800 as proposed, with minor technical modifications,[32] for the reasons stated in the Proposing Release.

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 17 CFR 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.

The Commission did not receive any comments on Proposed Rule 801 and is adopting Rule 801 as proposed, with minor technical modifications.[33]

C. Rule 802—Definitions

Proposed Rule 802 would set forth the definitions of terms that are used in multiple rules in proposed Regulation SE. The majority of these terms were adapted from the CFTC's swaps rules. Other terms were taken from section 3 of the SEA[34] or from a Commission rule under the SEA. In particular, Proposed Rule 802 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

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[32] In several instances, here and as noted below, the Commission has made technical modifications to the proposed regulatory text to conform cross-references in the regulatory text to the CFR to the required style, as well as to correct simple typographical errors. Here, the Commission has modified Rule 800 to change a reference from "[t]he provisions of this section" to "[t]he provisions of §§ 242.800 through 242.835." In other instances, the Commission has added the words "of this section" to a CFR cross-reference to conform to the required form of citation. Other types of technical modifications, and any substantive modifications, are described below with respect to specific instances.

[33] *See id.*

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

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

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—i.e., a "forced trading session"—would be exempt from the definition of "security-based swap execution facility."[37]

Although the Commission received comments regarding the proper application of the proposed definitions with respect to registration requirements, discussed below in section III.A.2, and the proposed amendments to Rule 3a1-1, discussed below in section X, the Commission did not receive comments suggesting a modification of the definitions themselves. The term "security-based swap execution facility" is defined directly in section 3(a)(77) of the SEA 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…,"[38] and it is appropriate to adopt the same definition in Rule 802, with a narrow exception to address certain activities of registered clearing agencies in furthering the accuracy of end-of-day valuations.[39]

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

37 *See* Proposing Release, *supra* note 1, 87 FR at 28878. This provision codifies a series of exemptions granted by the Commission to SBS clearing agencies that operate "forced trading" sessions. *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 (Mar. 6, 2009), 74 FR 10791, 10796 (Mar. 12, 2009) (providing, among other things, 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 (Dec. 14, 2009), 74 FR 67258, 67262 (Dec. 18, 2009) (providing, among other things, 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 15 U.S.C. 78c(a)(77).

39 Because this exception for certain clearing agencies specifies "an entity that is registered with the Commission as a clearing agency pursuant to section 17A of the [SEA]" and meets other specified conditions, the exception would not be available to any exempt clearing agency.

Specifically, it is necessary or appropriate in the public interest, and is consistent with the protection of investors, to exempt a registered clearing agency that utilizes a forced trading functionality for SBS from the definition of "security-based swap execution facility." Such an entity will 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—have to be submitted to the Commission pursuant to section 19 of the SEA. Therefore, codification of the exemption from the definitions of "exchange" and "security-based swap execution facility" preserves the status quo and eliminates a largely duplicative and unnecessary set of regulatory requirements. This exemption covers 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.

Proposed Rule 802 would have defined the term "block trade" to be an SBS transaction that, among other requirements, is an 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) having a notional size of $5 million or greater.[40] The Commission received a number of comments on the proposed definition of "block trade." These comments are discussed below in section V.E.1(c) relating to Rule 815(a), which specifies mandatory methods of execution for a Required Transaction that is not a block trade. As discussed in detail below in section V.E.1(c), the Commission is not adopting the proposed definition of "block trade.[41]

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[40] *See* Proposing Release, *supra* note 1, 87 FR at 28896, 28975.

[41] Additionally, as discussed below, the Commission is removing the term "block trade" from the text of certain rules *other than* Rule 815(a), *see infra* sections VI.B.1 (Rule 819(a)(3)), V.B (Rule 812(b)), VI.B.4 (Rule 819(d)(1)), VI.H (Rule 825(c)(1)(i) and (ii)), and is adding language regarding future definition of "block trade" in Rule 825(c)(1)(iii). *See infra* section VI.H.

Therefore, the Commission is adopting Rule 802 as proposed, except for the definition of "block trade," which it is reserving, and minor technical modifications.[42]

III. REGISTRATION OF SBSEFS

Section 3D(a)(1) of the SEA[43] provides that no person may operate a facility for the trading or processing of SBS[44] 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[45] 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").[46] According to their terms, the Temporary SBSEF Exemptions expire upon the earliest compliance date for the Commission's final rules regarding SBSEF registration.[47]

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42 *See supra* note 32. The Commission has also replaced the term "SBSEF" with "security-based swap execution facility," defined "SBS exchange" when the term is first used, added the words "of this definition of trading facility" to paragraph (2)(C)(ii) of the definition of "trading facility," and moved the definition of "dormant security-based swap execution facility" so that it appears in alphabetical order.

43 15 U.S.C. 78c-4(a)(1).

44 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.

45 15 U.S.C. 78mm(a)(1).

46 *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 the restrictions and 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 section 6 of the SEA. But because the Commission has not previously adopted final rules relating to SBSEFs, such entities have been unable to register with the Commission as SBSEFs. The Temporary SBSEF Exemptions have allowed 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.

47 *See* June 2011 Exemptive Order, *supra* note 46, 76 FR at 36293, 36306; July 2011 Exemptive Order, *supra* note 46, 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. 78*o*(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 ("Broker Exemptions"). The Broker Exemptions generally expired on Oct. 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 earliest compliance date set forth in any of the

A. Rule 803—Requirements and Procedures for Registration

1. Summary of Proposed Rule 803

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

Paragraph (a)(1) of Proposed Rule 803 would track the language of § 37.3(a)(1) closely, and would provide 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 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 SEA.[48]

Paragraph (a)(2) of Rule 803, like § 37.3(a)(2), would require an SBSEF, at a minimum, to offer an order book, which would be defined 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.[49]

Commission's final rules regarding registration of SBSEFs). *See* SEA Release No. 87005 (Sept. 19, 2019), 84 FR 68550, 68602 (Dec. 16, 2019).

[48] 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," *see* sec. 3(a)(77) of the SEA, 15 U.S.C. 78c(a)(77), and thus does not need to register as an SBSEF under Rule 803. Furthermore, as discussed below, s*ee infra* section X (discussing proposed paragraph (a)(4) of SEA Rule 3a1-1), a person that registers as an SBSEF under Rule 803 and provides a market place for no securities other than SBS is exempt from the definition of "exchange" and does not need to register as such pursuant to section 6 of the SEA. 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").

[49] 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 adapted the CEA definitions of those terms directly into Rule 802. *See* Proposed Rule 802 (defining "trading facility" and "electronic trading facility").

Paragraph (a)(3) of Rule 803 is closely modeled on § 37.3(a)(4) and would provide a narrow exception to the requirement to provide an order book for a Required Transaction[50] 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, with some parts of the package being subject to a trade execution requirement and some not.

Paragraph (b) of Proposed Rule 803 is closely modeled 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 file electronically a complete Form SBSEF or any successor forms, and all information and documentation described in such forms with the Commission using the Electronic Data Gathering, Analysis, and Retrieval ("EDGAR") system as an Interactive Data File in accordance with Rule 405 of Regulation S-T, and must provide to the Commission, upon the Commission's request, any additional information and documentation necessary to review an application.

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.[51] Paragraph (b)(2) would also provide that, as set forth in 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), Rule 803(b)(3) would provide that an applicant

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50 As discussed below in section V.E.1(a), the Commission is incorporating into Regulation SE the concepts of "Required Transaction" and "Permitted Transaction" in a manner closely modeled 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. Section 37.3 of the CFTC's rules requires an order book as a minimum trading functionality for all SEFs and is not limited to provision of an order book only for Required Transactions.

51 *See* 17 CFR 240.24b-2 (setting forth the procedures for identifying and redacting the portion of a submission under the SEA for which confidential treatment is requested). As the Commission stated in the Proposing Release, 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 other persons who request confidential treatment from the Commission under the SEA. *See* Proposing Release, *supra* note 1, 87 FR at 28880 n.50.

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 Rule 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 modeled 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 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 that notification until the application is resubmitted in completed form. In such a 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 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, modeled 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 Rule 803(b)(6)(ii), it would be required to specify the grounds for the denial.

Paragraph (c) of Proposed Rule 803, like § 37.3(d), would address reinstatement of a dormant registration. Proposed Rule 803(c) would provide that a dormant SBSEF[52] may reinstate its registration under the procedures of 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 modeled 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), modeled 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 that change.

Paragraph (d)(3) of Proposed Rule 803, like § 37.3(e)(3), would require an SBSEF's request for a transfer of registration to include the underlying agreement governing the corporate change, a description of the corporate change, a discussion of the transferee's ability to comply

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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 definition is modeled on the definition of "dormant swap execution facility" found in § 40.1(f).

with the SEA, the governing documents of the transferee, the transferee's rules marked to show changes from the rules of the SBSEF, and specified representations by the transferee.[53]

Paragraph (d)(4) of Proposed Rule 803, modeled 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.[54] 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 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.

2. Comments and Analysis

(a) Registration Requirements, Generally

Two commenters support the proposed SBSEF registration requirements under Rule 803 being modeled on the CFTC's rules and state that, as market participants are familiar with

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53 *See* Proposing Release, *supra* note 1, 87 FR at 28880–81.

54 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 Regulation SE. *See infra* section XIII.A.

CFTC's requirements, they appreciate the Commission's attempts to minimize registration burdens and expedite the establishment of the SBSEF regime.[55]

One commenter states that the Commission should ensure that all multilateral trading venues for SBS are required to register as an SBSEF, regardless of the specific trading protocol used.[56] Another commenter argues that section 3D(a)(1) of the SEA requires the registration of *any* "facility for the trading or processing of SBS," not just those that meet the statutory definition of SBSEF, which includes multiple-to-multiple trading.[57] Accordingly, this commenter states that single-dealer platforms should be required to register as SBSEFs and to change their operations to offer multiple-to-multiple trading, consistent with the definition of SBSEF.[58]

One commenter asks the Commission to "make clear that the SBSEF registration requirement applies only to these types of platforms that are within the statutory and proposed regulatory definition and does not include any broader CFTC staff interpretations purporting to expand the SEF definition."[59] This commenter states that CFTC Staff Letter 21-19[60] maintains that platforms can be required to register as SEFs "(i) even where multiple participants cannot *simultaneously* request, make, or accept bids and offers from market participants; or (ii) where multiple participants can initiate a one-to-many communication."[61] The commenter states that extending the definition of SBSEF to include "facilities offering one-to-many or bilateral

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55 *See* SIFMA AMG Letter, *supra* note 18, at 5; *see also* Bloomberg Letter, *supra* note 18, at 11.

56 *See* Citadel Letter, *supra* note 18, at 9 ("[A] security-based swap transaction executed via a fully electronic multilateral RFQ protocol should be subject to the same regulations as one executed by voice with the assistance of a voice broker (who may or may not be employed by the SBSEF)").

57 As discussed above, *see supra* note 38 and accompanying text, the statutory definition of SBSEF provides in relevant part that an SBSEF is "a trading system platform in which *multiple participants* have the ability to execute or trade security-based swaps by accepting bids and offers made by *multiple participants*…." SEA section 3(a)(77), 15 U.S.C. 78c(a)(77) (emphasis added). This is sometimes referred to as "multiple-to-multiple trading."

58 *See* Better Markets Letter, *supra* note 18, at 11–13.

59 *See* MFA Letter, *supra* note 18, at 3.

60 *See* CFTC Staff Advisory on Swap Execution Facility Registration Requirement, Letter No. 21-19 (Sept. 29, 2021), *available at* https://www.cftc.gov/node/238336.

61 *See* MFA Letter, *supra* note 18, at 3 (quoting CFTC Staff Letter No. 21-19, *supra* note 60 (emphasis in original)).

communications if more than one participant is able to submit an RFQ on the platform" would "contradict Congress' express intent" to limit the scope of SBSEF registration requirements to multiple-to-multiple platforms; that the Commission should make clear that the CFTC staff guidance is inapplicable to SBSEFs; and that the Commission should confirm that it is not adopting or incorporating, explicitly or implicitly, similar guidance.[62]

The Commission agrees with the comment that the definition of SBSEF applies to multilateral trading facilities regardless of the specific trading protocol used. As the statutory definition of SBSEF makes clear, a trading facility would fall under the definition of SBSEF if it offers "multiple participants 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*…."[63] Whether a specific instance or practice of brokering in fact offers multiple participants the ability to accept the bids or offers made by multiple participants, though, will depend on the attendant facts and circumstances of that instance or practice. The Commission does not, however, agree with the comment that the language of SEA section 3D(a)(1) means that single-dealer platforms for trading SBS must register as SBSEFs and, consistent with the statutory definition of SBSEF, change their operations to provide multiple-to-multiple trading. SEA section 3D is titled "Security-based swap execution facilities," and section 3D(a)(1) states, in full, "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."[64] The Commission is not persuaded that the phrase "facility for the trading or processing of security-based swaps" in this context can reasonably be read to apply more broadly to encompass anything *other than* an SBSEF or an SBS exchange. Since the definitions of both SBSEF and exchange include the concept of

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62 MFA Letter, *supra* note 18, at 3–4 (internal quotations omitted).

63 SEA section 3(a)(77), 15 U.S.C. 78c(a)(77) (emphasis added).

64 SEA section 3D(a)(1), 15 U.S.C. 78c-4(a)(1).

multiple-to-multiple trading,[65] single-dealer "one-to-many" trading platforms that do not offer multiple-to-multiple trading are outside the scope of the provisions of section 3D(a)(1).

It is not necessary to incorporate the guidance in CFTC Staff Letter 21-19 into this release, because the CFTC staff letter in large part refers to fact-specific circumstances that the Commission has yet to encounter since Reg SE is not yet effective and the application of the SBSEF definition depends on the particular facts and circumstances of a platform's structure and operations. For the same reason, it would be premature to reject the possibility of taking a position similar to that of the CFTC guidance with regard to SBSEFs, as one commenter suggested.[66] Moreover, because the statutory definition of SBSEF does not include the word "simultaneous," the Commission declines to issue its own guidance to reflect a requirement for simultaneity here. Where operators of SBS trading platforms have questions about the facts and circumstances particular to their situations, they can discuss their particular circumstances with Commission staff.

(b) Abbreviated Registration Procedures for CFTC-Registered SEFs

Several commenters state that the Commission should use its exemptive authority to provide a streamlined registration process for SBSEFs that are already registered with the CFTC as SEFs.[67] One commenter states that, because many entities will likely be registering with both the Commission and the CFTC, a streamlined SBSEF registration process will ease the burden of new requirements imposed on potential dual-registrants.[68] This commenter further states that allowing currently registered CFTC SEFs to become SEC-registered SBSEFs would be more

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65 *See* SEA section 3(a)(77), 15 U.S.C. 78c(a)(77) (defining SBSEF in relevant part 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…"); SEA section 3(a)(1), 15 U.S.C. 78c(a)(1) (defining an exchange in relevant part 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") (emphasis added).

66 *See supra* notes 59–62 and accompanying text.

67 *See* SIFMA AMG Letter, *supra* note 18, at 5; Bloomberg Letter, *supra* note 18, at 11; WMBAA Letter, *supra* note 18, at 3; ICE Letter, *supra* note 18, at 5.

68 *See* SIFMA AMG Letter, *supra* note 18, at 5.

efficient and would more quickly kick-start the Commission's SBS regime. This commenter thus supports the use of exemptive authority for SEFs that are currently registered, provided that the Commission's approach to exemptive authority does not disrupt the existing market structure and the relationships between venues and participants. Another commenter states that a streamlined registration process for SEFs currently registered and in good standing with the CFTC would have the potential to lower the costs of registration and encourage the entry of market participants.[69]

One commenter that supports a streamlined SBSEF registration process for SEFs states that a prolonged registration process, particularly for venues already registered with the CFTC, only further delays the introduction of regulated price discovery, liquidity formation, and trade execution for SBS.[70] This commenter also states that SBSEF registration also further expedites SBS data reporting to the extent SBSEFs will report trades to an SBS swap data repository under the Commission's Regulation SBSR, as this service cannot be provided until SBSEFs are registered and operational. If the Commission were not to retain the exemptive authority within Rule 803, this commenter supports a process that gives deference to existing CFTC SEFs and provides a more streamlined process for such registrants. The commenter states that, as the Commission observed in the proposing release, most of the SBS liquidity will likely be centralized around a few facilities, with most (if not all) of them already operating CFTC-regulated SEFs.[71]

Another commenter states that SEFs that are currently registered and in good standing with the CFTC should be permitted to register with the Commission utilizing their current documentation filed pursuant to the requirements of Form SEF.[72] This commenter states that CFTC registered SEFs are required to keep their Form SEF and its exhibits current through post-

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69 *See* Bloomberg Letter, *supra* note 18, at 11.

70 *See* WMBAA Letter, *supra* note 18, at 3.

71 *See* WMBAA Letter, *supra* note 18, at 3–4.

72 *See* ICE Letter, *supra* note 18, at 5.

registration amendments and that, as the Commission is modeling proposed Form SBSEF on the CFTC's Form SEF, substituting the forms should not be problematic for the Commission to review. The commenter states that the Commission should permit registered SEFs seeking to register as an SBSEF to submit their Form SEF and exhibits, with an accompanying addendum reflecting only those changes necessary to fulfill the specific requirements of proposed Regulation SE, in lieu of filing a new Form SBSEF.

One commenter, however, stated that "relaxing or eliminating any registration requirements would be highly inappropriate," and argued that the Commission must be "rigorous in reviewing and approving SBSEFs applicants while upholding complete impartiality."[73] This commenter further states that both active SEFs and non-SEFs seeking to register SBSEFs "must be held under the same standard to avoid any conflict of interests."[74] Therefore, this commenter states that the Commission should not use exemptive authority under SEA section 36(a)(1) to adopt an abbreviated procedure for SEFs seeking to register as SBSEFs, because doing so would rely on the "CFTC's biased judgment" and would not permit an "unprejudiced determination" by the Commission.[75]

In the Proposing Release, the Commission stated that it was 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[76] to relax or eliminate entirely certain of the registration requirements for entities that are already registered as SEFs with the CFTC.[77] The Commission recognizes that 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

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[73] Letter from J. T. at 1 (May 26, 2022).

[74] *Id.*

[75] *Id.*

[76] 15 U.S.C. 78mm(a)(1).

[77] *See* Proposing Release, *supra* note 1, 87 FR at 28882.

trade both swaps and SBS. As noted throughout this release, the Commission has sought 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 minimizing costs so as to impose only marginal costs on dually registered SEF/SBSEFs and their members. As a result of these harmonized regimes, 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.

While one commenter states that it would be inappropriate to relax or eliminate any SBSEF registration requirements for CFTC-registered SEFs,[78] an entity's status as a registered SEF in good standing with the CFTC is relevant when considering its application to register as an SBSEF and that reducing the registration burden for CFTC-registered SEFs, where possible, is appropriate. However, granting exemptive relief under section 36(a)(1), which this commenter opposes, or providing for a formally abbreviated SBSEF registration regime for CFTC-registered SEFs is not necessary to accomplish expedited registration and reduced registration burdens.[79] Requiring all applicants to submit Form SBSEF will support consistency in the review by the Commission and its staff of applications for registration of SBSEFs, which will include a review of the proposed rules for the SBSEFs. The Commission expects that prospective SBSEFs will be able to use the information in their SEF applications to complete their SBSEF applications, as discussed below.

For the reasons discussed above, the Commission is adopting Rule 803 as proposed, with minor technical modifications.[80]

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[78] *See supra* note 75 and accompanying text.

[79] In the Proposing Release, the Commission stated that it was "preliminarily considering" that it would exercise exemptive authority under section 36(a)(1) of the Act, 15 U.S.C. 78mm(a)(1), "to relax or eliminate entirely certain of the registration requirements for entities that are already registered as SEFs with the CFTC." Proposing Release, *supra* note 1, 87 FR at 28882.

[80] *See supra* note 32. The Commission is also deleting the header text "Minimum trading functionality" from paragraph (a)(3), and is adding the header text "Request to register" to paragraph (b)(1), in order to maintain consistency of style in the regulatory text. Additionally, the Commission is removing the

B. Form SBSEF

The Commission proposed new § 249.2001 to require that entities use Form SBSEF to register with the Commission as an SBSEF. Form SBSEF would also be used for submitting any updates, corrections, or supplemental information to a pending application for registration. Form SBSEF is closely modeled on the CFTC's Form SEF for entities that seek to register with the CFTC as SEFs, with only minor changes to remove from the form the concept of post-registration amendments, as the proposed rule would not require any amendments to Form SBSEF post-registration. The exhibits that were proposed along with Form SBSEF are very similar to the exhibits in Form SEF. As 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, 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 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

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requirement to use an Interactive Data File for filing requests to withdraw or vacate an application for registration pursuant to Rules 803(e) and 803(f). *See infra* section XIII.A.

information contained in its Form SBSEF by an active SBSEF would be required to be submitted as rules or rule amendments under Rule 806 or Rule 807 or as may be required by other rules in Regulation SE.

One commenter states that the Commission should closely harmonize the rules for SBSEF registration with the CFTC's rules, with the exception of Exhibits D and H of Form SBSEF, which require: (a) a list of all affiliates and a description of any material pending legal proceedings of such affiliates, and (b) the financial statements of the affiliates. This commenter states that the information required by these exhibits is "burdensome and not fit for purpose" and should not be required unless the affiliate provides support services to the SBSEF or the legal proceedings are expected to have a material effect on the applicant or the operation of its proposed SBSEF.[81] As discussed above, several commenters expressed support for the Commission providing an expedited process for CFTC-registered SEFs that wish to register as SBSEFs.

The CFTC adopted rules for the registration and regulation of SEFs in 2013,[82] and the CFTC's process for registering SEFs appears to be well understood by the industry and well designed for being adapted to the SBS market. Therefore, the Commission has used the CFTC's process as a basis for its own process for registering SBSEFs, and information about SBSEF affiliates is relevant to the Commission's oversight of SBSEFs and, in particular, oversight of SBSEF compliance with Rule 828 (conflicts of interest).[83] In addition, we assume that most if not all SBSEFs will be dually registered as SEFs.

However, while the content and exhibits of Form SBSEF closely match the form and content of Form SEF, exhibits to Form SEF are provided to the CFTC as unstructured documents, whereas most exhibits to Form SBSEF will be provided to the Commission as

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81 *See* Bloomberg Letter, *supra* note 18, at 11.

82 *See* 2013 CFTC Final SEF Rules Release, *supra* note 9.

83 *See infra* section VI.K.

structured, machine-readable documents. Permitting SBSEFs to provide copies of Form SEF exhibits in lieu of Form SBSEF exhibits, while likely resulting in an expedited registration process for most SBSEFs, would also potentially result in a much higher volume of unstructured data, making the Form SBSEF disclosures more difficult for market participants and the Commission to analyze in an efficient manner. Thus, notwithstanding some commenters' support for an expedited registration process, the final rules do not permit SBSEFs to provide copies of Form SEF exhibits in lieu of Form SBSEF exhibits. The Commission is therefore adopting 17 CFR 249.2001 as proposed, but is renumbering it as 17 CFR 249.1701 under new subpart R ("Forms for Registration of, and Filings by, Security-Based Swap Execution Facilities") and is making a minor technical correction.[84]

IV. RULE AND PRODUCT FILINGS BY SBSEFS

Unlike section 19(b) of the SEA,[85] which sets out a process whereby national securities exchanges and other SROs submit filings to the Commission to add, delete, or amend rules (including rules to list products), section 3D of the SEA[86] does not set out an equivalent process for SBSEFs, which are not SROs. 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 to make its market more attractive to participants, and adopting rules for filings related to these changes will promote public transparency regarding the changes, as well as consistent handling of those filings by the Commission.

An appropriate review process is necessary to assess whether changes to an SBSEF's rules and product offerings are consistent with section 3D of the SEA and the Commission's rules thereunder, and the CFTC's filing procedures are an appropriate model on which to base the Commission's own filing procedures. Furthermore, because of the likelihood that most if not

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84 The Commission is correcting the text in Instruction 20 to Form SBSEF to read "a list with the name(s) of the clearing agency(ies)" instead of "a list of the name of the clearing organization(s)."

85 15 U.S.C. 78s(b).

86 15 U.S.C. 78c-4.

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. 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,[87] the Commission proposed to establish similar filing processes for registered SBSEFs in Rules 804 to 810 of Regulation SE.[88]

A. Rule 804—Listing Products for Trading by Certification

1. Summary of the Proposed Rule

Proposed Rule 804 is modeled on 17 CFR 40.2 of the CFTC's rules and would set forth procedures by which an SBSEF may list a product via certification. Paragraph (a)(1) of Proposed Rule 804 would require an SBSEF to file its submission electronically with the Commission

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87 *See* 15 U.S.C. 78c-4(d)(1)(A)(ii) (requiring an SBSEF, in order 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).

88 The CFTC has proposed to amend the rules that govern how CFTC-registered entities submit self-certifications and requests for approval of their rules, rule amendments, and new products for trading and clearing, as well as the CFTC's review and processing of such submissions. *See* CFTC, Provisions Common to Registered Entities (Notice of Proposed Rulemaking), 88 FR 61432 (Sept. 9, 2023).The CFTC's proposing release states that the proposed amendments "are intended to clarify, simplify and enhance the utility of those regulations for market participants and the [CFTC]." *Id.* at 61432. The CFTC has not yet taken action on this proposal.

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 10 business days preceding the product's listing.[89]

Paragraph (a)(3) of Proposed Rule 804 would require a self-certification to include a copy of the submission cover sheet;[90] a copy of the product's rules, including all rules related to its terms and conditions; the intended listing date; a certification by the SBSEF that the product to be listed complies with the SEA and the Commission's rules thereunder; a concise 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; 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;[91] and a request for confidential treatment, if appropriate, as permitted pursuant to SEA Rule 24b-2.[92]

Paragraph (b) of Proposed Rule 804, modeled 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.

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89 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. *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).

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

91 Under Rule 804(a)(3)(vi), information that the SBSEF seeks to keep confidential can 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.

92 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 17 CFR 145.9. The Commission proposed instead to direct filers to make any request for confidential treatment pursuant to existing SEA Rule 24b-2. *See supra* note 51.

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.[93] 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-day period, 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.

2. Comments and Analysis

One commenter states that, while the proposed self-certification process does include improvements to the CFTC's self-certification process, including extending the initial review period from one business day to 10 business days and expanding the scope of reasons for staying the self-certification, it is still fundamentally flawed. This commenter states that the CFTC's

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[93] Rule 807(c) is based on § 40.2(c), which 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 proposed, in Rule 804(c), a provision that would allow the Commission to stay the certification of a new product in the same manner that Rule 807(c) would allow the Commission to stay the self-certification of a new rule or rule amendment.

self-certification process is mandated by statute and that, in the absence of any statutory mandate analogous to that applicable to the CFTC, the Commission must, at the very least, provide a coherent policy justification for its proposed self-certification process.[94]

This commenter states that it is not clear why it is necessary or desirable for SBSEFs to be able to bring new products to the market "speedily" and that self-certification turns the regulatory process on its head, creating in effect a presumption of regulatory compliance and putting the onus on the agency, under a predetermined timeline, to fully evaluate a proposed product that may threaten significant harm to investors and market stability.[95] This is especially the case, the commenter states, considering the context in which the SEC was given comprehensive authority to regulate and oversee the SBS market, i.e., a financial crisis caused in large part by SBS and other novel financial products whose risks regulators and market participants thought were well understood, but in fact were not. Given this context, the commenter states, it "makes little policy sense to establish a regime whereby an SBSEF could introduce a new potentially dangerous product to the financial system without an affirmative, independent SEC determination that such product not only complies with the SBSEF Core Principles and other requirements, but also that it does not pose an unwarranted danger to investors, the financial system, and the broader economy."[96]

For several reasons the Commission does not agree with the objections raised by this commenter. *First*, the Commission does not agree that the self-certification process of Rule 804 either "turns the regulatory process on its head" or would deny the Commission the opportunity to "fully evaluate a proposed product that may threaten significant harm to investors and market

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94 *See* Better Markets Letter, *supra* note 18, at 13.

95 *See* Better Markets Letter, *supra* note 18, at 13–14; *see also* Letter from Bryce Keeney (Apr. 27, 2022) ("Keeney Letter") (stating that "[d]erivatives are not the purpose of the market" and that the Commission should "align rules to focus on the primary purpose, not to support tertiary aspects that result in systemic risk and systemic abuse"); Letter from Kevin (Apr. 20, 2023) ("Kevin Letter") (stating that the proposed rules do not protect retail investors and that "[c]reating a self governing regime, allowing easier swaps trading across borders, exemption exchanges and registered brokers … sound like a terrible recipe for disaster in a multi-trillion marketplace").

96 Better Markets Letter, *supra* note 18, at 13–14.

stability."[97] The ability of the Commission to stay the effectiveness of any product self-certification, to seek public comment on that self-certification, and to object to (i.e., effectively disapprove) the proposed certification on the grounds that the product is inconsistent with the SEA or the Commission's rules will provide the Commission with sufficient opportunity (including the opportunity to seek public comment) to consider the self-certified rules and take steps to protect investors and maintain fair, orderly, and efficient markets. Further, the self-certification process does not create a "presumption of compliance," because: (a) Rule 804(b) requires an SBSEF to provide, at Commission request, 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"; (b) Rule 804(c)(1) permits the Commission to suspend a new product certification because "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" (emphasis added); and (c) Rule 804(c)(3) does not create a presumption of compliance but instead provides the Commission a mechanism by which to object to a proposed certification "on the grounds that the proposed product is inconsistent with the SEA or the Commission's rules."[98]

Second, given the relationship between the swaps market and the SBS market, as well as the likelihood that most or all entities seeking to register as SBSEFs will be CFTC-registered SEFs, harmonization with the CFTC filing procedures for new products should facilitate the ability of entities to dually register and minimize costs by allowing incumbent SEFs to use their existing systems, policies, and procedures to comply with the Commission's SBSEF rules. The aim of the rule is, however, not merely to allow SBSEFs to bring products to market "speedily,"

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97 *See supra* note 96 and accompanying text.

98 Section IV.D, *infra*, discusses the process for self-certification of rule changes, including the Commission's ability to stay the effectiveness of such a filing, which would lead to a public comment period and the opportunity for the Commission to object to the certification.

or at minimal cost, and, as discussed below in this section, it is appropriate for its rules to provide for a longer review period than the CFTC's rules.

And third, the Commission disagrees with this commenter's view that the self-certification process "would pose an unwarranted danger to investors, the financial system, and the broader economy." The new-product provisions of Regulation SE must be read in the context of the other relevant provisions of Title VII of the Dodd-Frank Act and the Commission's rules thereunder, which include, among other things, rules governing the registration and regulation of Security-Based Swap Dealers ("SBSDs") and Major Security-Based Swap Participants ("MSBSPs")[99]; capital, margin, and segregation requirements for SBSDs and MSBSPs[100]; business conduct standards and chief compliance officer requirements for SBSDs and MSBSPs[101]; and post-trade reporting and public dissemination of SBS transactions.[102] Because of the significant role these other rules play in addressing potential risks posed by SBS, the Commission's ability to require SBSEFs to provide any evidence, information, or data demonstrating that the SBS meets, initially or on a continuing basis, the requirements of the SEA or the Commission's rules or policies thereunder, and the Commission's ability to suspend and ultimately object to SBSEF self-certifications, are appropriate to protect investors, the financial system, and the broader economy with respect to new SBSEF products and rules.[103] Thus, the

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99 *See* Registration Process for Security-Based Swap Dealers and Major Security-Based Swap Participants, SEA Release No. 75611 (Aug. 5, 2015), 80 FR 48963 (Aug. 14, 2015) ("SBSD and MSBSP Registration Release").

100 *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 (Aug. 22, 2019) ("Capital, Margin, and Segregation Release").

101 *See* Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants, SEA Release No. 77617 (Apr. 14, 2016), 81 FR 29959 (May 13, 2016) ("Business Conduct Standards Release").

102 *See* Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, SEA Release No, 78321 (July 14, 2016), 81 FR 53546 (Aug. 12, 2016) ("Regulation SBSR Release").

103 The Commission's rules for SBSEFs do not directly affect retail investors. Only eligible contract participants ("ECPs") are eligible to trade on an SBSEF, *see* section 6(l) of the SEA, 15 U.S.C. 78f(l), and retail investors would have access to an SBS only after an SBS exchange has filed a proposed rule change with the Commission under Rule 19b-4, 17 CFR 240.19b-4, to amend its rules to permit the listing of a registered SBS, with that proposed rule change being published for public comment.

self-certification process in this context is appropriate for the underlying aims of the Dodd-Frank Act.

Two commenters state that the relatively low volume of SBS products expected to be self-certified supports a shorter review period than the proposed ten-business-day Commission review period.[104] Both commenters recommend a shorter review period of one day to harmonize with the CFTC's approach.[105] Alternatively, one of the commenters suggests a two-day review period.[106] This commenter suggests that a shorter review period would be beneficial to allow market operators to meet participants' demands to transact on regulated platforms in a reasonable period of time.[107] The commenter also states that a shorter review period would accommodate participants' needs to hedge risk in a timely manner.[108] The other commenter states that a longer review period would reduce the competitive benefit to SBSEFs that develop new products because a 10-day review period would enable competitors to list similar products.[109] This commenter also suggests varying from the one-day review period in certain limited circumstances, such as when an SBSEF submits an SBS for a made-available-to-trade determination.[110]

While a ten-day review period differs from the CFTC's one-day review period, one business day would not provide the SEC staff sufficient time to review a new product filing for error or incompleteness, let alone review a new product for compliance with the SEA or Regulation SE. Further, if a product does warrant a stay, the Commission would also need

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104 *See* WMBAA Letter, *supra* note 18, at 4; ICE Letter, *supra* note 18, at 2.

105 *See* WMBAA Letter, *supra* note 18, at 4; ICE Letter, *supra* note 18, at 2.

106 *See* WMBAA Letter, *supra* note 18, at 4.

107 See *id.*

108 *See id.*

109 *See* ICE Letter, *supra* note 18, at 3.

110 *See id.*

sufficient time to go through the administrative steps of formally issuing the stay.[111] 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,[112] which the Commission is replicating in Rule 807(a)(3).[113]

Further, while a shorter review period may allow SBS to trade on an SBSEF more quickly, failing to provide the Commission with a meaningful period for review of a new product would hamper the Commission's ability to protect market participants and maintain fair, orderly, and efficient SBS markets. A ten-day review period would still permit market participants to trade SBS on regulated platforms within a "reasonable period" and would provide the Commission the time it needs to review submissions. The Commission also disagrees with the comment that a shorter review period is necessary to accommodate market participants' need to hedge risk in a timely manner. During the relatively brief and time-limited period for Commission review of an SBSEF new-product filings, market participants would remain able to hedge that risk in other ways, such as in the OTC SBS market or other related securities markets, depending on the risk to be managed. Finally, while the 10-day review period might reduce the first-to-market competitive advantage of an SBSEF that first lists a given SBS,[114] the extent of such an advantage may vary considerably based on other factors in the SBSEF market, and that, in any event, the need for the Commission to have sufficient time to review a new product before it is listed justifies the potential competitive effect.

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111 *See infra* sections XV.D and XV.E (delegating authority to the Director of the Division of Trading and Markets to stay the effectiveness of a self-certification and to extend the period for consideration of a new product).

112 *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 10 business days prior to the registered entity's implementation of the rule or rule amendment).

113 *See infra* section IV.D.

114 *Cf.* ICI Letter, *supra* note 18, at 9 n.29 (discussing "first mover" advantage in the context of an SBSEF that has made an SBS available to trade).

Thus, a ten-business-day review period strikes an appropriate balance between allowing SBSEFs to list new products quickly and affording Commission staff a sufficient time period in which to assess those products prior to listing.

One commenter asks the Commission to confirm that it does not expect SBSEFs to self-certify for every security for which there may exist a related SBS.[115] This commenter states that, for example, while an SBSEF may publish "terms and conditions" relevant for an instrument (like a single-name total return SBS) under Rule 804, the Commission might receive thousands of underlying national market system equity stocks from each SBSEF, exponentially increasing the number of products the Commission would need to review. The commenter also states that, given the potential 10-day review period (compared to the CFTC's shorter timeframe), SBSEFs will be forced to proactively self-certify every potential SBS in an attempt to meet all potential participant demand without a two-week delay, only increasing the volume of self-certifications the Commission may receive. This commenter states that listing the instrument, and not each equity that may be linked to the instrument, is an appropriate approach to balance the SBSEFs and the Commission's resources with respect to product self-certification.

The Commission is conscious of the large number of individual SBS that may constitute a "class" of SBS, such as single-name, total return SBS given as an example by the commenter. While an SBSEF should not necessarily be required to make an individual filing for each of the securities underlying a single such class of SBS, a filing for a simple class certification that merely described the parameters of the SBS covered by the certification would not necessarily provide sufficient information for the Commission to determine whether all the potential products covered by the class are consistent with the SEA and the rules thereunder, including Regulation SE. Therefore, while the Commission is not providing for "class certifications" of SBS, the Commission will not necessarily require separate submissions for each underlying

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115 *See* WMBAA Letter, *supra* note 18, at 4.

security.[116] The Commission will consider submissions for an SBS that might overlie one or more of a list of securities, provided that those potential underlying securities are specifically identified and that the submission addresses, as part of the requirement in Rule 804 to submit "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,"[117] why *all* included underlying securities meet the applicable provisions of the SEA and the Commission's rules thereunder.[118]

Accordingly, for the reasons discussed above, the Commission is adopting Rule 804 as proposed, with the exception of the proposed Inline XBRL and EDGAR filing requirements, and with minor technical modifications.[119]

B. Rule 805—Voluntary Submission of New Products for Commission Review and Approval

Proposed Rule 805 is closely modeled 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.

Paragraph (a) of Proposed Rule 805 would adapt these requirements for SBSEFs.[120] First, an SBSEF would be required to file its submission electronically with the Commission using the

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116 By contrast, paragraph (d) of § 40.2 provides that a DCM or SEF may submit a class certification of swaps based on an "excluded commodity," subject to certain conditions. *See* section 1a(19) of the CEA, 7 U.S.C. 1a(19) (defining "excluded commodity").

117 Rule 804(a)(3)(v).

118 For example, a submission might cover a single-name total return SBS on any of the components of a given index, provided that the submission explains why the minimum criteria for inclusion in that index are sufficient to ensure that the proposed SBS are consistent with the requirements of the SEA and the rules thereunder, including Regulation SE.

119 *See supra* note 32. As described in further detail in the discussion of electronic filing systems and structured data, the Commission will require all rule and product filings required by Rules 804 through 807 and 816 to be filed in unstructured format through EFFS, rather than in Inline XBRL through EDGAR. *See infra* section XIII.A.

120 Paragraph (a) of Rule 805 omits two provisions in § 40.3(a). First, § 40.3(a)(6) requires the submitting entity to include the certifications required in 17 CFR 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 did not propose to adapt 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)

EDGAR system as an Interactive Data File in accordance with Rule 405 of Regulation S-T. The filing would also 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.[121] The submission would also 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, modeled 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 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.[122] 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

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requires the submitting entity to include a filing fee. The Commission is not proposing to charge SBSEFs filing fees for submitting new product proposals.

121 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.

122 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 51.

submission, concurrent with the filing of a submission with the Commission, on the SBSEF's website.[123]

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, modeled 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 as provided under 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) would also 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, modeled 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) would also 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 may, at any time during its review, 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

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[123] 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.

provision of the SEA or the Commission's rules thereunder, including the form or content requirements of 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 a 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, the notification would be presumptive evidence that the entity may not truthfully certify under Rule 804 that the same, or substantially the same, product does not violate the SEA or the Commission's rules thereunder.

The Commission did not receive any comments on this proposed rule. It is reasonable and appropriate to supplement the product certification procedures in Rule 804 by also including in Regulation SE, as Rule 805, procedures for voluntary submission of new products for Commission review and approval. Providing this approval process, as the CFTC does, can be valuable to an SBSEF seeking the Commission's concurrence that a new product does not violate the SEA or the Commission's rules thereunder prior to listing it. 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.[124]

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[124] As stated in the Proposing Release, 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 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, because the Commission is adopting these procedures substantially as proposed, is unnecessary to establish and apply one set of procedures for dual registrants and a different set for SEC-only SBSEFs. *See* Proposing Release, *supra* note 1, 87 FR at 28956 (stating that if the Commission "establishe[d] 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"). *See also* Bloomberg Letter, *supra* note 18, at 10 ("[A] harmonized framework has the potential to lower compliance costs by allowing SBSEFs and market participants to integrate with existing operational and compliance frameworks. Any potential differences would require SBSEF registrants to devote resources toward assessing the potential gaps and consequences of regulatory divergence.").

Therefore, the Commission is adopting Rule 805 as proposed, with the exception of the proposed Inline XBRL and EDGAR filing requirements, and with minor technical modifications.[125]

C. Rule 806—Voluntary Submission of Rules for Commission Review and Approval

Proposed Rule 806 is closely modeled 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.

Paragraph (a) of Proposed Rule 806 would provide that an SBSEF may request that the Commission approve a new rule, rule amendment, or dormant rule prior to implementation of the rule. First, an SBSEF must 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 would be required to include a copy of the submission cover sheet and to 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 to cite the rules of the SBSEF that authorize the adoption of the proposed rule. The SBSEF 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.

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[125] *See supra* note 32. As described in further detail in the discussion of electronic filing systems and structured data, the Commission will require all rule and product filings required by Rules 804 through 807 and 816 to be filed in unstructured format through EFFS, rather than in Inline XBRL through EDGAR. *See infra* section XIII.A.

Additionally, 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 be required to be set forth and the anticipated effect described. The SBSEF would also 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, as appropriate, include a request for confidential treatment as permitted under SEA Rule 24b-2. Finally, the SBSEF would be required 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.[126]

Paragraph (b) of Proposed Rule 806, modeled 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 Rule 806(a) and the SBSEF 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. Paragraph (c) would also provide that any amendment or supplementation not requested by the Commission would be treated as the submission of a new filing under Rule 806.

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126 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.

Paragraph (d) of Proposed Rule 806, modeled on § 40.5(d), would provide that the 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) would also 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 a 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 a 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 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 received no comments on Proposed Rule 806 and the Commission is adopting Rule 806 as proposed, with the exception of the proposed Inline XBRL and EDGAR filing requirements, and with minor technical modifications, for the reasons stated in the Proposing Release.[127]

D. Rule 807—Self-Certification of Rules

Proposed Rule 807 is closely modeled 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, modeled 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. Proposed Rule 807(a) would also 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 Rule 807, but that in the interim had become a dormant rule (i.e., unimplemented for 12 consecutive calendar months).[128]

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127 *See supra* note 32. As described in further detail in the discussion of electronic filing systems and structured data, the Commission will require all rule and product filings required by Rules 804 through 807 and 816 to be filed in unstructured format through EFFS, rather than in Inline XBRL through EDGAR. *See infra* section XIII.A.

128 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 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 only be required to meet the conditions of paragraphs (a)(1), (a)(2),

Paragraph (a)(1) of Proposed Rule 807 would require the 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) 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.[129] 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 10 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 Rule 807(c).

Paragraph (a)(5) of Proposed Rule 807 would set out procedures for emergency rule certifications. Paragraph (a)(5)(i) would require a new rule or rule amendment that establishes standards for responding to an emergency[130] to be submitted pursuant to Rule 807(a). Paragraph (a)(5)(ii) would provide that 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. In

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and (a)(6) of Rule 807. The introductory language in paragraph (a) of Proposed Rule 807 would generally track 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 is not relevant to SBSEFs.

129 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.

130 *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 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 adopting a definition of "emergency" in Rule 802 that is adapted from § 40.1(h).

addition, paragraph (a)(5)(ii) would provide that any such submission be subject to the certification and stay provisions of Rules 807(b) and (c), described below.

Paragraph (a)(6) of Proposed Rule 807, modeled 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 the 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) would also permit the SBSEF to include, as appropriate, a request for confidential treatment pursuant to the procedures provided in Rule 240.24b-2.[131]

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.

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[131] 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 51.

Paragraph (b) of Proposed Rule 807, modeled on § 40.6(b), would provide the Commission 10 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 Rule 807(c).

Paragraph (c)(1) of Proposed Rule 807, modeled 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) affords the Commission an additional 90 days from the date of the notification to conduct the review.

Paragraph (c)(2) of Proposed Rule 807, modeled 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, modeled 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.

Paragraph (d) of Proposed Rule 807, modeled 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 modeled 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 Notification of Rule Amendments:

- *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 Rule 807, the following types of rules can be put into effect by an SBSEF without self-certification and without having to be disclosed on the Weekly Notification 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.

One commenter states that the CFTC's self-certification process has been relied upon by CFTC registrants for most submissions, leaving little that is reviewed or capable of challenge by

market participants or the CFTC unless it is inconsistent with the statute or CFTC regulation.[132] This commenter states that rulebook or contractual changes can alter protections within Commission-regulated markets and that the Commission should be able to object to any such change it deems inconsistent with Commission policy, including considerations of compliance costs and the impact on consumer protections, all of which would be best informed by a requirement for public comment prior to certification. Under the CFTC regime, the commenter states, there is no formal process to allow market participants to object to a submission for changes that are submitted for certification. Decisions to adopt or modify rules by self-certification are typically made by the registrant's board of directors or a board committee, this commenter states, with market participants only learning of the rule after the registrant has self-certified the rule or amendment. This commenter supports an alternative approach in which the Commission can review all material rule and contractual changes by SBSEFs, clearing agencies, SBS data depositories, and exchanges. This commenter also recommends that the Commission adopt a requirement for public comment for such changes.

Regulation SE will afford the Commission a sufficient mechanism to assess new SBSEF rules and rule amendments for consistency with section 3D of the SEA, while also permitting SBSEFs to submit new rules and rule amendments using a self-certification process closely aligned with § 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 that these rules will thus have to be filed with both the SEC and CFTC. Adding a default comment period or otherwise altering the standard so that the

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132 *See* SIFMA AMG Letter, *supra* note 18, at 5–6. Another commenter raised questions specifically about self-certification in the context of a determination by an SBSEF that an SBS has been "made available to trade." *See* MFA Letter, *supra* note 18, at 6. This comment is discussed below in the context of made-available-to-trade determinations under Rule 816(a). *See infra* sectionV.F.2.

Commission reviews all material rule or contractual changes by SBSEFs, as requested by one commenter,[133] would significantly alter the timing of self-certified SBSEF rules compared to their SEF equivalents. By contrast, closely harmonizing the SEC's filing procedures and standards of review with the CFTC's would allow dually registered entities to submit the same (or substantially the same) filing to both agencies for review. Moreover, if the Commission exercises its authority to stay the effectiveness of a self-certified rule and seek public comment—i.e., with respect to a rule that is novel, complex, inadequately explained, or potentially inconsistent with the SEA or the regulations thereunder, including Regulation SE—market participants would be able to convey their concerns regarding that rule to the Commission.

The specified types of SBSEF rules or rule amendments that may be put into effect under Rule 807(d) without certification to the Commission are appropriate because they are limited to the types of rule changes described earlier in this section (e.g., administration), which do not implicate significant protections to market participants, including compliance costs and customer protection. Therefore, the Commission has harmonized Rule 807(d) with § 40.6(d) to allow such filings to be made without self-certification or Commission review.

Thus, 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. For the reasons discussed above, the Commission is adopting Rule 807 as proposed, with the exception of the proposed Inline XBRL and EDGAR filing requirements, and with minor technical modifications.[134]

E. Submission Cover Sheet and Instructions

In proposed new § 249.2002, the Commission proposed to require that an SBSEF use a submission cover sheet in conjunction with filings submitted pursuant to Rules 804 through 807,

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133 *See* SIFMA AMG Letter, *supra* note 18, at 5–6.

134 *See supra* note 32. The Commission has also moved the word "and" from the end of paragraph (d)(3)(D) to the end of paragraph (d)(3)(E)(2). As described in further detail in the discussion of electronic filing systems and structured data, the Commission will require all rule and product filings required by Rules 804 through 807 and 816 to be filed in unstructured format through EFFS, rather than in Inline XBRL through EDGAR. *See infra* section XIII.A.

809, and 816. The cover sheet and the instructions therein are modeled on the cover sheet and instructions used by SEFs in conjunction with their analogous filings with the CFTC.[135]

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 would also 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 includes 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.[136] Finally, the cover sheet includes a check box by which an SBSEF can indicate that it is requesting confidential treatment of materials in the submission.

The cover sheet divides the rule 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 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 "made available to trade" (or "MAT");[137] or if the filing concerned the delisting of an SBS with no open interest.[138] 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.

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135 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.

136 Rule 809 provides 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 IV.G.

137 Rule 809 provides 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 IV.G.

138 *See supra* note 128.

Paragraph (a) of the submission cover sheet instructions provides that a properly completed submission cover sheet must accompany all rule and product submissions filed electronically with the Commission by an SBSEF using the Electronic Form Filing System (EFFS).[139] Per paragraph (a), a properly completed submission cover sheet would include: (1) the name and platform ID of the SBSEF[140]; (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, the number of the rule(s) being modified; and (4) 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 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 submission cover sheet instructions states 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 does not obviate the SBSEF's responsibility to comply with applicable filing requirements.

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139 The Electronic Form Filing System (EFFS) is a secure, web-based system used for filing Forms 19b-4, 19b-7, and SCI. The system also supports pre-filings of certain types of Form 19b-4 filings. EFFS is used for form filing by SROs, including national securities exchanges, national securities associations, clearing agencies, and Systems Compliance Integrity (SCI) entities, including SCI SROs, SCI alternative trading systems, plan processors, and exempt clearing agencies subject to Automation Review Policy. *See* https://www.sec.gov/tm/electronic-form-filing-system-resources.

140 "Platform ID" is a term utilized in Regulation SBSR, 17 CFR 242.900 *et seq.*, and means the unique identification code 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 SBSDR 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 (Feb. 11, 2015), 80 FR 14563, 14631–32 (Mar. 19, 2015) ("Regulation SBSR Adopting Release I"). Therefore, Legal Entity Identifiers ("LEIs") issued through the GLEIS are currently the only allowable platform IDs that may be used by registered SBSEFs.

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

One commenter states that the submission cover sheet and instructions for SBSEF filings should harmonize with those of the CFTC.[141] This commenter states that entities currently registered with the CFTC as SEFs will be able to seamlessly enact the necessary steps for required SEC filings because of their familiarity with the CFTC's filing process. This commenter also states that any identifiers regarded as necessary should be included on the cover sheet.

The Commission agrees that the use of a submission cover sheet that is harmonized with that required for CFTC filings by SEFs is likely to facilitate the filing process for SBSEFs that are also registered as SEFs. For this reason, the proposed submission coversheet is harmonized with the CFTC's, with differences only in the details specific to the rules and processes of the SEC. The Commission contemplates providing for electronic completion (as well as submission) of the cover sheet and attachment of the submissions required by Rules 804, 805, 806, 807, and 809, and intends to advise affected persons regarding its use by public announcement in advance of the effective date of these rules.[142]

For the reasons discussed above, the Commission is adopting 17 CFR 249.2002 as proposed, but is renumbering it as 17 CFR 249.1702 under new subpart R ("Forms for Registration of, and Filings by, Security-Based Swap Execution Facilities"), and is also adopting the submission cover sheet and instructions as proposed with the exception of the proposed Inline XBRL and EDGAR filing requirements.[143]

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141 *See* Letter from J.T. (May 26, 2022). In section XIII.B, *infra*, the Commission discusses the use of identifiers, such as the LEI.

142 Below in section XIII.A, the Commission addresses the requirements to use the EDGAR system and Inline XBRL for submissions.

143 *See id.*

F. Rule 808—Availability of Public Information

Proposed Rule 808 is closely modeled on § 40.8 of the CFTC's rules.[144] Proposed Rule 808(a) would provide that certain parts of an application to register as an SBSEF would be made publicly available on the Commission's website, unless confidential treatment is obtained pursuant to SEA Rule 24b-2. Specifically, Proposed Rule 808(a) would make the following parts of a Form SBSEF publicly available: the (i) transmittal letter and first part of the application cover sheet; (ii) Exhibit C; (iii) Exhibit G; (iv) Exhibit L; and (v) Exhibit M.[145]

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,[146] an SBSEF's filing of new products pursuant to the self-certification procedures of Rule 804, new products for Commission review and approval pursuant to Rule 805, new rules and rule amendments for Commission review and approval pursuant to Rule 806, and new rules and rule amendments pursuant to the self-certification procedures of 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 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 received one comment on Proposed Rule 808. This commenter states that the Commission should not allow requests for confidential treatment and that these requests

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144 Section 40.8 of the CFTC's rules is entitled "Availability of public information."

145 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 proposed to list the specific corresponding exhibits in Rule 808 that would be made publicly available. Exhibit C would require a narrative that sets forth the fitness standards for the governing board and its composition; Exhibit G would require a copy of the corporate governance documents for the applicant; Exhibit L would require a narrative and any other form of documentation that describes the manner in which the applicant is able to comply with each core principle; and Exhibit M would require a copy of the applicant's proposed rules and any technical manuals, guides, or other instructions for members.

146 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).

are currently abused and result in little information being made available to the public.[147] A blanket prohibition on requesting confidential treatment would not be appropriate, however, because each request for confidential treatment should be addressed on its particular facts and circumstances. Moreover, as the Commission stated in the Proposing Release, "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 other persons who request confidential treatment from the Commission under the SEA."[148] The Commission anticipates that while SBSEFs may request confidential treatment for their filings pursuant to existing SEA Rule 24-2, the items enumerated in Rule 808 are not of the type that typically would constitute confidential information. Finally, it is appropriate to adopt a rule that is adapted from § 40.8, because Rule 808 will apply to submissions made under Rules 804–807, which are, as discussed above, also based on provisions of the CFTC's rules for SEFs. Therefore, the Commission is adopting Rule 808 as proposed.

G. Rule 809—Staying of Certification and Tolling of Review Period Pending Jurisdictional Determination

Section 718 of the Dodd-Frank Act, entitled "Determining Status of Novel Derivative Products," sets forth a mechanism for addressing a situation in which 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., a situation in which it is unclear whether the product in question 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

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147 *See* Keeney Letter, *supra* note 95.

148 Proposing Release, *supra* note 1, 87 FR at 28880 n.50.

classification of that product, and section 718(b) provides that the CFTC and SEC may petition for judicial review of any such determination.[149]

As described in the Proposing Release, Proposed Rule 809 is loosely modeled on § 40.12, but modified to focus on the products and jurisdictional issues that are more likely to be relevant to SBSEFs.[150] Paragraph (a) of Proposed Rule 809, modeled on § 40.12(b), would provide that a product certification made by an SBSEF pursuant to Rule 804 shall be stayed, or the review period for a product that has been submitted for Commission approval by an SBSEF pursuant to 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[151] by the SBSEF, the SEC, or the CFTC. Paragraph (b) is modeled 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 modeled 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 did not receive any comments on Proposed Rule 809. While section 718 of the Dodd-Frank Act addresses situations where it is unclear whether a product is a security or a future, the SEC and the CFTC have adopted separate rules—SEA Rule 3a68-2 and 17 CFR 1.8, respectively—governing requests for interpretation regarding a product that might be an SBS, a swap, or a mixed swap. It is appropriate for Regulation SE to include a mechanism for the staying or tolling of a filing by an SBSEF when it is unclear whether the product is a swap or an SBS, and it would be appropriate for Rule 809 to reflect the process set forth in SEA Rule 3a68-

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149 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. 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.

150 As noted in the Proposing Release, an SBSEF might seek to list a product where it is unclear whether the product is a swap or an SBS. *See* Proposing Release, *supra* note 1, 87 FR at 28890.

151 17 CFR 240.3a68-2.

2. Tailoring, as proposed, the scope of Rule 809, in relation to § 40.12, appropriately addresses the jurisdictional questions that are likely to arise from a product listed by an SBSEF.[152] Therefore, the Commission is adopting Rule 809 as proposed.

H. Rule 810—Product Filings by SBSEFs That Are Not Yet Registered and by Dormant SBSEFs

Proposed Rule 810 is closely modeled on § 37.4 of the CFTC's rules and would provide a process whereby a not-yet-registered SBSEF or a dormant SBSEF could submit product filings. Specifically, Proposed Rule 810 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 and that any such terms and conditions or rules submitted as part of an SBSEF's application for registration shall be considered for approval by the Commission at the time the Commission issues the SBSEF's order of registration. Similarly, any SBS terms and conditions or rules submitted as part of an application to reinstate the registration of a dormant SBSEF would be considered for approval by the Commission at the time the Commission approves the reinstatement of registration of the dormant SBSEF.

The Commission did not receive any comments on Proposed Rule 810 and is adopting Rule 810 as proposed, for the reasons stated in the Proposing Release.

V. MISCELLANEOUS REQUIREMENTS

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

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[152] The objective of Rule 809 is 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.

A. Rule 811—Information Relating to SBSEF Compliance

1. Harmonization with § 37.5

Paragraphs (a) to (c) of Proposed Rule 811 are modeled on § 37.5, which is entitled "Information regarding swap execution facility compliance." Paragraph (a) of Proposed Rule 811 is closely modeled 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 modeled 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 modeled 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 a notification, request supporting documentation of the transaction. Paragraph (c)(2) is closely modeled 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 10 business days following the date upon which the SBSEF enters into a firm obligation to transfer the equity Interest. Paragraph (c)(3) is closely modeled on § 37.5(c)(3) and 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 Rule 806 or Rule 807.

Paragraph (c)(4) of Proposed Rule 811 is closely modeled 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 did not receive any comments on Rule 811(a) to (c). It is appropriate for Regulation SE to include provisions requiring an SBSEF to provide the Commission with the information described above. Information about an SBSEF's business as an SBSEF and transfers of 50% or more of its equity would promote understanding of its operations and ownership, which should facilitate oversight of the SBSEF. Therefore, the Commission is clarifying, as proposed, that, similar to the CFTC, it may request such information from an SBSEF. In addition, as anticipated in the Proposing Release, 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, and the rule provides for this. By modeling 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 is changing the phrase "a transfer of an equity interest of 50 percent or more in a security-based swap execution facility" in paragraph (c)(4) to "an equity transfer described in paragraph (c)(1) of this section" because the text of paragraph (c)(4) should be modified to parallel the text of paragraphs (c)(2) and (c)(3). For these reasons, the Commission is adopting Rule 811(a) to (c) as proposed, with the change described to paragraph (c)(4).

2. Harmonization with § 1.60

Paragraph (d) of Proposed Rule 811 is not modeled 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 would require another type of information relevant to the regulatory oversight of a SEF, the Commission proposed to adapt this provision into Rule 811.[153]

Paragraph (d)(1) of Proposed Rule 811 is closely modeled 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 to which its property or assets are subject. Paragraph (d)(2) is closely modeled 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 modeled 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 10 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.

Paragraph (d)(4) of Proposed Rule 811 is closely modeled on the final two sentences of § 1.60(e) and would provide that, for purposes of Rule 811(d), a "material legal proceeding" includes but is not limited to actions involving alleged violations of the SEA or the Commission

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

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 did not receive any comments on Proposed Rule 811(d) and is adopting Rule 811(d) as proposed, for the reasons stated in the Proposing Release.

B. Rule 812—Enforceability

Proposed Rule 812 generally is modeled on § 37.6. Paragraph (a) of Rule 812, which is based on § 37.6(a)(1), and 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.[154] 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 modeled on the first sentence of § 37.6(b), which 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.[155] Proposed Rule 812(b) differs, however, in that it 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.

One commenter agrees that Rule 812 should be modeled on § 37.6 and states that, like § 37.6, Rule 812 should require the SBSEF to confirm "all the terms of the transaction," rather

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154 The Commission is not adapting into 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 93 and accompanying text. *See also* Proposing Release, *supra* note 1, 87 FR at 28893 n.90.

155 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.

than being limited, as proposed, to "all of the terms that were agreed to on the facility."[156] This commenter states that Rule 812 as proposed may cause issues with clearing SBS because SBS clearing agencies will likely require SBSEFs to represent that any transaction executed on the SBSEF is final and irrevocable (as CFTC-registered clearing agencies require for SEFs). Since Rule 812 only requires an SBSEF confirmation to be limited in scope to "all of the terms that were agreed to on the facility," this commenter states the SBSEF would not necessarily know any terms agreed upon by counterparties outside the SBSEF, and therefore could not represent to the clearing agency that the transaction is "final and irrevocable," which would be a roadblock for straight-through processing and full adoption of clearing for SBS.[157] This commenter states that, to address this issue, SBSEFs should have the ability to prohibit trading relationship documentation or enablements for cleared SBS transactions executed on an SBSEF, which are prohibited for CFTC-registered SEFs in accordance with the CFTC's 2013 Staff Impartial Access Guidance,[158] and that Rule 812 should require that the SBSEF confirm "all of the terms of the transaction."[159]

Another commenter, however, states that it is not practical or cost effective for an SBSEF to collect, review, and store each free-standing agreement underlying an SBS transaction entered into between numerous counterparties.[160] This commenter states that the CFTC has not required SEFs to comply with the requirements of 37.6(b) since 2014, when staff no-action relief was issued due to the impracticability of compliance.[161] Thus, this commenter supports the proposal

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156 *See* Bloomberg Letter, *supra* note 18, at 4, 12–13.

157 *See infra* section VI.F (discussing, among other things, straight-through processing).

158 *See* CFTC Division of Clearing and Risk, Division of Market Oversight, and Division of Swap Dealer and Intermediary Oversight, Guidance on Application of Certain Commission Regulations to Swap Execution Facilities (Nov. 14, 2013), *available at* https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/dmostaffguidance111413.pdf.

159 *See* Bloomberg Letter, *supra* note 18, at 4, 12–13.

160 *See* ICE Letter, *supra* note 18, at 5.

161 *See id.* (citing CFTC Division of Market Oversight, Staff No-Action Position Regarding SEF Confirmations and Recordkeeping Requirements under Certain Provisions Included in Regulations 37.6(b) and 45.2, Letter No. 14-108 (Aug. 18, 2014), *available at* https://www.cftc.gov/csl/14-108/download).

in Rule 812 to require an SBSEF to provide a written record of all the terms of the transaction that were agreed to on an SBSEF, which shall legally supersede any previous agreement regarding such terms.

It is appropriate to require an SBSEF to inform counterparties as soon as technologically practicable after they have effected a trade on or pursuant to the rules of the SBSEF, and to provide them with a written record of the terms to which they have agreed to on the SBSEF. With respect to uncleared SBS, it would be impractical for an SBSEF to be aware of, or responsible for, confirming terms of an SBS that were agreed to off the SBSEF's trading platform, such as terms contained in a credit support agreement between the two counterparties to an uncleared SBS. Thus, the Commission is not including in Rule 812 a requirement that the SBSEF provide a written record of any such terms.[162]

In response to the comment that Proposed Rule 812 may cause issues with clearing because the rule requires SBSEFs to confirm only the terms of an SBS transaction "that were agreed to on the facility," additional terms in trading relationship documents or enablements are unlikely to hinder the acceptance by a clearing agency of SBS that are intended to be cleared or might inhibit impartial access to trading of cleared SBS on an SBSEF. First, a cleared SBS would be a standardized product, the complete terms of which would be known to the SBSEF,

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[162] 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, *supra* note 9, 78 FR at 33491 n.195. The CFTC staff has taken a no-action position 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 (Mar. 24, 2017) (issued by the CFTC's Division of Market Oversight). In the no-action letter, the CFTC staff stated that it was continuing to assess confirmation requirements, including establishing a permanent solution to the issues raised. Given these circumstances, 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. Additionally, the CFTC recently issued a notice of proposed rulemaking to adopt a rule codifying the no-action position, which would enable SEFs to incorporate such terms by reference in an uncleared swap confirmation without being required to obtain the underlying, previously negotiated agreements. *See* CFTC, Swap Confirmation Requirements for Swap Execution Facilities (Notice of Proposed Rulemaking), 88 FR 58145, 58147 (Aug. 25, 2023). The CFTC has not yet taken action on this proposal.

agreed to by the counterparties trading that SBS on the SBSEF, and capable of being confirmed to the parties in writing by the SBSEF, as well as represented to the clearing agency by the SBSEF as "final and irrevocable." Thus, all the terms of the cleared transaction are confirmed when executed on the SBSEF. And second, Proposed Rule 819(c) would require that an SBSEF provide impartial access to its market and market services,[163] and it would not be consistent with an SBSEF's impartial access obligations to permit members to incorporate additional terms for a cleared SBS in trading relationship documentation, enablement documentation, or elsewhere, or to otherwise permit improper discrimination with respect to trading in cleared SBS against SBSEF members who have a direct or indirect clearing relationship with the clearing agency for a given SBS.

Therefore, for the foregoing reasons, the Commission is adopting Rule 812 as proposed.

C. Rule 813—Prohibited Use of Data Collected for Regulatory Purposes

Proposed Rule 813 is modeled on § 37.7, and 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. An SBSEF would be able to use such data or information for business or marketing purposes if the person consents, but the SBSEF would not be able to condition access to the SBSEF on the person's providing such consent. Finally, Proposed Rule 813 would provide that an SBSEF, where necessary for regulatory purposes, may share such data or information with another SBSEF or a national securities exchange.

The Commission did not receive any comments on Proposed Rule 813 and is adopting Rule 813 as proposed, for the reasons stated in the Proposing Release.

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[163] *See infra* section VI.B.3 (discussing the impartial access requirements of Rule 819(c)).

D. Rule 814—Entity Operating Both a National Securities Exchange and an SBSEF

Proposed Rule 814 is modeled 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 under the SEA. Paragraph (b), although consistent with § 37.8(b), draws its specific language from section 3D(c) of the SEA,[164] which contemplates that a single entity may operate both a national securities exchange and an SBSEF. Paragraph (b) of Proposed Rule 814 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.

Two commenters state that the key requirements applicable to SBSEFs should also apply to SBS exchanges to create a level regulatory environment and avoid encouraging regulatory arbitrage.[165] One of the commenters specifically identifies trading protocols, impartial access, limits on pre-execution communication, and straight-through processing as important aspects of SBSEF regulation that should also apply to SBS exchanges.[166] Another commenter states that more detailed rules are needed to address the separation of SBSEFs from SBS exchanges in order to avoid the aggregation of power in the financial markets and to clearly separate the roles of an entity operating both an SBSEF and an SBS exchange.[167]

The comment suggesting that requirements for SBSEFs should be applied to SBS exchanges is outside the scope of this rulemaking, which is designed to set forth requirements for SBSEFs, not exchanges.

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164 15 U.S.C. 78c-4(c).

165 *See* Citadel Letter, *supra* note 18, at 17; MFA Letter, *supra* note 18, at 14.

166 *See* Citadel Letter, *supra* note 18, at 17.

167 *See* Keeney Letter, *supra* note 95.

Additionally, more detailed rules are not necessary to separate the roles of an entity operating both an SBSEF and an SBS exchange. Each entity would be required to make rule or new product submissions to the Commission under a separate set of rules—Rules 804 to 807 for SBSEFs, and Rule 19b-4 for national securities exchanges—making it clear which rules will apply on which platform. Also, Rule 814(b)—which requires that a national securities exchange that also operates an SBSEF identify the platform on which an SBS transaction occurs—will provide further clarity to the market about the roles of an entity operating both an SBSEF and an SBS exchange. Further, the ability of an entity to operate both an SBSEF and an SBS exchange is unlikely to lead to the aggregation of power in the financial markets, because allowing for a variety of SBS trading platforms and ownership models should promote competition in the market for SBS trading.

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. Therefore, for the reasons discussed above, the Commission is adopting Rule 814 as proposed.

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

1. Rule 815(a)

(a) Background

The Dodd-Frank Act provides that if the Commission makes a mandatory clearing determination regarding an SBS, such SBS becomes subject to mandatory trade execution if at least one exchange or SBSEF makes the product "available to trade."[168] The Dodd-Frank Act does not require, however, that all SBS be subject to mandatory clearing or mandatory trade execution, and it does not impose any execution requirements for transactions in an SBS unless the SBS is subject to mandatory clearing *and* it has been made available to trade. Section 37.9 of

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[168] *See* 15 U.S.C. 78c-3(a)(1) (mandatory clearing for SBS) and 78c-3(h) (trade execution for SBS). *See also infra* section V.F.3 (discussing the six factors that an SBSEF shall consider, as appropriate, before making an SBS "available to trade").

the CFTC's rules addresses these issues for SEFs using the concepts of "Required Transactions" and "Permitted Transactions," and the Commission proposed Rule 815 of Regulation SE to adapt § 37.9 for SBSEFs. Rule 815(a)(1) defines "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."

(b) Methods of Execution for Required Transactions

(i) Background

Proposed Rule 815(a)(2) would require that, except for block trades or the exceptions described in paragraph (d) or (e) of the rule and discussed below,[169] the mandatory execution methods for a Required Transaction would be either: (a) an order book or (b) an RFQ system in conjunction with an order book, and the rule permits the SBSEF to use any means of interstate commerce for providing these execution methods.[170]

Proposed Rule 815(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 to no less than three market participants in the trading system or platform, to which all such market participants may respond" and would specify other requirements for an RFQ system to be recognized as such under the rule. The three market participants to which the RFQ is addressed could not be affiliates of or controlled by the requester and cannot be affiliates of or controlled by each other. The proposed rule would also provide that an SBSEF that offers an RFQ system in connection with a Required Transaction must have the following functionalities: (i) at the same time that the requester receives the first responsive bid or offer, the SBSEF must communicate to the requester any firm bid or offer pertaining to the same SBS resting on any of the SBSEF's order books; (ii) the SBSEF must provide the requester with the ability to execute against those

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169 *See infra* section V.E.3.

170 Proposed Rule 815(a)(2)(ii) would provide that any means of interstate commerce includes, but is not limited to, the mail, internet, email, and telephone, provided that the chosen execution method satisfies the requirements for order books in 17 CFR 242.800(x) or in paragraph (a)(3) of Rule 815.

firm resting bids or offers along with any responsive orders; and (iii) the SBSEF must 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. The requirements of Proposed Rule 815(a)(3) are referred to as the "RFQ-to-3 requirement."

(ii) Comments on the RFQ-to-3 Requirement

The Commission received comments on the proposed RFQ-to-3 requirement in Proposed Rule 815(a)(3).[171] One commenter suggests that the Commission expand the permitted modes of SBS execution for swaps mandated for trading on SBSEFs in order to provide for a less prescriptive, more principles-based approach that balances transparency, competition, and liquidity through a flexible set of rules and states that any means of execution that provides sufficient pre-trade price transparency and preserves competition should be available.[172] This commenter, while supporting general harmonization between the Commission's and the CFTC's rules on trading protocols and methods of execution, argues that the Commission's rule also needs to balance harmonization with the need to reflect the unique and sensitive liquidity conditions that exist in SBS markets.

Stating that an RFQ-to-3 requirement for Required Transactions that are SBSs means something completely different than for swaps, this commenter urges the Commission to consider a lower RFQ threshold given the nature of the SBS market. This commenter states that, in some cases, for an asset manager to seek three quotes would effectively require the asset manager to contact many of the primary price makers in the SBS market, as there simply are not the same number of liquidity providers, particularly for less liquid, more thinly traded SBSs, as the number of participants, the trading volume, and the depth of market liquidity are very different in the SBS market. The commenter suggests that requesting quotes from two participants, for example, would allow the asset manager to retain some control over the

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171 *See* ISDA-SIFMA Letter, *supra* note 18, at 5–6; SIFMA AMG Letter, *supra* note 18, at 8–9.

172 *See* SIFMA AMG Letter, *supra* note 18, at 8.

information disseminated about its interest to the market while preserving the statute's "multiple to multiple" definition requirement.[173]

Another commenter also urges the Commission to consider an alternative approach to the proposed RFQ-to-3 requirement, and to provide a "phased-in compliance" with the required methods of execution, whereby a MAT SBS product may be executed on an SBSEF via any method of execution until such time as it is determined through notice and comment that an appropriate level of liquidity exists to enable an order book or RFQ-to-3 system.[174] This commenter states that, considering the lack of liquidity in SBS products, pre-trade transparency via the proposed RFQ-to-3 requirement could negatively impact liquidity provision for end-users. The commenter states that, if clients are required to "show their hand to three liquidity providers," it may lead to information leakage and an inability to hedge the clients' risks through the SBS markets.[175] The commenter asserts that this is particularly so given that there are a relatively small number of active dealers for many SBS products, stating that, based on DTCC[176] data on credit SBS for the top 700 issuers, there are on average 2.7 dealers, and 400 of the top 700 issuers have fewer than three active dealers per month.[177]

This commenter further argues that an RFQ-to-3 requirement would be problematic for SBS equities, where the current execution processes are very different from their swaps counterpart. The commenter states that clients in SBSs typically ask their preferred dealer to execute shares in SBS at market price (or some other pricing structure), the dealer then purchases the shares directly for hedging purposes, and the dealer then executes the swap at the end of the

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173 *See id.* at 9.

174 *See* ISDA-SIFMA Letter, *supra* note 18, at 5–6.

175 *Id.* at 6.

176 "DTCC" refers to the Depository Trust and Clearing Corporation.

177 *See* ISDA-SIFMA Letter, *supra* note 18, at 6.

day with the client at an average market price.[178] The commenter states that, in this case, the dealer's interaction is more akin to a broker than a dealer counterparty, and that these trading practices would not be possible on an RFQ-to-3 or order book system. In addition, the commenter states that it has "compared the credit swaps activity that occurred on-venue back in 2012 before the CFTC trade execution requirement kicked in, with the credit SBS activity that occurs on-venue today" and asserts that the results suggest "that the swaps market was much more ready for the implementation of the trade execution requirement than the SBS market is today."[179] This commenter states that, "[a]bsent a phased-in implementation approach, the SBS market could suffer from significant disruptions."[180]

While the Commission acknowledges that there are differences between the liquidity in the SBS market and the swaps market, the process required before the execution requirement would apply to an SBS will reduce the risk of "substantial disruptions." The required methods of execution would be applied to an SBS only to the extent that it is subject to the clearing mandate *and* has been "made available to trade." Before making an SBS subject to the clearing mandate, the Commission would be able to take into account a number of factors, including the existence of significant outstanding notional exposures, trading liquidity, and the adequacy of pricing data.[181]

Further, to make an SBS "available to trade," an SBSEF would, under Proposed Rule 816(a)(1),[182] have to make a filing with the Commission under Rule 806 or Rule 807—both of which would allow the Commission to find that a filing was not consistent with the requirements

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178 The commenter also stipulates that at the onset of the relationship, clients will negotiate a grid with dealers where certain short/long benchmarks and spreads are agreed for equity issuers on a jurisdictional or other basis. *See* ISDA-SIFMA Letter, *supra* note 18, at 6.

179 *Id.*

180 *Id.*

181 *See* SEA section 3C(b)(4)(i), 15 U.S.C. 78c-3(b)(4)(i). *See also* SEA section 3C(b)(4)(ii) through (v), 15 U.S.C. 78c-3(b)(4)(ii) through (v) (discussing other factors that the Commission would be required to take into account when making a mandatory clearing determination).

182 *See infra* section V.F.2.

of the SEA or Regulation SE.[183] Moreover, the SBSEF's filing would, under Proposed Rule 816(b), have to address, as appropriate, a number of relevant factors, including whether there are ready and willing buyers and sellers; the frequency or size of transactions; the trading volume; the number and types of market participants; the bid/ask spread; and the usual number of resting firm or indicative bids and offers. Similarly, a national securities exchange that wished to make an SBS "available to trade" would have to file a rule change under Rule 19b-4,[184] and that proposed rule change would be subject to Commission review for compliance with the requirements of the SEA, which requires that the rules of a national securities exchange, among other things, promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the SEA.[185] Thus, before an SBS becomes subject to the trade execution requirement, the Commission would have had multiple opportunities to consider the trading characteristics of that SBS.

Additionally, most, if not all, SBSEFs are likely to be dually registered with the CFTC as SEFs, and that most, if not all, market participants in the SBS market will be participants in the swaps market. The Commission remains concerned 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 swaps but different protocols—different from ones that have been understood and utilized for many years—applied to Required Transactions for SBS transactions.

Thus, it is not appropriate to modify the requirement that a qualifying RFQ system under Proposed Rule 815(c) transmit a request for a quote to no fewer than three market participants in

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183 *See supra* sections IV.A and B.

184 17 CFR 240.19b-4.

185 *See* Section 6(b)(5) and (8) of the SEA, 15 U.S.C. 78f(b)(5) and (8).

the trading system or platform. The question whether sufficient liquidity exists in the market for a given SBS to trade RFQ-to-3 can be addressed when the SBS is subject to the clearing mandate and when a national securities exchange or SBSEF seeks to make that SBS available to trade. Until that time, SBSs would be Permitted Transactions on SBSEFs and thus could be traded using other methods of execution, thus avoiding any potential disruptions to liquidity in the SBS markets.

(iii) RFQ Functionalities

The Commission also received two comment letters on the functionalities required for RFQ systems under Proposed Rule 815(a)(3).[186] Both commenters suggest that the proposed rule be amended to require an SBSEF to communicate any firm bid or offer pertaining to the same instrument resting on any of the SBSEF's trading systems or protocols, not just firm bids or offers on the SBSEF's order book.[187] One of the commenters argues that, in practice, order books continue to be infrequently used on SEFs that offer RFQ systems and that, therefore, the same interaction requirement on SEFs has had little impact.[188] The commenter cites, for example, that "request for stream" trading protocols, which allow liquidity providers to stream firm prices, are not required to be communicated to clients sending an RFQ.

This commenter also suggests that the proposed rule should be modified to ensure that the RFQ requester has the ability to execute against all of the prices provided in connection with an RFQ on the same screen. The commenter argues that this will prevent an SBSEF from requiring the RFQ requester to click through multiple screens in order to execute against firm prices, which, the commenter argues, serves to disadvantage those prices versus other prices

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186 *See* Citadel Letter, *supra* note 18, at 13–14; MFA Letter, *supra* note 18, at 8.

187 *See* Citadel Letter, *supra* note 18, at 13; MFA Letter, *supra* note 18, at 8. Rule 813(a)(3)(i) requires an SBSEF to communicate to the requester any firm bid or offer pertaining to the same instrument resting on any of the SBSEF's order books.

188 *See* Citadel Letter, *supra* note 18, at 13; s*ee also* MFA Letter, *supra* note 18, at 8 (also referencing the request-for-stream protocol).

provided in response to an RFQ.[189] Finally, the commenter recommends that the requirements of Rule 815(a)(3) be modified to apply to all SBS transactions on an SBSEF, not solely Required Transactions, as they argued that this will help ensure that market participants transacting on SBSEFs are always provided with the necessary transparency to achieve the most favorable execution possible.[190]

The other commenter also urges the Commission to modify the requirement to ensure that the SBSEF communicates to the requester any firm prices available on the SBSEF, in addition to resting firm bids or quotes on the SBSEFs order book(s), and that they make this functionality available for Permitted Transactions as well.[191] In the commenter's view, this approach is necessary in order to ensure the availability of quotes for SBS transactions that will be essential to maintaining liquidity and promoting open and equitable participation in the markets.

As previously noted, given that most if not all SBSEFs will be dually registered as SEFs, there is a public interest in harmonizing its requirements for trading protocols with those of the CFTC.[192] The commenters' suggestions to apply the proposed interaction requirement to all trading systems and protocols on the SBSEF would be a deviation from the CFTC's requirements for SEFs that would likely introduce operational and compliance challenges created by having different standards. This would undercut the Commission's goal of minimizing operational and compliance burdens by seeking to harmonize requirements between SEFs and SBSEFs. For instance, the commenters' suggestions to apply the order interaction requirement to all transactions on the SBSEF, not only Required Transactions, or to require that firm interest outside the SBSEF's order book be communicated in response to RFQs, would be a significant deviation from the CFTC's method-of-execution requirements and would have wide

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189 *See* Citadel Letter, *supra* note 18, at 13–14.

190 *See id.* at 14.

191 *See* MFA Letter, *supra* note 18, at 8.

192 *See supra* section I.

ramifications for the SBS markets, particularly in view of the liquidity and information leakage concerns that other commenters expressed elsewhere regarding the less liquid and thinly traded SBS products that may trade on an SBSEF.[193] As a result, applying such requirements to Permitted Transactions, which the CFTC does *not* do, would be likely to have the undesirable effect of discouraging market participants from voluntarily executing Permitted Transactions on SBSEFs, which would lessen market transparency and would not provide greater opportunities for market participants to interact with trading interest not subject to the trade execution requirement. Further, it is not necessary for the Commission to mandate the technical details of how the SBSEF displays responses to RFQs to its members. Rule 819(c), discussed below,[194] requires SBSEFs to provide all ECPs and independent software vendors with impartial access market and market services, and this requirement is sufficient to address a situation in which an SBSEF designed its RFQ responses to systematically disadvantage certain market participants or types of market participants.

(c) Block-Trade Exception

(i) General Treatment of Block Trades

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.[195] The CFTC implemented this provision by excepting block trades from the required execution methods in § 37.9(a)(2).[196] Proposed Rule 815(a)(2) would also exclude block trades from the required execution methods using language closely modeled on § 37.9(a)(2). Specifically, Proposed Rule 815(a)(2)(i) would apply required methods of execution to "[e]ach Required Transaction *that is not a block trade.*"[197]

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193 *See supra* note 175 and accompanying text.

194 *See infra* section VI.B.3.

195 15 U.S.C. 78c-4(d)(2)(C); 7 U.S.C. 7b-3(f)(2)(C).

196 That rule cross-references § 43.2, which defines the term "block trade" for purposes of public dissemination of swap transactions.

197 *See* Proposed Rule 815(a)(2)(i) (emphasis added).

Thus, the Commission's proposal to include an exception from the required methods of execution for block trades in Regulation SE is consistent with the approach taken by the CFTC. The purpose of having a block-trade 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 an 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 SEF's trading system or platform, provided that it is executed pursuant to the SEF's rules and procedures. As noted above, the Commission proposed a similar approach for block trades on SBSEFs, excepting block trades from the required execution methods of Proposed Rule 815(a)(2).

The Commission received a number of comments on its proposal for a block trade exception. Commenters generally support the inclusion of a block trade exception from the Required Transaction requirement in Rule 815(a)(2).[198]

One commenter, supporting the Commission's harmonization with the CFTC's approach to block trades by providing an exception for those trades, states that a flexible block execution regime permits trading of larger-sized transactions in a manner that incentivizes dealers to provide liquidity and capital without creating market distortions.[199] Another commenter asserts that exempting block trades from order book and RFQ execution requirements is critical to the functioning of the SBS markets, particularly to execute large trades without affecting price.[200]

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198 *See* Bloomberg Letter, *supra* note 18, at 14; Citadel Letter, *supra* note 18, at 9–10, ICI Letter, *supra* note 18, at 10–13; SIFMA AMG Letter, *supra* note 18, at 9–10; ISDA-SIFMA Letter, *supra* note 18, at 7–9; MFA Letter, *supra* note 18, at 5–6. Many of these commenters raised questions about the proposed size of the block-trade threshold. *See infra* section V.E.1(c).

199 *See* SIFMA AMG Letter, *supra* note 18, at 10.

200 *See* MFA Letter, *supra* note 18, at 5–6.

This commenter expresses concerns that, absent such an exception, market participants would have difficulty executing, or would be unable to execute, large bona fide trades, since they would be required to do so only through the order book. This would increase the cost of trading and hedging, the commenter says, which could reduce participation in certain markets, resulting in less liquidity and increased volatility.

Another commenter states that the proposed exception for block trades would provide important flexibility for market participants executing SBS transactions of a significantly large size, and that rules that facilitate swap block trades allow market participants, such as regulated funds, to engage in large transactions while mitigating the risks of information leakage and impairment of market liquidity.[201] Another commenter also supports the Commission's proposal to align closely its approach to block trades with the approach taken by the CFTC.[202] This commenter agrees with the Proposing Release's assessment that the block exception to the required methods of execution balances the promotion of price competition and all-to-all trading against the potential costs to the market participants who wish to trade large orders, the importance of which they note is more acute in the SBS market, which is a smaller and less liquid market than the swaps market.

The Commission agrees with these commenters that a block-trade exception is appropriate, not only to maintain harmonization with the CFTC regime for swaps but also to facilitate trading of SBS. This approach, which is consistent with the approach of the CFTC for swaps, will be especially important in the smaller, less liquid SBS markets if and when a clearing determination has been made for one or more SBS. A block-trade exception for SBSs subject to the trade-execution requirement, provided that "block trade" is appropriately defined for those SBSs, can help ensure that large trades are not significantly more difficult and costly to execute because of the risks posed by information leakage and the potential for adverse price movement,

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201 *See* ICI Letter, *supra* note 18, at 10.

202 *See* Bloomberg Letter, *supra* note 18, at 14.

which could significantly impair liquidity in the markets for those SBSs. Therefore, the Commission is adopting Rule 815(a) as proposed, but is, as discussed immediately below, modifying the proposal with respect to the definition of "block trade" in Rule 802.

(ii) Block-Trade Definition for Credit SBS

The Commission also proposed to align the regulatory text defining "block trade" in proposed Regulation SE with the CFTC's definition. The proposed definition in Rule 802 of Regulation SE was 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."[203]

For the third prong of the "block trade" definition, the Commission proposed that the SBS be 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,[204] considered the distribution of transactions in the single-name CDS market[205] and took into consideration that FINRA applies a $5 million cap when disseminating transaction reports of economically similar cash debt securities.[206]

A number of commenters question the basis for the proposed $5 million block threshold size and advocate a variety of different approaches to establishing the block size threshold for SBS products, as alternatives to the proposed $5 million notional size block trade threshold.[207]

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203 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. SBSs are not within the CFTC's jurisdiction, so the CFTC had not considered what an appropriate minimum block size threshold would be for any SBS asset class. In this respect, there was no CFTC-defined threshold for the Commission to harmonize with, so the Commission proposed to establish a threshold tailored specifically for the SBS market, *see* Proposing Release, *supra* note 1, 87 FR at 28956, as discussed below.

204 *See* Proposing Release, *supra* note 1, 87 FR at 28896.

205 *See id.* at 28944.

206 *See id.* at 28944 n.369.

207 *See* Citadel Letter, *supra* note 18, at 9; ICI Letter, *supra* note 18, at 10–12; MFA Letter, *supra* note 18, at 5–8; SIFMA AMG Letter, *supra* note 18, at 10; ISDA-SIFMA Letter, *supra* note 18, at 7–9.

One commenter presents data that it argues supports its assertion that the block threshold for credit SBS should be recalibrated.[208] The commenter recommends that the Commission first establish an appropriate methodology to determine block thresholds based on current market-wide data. This commenter states that, otherwise, the already illiquid SBS market will be required to comply with an arbitrary, "one-size-fits-all" threshold amount that fails to consider the unique levels of market liquidity and risk sensitivity of various instruments. The commenter suggests that average daily volume ("ADV") is an appropriate indicator of liquidity levels because it represents a measure of how much trading occurs in a given issuer across the market as a whole, and that the lower the ADV, the lower the liquidity of the product. Based on its analysis of ADV data for credit default swaps ("CDS"), which it retrieved from the DTCC Trade Information Warehouse, the commenter posits that liquidity in single-name CDS is significantly lower than in broad-based CDS. Thus, the commenter argues, it is not appropriate to mirror the block threshold for credit SBS to the threshold for debt securities, when there are clear differences in liquidity levels within the CDS market itself.

This commenter also asserts that the data reveal that liquidity in single-name CDS is disproportionately concentrated in the most actively traded issuers, which, the commenter contends, corroborates its assertion that block thresholds should be calibrated at a more granular level in order to reflect the different liquidity levels of credit SBS products. The commenter cautions that, absent a data-based approach to setting block thresholds for credit SBS instruments, the proposal runs the risk that $5 million may be an inappropriately high threshold for those products, which may widen bid/offer spreads, further reduce liquidity, and force large-sized transactions to be publicly reported with their full size, leaving the dealer that "wins" in the position of risking the market moving against the dealer before the dealer is able to adequately lay-off its exposure. This risk to the dealer, the commenter asserts, could increase the costs of

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208 *See* ISDA-SIFMA Letter, *supra* note 18, at 7–9.

transacting with immediacy substantially, leading to overall increased costs and time delays in executing hedges, and adding to or taking down positions, which would have a direct impact on clients and end-users, who will ultimately bear the increased costs and inefficiencies when forced to split large trades into smaller sizes for liquidity purposes. The commenter states that these clients, end-users, and liquidity providers may decide that it is more economical to exit the market entirely, given that most of them do not trade in large volumes of SBS.[209]

The same commenter also states that, because "the appropriate block threshold depends on factors such as liquidity and risk sensitivity[,] which can change over time, … the rules should provide a formal adjustment mechanism that would allow market participants to petition the Commission to temporarily change block thresholds based on observed market conditions, or enable the Commission's staff to do so, subject to a public comment process."[210]

Several commenters argue for establishing a range of block trade threshold sizes, based on the product.[211] One commenter recommends that the Commission delay implementation of the required execution methods until it considers its approach to block trades more comprehensively.[212] This commenter argues that calibrating appropriate block threshold sizes for SBSs has significant implications for market participants from both a pre- and a post-trade transparency perspective. With respect to pre-trade transparency, the commenter states that requiring a fund to disclose its trading interest in an SBS of a large notional size to multiple participants—via an order book or an RFQ system—would "enable opportunistic market participants to piece together information about the fund's holdings or investment strategy and lead to frontrunning of those potential trades."[213] With respect to post-trade transparency, the commenter states that setting a block trade threshold that is too high would unnecessarily limit

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209 *See id.*

210 *Id.* at 9 n.23.

211 *See* MFA Letter, *supra* note 18, at 7; ICI Letter, *supra* note 18, at 11; SIFMA AMG Letter, *supra* note 18, at 10.

212 *See* ICI Letter, *supra* note 18, at 11–12.

213 *Id.* at 11.

the ability to report large-sized SBS transactions on a delay, which would make it difficult for liquidity providers to hedge such positions, leading to higher trading costs and less efficient trading for funds and other market participants. The commenter also states that the magnitude of these risks depends on, among other factors, an SBS's liquidity profile. The commenter also states that having a single threshold—across all applicable SBSs with respect to SBSEF trading and for any additional future rulemaking related to post-trade public reporting—does not adequately account for varying levels of liquidity across different categories or types of SBSs. The commenter recommends that, given the differences in liquidity across different SBSs, the Commission should base its thresholds on more comprehensive transaction data obtained pursuant to Regulation SBSR. The commenter asserts that taking such a data-driven approach would allow the Commission to assess the liquidity of different SBSs based on, for example, swap term, underlying security, and other characteristics. The commenter also argues that this would enable the Commission, similar to the CFTC, to formulate different types or categories of SBSs and propose differing block trade sizes that are more appropriately tailored to the liquidity characteristics of each type or group.

Another commenter states that the CFTC sets different minimum block sizes for different categories of swaps and argues that the Commission should similarly develop a more structured and tailored approach.[214] The commenter expresses concerns that setting a miscalibrated block size will likely limit the utility of the block trade exception, thereby preventing many market participants from executing transactions on SBSEFs. Another commenter recommends that the Commission adopt the CFTC's approach for block trades based on a "67 percent notional amount calculation."[215] That commenter also recommends that the Commission reserve the ability to update block thresholds on a regular basis to ensure they remain representative of

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214 *See* MFA Letter, *supra* note 18, at 7.

215 *See* Citadel Letter, *supra* note 18, at 9.

current market conditions.[216] Another commenter states that the proposed block threshold is not a result of any empirical analysis on the market conditions for credit SBSs and suggested that, as the SBS market develops and grows, it may become more appropriate for amendments to the credit SBS threshold.[217]

The Commission has considered the comments received and has determined, for the reasons discussed below, not to adopt a definition of "block trade." While the Commission had proposed the single block threshold for credit SBS based on its preliminary view that the block-trade threshold applicable to an SBS trade should be consistent with any reporting cap for that SBS trade, and any reporting cap applicable to the cash markets for the securities,[218] the Commission acknowledges commenters' concerns that the proposed $5 million block-trade threshold for all credit SBSs would not be sufficiently tailored to the unique and varying trading and risk characteristics of the full range of credit SBS, creating the potential for the adverse market risks that commenters point out may arise from having a one-size-fits-all block threshold.

Further, unless and until the Commission has made a clearing determination for a given SBS *and* an SBSEF or a national securities exchange has made that SBS "available to trade," *all* transactions in that SBS will be Permitted Transactions. On the effective date of Regulation SE, and until the Commission has made a clearing determination for an SBS, no SBSEF or national securities exchange will be able to make that SBS "available to trade." Consequently, there could be no mandatory trading requirement and thus there are no transactions to be excepted. Without a mandatory trading requirement, a block-trade threshold, therefore, has no effect on the ability of market participants to choose their preferred means of execution for trades in that SBS. Unless and until the Commission has made a mandatory clearing determination regarding an SBS, it is not necessary to define a block-trade threshold for SBS, and it would be appropriate for the

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216 *See id.* at 10.

217 *See* SIFMA AMG Letter, *supra* note 18, at 10.

218 *See* 2019 Cross-Border Application of Certain Security-Based Swap Requirements, SEA Release No. 87780 (Dec. 18, 2019), 85 FR 6270, 6347 (Feb. 4, 2020) ("2019 Cross-Border Adopting Release").

Commission to identify a block-trade threshold in the future after considering credit SBS transaction data and credit SBS markets at that time. In addition, the Commission agrees with commenters that additional consideration of credit SBS transaction data, including data reported under Regulation SBSR, would help the Commission determine the appropriate block threshold for credit SBS products, including whether different thresholds should apply to different types or groups of SBS. The Commission also agrees with commenters that the credit SBS markets are likely to evolve over time and that analysis of market data continues to be an important aspect of setting appropriate thresholds for both block trades and credit SBS public trade reporting.[219]

Therefore, the Commission is not adopting the proposed definition of "block trade" under Proposed Rule 802, or any other block-trade threshold.[220] In conjunction with any mandatory clearing determination by the Commission for SBS, or with any Commission proposal to specify the criteria for determining what constitutes a large notional SBS transaction for particular markets and contracts with respect to trade reporting, the Commission will have the opportunity to engage in rulemaking to propose a definition of "block trade" for purposes of Regulation SE—and to solicit public comment on Commission's proposal and its economic analysis of the proposed definition—before it considers adopting a definition.

In response to the comment that the Commission should delay implementation of the trade execution requirement until it has considered block trades more comprehensively, unless and until the Commission has made a clearing determination for a given SBS *and* an SBSEF or a

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219 In adopting Regulation SBSR, the Commission directed its staff to make reports in connection with the determination of block thresholds and reporting delays for security-based swap transaction data. *See* 17 CFR 242.901 (Appendix) (discussing the studies for the determination of block thresholds and reporting delays); *see also* Regulation SBSR Adopting Release I, *supra* note 140, 80 FR at 14625. The Commission stated that it intends to use these reports to inform its specification of the criteria for determining what constitutes a large notional SBS transaction (i.e., block trade) for particular markets and contracts; and the appropriate time delay for reporting large notional SBS transactions to the public. *See* 17 CFR 242.901 (Appendix). The reports for each asset class are to be completed no later than two years following the initiation of public dissemination of security-based swap transaction data by the first registered SDR in that asset class—in other words, the reports are anticipated to be complete by Feb. 14, 2024—and then published for comment in the *Federal Register*. *See id.*

220 Because the Commission is not adopting a definition of "block trade" at this time, it is also modifying other rules within Regulation SE that reference block trades. *See supra* note 41.

national securities exchange has made that SBS "available to trade," *all* transactions in that SBS will be Permitted Transactions. Thus, it is not necessary to formally delay the implementation of the trade execution requirement, because the Commission will have the opportunity if and when it makes a clearing determination for SBS—i.e., before any SBS transaction becomes a Required Transaction—to address whether a block-trade threshold should be set; what methodology should be used to determine that threshold; and what that threshold would be. At that time, because amending Rule 802 to define "block trade" would entail notice-and-comment rulemaking, market participants would have the opportunity to comment on the Commission's proposed action.

For the reasons discussed above, the Commission is not adopting the definition of "block trade" in Rule 802 as proposed but is instead adding a note to Rule 802 informing stakeholders the Commission has not yet adopted a definition of "block trade."[221]

(iii) Block-Trade Definition for Equity SBS

In the Proposing Release, the Commission did not propose a definition of "block trade" applicable to equity SBS. Accordingly, no equity SBS would qualify for the exception to required means of execution for block trades in Proposed Rule 815(a)(2).[222]

Several commenters submitted comment letters on the proposal to exclude equity swaps from the proposed block-trade exception.[223] One commenter states that, in its view, the use of block trades for equity SBS is at least as necessary as for credit SBS, due to the need to customize the size of transactions and to obtain timely and efficient executions.[224] This commenter asserts that requiring equity SBS trades to be executed only through the order book

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221 The Commission has corrected a cross-reference from 242.800(x) to 242.802.

222 As discussed in the Proposing Release, appendix F to part 43 of the CFTC's rules does not define a block trade for equity swaps, and accordingly, no equity swap transaction could qualify for the exception to the required means of execution for block trades under § 37.9(a)(2). *See* Proposing Release, *supra* note 1, 87 FR at 28896.

223 *See* MFA Letter, *supra* note 18, at 6–7; ICI Letter, *supra* note 18, at 12–13; ISDA-SIFMA Letter, *supra* note 18, at 9; SIFMA AMG Letter, *supra* note 18, at 10.

224 *See* MFA Letter, *supra* note 18, at 6–7.

or RFQ system could result in these trades having "significant price impact" on SBSEF products, which would ultimately inhibit the ability of market participants to efficiently arrange and execute large, customized trades that are essential for market participants' risk management activities.[225] The commenter also asserts that this would disincentivize market participants from using equity SBS for their legitimate business purposes, including hedging, which could increase volatility and reduce liquidity in equity SBS markets (as well as underlying equity markets). The commenter also argues that excluding equity SBS block trades would ultimately inhibit capital formation as an inability to execute blocks in equity SBS would make it riskier, more expensive, and more difficult to hedge, which would in turn inhibit market participants from participating in offerings.

This commenter further states that equity SBS are quite distinct from CFTC equity swaps in ways that make it more critical to allow block trades in equity SBS. Specifically, the commenter states that since CFTC-regulated equity swaps are based on broad-based equity indices, which reflect markets and not individual issuers, they are used to assume or hedge exposure to the relevant market or sector generally. By contrast, the commenter posits that equity SBS may reference a single name and are therefore a preferred tool for hedging exposure to specific equities, which makes them essential to capital formation. The commenter also argues that markets for SBS on individual equities will, in many cases, be less liquid than the markets for broad-based equity index swaps, further necessitating the opportunity for block trades.[226]

Another commenter also recommends that the Commission conduct further analysis before determining block treatment for equity SBSs.[227] That commenter states that it previously disagreed with CFTC's similar approach with respect to equity swaps. The commenter argues that the Commission should undertake additional analysis to demonstrate that the CFTC's

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225 *Id.* at 6.

226 *See* MFA Letter, *supra* note 18, at 6–7.

227 *See* ICI Letter, *supra* note 18, at 12–13.

justifications for its approach apply equally to the categories or types of equity-based swaps specifically under its jurisdiction, which include, for example, total return swaps based on a single security or loan, or a narrow-based security index. The commenter also recommends that the Commission determine whether block treatment would be appropriate for equity-based SBSs in the pre-trade transparency context. The commenter argues that similar to other categories or types of large-sized SBSs that would qualify for block treatment, flexible execution with respect to large-sized, equity-based SBSs is important to avoid information leakage regarding a market participant's investment strategies.

One commenter suggests that, if there is the ability to have fungible, single-name total return swaps in equity products, and they become subject to mandatory clearing in the future, that the commenter would expect there to be appropriately calibrated block size thresholds that are applied to those equity-based swaps.[228] Another commenter suggests that if an equity SBS product becomes subject to mandatory trade execution, there should be an appropriate methodology for establishing equity block thresholds.[229]

While the Commission acknowledges commenters' concerns, the general concerns expressed about the need for equity blocks lack specificity or analysis regarding a particular definition of "block trade" for equity SBS—whether a specific threshold or a methodology—that the Commission could adopt. Commenters' concerns focus on the need to customize the size of equity SBS transactions, to obtain timely and efficient executions, and to avoid information leakage. And commenters state that the lack of a block-trade exception could result in significant price impact and inhibit the large, customized trades essential for risk management and hedging, which would discourage hedging, increase volatility and reduce liquidity in equity SBS markets (as well as underlying equity markets), and ultimately inhibit capital formation and participation in offerings.

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228 *See* SIFMA AMG Letter, *supra* note 18, at 10.

229 *See* ISDA-SIFMA Letter, *supra* note 18, at 9.

With respect to the stated need for certain parties to use an equity SBS block-trade exception, a relevant consideration for the Commission in determining whether to establish a block-size threshold for equity SBSs, if and when it makes a clearing determination for those SBSs, is whether establishing that block-trade threshold would have the potential to create a situation where SBSEFs provide less transparency than exists in the underlying cash equity markets or the listed options markets. An inappropriate block-trade threshold for equity SBSs could create incentives for market participants to favor equity SBS markets over cash equities or listed options markets, either of which may be used, in many cases, to achieve economically equivalent trading objectives as strategies using equity SBS, and neither of which provides for block-trade reporting delays. If transactions were to migrate from cash equities or listed options markets to the SBS market, this could lead to decreased market transparency and could potentially undercut the goal of the Dodd-Frank Act to bring transparency to the trading of SBS.[230]

Additionally, as a general matter, it is important to harmonize the treatment of equity SBS with the treatment of equity swaps. There is no block-trade exception for equity swaps in the CFTC's rules, and the Commission does not wish to create incentives for market participants to trade equity SBS over swaps. And while a commenter states that equity SBS are quite distinct from equity swaps, the treatment of equity SBS transactions should be broadly consistent with the treatment of transactions in the cash equities underlying them to avoid, as discussed above, creating incentives for market participants to trade equity SBS instead of the underlying cash instruments.

For these reasons and those discussed above regarding credit SBS,[231] the Commission has determined not to adopt a definition of "block trade" in Rule 802. Thus, with respect to

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230 *See* Proposing Release, *supra* note , 87 FR at 28894 ("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.'" S. Rep. No. 111-176, at 34 (2010)).

231 *See supra* section V.E.1(c)(ii).

commenters' concerns, until the Commission has made a clearing determination with respect to equity SBS, equity SBS will be able to trade OTC, just as their underlying cash equities can trade OTC. Moreover, before making a clearing determination for an equity SBS—which would create the circumstances in which equity SBS might be MAT and therefore subject to the trade-execution requirement—the Commission would have the opportunity to solicit and consider additional public comment on the effect of such a determination, including comment with respect to the concerns commenters have raised to date regarding, among other things, timely and efficient executions, hedging, and capital formation.

2. Rule 815(b)

Paragraph (b) of Proposed Rule 815 would require a time delay for certain orders being entered by a broker or dealer on an SBSEF's order book. This provision would only apply to situations in which the broker or dealer is seeking to trade against a customer order (a "facilitation cross") or to cross two customer orders (a "customer cross"), following some form of pre-arrangement or pre-negotiation of such orders, and where the transaction is a Required Transaction.[232] Under Proposed Rule 815(b)(1), an SBSEF would require that the broker or dealer must expose one of the two orders in this transaction on the SBSEF order book for a minimum time period of 15 seconds 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)(2) would permit the SBSEF to adjust the time period of the required delay based on the SBS's liquidity or other product-specific considerations, provided that the time delay is 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 the order.

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[232] The Commission has modified the text of Rule 815(b)(1) to specify that the requirements in this provision only apply with regards to Required Transactions.

The Commission received comments on the provisions regarding the prearrangement or pre-negotiation of trades in Proposed Rule 815(b).[233] One commenter requests that the Commission address the extent to which market participants may utilize "pre-execution communications" when trading on an SBSEF, noting that the CFTC has specified that such communications may occur pursuant to a SEF's rules that have been certified or approved by the CFTC.[234] This commenter urges the Commission to align its rules to those of the CFTC in this respect, given that pre-execution communication is a standard market practice that investment advisers use to guard against information leakage and obtain fair pricing for large-sized trades and packaged transactions, among other types of transactions, on behalf of funds and other clients.

Another commenter, arguing that the Proposing Release and the CFTC rules are silent with respect to the permissibility of pre-arrangement on RFQ systems, urges the Commission to require SBSEF rulebooks to prohibit the pre-arrangement of Required Transactions, arguing that it is important that pre-trade transparency and the RFQ-to-3 requirement not be undermined through bilateral pre-arrangement of a Required Transaction followed by a directed RFQ that merely formalizes the transaction.[235]

The Commission agrees with the comment that it should view pre-execution communications in a way that is consistent with CFTC guidance on this matter.[236] The CFTC has viewed pre-execution communications as communications between market participants to discern interest in the execution of a transaction prior to the exposure of the market participants' orders (e.g., price, size, and other terms) to the market and has stated that such communications include discussion of the size, side of market, or price of an SBS order or a potentially

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233 *See* Citadel Letter, *supra* note 18, at 14–15; ICI Letter, *supra* note 18, at 13–14.

234 *See* ICI Letter, *supra* note 18, at 13–14.

235 *See* Citadel Letter, *supra* note 18, at 15.

236 *See* ICI Letter, *supra* note 18, at 13–14.

forthcoming order.[237] Consistent with the CFTC's approach, the Commission is generally of the view that the terms "pre-negotiation" and "pre-arrangement" within the meaning of Rule 802(b) should ordinarily be understood to include all communications between market participants to discern interest in the execution of a transaction prior to the exposure of the market participants' orders (e.g., price, size, and other terms) to the market, including discussion of the size, side of market, or price of an SBS order, or a potentially forthcoming order.

Additionally, while the CFTC has acknowledged that pre-execution communications may be permitted by a SEF, it has stated that any SEF that allows pre-execution communications must adopt rules regarding such communications that have been certified to or approved by the CFTC.[238] Consistent with this view, the rulebook of an SBSEF generally should address, with clarity, the application of the terms "pre-arrangement" and "pre-negotiation" in Rule 802(b) so that market participants will know what types of pre-execution communications are covered by the rule. An SBSEF's rules in this regard must, of course, also comply with the other provisions of the SEA and the rules thereunder, including the impartial access requirement of Rule 819(c).[239]

With respect to the comment that the Commission should ban pre-arrangement or pre-negotiation of RFQ trades on an SBSEF, while the CFTC regulation is silent regarding the permissibility of pre-arrangement on RFQ systems, the CFTC's adopting release with respect to its SEF rules expressly contemplates the permissible pre-arrangement of trades executed via RFQ.[240] Moreover, the CFTC explained in its adopting release that it refrained from requiring a time delay for Required Transactions entered into RFQ systems because the requirement to send an RFQ to three other market participants already provides pre-trade price transparency.[241] Thus,

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237 *See* 2013 CFTC Final SEF Rules Release, *supra* note 9, 78 FR at 33503.

238 *See id.*

239 *See infra* section VI.B.3.

240 *See* 2013 CFTC Final SEF Rules Release, *supra* note 9, 78 FR at 33504.

241 *See id.*

the CFTC has acknowledged that pre-arranged Required Transactions may be submitted into a SEF's RFQ system, and without a time delay.

The Commission recognizes that, as one of the commenters also states, pre-execution communications are a standard practice for many participants in the SBS market, and that to prohibit them entirely would be a major departure from the CFTC's approach and could have significant negative ramifications on the ability of market participants to effect their SBS transactions. Accordingly, and to maintain harmonization with the CFTC's treatment of pre-arrangement and pre-negotiation of swaps transactions, the Commission is not modifying Rule 815(b) to prohibit the use of pre-arrangement or pre-negotiation with respect to SBS transactions via RFQ or to impose a time delay before any such SBS can be executed via RFQ.

One of the commenters also requests that the Commission require SBSEFs to provide periodic regulatory reporting around pre-arranged trading on their platforms, including reporting the percentage of pre-arranged orders for which other SBSEF participants step in to join the trade, and that it also require an SBSEF to demonstrate that it offers a bona fide order book in order for the SBSEF to permit the execution of pre-arranged orders (such as a minimum level of trading activity on the order book or a minimum percentage of pre-arranged orders where pricing is improved as a result of other SBSEF participants stepping in).[242]

The suggested reporting requirements or "bona fide order book" standard, however, would exceed what SEFs are required to do under the CFTC rules. The Commission is concerned that different or additive requirements to the key concept of an order book, such as whether that order book is "bona fide," could introduce complexity and confusion if one set of trading protocols applied to Required Transactions for swaps but different protocols—different from ones that have been understood and utilized for many years—applied to Required Transactions for SBS transactions. Moreover, the commenter's proposed reporting requirements—such as a

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[242] *See* Citadel Letter, *supra* note 18, at 14–15.

minimum percentage of pre-arranged orders where pricing is improved as a result of other SBSEF participants stepping in—appear to be primarily relevant to an evaluation of a particular SBSEF has met the standard for having a "bona fide" order book. Accordingly, because the added complexity and costs associated with imposing the "bona fide" order book standard have not been justified, it is not appropriate to adopt the proposed regulatory reporting requirement suggested by the commenter with respect to cross-trading.

For the reasons discussed above, the Commission is adopting Rule 815(b) as proposed, with a clarifying change to the rule text to reiterate that the requirement applies only to Required Transactions.[243]

3. Rule 815(c)

Proposed Rule 815(c) is modeled on § 37.9(c) of the CFTC's rules and would define a "Permitted Transaction" as a transaction not involving an SBS that is subject to the mandatory trade execution requirement. This rule provides that an SBSEF may offer any method of execution for Permitted Transactions.

The Commission did not receive any comments on the definition of Permitted Transactions[244] and is adopting Rule 815(c) as proposed, for the reasons discussed in the Proposing Release.

4. Rule 815(d)

Paragraph (d) of § 37.9 provides an exception for package transactions that allows for flexible methods of execution for what would otherwise be Required Transactions. The Commission proposed to include similar exceptions in Proposed Rule 815(d). Proposed Rule 815(d)(1) would define "package transaction" as two or more component transactions executed

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243 The heading of the proposed rule text already indicated that it was a "Time delay requirement for Required Transactions on an order book." The rule text has been modified only to add "With regard to Required Transactions," at the beginning of the rule text, to reiterate the parameters indicated in the title and to clarify its application.

244 As discussed above, one commenter recommends that the requirements of Rule 815(a)(3) be modified to apply to all SBS transactions on an SBSEF, which would include Permitted Transactions. *See supra* note 190 and accompanying text (describing and discussing that comment).

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. Proposed Rule 815(d)(2) would provide that a Required Transaction that is executed as a component of a package transaction that includes a component SBS that is subject exclusively to the Commission's jurisdiction, but is not subject to mandatory clearing, may be executed on an SBSEF using any method of execution as if it were a Permitted Transaction.

Proposed Rule 815(d)(3) would provide that a Required Transaction that is executed as a component of a package transaction that includes a component that is not an SBS may be executed on an SBSEF using any method of execution as if it were a Permitted Transaction. Proposed Rule 815(d)(3) would further state 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-SBS components are U.S. Treasury securities; a Required Transaction that is executed as a component of a package transaction in which all other non-SBS 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-SBS 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.

The Commission received comments on the proposed exception for packaged transactions.[245] Several commenters support the Commission's proposal.[246] One commenter supports the proposal to harmonize with the CFTC rules, but suggested modifications to the

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245 *See* Bloomberg Letter, *supra* note 18, at 14, Citadel Letter, *supra* note 18, at 12–13, and ISDA-SIFMA Letter, *supra* note 18, at 9–10.

246 *See* Bloomberg Letter, *supra* note 18, at 14 and ISDA-SIFMA Letter, *supra* note 18, at 9–10.

proposed rule text.[247] First, the commenter suggests that Rule 815(d)(2) be modified so that the package-transaction exception is not available if the other SBS in the package is either subject to the clearing requirement *or intended to be cleared*. This commenter states that, because the scope of any future clearing requirement for SBSs is unclear, there may be significant trading activity in packages containing SBSs that are intended to be cleared, but not subject to the clearing requirement, and the commenter states that, for purposes of the package transaction exception, SBS that are cleared, whether by mandate or intention, should be treated the same. This commenter also recommends that Rule 815(d)(3) be modified to clarify that the exception would not apply to package transactions where all of the other components are swaps subject to the CFTC's trade execution requirement. The commenter states that this modification would prevent evasion for packages containing only SBSs and swaps that are subject to trade execution requirements on the Commission and the CFTC side, respectively.[248]

Another commenter, while agreeing that it is appropriate to treat package transactions differently from outright, single-legged transactions, suggests that the Commission take a different approach from that of the CFTC, stating that the current state of the CFTC's rules reflect the culmination of a phased implementation approach developed over time via no-action letters.[249] That commenter argues that it would be better for the Commission to tailor its rules for packaged transactions to address the particular market dynamics relevant to the SBS market instead of the swaps market. The commenter recommends that the Commission build into the MAT determination process a framework for identifying what types of package transactions exist for prospectively MAT SBS and then develop tailored rules around the execution of such transactions.

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247 *See* Citadel Letter, *supra* note 18, at 12–13.

248 *See id.*

249 *See* ISDA-SIFMA Letter, *supra* note 18, at 9–10.

Rule 815(d) is closely modeled 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.[250] As noted in the Proposing Release, 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.[251]

The Commission agrees with a commenter's suggestions that Proposed Rule 815(d)(2) and (3) should be modified to narrow the scope of the package-transaction exception. Accordingly, the Commission is modifying these rules so that neither an SBS that is intended to be cleared (even if it is not required to be cleared) nor a swap subject to a CFTC trade execution requirement would create an exception from required methods of execution for a Required Transaction that is part of the same package. For purposes of exempting a Required Transaction in a package transaction from the required means of execution, there is no reason to distinguish mandatorily cleared SBS from voluntarily cleared SBS, or cleared swaps from cleared SBS. Therefore, the Commission is adding the words "and is not intended to be cleared" to Rule 815(d)(2) so that it covers only 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 SEA *and is not intended to be cleared*. And the Commission is adding new subsection (iv) to Rule 815(d)(3) to provide that a Required Transaction in a package transaction is ineligible to be

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250 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.

251 *See* Proposing Release, *supra* note 1, 87 FR at 28896.

treated as a Permitted Transaction if it is "[a] Required Transaction that is executed as a component of a package transaction in which all other non-SBS components are swaps that are subject to a trade execution requirement under the CFTC's rules."

With respect to the suggestion that the Commission take a different approach from that of the CFTC and develop tailored rules for SBS, the package-transaction rule is not the appropriate place to recognize the differences between the swaps and the SBS market. Rather, the clearing determinations and MAT determinations will necessarily consider the trading characteristics of a given SBS, and both these determinations will have to be made before the package transaction exception would ever potentially be relevant to a transaction in that SBS.

For the foregoing reasons, the Commission is adopting Rule 815(d) with the modifications to paragraph (d)(2) and (d)(3), as described above.

5. Rule 815(e)

Proposed Rule 815(e) is modeled on § 37.9(e), which requires SEFs to maintain rules and procedures for resolution of operational and clerical error trades, which could be for swaps that otherwise would be subject to required methods of execution. Proposed Rule 815(e) would also require an SBSEF 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. Definitions of the terms "correcting trade," "error trade," and "offsetting trade" would be included in Rule 802 rather than in Rule 815(e).[252]

The Commission received one comment letter on this provision.[253] The commenter states that, with respect to a cleared SBS, correcting an error trade that was rejected by a clearing

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[252] *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); Proposed Rule 802 (defining "error trade" as any trade executed on or subject to the rules of an SBSEF that contains an operational or clerical error); Proposed Rule 802 (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 definitions are modeled on the definitions of the same terms in § 37.9(e)(1).

[253] *See* Bloomberg Letter, *supra* note 18, at 3, 14.

agency is not feasible unless the rejected error trade is declared by the SBSEF void *ab initio*. Otherwise, the commenter states, the parties might be encumbered by unresolved obligations related to the rejected SBS trade, and this might further prevent a timely and efficient resolution of the error. For this reason, the commenter recommends that the SBSEF should be able to declare void *ab initio* any trade rejected by a clearing agency.[254]

The CFTC's rules for addressing error trades are well articulated and well understood by the market, and they continue to 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 swap trading or SBS trading. Therefore, the rules for addressing error trades should not differ between the SBS regime and the swaps regime. While the Commission appreciates the difficulties that might arise in trying to correct an error trade that has been rejected by a clearing agency, under Proposed Rule 815(e), an SBSEF would be required to adopt rules and procedures for addressing such situations, which it could do by, among other things, declaring trades rejected by a clearing agency as void *ab initio*, as it would be required to do for non-error trades that are rejected for clearing under Rule 815(g). For the foregoing reasons, the Commission is adopting Rule 815(e) as proposed.

6. Rule 815(f)

Rule 815(f) is modeled on § 37.9(f), which addresses counterparty anonymity and is widely referred to as the prohibition on "post-trade name give-up" ("PTNGU"). Proposed Rule 815(f) would generally prohibit any person, directly or indirectly (including through a third-party service provider), from disclosing the identity of a counterparty to an SBS that is executed anonymously on an SBSEF and intended to be cleared and requires the SBSEF to establish and

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[254] *See id.*

maintain rules to that effect. Furthermore, it provides that "executed anonymously" as used in the rule includes an SBS that is pre-arranged or pre-negotiated anonymously, including by an SBSEF participant. Finally, Rule 815(f) provides that, for a package transaction that includes a component SBS that is not intended to be cleared, disclosing the identity of a counterparty would not violate the rule.

The Commission received several comments on Proposed Rule 815(f).[255] Most of the commenters support the rule.[256] Several commenters state that they strongly support the proposal harmonizing with the CFTC rules to prohibit PTNGU for SBSs executed anonymously on SBSEFs and that are intended to be cleared.[257] One commenter asserts that PTNGU has no legitimate purpose for centrally cleared financial instruments, since trading counterparties face the central clearinghouse and do not have any credit, operational, or legal exposure to each other post-trade.[258] This commenter states that PTNGU functions as a source of uncontrolled information leakage since a market participant has no control over who it will be matched with when executing through a pre-trade anonymous trading protocol, such as an order book. Accordingly, a buy-side firm must be comfortable potentially sharing its trading activity with every other participant on the trading venue, including other buy-side firms before using an anonymous order book with PTNGU. The commenter considers this an unattractive proposition for buy-side firms that completely undermines the anonymous nature of the trading protocol and deters access and participation. The commenter also argues that PTNGU is a discriminatory practice that impedes market participant access to trading venues by allowing dealers to monitor whether buy-side firms have started to transact in anonymous order books and use this

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255 *See* Bloomberg Letter, *supra* note 18, at 14–15, Citadel Letter, *supra* note 18, at 10–12, SIFMA AMG Letter, *supra* note 18, at 10–12, WMBAA Letter, *supra* note 18, at 5.

256 *See* Bloomberg Letter, *supra* note 18, at 14–15, Citadel Letter, *supra* note 18, at 10–12, SIFMA AMG Letter, *supra* note 18, at 10–12.

257 *See* Citadel Letter, *supra* note 18, at 10; SIFMA AMG Letter, *supra* note 18, at 10.

258 *See* Citadel Letter, *supra* note 18, at 10.

information as a policing mechanism to deter buy-side access and participation.[259] The commenter also states that Rule 815(f)(3)[260] is drafted to prevent evasion by voice brokers. Other commenters express similar views.[261]

Another commenter states that if the Commission prohibits PTNGU, its policy would mirror the CFTC's approach and that certain traders would be more likely to participate on venues that offer anonymous execution, including order book functionality.[262] This, in turn, the commenter argues, could result in deeper liquidity pools on SBSEFs and promote the development, innovation, and growth of the SBS market.[263] The commenter asserts that the Commission's rules should be designed to better promote the development, innovation, and growth of the swaps market, with the intent of attracting liquidity formation onto SBSEFs, in a manner that adds to efficiency for the market and market participants.

One commenter also states that PTNGU was a more important feature of the market when few swaps were centrally cleared and market participants needed to know their counterparty's identity to manage the associated credit risk; however, with the prevalence of central clearing, the need for PTNGU is diminished for cleared swaps.[264]

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259 *See* Citadel Letter, *supra* note 18, at 11. This commenter also cites news articles relating the accounts of buy-side firms of dealers contacting them to get them not to join SEF platforms. *See id.* at 11 n.20.

260 Rule 815(f)(3) provides that SBSs that are "executed anonymously" include SBSs that are pre-arranged or pre-negotiated anonymously, which would include voice broker trades.

261 *See* SIFMA AMG Letter, *supra* note 18, at 10 (stating that PTNGU for anonymously traded cleared SBSs is unnecessary and does not provide any advantages to clients, but rather leads to uncontrolled information leakage); Bloomberg Letter, *supra* note 18, at 15 (stating that prohibiting PTNGU facilitates and promotes trading on SBSEFs and promotes pre-trade price transparency by encouraging more participants to bid anonymously, whereas the practice of requiring disclosure of one counterparty's name to the other counterparty increases the risk of information leakage and can deter participation by liquidity seekers on SBSEFs).

262 *See* SIFMA AMG Letter, *supra* note 18, at 10.

263 *See id.* at 11.

264 *See* Bloomberg Letter, *supra* note 18, at 15.

A few commenters, while generally supportive of the rule, suggest some modifications to it.[265] One commenter argues that Rule 815(f)(4)[266] is overbroad and may significantly limit the scope of the prohibition.[267] Specifically, this commenter states that many security-based swaps are transacted as part of a package transaction with other instruments (e.g., single-name CDS and index CDS). The commenter argues that, at a minimum, any exception for package transactions should only apply to packages that include a component that is not an SBS intended to be cleared *or a swap that is intended to be cleared*. The commenter expresses concern that the current language would appear to exempt packages containing CFTC-regulated swaps, even if those instruments should be subject to an equivalent prohibition (notwithstanding the working of the corresponding CFTC exception for packages). The commenter encourages the Commission to work with the CFTC to avoid creating a loophole for common packages containing swaps and security-based swaps that are all intended to be cleared. Furthermore, the commenter questions the need for Rule 815(f)(4) at all. The commenter states that, as proposed, the prohibition on PTNGU applies only to security-based swaps that are executed anonymously and intended to be cleared. The commenter argues that PTNGU could still be used for the uncleared security-based swap leg of a package transaction containing both a cleared security-based swap and an uncleared security-based swap, even without Rule 815(f)(4).

One commenter argues that the Commission should take an evolutionary approach to the prohibition on name give-up, which initially should apply only to Required Transactions, and not Permitted Transactions on an SBSEF where clearing may not be certain leading up to or at the time of trade execution.[268] This commenter believes that this approach would encourage liquidity

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265 *See* Bloomberg Letter, *supra* note 18, at 15, Citadel Letter, *supra* note 18, at 11, WMBAA Letter, *supra* note 18, at 5.

266 Rule 815(f)(4) provides that, for a package transaction that includes a component transaction that is not an SBS intended to be cleared, disclosing the identity of a counterparty shall not violate the other provisions in the rule that prohibit the disclosure of the identity of a counterparty for SBSs executed anonymously.

267 *See* Citadel Letter, *supra* note 18, at 11.

268 *See* WMBAA Letter, *supra* note 18, at 5.

formation and further development of less liquid SBSs where an SBSEF trading mandate is not required.

One commenter suggests that the Commission augment the rule with a prohibition on trade-relationship documentation for SBS that are intended to be cleared and grant the SBSEF the ability to void *ab initio* trades rejected from clearing to avoid the necessity of post-trade name disclosure in case of an error trade.[269]

The Commission agrees with commenters that prohibiting post-trade name give-up for cleared trades is reasonably necessary to facilitate and promote trading on SBSEFs, and Proposed Rule 815(f) would accomplish these goals.

The Commission disagrees with the comment that Rule 815(f)(4) is overbroad and unnecessary. The Commission finds that Rule 815(f)(4) is necessary and important to provide clarity about the application of the PTNGU prohibition to package transactions and also to provide consistency with the CFTC's approach. Narrowing the exception in Rule 815(f)(4) as suggested by one commenter so that it would not apply if a component of a package transaction were a cleared swap would cause the Commission's approach to PTNGU to differ from that of the CFTC and create the potential for different PTNGU rules to apply to different components of the same package transaction. That is, if the Commission modified Rule 815(f)(4) as the commenter suggests, in the case of a package transaction comprising an SBS that is intended to be cleared and a swap that is intended to be cleared, Rule 815(f)(4) would *prohibit* PTNGU, but § 37.9(f)(4) would *permit* PTNGU.[270] To avoid this situation, the Commission declines to modify Rule 815(f)(4) as suggested.

Further, the Commission disagrees with the comment that the prohibition on PTNGU should initially apply only to Required Transactions. The prohibition on PTNGU is designed to

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269 *See* Bloomberg Letter, *supra* note 18, at 15.

270 Section 37.9(f)(4) provides, in relevant part, that "[f]or a package transaction that includes a component transaction that is not a swap intended to be cleared, disclosing the identity of a counterparty shall not violate" the prohibition against PTNGU. 17 CFR 37.9(f)(4).

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, and it does so by preventing the sharing of the names of counterparties where such sharing is unnecessary—namely, when a transaction is cleared. Whether clearing the transaction is required or voluntary is not relevant to the purposes of prohibiting PTNGU. With regards to trades rejected from clearing, the prohibition on PTNGU would apply to all trades that are *intended* to be cleared, not just those that are successfully cleared, so that prohibition would also apply to a trade that is submitted but then rejected for clearing. For the foregoing reasons, the Commission is adopting Rule 815(f), as proposed, with minor technical modifications.[271]

7. Rule 815(g)

One commenter states that in order to protect counterparty anonymity in the event of an SBS that is executed anonymously and intended to be cleared, but is nonetheless rejected for clearing, the SBSEF should declare the trade void *ab initio*.[272] The commenter suggests that the Commission augment the rule to prohibit trade relationship documentation for SBS that are intended to be cleared and to grant SBSEFs the ability to declare trades rejected from clearing void *ab initio* in order to avoid post-trade name disclosure in the case of a rejected trade.

The Commission agrees that declaring such trades void *ab initio*, which helps prevent trades rejected from clearing from effectively becoming bilateral transactions where the identity of counterparties might be disclosed. This approach is also consistent with practices in the swaps market with respect to such trades.[273] Therefore, the Commission is amending Rule 815 to add a

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271 The Commission has corrected a reference in paragraph (f)(2) to a "security-based swap execution facility" to refer instead to a "security-based swap." The Commission has also changed first instance of the word "paragraph" in paragraph (f)(4) to "paragraphs."

272 *See* Bloomberg Letter, *supra note* 18, at 14–15. *See also* Citadel Letter, *supra note* 18, at 5 (stating that the CFTC guidance regarding trades that are void *ab initio* has eased trading of cleared swaps on SEFs and "facilitated the entry of new liquidity providers that do not have legacy bilateral trading documentation in place with clients").

273 *See* CFTC, Division of Clearing and Risk and Division of Market Oversight Staff Guidance on Swaps Straight-Through Processing (Sept. 26, 2013), *available at* https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/stpguidance.pdf ("CFTC 2013 STP Guidance").

new paragraph (g), which specifies that SBSEFs shall establish and enforce rules that provide that a security-based swap that is intended to be cleared at the time of the transaction, but is not accepted for clearing at a registered clearing agency, shall be void *ab initio*. In light of new paragraph (g), the Commission is generally of the view that it would not be consistent with the impartial-access requirements of Rule 819(c) for an SBSEF to permit its members to require bilateral relationship documentation from their counterparties with respect to SBS that are intended to be cleared.[274] Consequently, the Commission finds that it is not necessary to include a prohibition on trade relationship documentation in Rule 815 for SBS that are intended to be cleared.

For the foregoing reasons, the Commission adopting Rule 815(f)(1) through (4), with minor technical modifications,[275] and is also adding a new paragraph (g), as discussed above.

F. Rule 816—Trade Execution Requirement and Exemptions Therefrom

Section 3C of the SEA[276] 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 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 national securities exchange or SBSEF makes the SBS available to trade or 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 establishes procedures for an SBSEF to make an SBS "available to trade" (assuming it is also subject to the clearing requirement), thereby

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274 *See also infra* section VI.B.3.

275 *See supra* note 271.

276 15 U.S.C. 78c-3.

activating the trade execution requirement with respect to that SBS. Rule 816 also includes three proposed exemptions from the trade execution requirement.

Paragraphs (a) through (d) of Rule 816 are modeled on § 37.10 of the CFTC's rules and establish a process whereby an SBS product is 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* a MAT determination has been made 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 Rule 816 to trigger the trade execution requirement, similar to the MAT process of § 37.10.

1. General Comments on Harmonization with CFTC MAT Process

Several commenters cite efforts by the CFTC to review its MAT process as an indication that the Commission should take a different approach for making MAT determinations rather than align with the CFTC's current rule.[277] One commenter cites to the findings of the Market Risk Advisory Committee ("MRAC"), an advisory committee that provided recommendations to the CFTC, and states that the MRAC and the CFTC raised concerns regarding the current MAT process for swaps.[278] This commenter states that reforming the MAT process was included as an agenda item in the CFTC 2021 fall rulemaking agenda and that, for this reason, the Commission should align the MAT process for SBS with the recommendations made by the MRAC or, in the alternative, coordinate with the CFTC to ensure that the MAT process is aligned and conducted in a manner that allows input from a variety of stakeholders and the Commission. Another commenter also urges the Commission to review the CFTC MRAC's recommendations with an eye towards adopting a more flexible regime given the unique characteristics of the SBS

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277 *See* Bloomberg Letter, *supra* note 18, at 15–16; ISDA-SIFMA Letter, *supra* note 18, at 5.

278 *See* Bloomberg Letter, *supra* note 18, at 15–16.

market.[279] One commenter strongly recommends that the Commission refrain from adopting a MAT determination process that is based on the existing CFTC process, but rather coordinate with the CFTC as it considers potential reforms to improve its MAT process.[280]

It is appropriate for Regulation SE to establish a MAT SBS process that aligns with the CFTC's process as closely as possible. While commenters state that the CFTC may be considering changes to its MAT process, the CFTC has not yet proposed any such changes, so it is not certain that the CFTC would adopt the recommendations of the MRAC, either in whole or in part, or with modification, or when the CFTC might act if it does make changes to its MAT process. Additionally, because no MAT determination can be made with respect to an SBS unless and until the Commission has made a mandatory clearing determination as to that SBS, the Commission would have the opportunity, if and when it makes a mandatory clearing determination with respect to an SBS, or category of SBS, to consider whether changes to the process for a MAT determination with respect to that SBS would be appropriate. Further, in the event that the CFTC does move forward with changes to its MAT process, the Commission will have the opportunity to reassess its own MAT process and to consider further harmonization with the CFTC regime, as appropriate. For the present, the CFTC's procedures are well articulated and well understood by SBS markets, so closely harmonizing with these procedures would yield comparable regulatory benefits while minimizing burdens on SBSEFs. In particular, even though the SEF and SBSEF markets differ in ways that are relevant to the *application* of the criteria for MAT determinations, the criteria themselves are equally applicable to the SEF and SBSEF markets. Thus, the Commission is adopting the rule as proposed, without any different or additional criteria that would have to be considered by an SBSEF in order to MAT an SBS product.

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279 *See* ISDA-SIFMA Letter, *supra* note 18, at 5.

280 *See* ICI Letter, *supra* note 18, at 5.

2. Rule 816(a)

Paragraph (a)(1) of Rule 816 provides that an SBSEF that makes an SBS available to trade in accordance with paragraph (b) of the rule must submit to the Commission its determination with respect to that SBS, pursuant to the procedures under Rule 806 (voluntary submission for Commission review and approval) or Rule 807 (self-certification).[281] Paragraph (a)(2) provides 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.

The Commission received a number of comments on Rule 816(a).[282] Many commenters raise concerns about an SBSEF having the sole ability to make a MAT determination and generally advocate that the Commission and other market participants have a greater role in making MAT determinations.[283] One commenter states that experience with the existing CFTC regime suggests that the scope of the trade execution requirement should not be determined solely by the SBSEFs.[284] This commenter states that the trade execution requirement is a key pillar of the G20 post-crisis reforms and recommends that the Commission also be able to propose MAT determinations for public comment, based on its independent assessment of the criteria set forth in Rule 816(b). One commenter asserts that it has long believed that a MAT determination should not rest solely with a single SBSEF.[285] This commenter states that such an approach risks introducing commercial and other motives beyond an objective assessment of the factors set forth in the rule.

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281 *See supra* sections IV.C (discussing Rule 806) and IV.D (discussing Rule 807).

282 *See* Bloomberg Letter, *supra* note 18, at 15–16; Citadel Letter, *supra* note 18, at 15–16; ICI Letter, *supra* note 18, at 4–10; ISDA-SIFMA Letter, *supra* note 18, at 4–5; MFA Letter, *supra* note 18, at 9; SIFMA AMG Letter, *supra* note 18, at 6–8; WMBAA Letter, *supra* note 18, at 5; Tradeweb Letter, *supra* note 18, at 3–4.

283 *See* Citadel Letter, *supra* note 18, at 15–16; *see* Bloomberg Letter, *supra* note 18, at 15–16; ICI Letter, *supra* note 18, at 5–8; ISDA-SIFMA Letter, *supra* note 18, at 4–5.

284 *See* Citadel Letter, *supra* note 18, at 15–16.

285 *See* WMBAA Letter, *supra* note 18, at 5.

Another commenter states that it does not believe that a trading venue should be solely responsible for identifying the types of products that should be subject to a trade execution requirement.[286] Instead, the commenter states that a Commission-led process is more appropriate. The commenter argues that a Commission-led process would ensure that the views of all relevant market participants (including SBSEFs) are considered in making a MAT determination. In addition, the commenter asserts that the Commission is likely to have better access to data regarding the overall SBS market than any individual trading venue will have. The commenter requests that the Commission provide in Regulation SE that MAT determinations are to be made by the Commission following a notice and comment rulemaking process that takes into account the views of SBSEFs and other market participants.

Because no MAT determination can be made for an SBS until the Commission has made a mandatory clearing determination for that SBS, the MAT-determination process is, in that sense, inherently a Commission-led process. Moreover, because the SBSEFs will have direct experience with the trading of SBSs on SBSEFs, they will be best positioned make the initial decision as to whether it is appropriate to submit a MAT determination for an SBS. However, the Commission would still play a primary role in the MAT process, as it will have the opportunity to review all SBSEF MAT determinations, whether they are self-certified or voluntarily filed for Commission approval, to determine whether those determinations are adequately supported by evidence and consistent with the SEA and the rules thereunder, including the six factors to be considered for MAT determinations under Rule 816(b), which are discussed below. In the absence of such evidence, the Commission can decline to approve or can stay and then object to a MAT petition, which will ultimately allow the Commission to prevent an inappropriate MAT determination from taking effect.

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286 *See* Tradeweb Letter, *supra* note 18, at 3–4.

Some commenters also recommend that the MAT process provide other market participants the ability to provide comment on any MAT proposal.[287] One commenter proposes that market participants have a meaningful opportunity to review and opine on a petitioning SBSEF's proposed MAT determination.[288] This commenter argues that the MAT factors are intended to measure trading liquidity that is available and that this assessment should include the perspectives of market participants.[289] Another commenter also states that it has long believed that market participants should have the ability or a forum to comment on proposed MAT determinations.[290] One commenter recommends that, in order to support the MAT process and to guard against inappropriate MAT determinations, the Commission permit market participants and other interested parties to participate in the MAT analysis by introducing a public notice and comment period into the MAT assessment timeline.[291] This commenter states that this would provide market participants, who would be those most affected by a MAT determination, with the opportunity to identify specific aspects of individual SBS products that may limit their liquidity, which would help ensure each MAT determination is appropriate for the relevant SBS product. Another commenter states that one of the shortcomings of the MAT process is that it puts too much responsibility in the hands of the trading platform and does not require, or even consider, input from market participants.[292] This commenter states that the implications of this outcome are even more evident in the context of an SBS MAT determination, as such a determination would only be relevant to a small segment of the global SBS market, which the commenter states is much smaller and less liquid than its swaps counterpart.

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287 *See* SIFMA AMG Letter, *supra* note 18, at 7; MFA Letter, *supra* note 18, at 9; ICI Letter, *supra* note 18, at 5, 7–8.WMBAA Letter, *supra* note 18, at 5.

288 *See* SIFMA AMG Letter, *supra* note 18, at 7.

289 *See id.*

290 *See* WMBAA Letter, *supra* note 18, at 5.

291 *See* MFA Letter, *supra* note 18, at 9.

292 *See* ISDA-SIFMA Letter, *supra* note 18, at 4–5.

One commenter also states that the proposed approach will give SBSEFs the sole ability to dictate the scope of SBSEF trading for market participants based on the commercial interests of SBSEFs.[293] This commenter recommends that the Commission require a 30-day public comment period for all MAT determinations. The commenter expresses concern that, under the proposal, it would be possible for a MAT determination to become effective without an opportunity for public comment and that the MAT process would be controlled almost entirely by one segment of the SBS markets, the SBSEFs. The commenter states that market participants can provide the Commission with invaluable commentary, insights, and data on the potential effects of proposed rules, as well as help to ensure that rules are implemented in a fair and orderly manner. The commenter asserts that, because MAT determinations are data intensive, 30 days would give market participants sufficient time to analyze the data presented by the SBSEF, prepare their own data and analyses, and comment effectively on operational and technological implications. This commenter also recommends that the Commission consider creating an advisory board to provide recommendations both to the Commission and to SBSEFs on SBSs that should be added to or removed from the list of SBSs that are subject to the trade execution requirements.[294] The commenter states that the advisory board should have appropriate expertise and balanced representation, including from the buy side, sell side, and other stakeholders. The commenter asserts that this would help further address some of their concerns about the MAT process and ensure that the SBSs made subject to the trade execution requirement are only the most liquid. Furthermore, the commenter argues that the advisory board could also help the Commission assess the functioning of the MAT determination process and of the overall SBS regulatory framework and provide recommendations for improvement.[295]

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293 *See* ICI Letter, *supra* note 18, at 5, 7–8.

294 *See id.* at 9–10.

295 *See id.*

Another commenter states that the process for MAT determinations should include input from both market participants and the Commission.[296] The commenter states that market participants may trade on multiple venues and in multiple jurisdictions and have a greater or different perspective from the SBSEF making the MAT determination. Additionally, the commenter states that the Commission's input should be considered as well.

The Commission will have sufficient opportunity to assess self-certified MAT determinations for consistency with the criteria of Rule 816(b), as well as with the SEA and the other regulations thereunder, while also permitting SBSEFs to use a self-certification process closely aligned with § 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. Certain MAT determinations of dually registered SEF/SBSEFs may apply to SBSs and swaps that are related and that related MAT determinations will thus have to be filed with both the SEC and CFTC. Adding a default comment period or otherwise altering the standard so that the Commission reviews all MAT determinations by SBSEFs, as commenters requested, would significantly alter the timing of self-certified SBSEF MAT determinations compared to their SEF equivalents. By contrast, closely harmonizing the SEC's filing procedures and standards of review with the CFTC's would allow dually registered entities to submit related MAT determinations to both agencies for review. Moreover, if the Commission exercises its authority to stay the effectiveness of a self-certified MAT determination and seek public comment—i.e., with respect to a rule that is novel, complex, inadequately explained, or potentially inconsistent with the SEA or the regulations thereunder, including Regulation SE—market participants would be able to convey their concerns regarding that rule to the Commission.

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[296] *See* Bloomberg Letter, *supra* note 18, at 15–16.

For SBS MAT determinations submitted under the Rule 806 process that present novel or complex issues or meet other criteria under Rule 806(d), the initial 45-day review period for rule approval submissions may be extended for an additional 45 days. The Commission recognizes the importance of public input regarding any MAT determination, and not only does Rule 808(b) provide that the Commission make publicly available on its website Rule 806 filings, such as an SBSEF's MAT filing, but the Commission is also, as discussed below, delegating to its staff the authority to make filings under Rule 806 available on the Commission's website, which will expedite the process of providing interested persons with the ability to review a MAT-determination filing so that they can communicate their views to the Commission. Thus, in either process, if MAT petitions present novel or complex issues, the Commission will have sufficient time to receive and consider public comment for those submissions. Further, accepting public comment from all interested market participants in the context of a specific MAT determination would more efficiently aid the Commission's review of SBSEF MAT-determination filings than forming a formal advisory board to offer opinions on adding or removing SBS from the list of products that have been MAT.

Several commenters question the extent of the Commission's role in the MAT determination process.[297] One commenter cites the lack of Commission authority to delay or decline an SBSEF submission for a MAT determination, particularly without comment from market participants, as the basis for its concerns about the proposed MAT process.[298] Another commenter recommends that the Commission enhance its oversight by ensuring that it has a more meaningful ability to review and reject MAT determinations, as well as the ability to initiate determinations itself as appropriate.[299] This commenter also expresses concern that the Commission would not have adequate time to consider, or authority to challenge, the basis for a

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297 *See* SIFMA AMG Letter, *supra* note 18, at 6; ICI Letter, *supra* note 18, at 6–7.

298 *See* SIFMA AMG Letter, *supra* note 18, at 6.

299 *See* ICI Letter, *supra* note 18, at 5–8.

MAT determination. The Commission, however, does have the authority to prevent an SBSEF MAT determination under either Rule 806 or Rule 807 from taking effect. As noted above, under Rule 806, the Commission has a 45-day period to consider a submission under Rule 806, which could be extended for another 45 days. The Commission can, if it finds the determination to be inconsistent with the SEA or the rules thereunder, notify the SBSEF that it will not, or is unable to, approve the new rule or rule amendment. Under Rule 807, MAT determinations cannot go into effect for at least 10 business days, during which the Commission has the opportunity to determine whether the determination presents novel or complex issues, if it is inadequately explained, or if it is potentially inconsistent with the SEA or the rules thereunder. If the Commission determines that any of these concerns is present, the Commission can stay the MAT determination for a 90-day period for further review. Within those 90 days, the Commission will have the opportunity to object 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, thereby preventing the self-certified MAT determination from going into effect. Therefore, the processes for submitting MAT determinations do afford the Commission sufficient time and authority to review and, where appropriate, decline to approve, or object to, MAT determinations.

For the reasons discussed above, the Commission is adopting Rule 816(a) as proposed.

3. Rule 816(b)

Paragraph (b) of Rule 816 sets forth six factors that an SBSEF shall consider, as appropriate, when making a MAT determination for an SBS product, which are the same six factors enumerated in the CFTC rule. Those factors are: (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.

The Commission received several comments on the factors for making a MAT determination described in Rule 816(b).[300] Several commenters express concern that the factors for consideration enumerated in Rule 816(b) are not mandatory.[301] One commenter states that the rule requires that an SBSEF's submission consider the factors in the rule, as appropriate, when making a MAT determination.[302] This commenter proposes that all of the MAT factors *must* be considered for mandatory SBSEF trading. This commenter also urges the Commission to assess the MAT factors on the basis of the current trading activity of the relevant SBSs on the SBSEF against stringent standards, and in the aggregate, in order to determine whether there is proven liquidity on SBSEFs to support mandatory SBSEF trading. The commenter also proposes that the Commission expand the MAT factors to require evidence demonstrating that the SBSEF has the requisite infrastructure to support mandatory SBSEF trading by: (a) adding an assessment of technological readiness, and (b) requiring threshold numbers of SBSEFs as well as liquidity providers on the SBSEF transacting in the relevant SBS. The commenter argues that, while the expansion of MAT factors may be viewed as requiring more intervention and resources by the Commission, the revised approach will ultimately lead to a streamlined process, while at the same time avoiding a potential sacrifice of liquidity if a particular SBS is mandated for SBSEF trading prematurely.

One commenter also expresses concern that the factors in Rule 816(b) are neither mandatory nor based on calculated thresholds, and that they would permit SBSEFs to assert that an SBS should be MAT even absent objective evidence of a sufficiently liquid trading market.[303] This commenter states that this could have negative consequences for buy-side participants such as funds—requiring SBSs with insufficient liquidity to be traded via order book or an RFQ

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300 *See* SIFMA AMG Letter, *supra* note 18, at 6–8; ICI Letter, *supra* note 18, at 5; MFA Letter, *supra* note 18, at 9; WMBAA Letter, *supra* note 18, at 5.

301 *See* SIFMA AMG Letter, *supra* note 18, at 7–8; ICI Letter, *supra* note 18, at 5; WMBAA Letter, *supra* note 18, at 5.

302 *See* SIFMA AMG Letter, *supra* note 18, at 6–8.

303 *See* ICI Letter, *supra* note 18, at 5–6.

system, which would raise a significant risk of revealing advisers' sensitive portfolio management strategies. This commenter also states that, without requiring SBSEFs to consider any objective factors (e.g., threshold levels), it is not clear how the Commission could ever find that a MAT determination is inconsistent with the SEA or the Commission's rules. This commenter recommends that the Commission enhance the MAT determination factors by: clarifying that all factors must be evaluated, rather than just one or a subset; adding as a factor the number of SBSEFs that list the SBS; requiring that at least two SBSEFs list the SBS; and requiring a minimum amount of trading history (e.g., that an SBS has been listed for at least 90 days). The commenter also recommends that the Commission make the MAT determination factors more robust by establishing at least some objective mandatory criteria. The commenter argues that adopting these recommendations would provide the Commission with greater authority to reject a MAT determination and would address the conflict raised by an SBSEF's commercial incentive to make an SBS MAT, as well as ensure that there is enough liquidity in an SBS before it is subject to a MAT determination. The commenter urges that a more robust MAT determination process is critical to bring consistency to the SBS market over time, as having objective standards would avoid MAT determinations based on subjective assessments of liquidity that may change over time.

The Commission's approach of requiring the MAT factors to be considered as appropriate, rather than mandating the consideration of all the factors, is consistent with the approach the CFTC has taken. The CFTC adopted its approach to provide more flexibility so that its markets could accommodate swaps with different trading characteristics that can be supported in a centralized trading environment.[304] And a similarly flexible approach is appropriate for the different SBSs that would be traded on its SBSEFs, as the appropriate thresholds on any of the factors may vary depending on the SBS and over time. Adopting specific thresholds would

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[304] *See* 2013 CFTC Final MAT Rules Release, *supra* note 9, 78 FR at 33613.

create excessive rigidity at the outset. MAT submissions, under Rules 806(a)(5) and 807(a)(6), would be required to contain an explanation and analysis of the SBSEF's determination, including a discussion of the factors enumerated in the rule, and how it complies with the SEA and the Commission's regulations thereunder. Rule 816(b) requires SBSEFs to consider all the factors enumerated in the rule, as appropriate. However, such consideration, to be meaningful, generally should discuss the factors in the context of the general market, relative to some outside benchmark. And the SBSEF would have the burden of providing support for any assertions it makes regarding the adequacy of any of the factors it considers, with reference to some external, objective standard. The explanations and analyses provided by the SBSEF generally should provide adequate justification as to how all the factors considered apply to the SBS MAT determination, as well as to why any factors enumerated in Rule 816(b) that are not addressed are not relevant. A failure, on the part of the SBSEF, to address any factors that are relevant or to adequately support its assertions would be a basis for the Commission to find that a MAT determination is inconsistent with the SEA and its rules.

One commenter, while supporting harmonization with the CFTC's MAT standards, expresses concern with the current framework for determining whether mandatorily cleared SBS should also be mandated for SBSEF trading through the MAT process. This commenter urges that there be a substantive analysis of whether an SBS has sufficient liquidity available to market participants on the SBSEF. The commenter states that, absent a robust MAT process requiring the SBSEF to demonstrate that voluntary exchange trading has met minimum liquidity and other standards, an absence of liquidity for the newly MAT-ed product on the SBSEF could shut out asset managers from accessing liquidity for their clients once OTC trading is prohibited. To this end, the commenter recommends that the Commission specify that the MAT standards are not synonymous with the clearing requirement standards. The commenter asserts that its assessment reflects the fact that necessary market conditions that make central clearing appropriate are

different from the necessary market conditions that make mandatory SBSEF execution appropriate.[305]

Another commenter, while generally supporting the Commission's approach to MAT determinations and the six factors enumerated in the rule, urges the Commission to take a cautious approach in its assessment of whether a MAT determination is appropriate. Specifically, the commenter recommends that the Commission carefully consider each factor, individually and collectively, in assessing whether a particular SBS has sufficient liquidity to support mandatory SBSEF trading. The commenter also cautions that the Commission should avoid broad MAT categorizations for specific types of SBS when individual SBS products within each category may be more or less suitable for a MAT designation.[306]

From the factors enumerated in Rule 816(b), it is clear that additional factors, beyond the fact that a product is subject to mandatory clearing, will need to be considered in determining whether an SBS is suitable to be MAT, and these factors are directly relevant to the liquidity of trading in a given SBS: whether there are willing buyers and sellers, the frequency and size of transactions, the trading volume, the number and types of market participants, the bid/ask spread, and the usual number of resting firm or indicative bids and offers. Adopting specific thresholds, however, would be too rigid an approach to accommodate the different kinds of SBSs that may be traded on an SBSEF, particularly at this early stage. As stated above, the Commission or its staff will review SBS products on a case-by-case basis, and for SBS products presenting novel or complex issues there will be an extended period for the Commission to review the submission and consider public comments on the appropriateness of a MAT determination on a case-by-case basis, taking into account the facts and circumstances of the SBS subject to the determination, including when a filing seeks to include a broad category of SBS within a MAT determination.

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305 *See* SIFMA AMG Letter, *supra* note 18, at 6–7.

306 *See* MFA Letter, *supra* note 18, at 9.

The Commission has carefully considered the concerns raised by commenters regarding the determination of when an SBS is appropriate for a MAT determination by an SBSEF, and the Commission is adopting Rule 816(b) as proposed. The Commission appreciates that a MAT determination for an SBS will be consequential for market participants, and that the enumerated factors in Rule 816(b) are important components of an analysis of whether an SBS is appropriate for a MAT determination. Rule 816(b) will require SBSEFs to consider each of the factors enumerated in Rule 816(b), as appropriate. As noted above, a flexible approach to the enumerated factors will accommodate the different kinds of SBSs that will be traded on SBSEFs. While the rule does not require that every factor be considered in every case, to the extent that a factor is relevant and an SBSEF's MAT determination submission fails to sufficiently address that factor, the Commission would be in a position to either disapprove the submission, if made under Rule 806, or stay and ultimately object to the submission, if self-certified under Rule 807.

Furthermore, the rules for filing MAT determinations require SBSEFs to provide, among other things, an explanation and analysis of the proposed MAT determination, including a discussion of its compliance with the SEA, the Core Principles for SBSEFs, and the Commission's rules thereunder. In the case of a MAT determination, the SBSEF generally should do more than simply state that it is consistent with the SEA and the Commission's rules thereunder, but should also provide supporting analysis, and supporting documentation as appropriate, for its conclusion. If an SBSEF fails to provide adequate explanation or analyses of the MAT determination, it would be difficult for the Commission to find that the determination is consistent with the SEA and the Commission's rules thereunder. Thus, MAT determination filings generally should be accompanied with adequate discussion and support for a MAT determination based on all relevant factors in Rule 816(b), including discussion supporting a conclusion that the SBS product subject to the MAT determination achieves the appropriate thresholds for that category of products. Furthermore, for MAT determinations presenting novel

or complex issues, there will be an extended period for the Commission to solicit and consider public comments on, among other things, the appropriateness of the factors considered.

For the reasons discussed above, the Commission is adopting Rule 816(b) as proposed.

4. Rule 816(c)

Paragraph (c) of Rule 816 provides that, upon a determination that an SBS has been MAT on an SBSEF or SBS exchange,[307] all other SBSEFs and SBS exchanges shall comply with the requirements of section 3C(h) of the SEA in listing or offering that SBS for trading.

The Commission received no comments on Rule 816(c) and the Commission is adopting Rule 816(c) as proposed for the reasons stated in the Proposing Release.

5. Rule 816(d)

Paragraph (d) of Rule 816 provides that the Commission may issue a determination that an SBS is no longer MAT upon determining that no SBSEF or SBS exchange lists that SBS for trading.

The Commission received one comment on Rule 816(d).[308] This commenter recommends that the Commission modify its proposed approach to removing an SBS from the trade execution requirement. The commenter states that the proposed approach raises a significant risk that an SBS may be required to be traded on an SBSEF merely because it is listed on one SBSEF, even if there is no liquidity to sustain trading in that SBS, which could be detrimental for both buy-side and sell-side market participants. To ensure that there is adequate liquidity in MAT SBSs, the commenter recommends that the Commission adopt a process for removing an SBS from the MAT scope that is similar to the process for making a MAT determination. The commenter also urges the Commission, given the industry's recent experience with the COVID-19 crisis, and consistent with the MRAC Report, to consider the implications that a temporary outage at one or

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[307] 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 proposed rule text did not establish a new procedure for SBS exchanges to list or MAT SBS products. *See* Proposing Release, 87 FR at 28898 n.107.

[308] *See* ICI Letter, *supra* note 18, at 9.

more SBSEFs or a major market disruption would have for SBSs subject to the trade execution requirement. For this reason, the commenter recommends that the Commission consider the circumstances under which it would allow for a temporary suspension of the trade execution requirement and any possible terms for such a suspension, as well as any other relief measures the Commission may be able to provide.[309]

The commenter's concern that an SBS may be required to be traded on an SBSEF merely because a single SBSEF has listed that SBS, even if there is no liquidity to sustain trading in that SBS, is addressed by the requirements in Rule 816(b) that must be met by an SBSEF before it submits a MAT determination under Rule 806 or Rule 807, as well as by the Commission's ability to disapprove, or stay and then object to, any MAT determination by an SBSEF. In considering an SBSEF's MAT submission, the Commission will generally consider how many SBSEFs list and trade a given SBS, as well as the liquidity and trading characteristics of that SBS. Further, to the extent market circumstances change to make a previous MAT determination unsuitable for then-prevailing market conditions, and if the SBSEF that has made a MAT determination is unwilling to withdraw that determination, the Commission would be able to grant exemptive relief (including on an emergency basis) pursuant to its authority in section 36 of the SEA in order to address that situation.[310] For these reasons, the Commission would have the ability to address market circumstances that disrupt the ability of market participants to trade SBS in compliance with the trade execution requirement.

Therefore, the Commission is adopting Rule 816(d) as proposed.

6. Rule 816(e)

Paragraph (e) of Proposed Rule 816 has no analog in § 37.10, but instead is adapted from 17 CFR 36.1 of the CFTC's rules, which sets out certain exemptions from the trade execution

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[309] *See id.*

[310] *See* 15 U.S.C. 78mm.

requirement. The exemptions incorporated into § 36.1 result from the CFTC's many years of experience in administering the CEA's trade execution requirement.

Paragraph (e)(1) of Rule 816 provides that an SBS transaction that is executed as a component of a package transaction and 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) provides that, for purposes of paragraph (e), a package transaction consists 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.

Paragraph (e)(2) of Rule 816, which is adapted from § 36.1(b), provides that section 3C(h) of the SEA does not apply to an SBS transaction that qualifies for an exception[311] 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.[312] Unlike the CFTC, the Commission does not have a specific rule to cite to regarding exemptions from the clearing requirement, so Rule 816(e)(2) would refer only generally to such exemptions.

Paragraph (e)(3) of Rule 816, which is adapted from § 36.1(c), provides 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."[313] Counterparties would be "eligible affiliate

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311 Section 3C(g) of the SEA is entitled "*Exceptions*," not "*Exemptions*."

312 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.

313 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

counterparties" for purposes of Rule 816(e)(3) if: (i) 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 ("GAAP") or International Financial Reporting Standards ("IFRS"), 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 GAAP or IFRS, and such consolidated financial statements include the financial results of both of the counterparties. In addition, for purposes of 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.

The Commission received comments on Rule 816(e).[314] One commenter supports the proposed carve-out for package transactions.[315] Another commenter, however, states that the CFTC's rules for package transactions were "developed by the CFTC, initially via staff no-action relief, after SEFs had adopted various MAT determinations and market participants had provided input to the CFTC regarding the particular types of package transactions common in the market for the relevant types of MAT swaps."[316] The commenter states that it is for this reason that particular types of package transactions addressed by the CFTC generally focus on transactions common in the interest-rate swaps market, which make up the majority of MAT swaps. In addition, the commenter asserts that the current state of the CFTC's rules in this area reflect the

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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. Since the Commission does not have an equivalent to § 50.52 to reference, the Commission is instead defining the term "eligible affiliate counterparties" directly in Rule 816(e)(3). These definitions are closely modeled on the equivalent definitions used in § 50.52, which are incorporated into § 36.1(c).

314 *See* ISDA-SIFMA Letter, *supra* note 18, at 9–10; SIFMA AMG Letter, *supra* note 18, at 6.

315 *See* SIFMA AMG Letter, *supra* note 18, at 6.

316 ISDA-SIFMA Letter, *supra* note 18, at 9.

culmination of a phased implementation approach developed over time via no-action letters. The commenter argues that, in light of this, it would be better for the Commission to tailor its rules for package transactions to address the particular market dynamics relevant to the SBS market instead of those in the swaps market. The commenter recommends that the Commission build into the MAT determination process a framework for identifying what types of package transactions exist for prospective MAT SBS and then develop tailored rules around the execution of such transactions.[317]

The Commission does not agree that it is necessary to tailor the Commission's rules for package transactions to address the particular market dynamics relevant to the SBS market, because no MAT determinations for SBS have been made, and no MAT determinations can yet be made because no SBS are required to be cleared. Moreover, the Commission does not yet have a sufficient basis on which to tailor the rules for package transactions to address SBS market dynamics, because the market dynamics relevant to trading of SBS on SBSEFs have yet to develop. It would be preferable to address those dynamics with respect to package transactions if and when it becomes necessary or appropriate to do so, because, at that point, the Commission and commenters would be better informed about the nature of trading various SBS on SBSEFs. In the meantime, it is desirable for Rule 816(e) to be harmonized with § 36.1 of the CFTC's rules to promote similar treatment of package trades, whether they involve SBS or swaps, as this will facilitate the participation of current SEF participants on SBSEFs. If, after SBSEFs have become operational and MAT determinations have been made, the Commission observes that the rules for package transactions are no longer suitable for the SBS market, the Commission could consider amending Rule 816(e) at that time.

For the reasons discussed above, the Commission is adopting Rule 816(e) as proposed.

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[317] *See* ISDA-SIFMA Letter, *supra* note 18, at 9–10.

G. Rule 817—Trade Execution Compliance Schedule

Proposed Rule 817 is modeled 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.[318] Accordingly, paragraph (a) of Rule 817 provides 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 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 Rule 817 also provides that a counterparty may voluntarily comply with the trade execution requirement sooner than required by paragraph (a).

The Commission received several comment letters about the sufficiency of the time period allotted for compliance with a MAT determination.[319] One commenter encourages the Commission to provide an extended duration of time until any MAT determination becomes effective so that asset managers and other market participants have adequate time to make the necessary operational and market structure arrangements to accommodate the trade execution requirement.[320] Another commenter urges the Commission to ensure that all SBSEFs and market participants have adequate time to prepare for the operational and market conditions that come along with a MAT determination.[321]

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318 Rule 3Ca-1 under the SEA 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. 17 CFR 240.3Ca-1.

319 *See* Bloomberg Letter, *supra* note 18, at 16; ICI Letter, *supra* note 18, at 8–9; ISDA-SIFMA Letter, *supra* note 18, at 5, SIFMA AMG Letter, *supra* note 18, at 7; WMBAA Letter, *supra* note 18, at 5.

320 *See* SIFMA AMG Letter, *supra* note 18, at 7.

321 *See* WMBAA Letter, *supra* note 18, at 5.

Some commenters recommend that a MAT determination not be effective for at least 90 days.[322] One commenter emphasizes that, after a MAT determination, market participants should be provided with sufficient time to comply with any new trade execution requirement, and that commenter believes that market participants would benefit from 90 days to comply.[323] Another commenter, citing its experience with the MAT requirement, states that it has observed that 30 days provides insufficient time to adjust trading protocols and ensure a smooth transition to trading on SEFs.[324] In this regard, the commenter asks the Commission to extend the time between when a MAT determination is made and when it becomes effective from the proposed 30 days to 90 days. The commenter also asserts that this is consistent with the recommendations of the CFTC MRAC report that examined the appropriateness, efficacy, and sustainability of the MAT process.

Another commenter also cites the CFTC MRAC's report in recommending that the Commission provide 90 days after a MAT determination is final before it becomes effective. This commenter emphasizes that market participants will need an adequate compliance period after a mandatory clearing determination is made *and* after the SBS is first made available to trade on an SBSEF to prepare. The commenter expresses concern that, under the proposed approach, if an SBS is made available to trade fewer than 30 days before a mandatory clearing determination, then the SBS would be subject to mandatory trading on an SBEF with a less than 30-day compliance period. This commenter urges the Commission to clarify that the scope of eligible SBS for MAT determination is limited to only those that have already been determined to be subject to mandatory clearing. This commenter also asserts that, even when an SBS is already subject to mandatory clearing, the proposed 30-day compliance period would still be inadequate given the complex operational and technological steps that must be taken to trade a

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322 *See* Bloomberg Letter, *supra* note 18, at 16; ICI Letter, *supra* note 18, at 8; ISDA-SIFMA Letter, *supra* note 18, at 5.

323 *See* Bloomberg Letter, *supra* note 18, at 16.

324 *See* ISDA-SIFMA Letter, *supra* note 18, at 5.

new SBS on an SBSEF. The commenter states that market participants such as regulated funds will need time to onboard to an SBSEF if necessary, and to further update their systems, processes, and procedures to transact via an SBSEF's order book or RFQ system.[325]

The Commission has considered commenters' requests for an extended compliance period for the mandatory trading requirement once a MAT determination has been made with respect to an SBS. The presence of ready and willing buyers and sellers and the number and types of market participants, among other things, are relevant factors in a MAT determination under Rule 816(b).[326] As noted above, the extent to which a MAT determination is likely to be disruptive to the market for a given SBS is best addressed in the context of making the MAT determination, which, as discussed above, allows for the Commission oversight of the determination through its review and approval or disapproval of a filing under Rule 806, or through staying and seeking public comment on a self-certification under Rule 807.[327] Further, with respect to the suggestion that the Commission clarify that the scope of eligible SBS for MAT determination is limited to only those that have already been determined to be subject to mandatory clearing, a MAT determination filing would not have any relevance until there are any SBSs subject to the clearing requirement.

It is not necessary to revise the 30-day period for compliance with a MAT determination, because the readiness of the market to comply with a MAT determination for a particular SBS would be relevant to the MAT determination itself, including the analysis of the six factors enumerated in Rule 816(b), and because an analysis of that readiness would best be undertaken based on the facts and circumstances attending a specific MAT determination.

For the reasons discussed above, the Commission is adopting Rule 817 as proposed.

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325 *See* ICI Letter, *supra* note 18, at 3, 8.

326 *See supra* section V.F.3.

327 *See supra* section V.F.2.

VI. IMPLEMENTATION OF CORE PRINCIPLES

Section 3D(d) of the SEA[328] 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.[329]

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
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

It continues to 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 the SEC rule being adopted, the discussion below addresses those differences. The discussion below will also address where there is not, or at least there is not intended to be, a difference between the SEC rule and the analogous existing 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

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328 15 U.S.C. 78c-4(d).

329 *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.

used as a mandatory checklist."[330] Where the CFTC has included guidance and/or accepted practices pertaining to a Core Principle for SEFs, the discussion below addresses how (if at all) the Commission has incorporated the substance of these statements into Regulation SE.

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

Core Principle 1[331] requires an SBSEF, to be registered and maintain registration as an SBSEF, and 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.[332] Proposed Rule 818, like § 37.100 of the CFTC's rules, repeats the relevant statutory text of the Core Principle.

The Commission received no comments on Proposed Rule 818 and is adopting Rule 818 as proposed for the reasons stated in the Proposing Release.

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

Core Principle 2 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.[333] 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

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330 17 CFR appendix-B-to-part-37 1.

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

332 CEA Core Principle 1 is substantively identical. *See* 7 U.S.C. 7b-3(f)(1).

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

facility, including block trades. Core Principle 2 for SEFs[334] 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.[335]

As described in the Proposing Release, the Commission modeled Rules 819 (a) through (g) on subpart C of part 37 of the CFTC's rules,[336] and Rules 819 (h) through (k) on other parts of the CFTC's rules.[337]

1. Rule 819(a) – General

Paragraph (a) of Proposed Rule 819, like § 37.200 of the CFTC's rules,[338] would repeat the statutory text of Core Principle 2.[339] The Commission did not receive any comments on Proposed Rule 819(a). It is appropriate to repeat the statutory text of Core Principle 2 in Rule 819(a) and is adopting Rule 819(a) as proposed, except that it is deleting the words "including block trades," in light of its decision not to adopt a definition of "block trade."[340]

2. Rule 819(b) – Operation of Security-Based Swap Execution Facility and Compliance with Rules

Paragraph (b) of Proposed Rule 819 is closely modeled on § 37.201 of the CFTC's rules,[341] 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.[342] The

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334 7 U.S.C. 7b-3(f)(2).

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

336 *See* Proposing Release, *supra* note 1, 87 FR at 28901–05.

337 *See id.* at 28905–09.

338 17 CFR 37.200; *see also* Proposing Release, *supra* note 1, 87 FR at 28901.

339 *See* Proposing Release, *supra* note 1, 87 FR at 28902.

340 *See supra* section V.E.1(c).

341 17 CFR 37.201; s*ee also* Proposing Release, *supra* note 1, 87 FR at 28901.

342 *See* Proposing Release, *supra* note 1, 87 FR at 28902.

Commission did not receive any comments on Proposed Rule 819(b). It is appropriate for an SBSEF to specify trading procedures and to establish and impartially enforce compliance with its rules, and the Commission is adopting Rule 819(b) as proposed, except that it is deleting the words "including block trades, if offered," in light of its decision not to adopt a definition of "block trade,"[343] which will have no effect on the requirement as compared to the proposed rule.

3. Rule 819(c) – Access Requirements

Paragraph (c) of Proposed Rule 819 is closely modeled on § 37.202 of the CFTC's rules,[344] and would require an SBSEF, consistent with section 3D(d)(2)(B)(i) of the SEA,[345] 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 will also be required to establish nondiscriminatory fee structures for ECPs and independent software vendors based on the level of access to or services provided by the SBSEF. Rule 819 further requires an SBSEF 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.

Several commenters express general support for the adoption of impartial access standards for SBSEFs.[346] One commenter specifically supports the Commission's close harmonization with CFTC rules.[347]

One commenter expresses support for Proposed Rule 819(c), but states that the Commission's proposal does not provide market participants with sufficient clarity regarding

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343 *See supra* section V.E.1(c).

344 17 CFR 37.202; *see also* Proposing Release, *supra* note 1, 87 FR at 28901.

345 15 U.S.C. 78c-4(d)(2)(B)(i) ("a security-based swap execution facility shall … establish and enforce trading, trade processing, and participation rules that will deter abuses and have the capacity to detect, investigate, and enforcement those rules, including means … to provide market participants with impartial access to the market").

346 *See* Citadel Letter, *supra* note 18, at 6–7; SIFMA AMG Letter, *supra* note 18, at 4; MFA Letter, *supra* note 18, at 10.

347 *See* MFA Letter, *supra* note 18, at 10.

how Proposed Rule 819(c) will be interpreted and applied in practice, and the commenter encourages the Commission to provide in the final rule that access to SBSEFs should be based on "objective, pre-established" criteria, and that any ECP should be able to demonstrate financial soundness by showing that it is a clearing member or that it has clearing arrangements in place with a clearing member.[348]

This commenter states that the CFTC has provided market participants with extensive guidance regarding impartial access and encourages the Commission to provide similar clarity when finalizing the SBSEF rules, including guidance with respect to membership criteria, trading protocols and functionality, and fee arrangements. Specifically, this commenter urges the Commission to provide in the final rule that an SBSEF may not limit membership to (i) self-clearing members; (ii) registered security-based swap dealers; (iii) banks or liquidity providers with a minimum amount of Tier 1 capital; (iv) liquidity providers that have been "enabled" by, or have bilateral documentation with, a minimum number of other liquidity providers; or (v) liquidity providers with a minimum amount of transaction volume.[349]

This commenter also states that SBSEFs should not be permitted to apply trading protocols in a manner that results in impermissible discrimination among market participants. Specifically, the commenter states that SBSEFs should not allow participants to selectively restrict their trading with other SBSEF participants through "enablement mechanisms"; that market participants should be permitted to act as both liquidity providers and liquidity takers on an SBSEF; that all SBSEF participants should be permitted to both send and receive RFQs (instead of only designated liquidity providers being eligible to receive RFQs); and that SBSEFs should not be permitted to require participants to have bilateral documentation in place to trade cleared security-based swaps, as this could provide a pretext for some participants to restrict trading with other participants. This commenter further states that SBSEFs should not be

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348 *See* Citadel Letter, *supra* note 18, at 6–7.

349 *See* Citadel Letter, *supra* note 18, at 6–7.

permitted to use fee arrangements to effect otherwise impermissible discrimination with respect to access.[350]

Another commenter also urges the Commission to incorporate the CFTC's impartial access requirement guidance with respect to SBSEFs, which would assist market participants in interpreting how the impartial access rules should work. Coordination of impartial access "not only affects an entity operating both an SEF and SBSEF but also their clients, many of whom use the same individual traders to trade both instrument types.[351] One commenter specifically encourages the Commission to address the potential use of restrictive requirements to obtain access to SBSEFs and to make clear that an SBSEF's reasonable discretion in establishing access criteria must be impartial, transparent, and applied in a fair and nondiscriminatory manner.[352]

One commenter states that the trading documentation requirement of Rule 15Fi-5 may at times conflict with the impartial access requirement of Proposed Rule 819(c) because it is unlikely that all SBSEF members trading cleared swaps will have trading relationship documentation with all other members trading cleared SBS.[353] This commenter encourages the Commission to adopt the CFTC guidance regarding enablement mechanisms and states that such mechanisms were historically used to eliminate credit risk, but that no such risk exists if an SBSEF intended to be cleared is void *ab initio* if rejected for clearing.

The Commission agrees with commenters that impartial access to an SBSEF encompasses both impartial access to membership in an SBSEF and the ability to fully interact on the SBSEF's order book or RFQ system, and that an SBSEF's rules must incorporate impartial criteria for this access. The Commission expects 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 and that ensuring consistency of access to SBSEFs and SEFs will provide market participants with

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350 *See id.*

351 *See* MFA Letter, *supra* note 18, at 10.

352 *See* SIFMA AMG Letter, *supra* note 18, at 4.

353 *See* Bloomberg Letter, *supra* note 18, at 3–4.

greater certainty about permissible practices regarding access to these platforms.[354] Efforts to undermine the principle of impartial access may take myriad forms over time. The text of Rule 819(c) is consistent with the text of § 37.202 of the CFTC's regulations and emphasizes the general principal that access to an SBSEF and its services must be impartial. The Commission does not find it necessary to describe within 819(c) specific practices that would violate its requirements. For the purposes of the Commission's review process for a denial or limitation of access or membership that is inconsistent with Rule 918(c), the Commission will apply a standard of review consistent with standards of review that the Commission uses in similar contexts.[355]

The Commission is aware of the CFTC staff guidance on impartial access related to § 37.202 of the CFTC's regulations.[356] The Commission finds it is appropriate to similarly provide guidance as to certain criteria or practices that are inconsistent with Rule 819(c)'s requirement to provide impartial access. The Commission agrees that it is inconsistent with providing impartial access for an SBSEF to limit membership based on an ECP's status, such as by limiting membership to (1) self-clearing members; (2) registered security-based swap dealers; (3) banks or liquidity providers with a minimum amount of Tier 1 capital; (4) liquidity providers that have been "enabled" by, or have bilateral documentation with, a minimum number of other liquidity providers; or (5) liquidity providers with a minimum amount of transaction volume.[357] Access to an SBSEF generally should be determined, for example, on an SBSEF's "impartial evaluation of an applicant's disciplinary history and financial and operational soundness against

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354 *See* Proposing Release, *supra* note 1, 87 FR at 28876.

355 *See* Rule 819(c)(4). The Commission is adopting Rule 819(c) with the addition of paragraph (c)(4). The Commission notes that the CFTC has a standard of review applicable to its process. See 17 CFR 9.2(c); 17 C.F.R. 9.33(c).

356 *See* Division of Clearing and Risk, Division of Market Oversight and Division of Swap Dealer and Intermediary Oversight Guidance on Application of Certain Commission Regulations to Swap Execution Facilities, CFTC (Nov. 14, 2013), *available at* https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/dmostaffguidance111413.pdf.

357 *See* Citadel Letter, *supra* note 18, at 6. Membership requirements based on any combination of these factors would similarly be inconsistent with providing impartial access.

objective, pre-established criteria."[358] As one example of such criteria, any ECP should be able to demonstrate financial soundness either by showing that it is a clearing member of a clearing agency that clears products traded on that SBSEF or by showing that it has clearing arrangements in place with such a clearing member.[359]

Further, providing impartial access as required by Proposed Rule 819(c) means providing all of an SBSEF's market participants—dealers and non-dealers alike—with the ability to fully interact on the order book or RFQ system as liquidity providers, liquidity takers, or both, including viewing, placing, or responding to all indicative or firm bids and offers and to place, receive, and respond to RFQs. Therefore, it would be incompatible with impartial access for an SBSEF's rules to permit mechanisms, schemes, functionalities, counterparty filters, or other arrangements that prevent an SBSEF participant from interacting or trading with, or viewing the bids and offers (firm or indicative) displayed by, any other market participant on that SBSEF, whether by means of any condition or restriction on its ability or authority to display a quote to any other market participant or to respond to any quote issued by any other market participant on that SBSEF with respect to security-based swap transactions that are intended to be cleared.

It is also inconsistent with impartial access for an SBSEF's rules to require bilateral documentation or to permit bilateral enablements in order to trade security-based swaps that are intended to be cleared, because providing for such documentation or enablements solely to address occasional trade rejections by a clearing agency would undercut the ability of all ECPs to post or interact with interest on security-based swaps that are intended to be cleared, and because such documentation or enablements are unnecessary in light of the provisions of Rule 815(g), which, as discussed *supra* section V.E.7, would require an SBSEF's rules to provide that a trade

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358 *See* 2013 CFTC Final SEF Rules Release, *supra note* 9, at 78 FR at 33598 (discussing "impartial access" to swap execution facilities).

359 *See id.* Similarly, it is not consistent with impartial access for an SBSEF to require that an ECP have clearing arrangements in order to trade security-based swaps that are not intended to be cleared. In such a case, the SBSEF's standards of financial soundness should be objective and impartial and should have a relevant relationship to trading on the SBSEF.

that is intended to be cleared at the time of the transaction, but is not accepted for clearing by a registered clearing agency, is void *ab initio*. Providing that such trades are void *ab initio* also reflects the economic reality that an uncleared transaction is significantly different from a cleared transaction in terms of the credit risk faced by the counterparties. Lastly, it is inconsistent with impartial access for an SBSEF to employ fee structures that would have a disproportionate or adverse effect on certain market participants based on their status, as described above,[360] with respect to the ability to fully interact on the order book or RFQ system as liquidity providers, liquidity takers, or both, including viewing, placing, or responding to all indicative or firm bids and offers and to place, receive, and respond to RFQs.

With respect to the comment that the documentation requirements of Rule 15Fi-5 may, at times, conflict with the impartial access requirement of Proposed Rule 819(c), no such conflict exists, because Rule 15Fi-5(a)(1)(ii) provides that the rule does not apply to cleared swaps, and Rule 15Fi(a)(1)(iii) further provides that the rule does not apply to security-based swap transactions executed anonymously on an SBSEF or a national securities exchange, provided that certain conditions are met.[361]

4. Rule 819(d) – Rule Enforcement Program

Paragraph (d) of Proposed Rule 819 is closely modeled 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.[362] Paragraph (d)(2) would require an SBSEF to have arrangements and resources for effective enforcement of its rules, including the authority to

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360 *See supra* note 357 and accompanying text.

361 *See* 17 CFR 240.15Fi-5(a)(1) (ii) and (iii). Rule 15Fi-5(a)(1)(iii) provides in part that SBSs executed anonymously on an SEF or a national securities exchange are exempt from the provisions of Rule 15Fi-5, provided that: (1) the SBSs are intended to be cleared and are actually submitted for clearing to a clearing agency; (2) all terms of the SBSs conform to the rules of the clearing agency; and (3) upon acceptance of such an SBS by the clearing agency the original SBS is extinguished; the original SBS is replaced by equal and opposite SBS with the clearing agency; and all terms of the SBS conform to the product specifications of the cleared SBS established under the clearing agency's rules. *See* 17 CFR 240.15Fi-5(a)(1)(iii).

362 To promote uniformity throughout proposed Regulation SE, it is appropriate to denote all persons who have a right to participate in an SBSEF's market as "members."

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 would also be required to 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. Paragraph (d)(6) is modeled on § 37.203(f), again using the same structure and rule text. Like § 37.203(f), Rule 819(d)(6) addresses investigations and investigation reports and includes provisions relating to procedures, timeliness, the reporting requirements when a reasonable basis does or does not exist for finding a violation, and warning letters.[363]

The Commission did not receive any comments on Rule 819(d) and is adopting Rule 819(d) as proposed, except that, in light of its decision not to adopt a definition of "block trade,"[364] the Commission is deleting the words "block trades or other types of" from the phrase "pre-arranged trading (except for block trades or other types of transactions approved by or certified to the Commission pursuant to § 242.806 or § 242.807, respectively)." While the deletion of this text would remove an automatic exemption for block trades from the prohibition against pre-arranged trading that an SBSEF's rules would be required to include, it is appropriate given that a definition of block trade has not been adopted. At such time as the Commission

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363 Rule 819(d)(6)(v) provides 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.

364 *See supra* section V.E.1(c).

adopts a definition of block trade, an SBSEF could submit a rule change under Rule 806 or Rule 807 to address trades that meet the definition of block trade.

5. Rule 819(e) – Regulatory Services Provided by a Third Party

Paragraph (e) of Proposed Rule 819 is modeled 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.

One commenter states that SBSEFs should be able to use regulatory service providers and that the types of regulatory service providers permitted under Proposed Rule 819(e)(1) are appropriate.[365] Another commenter also supports the use of regulatory service providers but believes that the Commission should include DCMs among the types of entities permitted to act as regulatory service providers, as they are "uniquely qualified" and are permitted to act as regulatory service provider under the CFTC SEF regime.[366] This commenter states that DCMs have well-established regulatory protocols and are subject to CFTC oversight, conduct regulatory activities similar to registered futures associations, have developed expertise in securities markets, and are permitted to list futures on individual stocks and to list swap contracts for trading.[367]

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365 *See* Bloomberg Letter, *supra* note 18, at 16.

366 *See* ICE Letter, *supra* note 18, at 3.

367 *See id.* at 3–4 (also stating that, for example, ICE Futures U.S., Inc. is a DCM that provides regulatory services to SEFs).

The Commission agrees that SBSEFs should be able to contract with DCMS for the provision of regulatory services. As the commenter states, DCMs have well-established regulatory protocols and are subject to CFTC oversight, and they are permitted to act as regulatory service providers for SEFs. Additionally, permitting an SBSEF to use the same regulatory service provider as an affiliated SEF may create efficiencies for both the SBSEF and SEF, while maintaining regulatory oversight of the entity that is providing the regulatory services. While the CFTC's regulation for SEFs does not contain a reciprocal provision permitting national securities exchanges to perform regulatory services for SEFs, harmonization in practical terms with this aspect of the CFTC regime—i.e., so that DCMs can perform regulatory services for both SBSEFs and SEFs—is appropriate in light of the relative size of the SBSEF market compared to the swaps market and because most if not all entities that will seek to register as SBSEFs are already registered as SEFs. Significantly, regardless of the type of entity acting as regulatory service provider for an SBSEF, the SBSEF will 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. Accordingly, the Commission is adopting Rule 819(e) as amended to permit SBSEFs to contract with DCMs for the provision of services to assist in complying with the SEA and Commission rules thereunder, as approved by the Commission.[368]

6. Rule 819(f) – Audit Trail

Paragraph (f) of Proposed Rule 819 is modeled 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 imposes 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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[368] Specifically, the Commission is adding to Rule 819(e) the language "a board of trade designated as a contract market (under section 5 of the Commodity Exchange Act)"—in other words, a DCM—to the list of entities with which an SBSEF may enter into a contract for the provision of regulatory services.

The Commission did not receive any comments on Proposed Rule 819(f). An audit trail is a crucial component of a trading venue's ability to ensure compliance with its rules. These requirements should be modeled on the parallel CFTC regulations regarding SEFs, as most, if not all, entities that will register as SBSEFs will be SEFs registered with the CFTC, and that consistent requirements will promote a consistent approach to compliance. Accordingly, the Commission is adopting Rule 819(f) as proposed, with minor technical modifications.[369]

7. Rule 819(g) – Disciplinary Procedures and Sanctions

Paragraph (g) of Proposed Rule 819 is based on § 37.206 of the CFTC's rules and generally tracks all of its rule text but would include additional language derived from guidance in appendix B of part 37 of the CFTC's rules. Converting the guidance to rule text, and thus grouping conceptually related items together, yields 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[370] 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.

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369 The Commission has corrected a reference to Core Principle 9 and corrected the phrase "account(s) owner(s)" to read "account's owner(s)."

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

- The enforcement staff of an SBSEF may operate as part of the SBSEF's compliance department.

Paragraph (g)(2) of Rule 819 is modeled on § 37.206(b) and would require an SBSEF to establish one or more disciplinary panels that are authorized to fulfill their obligations under Proposed 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 in the makeup of members of SBSEF major disciplinary committees and hearing panels, the Commission proposed instead to require the disciplinary panels established under Proposed Rule 819(g)(2) to meet the composition requirements of Rule 834(d), which apply to each major disciplinary committee and hearing panel of an SBSEF.[371]

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

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[371] 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 VIII.

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 SBSEF. Paragraph (g)(8) would address settlement offers.

Paragraph (g)(9) of Proposed Rule 819 returns to the text of § 37.206(c) for provisions regarding hearings. Paragraph (g)(9)(i) is modeled 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 proposed 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 in appendix B of part 37. 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[372] 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

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372 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 uses the word "shall" in such instances instead.

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 modeled 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 respondent, the decision is appealed pursuant to the rules of the SBSEF, or the decision is reviewed by the Commission pursuant to § 201.442.[373] In all other instances, a summary record of a hearing is permitted.

Paragraph (g)(10) of Proposed Rule 819 is modeled 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 must include six enumerated elements, all of which are closely modeled on those in § 37.206(d).

Paragraph (g)(11) of Proposed Rule 819 would address emergency disciplinary actions and is drawn from the guidance in appendix B of part 37. 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

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[373] *See infra* section XIV.E (discussing Rule 442, which establishes the right to appeal to the Commission certain actions taken by an SBSEF and sets out certain procedural matters relating to any such appeal).

based upon the weight of the evidence contained in the record. Proposed Rule 819(g)(11) would seek to balance the need to allow an SBSEF to take summary action against the need to afford due process to respondents.[374]

Paragraph (g)(12) of Proposed Rule 819 also is drawn from the appendix B guidance and would provide that, if the rules of the SBSEF permit appeals,[375] the SBSEF shall establish an appellate panel that is authorized to hear appeals. The composition of the panel would have to be consistent with Rule 834(d)[376] 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. As to the Commission's process of reviewing disciplinary actions, the Commission will apply a standard of review consistent with standards of review that the Commission uses in similar contexts.[377]

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 have to take into account the respondent's disciplinary history. In the event of demonstrated customer harm, any disciplinary sanction

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374 *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).

375 Neither § 37.206 nor 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 adhered to this permissive approach in the proposal but sought comment on whether the final rules should require an SBSEF to create an appeals procedure.

376 *See infra* section VIII.D.

377 *See* Rule 819(g)(14); *see also supra* note 355.

would have 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 appendix B 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 received no comments on Proposed Rule 819(g) and, apart from the addition of paragraph (g)(14) regarding Commission review,[378] is adopting Rule 819(g) as proposed for the reasons stated in the Proposing Release.

8. Rule 819(h) – Activities of Security-Based Swap Execution Facility's Employees, Governing Board Members, Committee Members, and Consultants

Paragraph (h) of Proposed Rule 819 would generally 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 modeled on § 1.59 of the CFTC's rules, which requires a SEF (among other CFTC-regulated entities) 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.

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 819(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 opportunity to observe order

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378 *See supra* note 377 and accompanying text.

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.[379]

Paragraph (h)(2)(ii), modeled on § 1.59(b)(1)(ii), would prohibit an SBSEF employee from disclosing to any other person any material non-public information that the employee obtains as a result of their employment at the SBSEF, and where the 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 Proposed Rule 819, modeled 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.[380]

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

380 The first and the fourth carve-outs listed above are comparable to those listed in § 1.59(b)(2). The Commission proposed 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 first and the fourth carve-outs listed above are comparable to those listed in § 1.59(b)(2). The Commission proposed 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.[381] 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 proposed to depart from the CFTC definition of "pooled investment vehicle"[382] to adapt it for the SBS and securities markets. Rule (h)(1)(ii) defines "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 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, 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) would still 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),

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381 *See* Proposing Release, *supra* note 1, 87 FR at 28905.

382 *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").

which is modeled 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), would address prohibited conduct not just by employees of an SBSEF, but also of governing board members, committee members, and consultants of the SBSEF. Paragraph (h)(4)(i)(A) is modeled on § 1.59(d)(1)(i) and would prohibit any employee, governing board member, committee member, or consultant of the SBSEF from trading for their 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 their official duties as an employee, governing board member, committee member, or consultant. Paragraph (h)(4)(i)(B), modeled 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 their 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 those duties. Paragraph (h)(4)(ii), modeled on § 1.59(d)(2), would provide that no person shall trade for their 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 the 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 received no comments on Proposed Rule 819(h) and is adopting Rule 819(h) as proposed, with minor technical modifications,[383] for the reasons stated in the Proposing Release.

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[383] *See supra* note 32.

9. Rule 819(i) – Service on Security-Based Swap Execution Facility 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 would impose certain other duties on the SBSEF associated with that fundamental requirement. Rule 819(i) is modeled on § 1.63 of the CFTC's rules, which imposes similar requirements in connection with SEFs and certain other entities.

Paragraph (i) of Proposed Rule 819 is closely modeled on § 1.63. Paragraph (i)(1), like § 1.63(b), would require an SBSEF to maintain rules[384] that render a person ineligible to serve on its disciplinary committees,[385] arbitration panels, oversight panels,[386] or governing boards if that person falls into any of six enumerated criteria, all of which are modeled closely on the criteria in § 1.63(b).[387] Paragraph (i)(2), modeled on § 1.63(c), would impose a direct bar on any person

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384 Section 1.63(b), in relevant part, requires a SEF to maintain rules that have been submitted to the CFTC pursuant to section 5c(c) of the CEA and part 40 of the CFTC's rules. As noted above, the Commission proposed 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 that have been submitted to the Commission pursuant to Rule 806 or Rule 807.

385 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 has modeled its definition of "disciplinary committee" on § 1.69(a)(1) rather than on § 1.63(a)(2). The Commission is locating the definition in Rule 802, since the term is used by multiple rules in Regulation SE.

386 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 has modeled its 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 Rule 802, since the term is used by multiple rules in Regulation SE.

387 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 proposed for the equivalent criterion in Rule 819(i)(1)(v) that a

from serving on a disciplinary committee, arbitration panel, oversight panel, or governing board of an SBSEF if that person meets any of the six criteria enumerated in Rule 819(i)(1). Paragraph (i)(3), modeled on § 1.63(d), would require an SBSEF to submit to the Commission a schedule listing the rule violations that 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), modeled on § 1.63(f), would provide that, whenever an SBSEF finds by final decision that a person has committed a disciplinary offense and that finding makes the 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.

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person would be barred for having been convicted within the prior three years of any felony, without limitation on the type of felony. *See* Proposing Release, *supra* note 1, 87 FR at 28907 n.145.

Paragraph (i)(6) of Proposed Rule 819 would define the terms "arbitration panel," "disciplinary offense," and "final decision" that are used in Rule 819(i).[388] These definitions are closely modeled on those provided in § 1.63(a).[389]

The Commission received no comments on Proposed Rule 819(i) and is adopting Rule 819(i) as proposed, with minor technical modifications,[390] for the reasons stated in the Proposing Release.

10. 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. Paragraph (j)(1) of Proposed Rule 819 would be designed to replicate for SBSEFs the fundamental duty of § 1.67 and provides 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 Rule 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.[391] Paragraph (j)(2) would provide

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388 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. Rule 819(i)(6)(ii) defines "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.

389 Since these terms are used only in Proposed Rule 819(i) and not elsewhere in Regulation SE, the Commission has defined them in Proposed Rule 819(i) and not the omnibus definitions rule in Regulation SE (Proposed Rule 802).

390 *See supra* note 32.

391 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.

that the written notice must include the principal facts of the disciplinary action and a statement 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 definition of "final disciplinary action" is closely modeled on the CFTC's definition in § 1.67(a).[392] The definition of "customer" is only loosely modeled on the definition of "customer" provided in § 1.3, which includes complexities deriving from the CEA that are not necessary or appropriate to adapt into a rule that applies to SBSEFs.[393] The Commission proposed to define "customer" in Rule 819(j)(3)(i) as a person that utilizes an agent in connection with trading on an SBSEF.

The Commission received no comments on Proposed Rule 819(j) and is adopting Rule 819(j) as proposed, with minor technical modifications,[394] for the reasons stated in the Proposing Release.

11. 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 of process, which could be an agent of its own choosing or, by default, the SBSEF. Proposed Rule 819(k) is modeled on § 15.05(i) of the CFTC's rules,

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Because of differences in the respective agencies' statutory authority, the Commission proposed 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.

392 *See* Proposed Rule 819(j)(3)(ii) (defining "final disciplinary action" as any decision by or settlement with an SBSEF in a disciplinary matter that 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).

393 The definitions of "customer" and "final disciplinary action" would apply only within Proposed Rule 819(j), so the Commission has not included them in the omnibus definitions rule for proposed Regulation SE (Proposed Rule 802).

394 *See supra* note 32.

which concerns the designation of agents for foreign persons participating on "reporting markets," a category in the CFTC's rules that includes SEFs.[395]

Paragraph (k)(1) of Proposed Rule 819 is modeled 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"[396] 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 would 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 modeled 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 Rule 819(k).

Paragraph (k)(3) of Proposed Rule 819 is modeled 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 executing any transaction on the SBSEF. Paragraph (k)(4) of Proposed Rule 819, modeled 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.

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395 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.

396 "Non-U.S. member" is a defined term in Rule 819(k) that does not appear in § 15.05 of the CFTC's rules but which 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 has thus defined "non-U.S. member" in Rule 802 as "a member of a security-based swap execution facility that is not a U.S. person."

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 received no comments on Proposed Rule 819(k) and is adopting Rule 819(k) as proposed for the reasons stated in the Proposing Release.

C. Rule 820—Core Principle 3—SBS Not Readily Susceptible to Manipulation

Core Principle 3[397] 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.[398] Proposed Rule 820 is modeled after § 37.300 of the CFTC's rules and would implement Core Principle 3.

The Commission received no comments on Proposed Rule 820, and is adopting Rule 820 as proposed for the reasons stated in the Proposing Release.

D. Rule 821—Core Principle 4—Monitoring of Trading and Trade Processing

Core Principle 4[399] 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

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

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

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

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[400] is substantively identical.

Proposed Rule 821 would implement Core Principle 4 and is closely modeled on the rules in subpart E of part 37 and the CFTC's guidance and acceptable practices in appendix B to part 37. As explained in the Proposing Release, paragraph (a) of Proposed Rule 821, like § 37.400 of the CFTC's rules, incorporates the requirements of Core Principle 4 described above, and the remaining paragraphs of Proposed Rule 821 are modeled on §§ 37.401 to 37.408 of the CFTC's rules and also incorporate guidance and acceptable practices from appendix B to part 37.[401]

Paragraph (b) of Proposed Rule 821 would specify an SBSEF's market-oversight obligations. Paragraph (c) of Proposed Rule 821 would specify requirements for an SBSEF's monitoring of physical-delivery SBS. Paragraph (d) of Proposed Rule 821 would specify additional requirements for cash-settled SBS. Paragraph (e) of Proposed Rule 821 would specify requirements for an SBSEF's ability to obtain information. Paragraph (f) of Proposed Rule 821 would require an SBSEF to establish and maintain risk control mechanisms to prevent and reduce the potential risk of market disruptions. Paragraph (g) of Proposed Rule 821 would require an SBSEF to have the ability to comprehensively and accurately reconstruct all trading on its facility and requires an SBSEF to make all audit-trail data and reconstructions available to the Commission. And paragraph (h) of Proposed Rule 821 would provide that an SBSEF shall comply with the rules in this section through a dedicated regulatory department or by contracting with a regulatory service provider pursuant to Rule 819(e).

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

401 *See* Proposing Release, *supra* note 1, 87 FR at 28910–11.

The Commission received no comments on Proposed Rule 821 and is adopting Rule 821 as proposed for the reasons stated in the Proposing Release.

E. Rule 822—Core Principle 5—Ability to Obtain Information

Core Principle 5[402] 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[403] is substantively identical.

Proposed Rule 822 implements Core Principle 5 and is substantively identical to subpart F of part 37. Paragraph (a) of Proposed Rule 822 would repeat the statutory text of Core Principle 5. Paragraph (b), modeled 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.[404] 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

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

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

404 While § 37.502 of subpart F uses the term "market participant," Proposed Rule 822 would substitute 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 362.

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.

The Commission received no comments on Proposed Rule 822 and is adopting Rule 822 as proposed for the reasons stated in the Proposing Release.

F. Rule 823—Core Principle 6—Financial Integrity of Transactions

Core Principle 6 sets forth requirements related to the financial integrity of transactions that are entered on or through the facilities of an SBSEF.[405] Specifically, paragraph (a) of Proposed Rule 823 would require 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.[406] Paragraph (b) would provide that transactions required to be cleared or voluntarily cleared must be cleared through a registered clearing agency (or an exempt clearing agency). Paragraph (c) addresses the manner in which an SBSEF shall provide for the financial integrity of transactions. Finally, paragraph (d) would require an SBSEF to monitor its members to ensure that they continue to qualify as eligible contract participants. As described in the Proposing Release, the Commission modeled Rule 823 on subpart H of part 37 of the CFTC's rules,[407] which implements CEA Core Principle 7 for SEFs.[408]

1. Rule 823(a) – General

Paragraph (a) of Proposed Rule 823 would repeat the statutory text of SEA Core Principle 6 in the same manner that § 37.700 of the CFTC's rules[409] repeats the statutory language of CEA Core Principle 7 for SEFs.[410] Proposed Rule 823(a) would require an SBSEF to

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

406 15 U.S.C. 78c-3(a)(1). *See supra* note 168 and accompanying text (discussing mandatory clearing provisions).

407 *See* Proposing Release, *supra* note 1, 87 FR at 28912.

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

409 17 CFR 37.700; s*ee also* Proposing Release, *supra* note 1, 87 FR at 28912.

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

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.[411] The Commission did not receive any comments on Proposed Rule 823(a) and is adopting Rule 823(a) as proposed for the reasons stated in the Proposing Release.

2. Rule 823(b) – Required Clearing

Paragraph (b) of Proposed Rule 823 is closely modeled on § 37.701 of the CFTC's rules,[412] and it would provide that transactions executed on or through an 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 or a clearing agency that has obtained an exemption from clearing agency registration to provide central counterparty services for SBS. The Commission did not receive any comments on Proposed Rule 823(b) and is adopting Rule 823(b) as proposed for the reasons stated in the Proposing Release.

3. Rule 823(c) – General Financial Integrity

Paragraph (c) of Proposed Rule 823 is closely modeled on § 37.702 of the CFTC's rules,[413] and would require an SBSEF to provide for the financial integrity of transactions by establishing minimum financial standards for its members, which shall at a minimum require members to be ECPs. Proposed Rule 823(c) would further require an SBSEF to provide for the financial integrity of transactions by ensuring that the SBSEF, for transactions cleared by a registered clearing agency, has the capacity to route transactions to the registered clearing agency in a manner acceptable to the clearing agency, 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.

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411 15 U.S.C. 78c-3(a)(1).

412 17 CFR 37.701; s*ee also* Proposing Release, *supra* note 1, 87 FR at 28912.

413 17 CFR 37.702; s*ee also* Proposing Release, *supra* note 1, 87 FR at 28912.

One commenter characterizes the CFTC regime as providing detailed straight-through-processing ("STP") standards for swaps executed on SEFs that are intended to be cleared but believes that the Commission's proposal lacks such standards.[414] The commenter observes that there is a lack of market consistency regarding the execution-to-clearing workflow for SBS that are intended to be cleared, which complicates the trading of cleared SBS. The commenter highlights "clearing submission timeframes" and "clearing certainty" as key issues and discusses the manner in which the CFTC has addressed these issues in its rules and guidance. The commenter states that the CFTC's STP standards, including "pre-execution credit checks" and "well-defined submission timeframes," have been successfully implemented by the industry since 2013, enhancing the SEF trading environment. The commenter argues that the timeframes minimize delays between execution and clearing acceptance and increase pre-trade clearing certainty, decreasing market, credit, and operational risks for market participants and clearing agencies, and broadens the range of trading counterparties. For these reasons, the commenter recommends harmonizing with the CFTC by establishing STP standards, incorporating relevant CFTC guidance, and prohibiting breakage agreements for SBS that are intended to be cleared.[415]

Another commenter agrees that applying the CFTC's approach to STP would further harmonize SBSEFs with SEFs and would provide greater certainty of execution and clearing, encourage more clearing, facilitate electronic trading, and promote accessible, competitive markets and access to best execution.[416] Lastly, a third commenter supports harmonization and encourages the Commission to both codify the guidance in appendix B to part 37 of the CFTC regulations and the CFTC's staff guidance regarding STP.[417] The commenter believes that the STP requirements have been successfully implemented by market participants for nearly a

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414 *See* Citadel Letter, *supra* note 18, at 4–6.

415 *See id.*

416 *See* MFA Letter, *supra* note 18, at 12.

417 *See* SIFMA AMG Letter, *supra* note 18, at 9.

decade, and modifying them now would introduce significant market, operational, and credit risk, along with additional complexity and cost for market participants.[418]

As previously stated, harmonization with the CFTC regime for SEFs is an important consideration for the Commission, given that it expects most registered SBSEFs to also be registered SEFs. Consistent with this view, Proposed Rule 823 is largely based on subpart H of part 37, and the key language of Rule 823(c)(2) relevant to STP is substantively identical to § 37.702(b). Both provisions require an SBSEF or SEF to (i) ensure that it has the capacity to route transactions to the relevant clearing agency in a manner acceptable to the clearing agency for purposes of clearing; and (ii) coordinate with each relevant clearing agency to which it submits transactions for clearing, in the development of rules and procedures to facilitate prompt and efficient transaction processing. Rule 249.1701, Exhibit T further requires SBSEFs to provide "the name(s) of the clearing agency(ies) that will clear the Applicant's trades, and a representation that clearing members of that organization will be guaranteeing such trades."[419]

The Commission generally expects an SBSEF's rules and procedures to demonstrate compliance with these requirements with respect to SBS that are intended to be cleared or that would become subject to a mandatory clearing requirement in the future. Since SBSEFs are required to establish rules and procedures for clearing in coordination with each relevant clearing agency to which it submits trades, SBSEFs should be able to route executed trades to relevant clearing agencies promptly, particularly if fully automated systems are used. Furthermore, if an SBSEF were to act to purposefully delay clearing submission in order to favor certain market participants over others, that type of action could be addressed under the impartial access requirements of Rule 819(c).[420] Lastly, as noted previously, the Commission is adopting Rule

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418 *See id.*

419 *See* Form SBSEF (Exhibits Instructions, Instruction No. 20, Exhibit T); *see also supra* note 84.

420 *See supra* section VI.B.3 (discussing the impartial access requirements of Proposed Rule 819(c)). For example, if an SBSEF purposefully delayed clearing submission of only certain market participants that the SBSEF favors, that would be contrary to the requirement of Proposed Rule 819(c) of providing impartial access to market services.

815(g), which specifies that SBSEFs shall establish and enforce rules that provide that a security-based swap that is intended to be cleared at the time of the transaction, but is not accepted for clearing at a registered clearing agency, shall be void *ab initio.* Together, these provisions should help ensure that SBSEFs will process trades promptly and efficiently. These provisions are also consistent with the CFTC's staff guidance related to SEFs. The CFTC staff guidance also addressed regulatory requirements related to intermediaries and clearing organizations that are beyond the scope of this rulemaking.

For the reasons stated above, the Commission is adopting Rule 823(c) as proposed.[421]

4. Rule 823(d) – Monitoring for Financial Soundness

Paragraph (d) of Proposed Rule 823 is closely modeled on § 37.703 of the CFTC's rules,[422] and it would require an SBSEF to monitor its members to ensure that they continue to qualify as ECPs. The Commission did not receive any comments on Rule 823(d) and is adopting Rule 823(d) as proposed for the reasons stated in the Proposing Release.

G. Rule 824—Core Principle 7—Emergency Authority

SEA Core Principle 7[423] 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[424] is substantively identical, and 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 a SEF "may refer" to the guidance in appendix B to part 37 "to demonstrate to the Commission compliance with [Core Principle 8]."

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421 While one commenter suggests that the Commission incorporate guidance from appendix B to part 37 of the CFTC rules, the appendix does not contain any guidance or acceptable practices under Core Principle 7 of section 5h of the CEA—Financial Integrity of Transactions.

422 17 CFR 37.703; s*ee also* Proposing Release, *supra* note 1, 87 FR at 28912.

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

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

Proposed Rule 824 would implement SEA Core Principle 7 and is closely modeled 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 received no comments on Proposed Rule 824 and is adopting Rule 824 as proposed, with minor technical modifications,[425] for the reasons stated in the Proposing Release.

H. Rule 825—Core Principle 8—Timely Publication of Trading Information

SEA Core Principle 8[426] 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[427] is substantively identical to SEA Core Principle 8, and the CFTC implemented CEA Core Principle 9 in subpart J of part 37.

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425 The Commission has corrected a reference to "exercise of emergency action" to read "exercise of emergency authority." The Commission has also made two non-substantive corrections to the text of Proposed Rule 824. The Commission has replaced a period with a semicolon at the end of paragraph (b)(3) and has added the word "and" to the end of paragraph (b)(5).

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

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

Proposed Rule 825 would implement SEA Core Principle 8 and is closely modeled on subpart J of part 37. Paragraph (a) of Proposed Rule 825, like § 37.900, would repeat 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.[428]

Paragraph (c) of Proposed Rule 825 would require the publication, on an SBSEF's website, of a "Daily Market Data Report." The data fields that the Commission proposed to require for the Daily Market Data Report approximated, although they were not the same as, those required by part 16. 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, correcting trades, and offsetting trades[429]);

(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

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428 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.

429 Each of these terms is defined in Proposed Rule 802 and also used in Proposed Rule 815.

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. Paragraph (c)(3)(ii) 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 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.[430]

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[430] 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.

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. 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.

Several commenters criticized the Daily Market Data Report required by Proposed Rule 825.[431] One commenter states that the Daily Market Report would require inappropriate and detrimental disclosures that would undermine the Commission's goal of fostering a competitive and efficient market for SBS trading.[432] This commenter states that there are significant differences in the information required to be reported under the SEC and CFTC regimes. The commenter states that Proposed Rule 825(c)(1) increases the burden on SBSEFs compared to SEFs by requiring additional information regarding sale and offer prices, as well as qualitative descriptions of certain data that are reported.

This commenter further states that the Commission's proposal does not address why the CFTC's approach would not be acceptable in the context of SBSEFs and does not justify the increased operational costs to SBSEFs (which will ultimately be passed on to members). The commenter also states that the Commission has not considered the costs and potential for duplicative requirements in the context of Regulation SBSR reporting requirements. The commenter concludes that, in sum, the Daily Market Data Report is overly granular and

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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.

431 *See* MFA Letter, *supra* note 18, at 13; WMBAA Letter, *supra* note 18, at 5–6; ISDA-SIFMA Letter, *supra* note 18, at 10; Bloomberg Letter, *supra* note 18, at 5, 17. Eleven commenters supported general transparency in markets but did not address the Daily Market Data Report specifically. *See, e.g.*, Letter from David Mounts (Oct. 29, 2022); Letter from Katie K. (Apr. 7, 2022).

432 *See* MFA Letter, *supra* note 18, at 13.

duplicative, is unnecessary for transparency purposes, and could negatively impact the market and market participants. The commenter states that the Commission should therefore remove the Daily Market Data Report in favor of harmonizing with the analogous CFTC rules and that, if the Commission does not eliminate the Daily Market Data Report requirement altogether, it should adopt additional masking protections for trades, specifically with respect to block trades. Failure to do so, the commenter states, would cause inappropriate and detrimental disclosures and would "negate the benefits that the rule purports to achieve by exempting block trades from clearing [sic] requirements."[433]

Another commenter states that the requirement for a Daily Market Data Report is a departure from the otherwise generally harmonized rule proposal and risks overly complicating the SBSEF regime for limited benefit, particularly with SBS reporting and dissemination in place through Regulation SBSR.[434] The commenter states that the Daily Market Data Report serves as a duplicative source of information that fails to improve price discovery or liquidity formation, and that the Daily Market Data Report could negatively impact conditions, particularly for block trades, especially given the relatively illiquid SBS market, which has a relatively small number participants. This commenter encourages the Commission to remove the proposed Daily Market Data Report and review this issue with the benefit of several years' experience with these rules, particularly once Regulation SBSR is fully operational.

One commenter states that the Daily Market Report is not necessary because the CFTC SEF regulatory framework, which does not impose such a requirement, provides sufficient price transparency.[435] This commenter states that the Commission has not pointed to any observable issues with the SEF transparency framework to justify a need for these reports, and the commenter states that the daily publication of information related to block trade numbers and

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433 *See id.* Regulation SE does not address any exemption from clearing requirements.

434 *See* WMBAA Letter, *supra* note 18, at 5–6.

435 *See* ISDA-SIFMA Letter, *supra* note 18, at 10.

block notional amounts, coupled with aggregate pricing information, would magnify the problems associated with the "winner's curse." This is particularly concerning, the commenter states, where a dealer is unable to fully lay-off its risk from a block trade within the course of a single day—a scenario that is extremely likely considering the thin nature of SBS markets. Based on the information published in the report as proposed, the commenter states, SBSEF participants may be able to identify a particular block trade and the likely price point, and then use that information to up-charge the dealer who is seeking to lay off the rest of its risk, thus frustrating the key objective of block trading.

This commenter further states that the issues it has identified are amplified even further if the Daily Market Report does not follow the cap requirements that apply in the public price dissemination of data under the Commission's trade reporting rule and related Commission no-action relief. The commenter states that publication of uncapped trade sizes could, in certain cases, reveal the exact notional amount of a trade to the public, which is not permitted under the Commission's SBS trade reporting rules. The commenter states that this is especially concerning given that the proposed Daily Market Report provides detailed information by SBS product and tenor. The commenter states that the Commission should abandon its proposed Daily Market Report or, if it does not, require publication of the proposed report on a monthly or quarterly basis and make it subject to the cap size requirements imposed on SBSDRs. This, the commenter states, would ensure that the report does not conflict with the protections afforded to market participants per the cap size requirements and under the Commission's SBS trade reporting rules and related relief for SBS.[436]

Another commenter states that, in its experience with the reports required under CFTC part 16, which requires the compilation of similar information as the proposed Daily Market Data Report, the timeline for publication proposed under Rule 825(c)(4) would be impractical, if

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[436] *See id.*

not technologically impossible.[437] This commenter states that it operates a SEF with trading hours that run from 00:01 hours to 24:00 hours, Sunday through Friday. The commenter envisions SBS trading to be permitted during the same trading hours and states that the break between the end of trading one day and the beginning of trading the next day—one minute—means that it would likely not be possible to compile the required report "no later than the SBSEF's commencement of trading on the next business day." This commenter proposes synchronizing Rule 825(c)(4) with CFTC Rule 16.01(d)(2) to allow additional time for the publication of the Daily Market Data Report. With regard to the content of the report, this commenter states that the settlement price required under Rule 825(c)(1) should be included in the report only to the extent it is calculated by an SBSEF.

Many of the reporting requirements of the Daily Market Data Report under Proposed Rule 825 are closely aligned with the data required to be disclosed on a daily basis by SEFs under § 16.01 of the CFTC's rules. Both rules require the daily disclosure of: (1) a measure of trading volume in terms of trades or contracts[438]; (2) the total notional volume traded[439]; (3) the notional amount of block trades[440]; (4) the opening and closing prices[441]; (5) the price used for settlement, if different from the closing price[442]; (6) 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 facility reasonably determines accurately reflects market conditions[443]; (7) the method used by the facility in

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437 *See* Bloomberg Letter, *supra* note 18, at 5, 17.

438 *Compare* Proposed Rule 825(c)(1)(i) (trade count, including block trades but excluding error trades, correcting trades, and offsetting trades), *with* 17 CFR 16.01(a)(1)(iii) (trading volume and open contracts by product type term life of the swap).

439 *Compare* Proposed Rule 825(c)(1)(ii) (total notional amount traded, including block trades but excluding error trades, correcting trades, and offsetting trades), *with* 17 CFR 16.01(a)(2)(iv) (total trading volume in terms of the number of contracts traded for standard-sized contract or in terms of notional value for non-standard-sized contracts).

440 *Compare* Proposed Rule 825(c)(1)(iv) (total notional amount of block trades), *with* 17 CFR 16.01(a)(2)(vi) (total volume of block trades included in the total volume of trading).

441 *See* Proposed Rule 825(c)(1)(v); 17 CFR 16.01(b)(2)(i).

442 *See* Proposed Rule 825(c)(1)(vi); 17 CFR 16.01(b)(2)(ii).

443 *See* Proposed Rule 825(c)(1)(vii); 17 CFR 16.01(b)(2)(iii).

determining nominal prices and settlement prices, and if discretion is used in determining the opening or closing ranges or the settlement prices, an explanation that certain discretion may be employed and a description of the manner in which that discretion may be employed[444]; and (8) in each instance in which such discretion was applied, an explicit notation that discretion was applied.[445]

Further, the Commission is modifying Proposed Rule 825 to resolve the two differences between the proposed Daily Market Data Report and the existing CFTC reporting scheme under § 16.01: (1) that the Daily Market Data Report would include the number of block trades executed[446]; and (2) that the Daily Market Data Report would be posted on the SBSEF's website no later than *the beginning of trading* on the next business day,[447] while the information required by § 16.01 must be made public no later than the next business day.[448]

A number of commenters raised specific concerns that the disclosures in the Daily Market Data Report would hamper the efficient trading of block trades.[449] The Commission agrees that the additional disclosed data element for SBSEFs—the number of block trades—could lead to additional information leakage while a dealer that facilitated a block trade might still be laying off the risk it undertook in facilitating that trade. Therefore, consistent with the CFTC's disclosure elements under § 16.01, the Commission is modifying Rule 825(c)(1) as proposed to delete paragraph (c)(1)(iii), which requires the disclosure of the number of block trades, and to renumber the following paragraphs accordingly. The Commission is also, pursuant to its determination not to adopt a definition of "block trade,"[450] deleting the words "including

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444 *See* Proposed Rule 825(c)(2)(i); 17 CFR 16.01(b)(4)(i).

445 *See* Proposed Rule 825(c)(2)(ii); 17 CFR 16.01(b)(4)(ii).

446 *See* Proposed Rule 825(c)(1)(iii).

447 *See* Proposed Rule 825(c)(4).

448 *See* 17 CFR 16.01(e). The Commission views the requirement to keep each Daily Market Data Report on an SBSEF's website for one year, *see* Proposed Rule 825(c)(5), as a small additional burden for an SBSEF and does not view it as a significant departure from harmonization with the CFTC's SEF regime.

449 *See supra* notes 433–436 and accompanying text.

450 *See supra* section V.E.1(c)(ii).

block trades but" from the text of paragraph (c)(i) and (ii) of Rule 825, and is adding the words "after such time as the Commission adopts a definition of 'block trade'" to paragraph (c)(iii) of Rule 825 (formerly paragraph (c)(iv) of Proposed Rule 825[451]), which will have no effect on the requirement as compared to the proposed rule.

The Commission is also modifying Proposed Rule 825 to address the comment that an SBSEF that operates nearly 24 hours a day might not be able to comply with the requirement to publish the Daily Market Data Report before the beginning of trading on the next business day. Accordingly, the Commission is modifying Proposed Rule 825(c)(4) to require the publication of the Daily Market Data Report "as soon as reasonably practicable on the next business day after the day to which the information pertains, but in no event later than 7 a.m. on the next business day." This modified requirement, while less stringent than the requirement as proposed, would differ slightly from the CFTC's requirement that such information must be made public "no later than the next business day."[452] Making each trading day's information available to market participants before the beginning of the next trading is reasonably designed to foster transparency and efficiency in the market for SBS.

With these modifications, the proposed Daily Market Data Report for SBSEFs is consistent with the required daily disclosures for SEFs. While one commenter states that Proposed Rule 825(c)(1) increases the burden on SBSEFs compared to SEFs, including by calling for qualitative descriptions of certain data, the data called for by Rule 825(c)(1), as modified, does not differ materially from that required to be published daily under § 16.01. Thus, the Commission does not agree with the commenter that the data required under the Commission approach differs materially from that required under the CFTC approach or that the Daily Market Data Report will result in an unjustified increase in operational costs.

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451 The Commission is also correcting the form of a cross-reference in paragraph (b) to "Regulation SBSR" to read "§§ 242.900 through 242.909 (Regulation SBSR)."

452 *See* 17 CFR 16.01(e). The Commission views the requirement to keep each Daily Market Data Report on an SBSEF's website for one year, *see* Proposed Rule 825(c)(5), as a small additional burden for an SBSEF and does not view it as a significant departure from harmonization with the CFTC's SEF regime.

Further, the Commission does not agree with commenters that the Daily Market Data Report would serve as a duplicative source of information to reporting under Regulation SBSR and therefore risks overly complicating the SBSEF regime for limited benefit, without benefit to price improvement or liquidity formation. Regulation SBSR requires the reporting and public dissemination of SBS transactions,[453] but because the transaction reports for credit SBS are permitted to be capped at a notional volume of $5 million,[454] market participants would be unable to glean the information provided by the Daily Market Data Report—which would publish daily total notional volumes based on uncapped transaction amounts—from the individual reports of SBS transactions under Regulation SBSR. Thus, the Daily Market Data Report would provide market participants with information about pricing and trading volume for SBS on SBSEFs that goes beyond the information that could be obtained from SBS transaction reports that are publicly disseminated pursuant to Regulation SBSR. And because individual trades would not be reported—and, with the modification the Commission is making, the number of block trades would also not be reported—a size cap on reporting volume used to provide summary data to the market is not necessary or appropriate. Additionally, with the respect to the comment that the settlement price required under Proposed Rule 825(c)(1) should be included in the report only to the extent it is calculated by an SBSEF, the language of the requirement—"[t]he price *that is used for* settlement…"[455]—means that if no settlement price is calculated for a given SBS, that data element does not need to be reported.

With respect to the means of publication of the information, while the means of publishing the Daily Market Data Report varies from that specified under the CFTC regime, the difference is not material. The Commission proposed that this information be posted on an

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453 *See* 17 CFR 242.900 *et seq*.

454 *See* 2019 Cross-Border Adopting Release, *supra* note 218, 85 FR at 6347 (providing no-action relief with respect to Rule 902 of Regulation SBSR, 17 CFR 242.902, for reports of credit SBS transaction disseminated with a capped size of $5 million).

455 *See* Proposed Rule 825(c)(1)(vi) (emphasis added).

SBSEF's website in the most recent XML schema and PDF renderer, without fees or charges, without any encumbrances on access or usage, and without requiring a user to agree to any terms before viewing or downloading the report.[456] And the CFTC, in addition to requiring that this information be provided to the CFTC, requires it be made available to news media and the general public "in a format that readily enables the consideration of such data."[457]

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, and, as the Commission stated in the Proposing Release, the prohibition against an SBSEF imposing any usage restrictions on its Daily Market Data Report would necessarily encompass a prohibition on bulk redistribution of the Daily Market Data Report or any information contained therein.[458] 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.

For the reasons discussed above, the Commission is adopting Rule 825 as modified.[459]

I. Rule 826—Core Principle 9—Recordkeeping and Reporting

SEA Core Principle 9[460] 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.

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456 *See* Proposed Rule 825(c)(3).

457 17 CFR 16.01(e).

458 *See* Proposing Release, *supra* note 1, 87 FR at 28915.

459 *See supra* note 32.

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

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.[461] CEA Core Principle 10 for SEFs, although it includes an additional clause not present in the equivalent SEA Core Principle 9,[462] is substantively identical.

To implement SEA Core Principle 9, the Commission proposed Rule 826, which roughly approximates §§ 1.31 and 45.2 of the CFTC's rules,[463] while also drawing on concepts from the books and records requirements applicable to brokers, SEC-registered SROs, and other SEC-registered entities.[464]

Paragraph (a) of Proposed Rule 826 would repeat the statutory text of the Core Principle. Paragraph (b) would require an SBSEF to keep full, complete, and systematic records,[465] 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 Rule 819(f) and all other records that an SBSEF is required to create or obtain under Regulation SE.

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461 As discussed below in this section, the Commission is adopting 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 CFR 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.

462 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).

463 Section 1.31 imposes on "records entities" (which term includes SEFs) various requirements relating to record retention and production. Section 45.2 imposes various recordkeeping, retention, and retrieval requirements applicable to SEFs (among others) to support trade reporting.

464 *See infra* section XI (discussing in the context of Proposed 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).

465 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 has included a definition of "records" in Rule 802 that cross-references section 3(a)(37) of the SEA.

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 five-year retention requirements would be consistent with section 3D(d) of the SEA[466] and are modeled 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 rule for exchange members, brokers, and dealers.[467]

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 SEA and the Commission's rules thereunder. Paragraph (d)(2) would require an SBSEF, upon request of any representative of the Commission, to promptly[468] 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) would also include provisions modeled 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.

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466 *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).

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

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

Paragraph (e) of Proposed Rule 826 would provide that 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, which 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 would not seek to limit or expand that authority using the Commission's powers over SBSEFs in section 3D of the SEA.

Proposed Rule 826 would include a paragraph (f) that is not modeled on any provision of § 1.31 or § 45.2, but rather on § 1.37(c) of the CFTC's rules, which would provide: "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 modeled closely on § 1.37(c), except that it would use the term "non-U.S. member" rather than "foreign trader."[469]

The Commission received no comments on Proposed Rule 826 and is adopting Rule 826 as proposed, with minor technical modifications,[470] for the reasons stated in the Proposing Release.

J. Rule 827—Core Principle 10—Antitrust Considerations

SEA Core Principle 10[471] 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

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469 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 term "member" as used throughout Regulation SE is defined in Rule 802. The term "non-U.S. member," also found in Rule 802, is defined as "a member of a security-based swap execution facility that is not a U.S. person."

470 *See supra* note 32.

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

any unreasonable restraint of trade, or (2) impose any material anticompetitive burden on trading or clearing. CEA Core Principle 11[472] is substantively identical. Proposed Rule 827 would implement SEA Core Principle 10 and reiterate the statutory text of the Core Principle.[473]

The Commission did not receive any comments on Proposed Rule 827 and is adopting Rule 827 as proposed, for the reasons stated in the Proposing Release.

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

SEA Core Principle 11[474] 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[475] is substantively identical, and the CFTC implemented CEA Core Principle 12 in subpart M of part 37.[476]

Proposed Rule 828 would implement SEA Core Principle 11. Paragraph (a) of Rule 828, like § 37.1200, would repeat the statutory text of the Core Principle. Paragraph (b) would direct an SBSEF to comply with the requirements of Rule 834, which, as discussed below, would implement section 765 of the Dodd-Frank Act for both SBSEFs and SBS exchanges.[477]

The Commission received no comments on Proposed Rule 828 and is adopting Rule 828 as proposed for the reasons stated in the Proposing Release.

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

473 The Commission has not adapted the guidance from appendix B pertaining to CEA Core Principle 11 into its rule. As explained in the Proposing Release, it is not 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). *See* Proposing Release, *supra* note 1, 87 FR at 28917 n.196. 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. *Id.*

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

475 7 U.S.C. 7b-3(f)(12).

476 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. 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 (Oct. 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 (Jan. 6, 2011).

477 *See infra* section VIII.

L. Rule 829—Core Principle 12—Financial Resources

Core Principle 12[478] sets forth certain requirements related to the financial resources of an SBSEF. Paragraph (a)(1) requires an SBSEF to have adequate financial, operational, and managerial resources to discharge each responsibility of the SBSEF, as determined by the Commission. Paragraph (a)(2) would provide 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 period, as calculated on a rolling basis. Finally, paragraphs (b) through (g) provide details and instruction on how to comply with the requirements of Core Principle 12.

CEA Core Principle 13 for SEFs[479] is substantively identical to SEA Core Principle 12 but lacks the clause in section 3D(d)(12)(B)(i) of the SEA relating to an SBSEF meeting financial obligations to members and participants notwithstanding a default by the member or participant creating the largest financial exposure for the SBSEF in extreme but plausible market conditions. As described in the Proposing Release, the Commission modeled Rule 829 on subpart N of part 37 of the CFTC's rules,[480] which implements CEA Core Principle 13 for SEFs.

1. Rule 829(a) – General

Paragraph (a) of Proposed Rule 829 would repeat the statutory text of SEA Core Principle 12.

One commenter states that the language in paragraph (a)(2)(i) of Proposed Rule 829 that requires an SBSEF to have sufficient financial resources "to meet its financial obligations to its

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

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

480 *See* Proposing Release, *supra* note 1, 87 FR at 28919.

members notwithstanding a default by a member creating the largest financial exposure for that organization in extreme but plausible market conditions" is not adequate.[481] The commenter believes that an SBSEF should be required to have resources significantly in excess of this requirement because, during financial uncertainties and stress, the SBSEF would need even greater resources.[482]

Another commenter states that the same provision, paragraph (a)(2)(i) of Proposed Rule 829, is overly burdensome and unnecessary.[483] The commenter states that the provision would add significantly to the amount of capital required to operate an SBSEF with little corresponding benefit to the market. The commenter argues that trading platforms such as SEFs and SBSEFs will have credit exposure to a member in limited circumstances and for very limited periods of time. Therefore, this commenter states, requiring a trading platform to maintain capital sufficient to cover the largest financial exposure of a member trading on the SBSEF, when the trading platform will not be called upon to cover the cost of a default, is unnecessary and overly burdensome. The commenter also states that the provision is not in the parallel CFTC rule. The commenter suggests eliminating the provision or, in the alternative, affirm that satisfying the financial requirements in Rule 829(b), relating to having adequate resources to enable an SBSEF to comply with the SEA and applicable Commission rules for one year, would be sufficient to satisfy the requirements of Rule 829(a) as well.[484]

The requirements of Proposed Rule 829(a)(2)(i), which repeats the statutory text of SEA Core Principle 12, do not need to be more stringent, as suggested by the first commenter. The provision requires an SBSEF to have adequate resources to "meet its financial obligations to its members" even in case of a default by a member creating the largest financial exposure. By the

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481 *See* Letter from Chris Barnard to Commission at 2 (May 21, 2022) (submitted under cover email dated June 6, 2022).

482 *See id.*

483 *See* Bloomberg Letter, *supra* note 18, at 8.

484 *See id.*

plain meaning of its terms, the provision requires that an SBSEF meet its financial obligations. The Commission does not see a benefit to requiring an SBSEF to have the financial resources that exceed its obligations. As long as an SBSEF's obligations are met, its members can be made whole with respect to any obligations of the SBSEF and the SBSEF can continue to operate. Therefore, ensuring that an SBSEF can meet its financial obligations is sufficient. Furthermore, the provision itself already envisions "extreme but plausible market conditions," analogous to the "conditions of financial uncertainty and stress" that the commenter discusses.

At the same time, Proposed Rule 829(a)(2)(i) should not be eliminated, and the rules should not be interpreted in a manner that allows the requirements of Proposed Rule 829(a)(2)(i) to be satisfied by complying with Proposed Rule 829(b). First, the requirement that an SBSEF be able to cover its financial obligations even when its largest member defaults is in the statutory language of the SEA, and the Commission is not adopting a rule inconsistent with this requirement. The statutory language is an appropriate requirement to impose on SBSEFs because it seeks to address a plausible risk caused by the default of a member, a financial risk that, if an SBSEF has not accounted for it, could endanger the SBSEF's ability to continue to operate. While, the commenter is correct that the CFTC's rules do not have a similar provision, it is also the case that the CEA does not have a similar provision. Therefore, while the Commission is, as explained above, generally striving for harmonization with the CFTC, the Commission is not modifying Proposed Rule 829(a) to remove the requirement that an SBSEF have adequate resources to meet its financial obligations to its members even in case of a default by a member creating the largest financial exposure. Second, the Commission will not affirm that it will, as requested by a commenter, interpret the rules in a manner that allows the requirement of Rule 829(a) to be satisfied by satisfying the requirements of Rule 829(b). The scope of Proposed Rule 829(a) and Proposed Rule 829(b) are different. Proposed Rule 829(a) would in general address having adequate financial (and operational and managerial) resources to discharge each responsibility of an SBSEF. Proposed Rule 829(b) would specifically address the financial (not

operational or managerial) resources that are necessary to comply with one type (not each type) of responsibility of the SBSEF, i.e., compliance with section 3D of the SEA and the applicable Commission rules. Because Proposed Rule 829(a) would address topics beyond the scope of Proposed Rule 829(b), including the topic of a default by a member creating the largest financial exposure, the requirements of Proposed Rule 829(a) cannot be satisfied by merely satisfying the requirements of Proposed Rule 829(b).

For the reasons discussed above, the Commission is adopting Rule 829(a) as proposed, with a minor technical modification.[485]

2. Rule 829(b) – General Requirements

Paragraph (b) of Proposed Rule 829 is closely modeled on § 37.1301 of the CFTC's rules,[486] and it requires an SBSEF to maintain financial resources that are adequate to enable it to comply with the SBSEF Core Principles set forth in the SEA and the Commission rules for a one-year period, calculated on a rolling basis.

The Commission did not receive any comments and is adopting Rule 829(b) as proposed for the reasons stated in the Proposing Release.

3. Rule 829(c) – Types of Financial Resources

Paragraph (c) of Proposed Rule 829 is closely modeled on § 37.1302 of the CFTC's rules,[487] and it describes the types of financial resources that may satisfy the requirements of Rule 829(b).

The Commission did not receive any comments on Proposed Rule 829(c) and is adopting Rule 829(c) as proposed for the reasons stated in the Proposing Release.

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485 The technical modification removes a stray parenthesis.

486 17 CFR 37.1301; s*ee also* Proposing Release, *supra* note 1, 87 FR at 28918.

487 17 CFR 37.1302; s*ee also* Proposing Release, *supra* note 1, 87 FR at 28918.

4. Rule 829(d) – Liquidity of Financial Resources

Paragraph (d) of Proposed Rule 829 is closely modeled on § 37.1303 of the CFTC's rules,[488] and would provide that the financial resources allocated by an SBSEF 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 SBSEF's operations. If an SBSEF 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.

The Commission did not receive any comments on Proposed Rule 829(d) and is adopting Rule 829(d) as proposed for the reasons stated in the Proposing Release.

5. Rule 829(e) – Computation of Costs to Meet Financial Resources Requirement

Paragraph (e) of Proposed Rule 829 is closely modeled on § 37.1304 of the CFTC's rules,[489] and would require an SBSEF, 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 Rule 829. Paragraph (e) would further provide that the SBSEF shall have reasonable discretion in determining the methodology used to compute such amounts, provided that the Commission may review the methodology and require changes as appropriate. Proposed Rule 829(e) would also append language based on the CFTC guidance from appendix B to part 37 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.

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488 17 CFR 37.1303; s*ee also* Proposing Release, *supra* note 1, 87 FR at 28919.

489 17 CFR 37.1304; s*ee also* Proposing Release, *supra* note 1, 87 FR at 28919.

The Commission did not receive any comments on Proposed Rule 829(e) and is adopting Rule 829(e) as proposed, with a minor technical modification for the reasons stated in the Proposing Release.[490]

6. Rule 829(f) – Valuation of Financial Resources

Paragraph (f) of Proposed Rule 829 is closely modeled on § 37.1305 of the CFTC's rules,[491] and would provide that, no less than each fiscal quarter, an SBSEF must compute the current market value of each financial resource used to meet its obligations under Rule 829 and that reductions in value to reflect market and credit risk ("haircuts") shall be applied as appropriate.

The Commission did not receive any comments on Proposed Rule 829(f) and is adopting Rule 829(f) as proposed for the reasons stated in the Proposing Release.

7. Rule 829(g) – Reporting to the Commission

Paragraph (g) of Proposed Rule 829 is closely modeled on § 37.1306 of the CFTC's rules,[492] and would address reporting to the Commission regarding an SBSEF's financial resources. Paragraph (g)(1) would generally provide that, each fiscal quarter, or at any time upon Commission request, an SBSEF shall report the amount of financial resources necessary to meet the requirements of Rule 829 and the market value of each financial resource available, and shall provide the Commission with financial statements prepared in accordance with GAAP. Paragraph (g)(2) would provide that the calculations required under Rule 829(g) shall be made as of the last business day of the SBSEF's fiscal quarter. Paragraph (g)(3) would generally require the SBSEF to provide the Commission with sufficient documentation to explain its methodology for computing its financial requirements. Paragraph (g)(4) would generally provide the timing for submission of reports and supporting documentation. Paragraph (g)(5) would require an

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490 The technical modification corrects an incorrect internal cross-reference to a paragraph in the rule.

491 17 CFR 37.1305; s*ee also* Proposing Release, *supra* note 1, 87 FR at 28919.

492 17 CFR 37.1306; s*ee also* Proposing Release, *supra* note 1, 87 FR at 28919.

SBSEF to 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 Rule 829(b) and (d). Paragraph (g)(6) would require the use of EDGAR to submit reports and documentation required under Rule 829.

The Commission did not receive any comments on Proposed Rule 829(g) and is adopting Rule 829(g) as proposed, with minor technical modifications, for the reasons stated in the Proposing Release.[493]

M. Rule 830—Core Principle 13—System Safeguards

Paragraph (A) of SEA Core Principle 13[494] 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 must also 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 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[495] is substantively identical to SEA Core Principle 13, and the CFTC implemented this Core Principle through subpart O of part 37, which is entitled "System Safeguards."

Proposed Rule 830 is closely modeled on subpart O of part 37 of the CFTC's rules, except in one aspect. Subpart O includes language relating to "critical financial markets,"[496]

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493 *See supra* note 32. The Commission has also changed the word "paragraph" in Rule 829(g)(5) to the plural form.

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

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

496 *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

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.[497] A similar concept in the SEC's rules is "SCI entity."[498] When adopting Regulation SCI, the Commission considered whether it should apply Regulation SCI to SBSEFs, among other entities, and determined not to do so,[499] and when proposing amendments to Regulation SCI in 2023 to, among other things, expand the definition of "SCI entity," the Commission did not propose to include SBSEFs as SCI entities.[500]

One commenter states that it has seen no changes in the SBS market that should cause the Commission to revisit its decision not to apply Regulation SCI to SBSEFs. The commenter states that, as the Commission has noted, the greatest operations risk to a dually registered entity is likely to arise from the swap business rather than the SBS business. From this standpoint, according to the commenter, it is appropriate for the Commission to align with the CFTC approach to ensure that SEFs and SBSEFs alike have adequate system safeguards and business continuity protocols that are aligned with this risk.[501]

Subpart O is reasonably designed to promote SEF operational capability, and that the most appropriate way to implement SEA Core Principle 13 is to closely harmonize with the CFTC's rules that implement the corresponding Core Principle. As with SEA Core Principle 12

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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).

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

498 *See* Rule 1000 of Regulation SCI (defining "SCI entity"). In Nov. 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 (Nov. 19, 2014), 79 FR 72252 (Dec. 5, 2014).

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

500 *See* Regulation Systems Compliance and Integrity, SEA Release No. 97143 (Mar. 15, 2023), 88 FR 23146 (Apr. 14, 2023) (Proposed Amendments) (File No. S7-07-23).

501 *See* Bloomberg Letter, *supra* note 18, at 18.

(Financial resources),[502] 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 swaps market that warrant imposing different or additive operational capability requirements on SBSEFs. Additionally, because SBSEFs are not SCI entities and the corresponding CFTC rule has not imposed additional requirements on critical financial markets, it is not necessary or appropriate to adapt into Rule 830 the language of subpart O applicable to critical financial markets.[503]

Therefore, the Commission is adopting Rule 830 as proposed, with minor technical modifications.[504]

N. Rule 831—Core Principle 14—Designation of Chief Compliance Officer

SEA Core Principle 14[505] 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,

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502 *See supra* section VI.L (discussing Core Principle 12).

503 While subpart O frequently uses the term "market participant," Proposed Rule 830 would substitute 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 362.

504 *See supra* note 32.

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

certify that the report is accurate and complete, and submit the report to the Commission. CEA Core Principle 15 for SEFs[506] is substantively identical.

Proposed Rule 831 would implement SEA Core Principle 14 and is closely modeled on subpart P of part 37, with two minor substantive exceptions.[507] 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 officer." The Commission proposed instead, in Rule 831(c)(2), that no individual that would be disqualified from serving on an SBSEF's governing board[508] or committees pursuant to the criteria set forth in § 242.819(i) may serve as the CCO. As noted above,[509] the disqualification criteria in Rule 819(i) are adapted from § 1.63 of the CFTC's rules. Second, the Commission adapted the acceptable practices pertaining to CEA Core Principle 15 into paragraph (c) of Proposed Rule 831.[510]

The Commission received one comment on Proposed Rule 831. The commenter states that he fully supports the intent of the proposed regulations and believes that the CCO role is the single most important compliance role in an SBSEF and that it is critical that its job description, and the entity's rules, structures, and procedures, act to secure and maintain the CCO's independence. For example, the commenter states, the CCO should have a single compliance role and no other competing role or responsibility that could create conflicts of interest or

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

507 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).

508 Subpart P uses the term "board of directors," while the Commission proposed to use the term "governing board" instead throughout proposed Regulation SE. *See* Proposing Release, *supra* note 1, 87 FR at 28877 n.29.

509 *See supra* section VI.B.9.

510 Proposed Rule 831(c) would provide 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 would have 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.

threaten its independence. Therefore, the commenter suggests that the rules restrict the CCO position from being held by an attorney who represents the SBSEF or its board of directors, such as an in-house or general counsel. The commenter also states that the remuneration of the CCO must be specifically designed in such a way that avoids potential conflicts of interest with its compliance role.[511]

The commenter further states that although the CCO would normally report to an executive officer, the CCO must also have a direct reporting line to the independent directors, and the CCO should report to the audit committee at least yearly. The commenter strongly recommends amending § 242.831 such that the authority and sole responsibility to designate or remove the CCO, or to materially change its duties and responsibilities, vests only with the independent directors and not with the full board. This would help, the commenter states, to ensure the independence of the CCO within the entity and would possibly mitigate the need to promulgate rules requiring the SBSEF to insulate the CCO from undue pressure and coercion or to address the potential conflict between and among compliance interests, commercial interests and ownership interests of an SBSEF.[512]

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. While the commenter's suggestions would support the independence of the CCO, key provisions of paragraph (b) of Proposed Rule 831 would sufficiently protect the independence and authority of an SBSEF's CCO in performing the required functions. Significantly, paragraph (b)(1) would require that the position of CCO carry with it sufficient authority and resources to fulfill the position's duties, and paragraph (b)(2) would provide that the CCO shall have supervisory authority over all staff acting at the CCO's

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511 *See* Letter from Chris Barnard (May 20, 2022) (submitted under cover email dated June 6, 2022).

512 *See id.*

direction. The SBSEF remains responsible for establishing and administering required policies and procedures.

The Commission also recognizes that most SBSEFs are likely to be dually registered SEF/SBSEFs and that the swaps 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, and it is thus 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 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 swaps market that warrant imposing different or additive CCO requirements on SBSEFs relating to the CCO.

For the reasons discussed above, the Commission is adopting Rule 831 as proposed, with minor technical modifications.[513]

VII. CROSS-BORDER RULES

A. Rule 832—Cross-border Mandatory Trade Execution

Given the global nature of the SBS market, where there is frequent interaction among counterparties domiciled in different jurisdictions, the Commission proposed Rule 832 to address when the trade execution requirement would apply to a cross-border SBS transaction.[514] The proposed rule would be consistent with the Commission's territorial approach to applying Title VII requirements in other contexts, where relevant activity need not occur wholly within the

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513 *See supra* note 32. The Commission has also deleted an extraneous "and" at the end of the text of Rule 831(a)(1)(v).

514 *See supra* section V.F (discussing the trade execution requirement of section 3C(h) of the SEA); s*ee also* Proposing Release, *supra* note 1, 87 FR at 28922–25 (discussing proposed Rule 832 in more detail).

United States or solely between U.S. persons for Title VII requirements to apply.[515] As discussed further below, the relevant activity here is "to engage in a security-based swap" in whole or in part in the United States.[516]

Paragraph (a) of 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 Rule 832 would define the term "covered person" with respect to a particular security-based swap, as any person that is: (1) a U.S. person;[517] (2) a non-U.S. person whose performance under an SBS is guaranteed by a U.S. person; or (3) 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. Taken together, the provisions of Rule 832 apply to persons who are—consistent with the relevant statutory provisions added by Title VII—engaging in SBS in the United States.

Two commenters express support for Rule 832 or its subparts. Specifically, one commenter states that inclusion of paragraphs (b)(2) and (b)(3) in the proposed rule—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 ("guaranteed person transactions"), and where one counterparty of an SBS transaction 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 a transaction ("ANE transactions"), respectively—are "appropriately broad [and] will help prevent attempted evasion

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515 *See* Proposing Release, *supra* note 1, 87 FR at 28922–23.

516 *See* SEA section 3C(a)(1), 15 U.S.C. 78c-3(a)(1).

517 Transactions effected through the foreign branch of a U.S. person would be subject to the trade execution requirement, as "a foreign branch has no separate existence from the U.S. person itself." *See* Proposing Release, *supra* note 1, 87 FR at 28923.

of the trade execution requirement by ensuring that it will apply where there is a significant connection to the U.S., even when neither counterparty is a U.S. person."[518]

While generally supportive of Rule 832, this commenter believes that, in addition to guaranteed person transactions, the rule should also cover transactions that include a "de facto guarantee" by a U.S. person, which this commenter states represents "an unspoken but nevertheless powerful arrangement whereby a parent or other U.S. person has a virtually irresistible incentive to cover the losses incurred by another affiliated entity" given the reputational impact a failure of even a non-guaranteed affiliate could have.[519]

Another commenter expresses support for paragraph (b)(3) of Rule 832 relating to ANE transactions.[520] This commenter agrees that such transactions fall within the Commission's jurisdiction, even if they are booked to non-U.S. entities, and believes that, given the Commission's supervisory interests and policy objectives, it is warranted for the Commission to exercise its jurisdiction over ANE transactions. This commenter states that, "following the CFTC granting no-action relief from the trade execution requirement for ANE transactions, interdealer trading activity in EUR interest rate swaps began to be booked almost exclusively to non-U.S. entities, a fact pattern that academic research found was 'consistent with (although not direct proof of) swap dealers strategically choosing the location of the desk executing a particular trade in order to avoid trading in a more transparent and competitive setting.'"[521] The commenter states that this is "an outcome to avoid in the SBS market."[522]

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518 Better Markets Letter, *supra* note 18, at 14–15.

519 *Id.* at 15–16. This commenter cited Citigroup's experience with certain structured investment vehicles during the 2008 financial crisis, which this commenter states Citigroup "chose" to bring onto its balance sheet even though it had no legal obligation to do so. *See id.*

520 *See* Citadel Letter, *supra* note 18, at 16.

521 *Id.* (citing Benos, E., Payne, R., and Vasios, M., Centralized trading, transparency and interest rate swap market liquidity: evidence from the implementation of the Dodd-Frank Act, Bank of England Staff Working Paper, at 30 (May 2018), *available at* https://www.bankofengland.co.uk/-/media/boe/files/working-paper/2018/centralized-trading-transparency-and-interest-rate-swap-market-liquidity-update).

522 *Id.*

Several commenters oppose certain aspects of Rule 832. One commenter disagrees with the Commission's application of the trade execution requirement to transactions involving foreign branches of U.S. persons, as well as to guaranteed person transactions.[523] This commenter believes that "mandatory trade execution is not designed to address or mitigate systemic risk" and, thus, it is unnecessary to extend SBSEF rules to transactions with non-U.S. counterparties "where the lack of such rules would have no ability of posing risk to the U.S. financial system."[524] This commenter states that guaranteed entities (by definition non-U.S. persons) and foreign branches of U.S. persons are both subject to the laws and regulations of their home country or the foreign jurisdictions in which they and their counterparties operate, respectively, and the commenter states that imposing the rule's mandatory trading obligations on them in transactions with non-U.S. counterparties would result in duplicative regulation, which would increase compliance costs and add complexity and inefficiencies to cross-border trading.[525] This commenter also states that foreign trading venues are already subject to comprehensive regulatory oversight in their home jurisdictions and, based on its experience with the CFTC's SEF trading rules prior to the grant of equivalency to major foreign trading platforms in Europe and Asia, "foreign platforms will deny access to any entity with any connection to the United States, no matter how remote, for fear of being captured by the SEC's regime" and will further fragment SBS markets.[526]

Several commenters also oppose subjecting ANE transactions to the trade execution requirement in Rule 832(b)(3). One commenter believes that ANE transactions fall outside the jurisdictional reach of Title VII, and that "the location of personnel or agents within the United States should not form the basis for extending the [Commission's] trading mandate…."[527] This

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523 *See* ISDA-SIFMA Letter, *supra* note 18, at 12–13.

524 *Id.* at 12.

525 *See id.* at 13.

526 *Id.*

527 *Id.* at 11.

commenter states that, when assessing the necessity of extending the extraterritorial reach of a particular ruleset, "it is important to consider the objectives of individual rulesets" and further states that "platform trading rules are not intended to address or mitigate risk, and therefore, the Commission should exercise more flexibility" when deciding whether these rules should extend to ANE transactions.[528] This commenter believes that including ANE transactions "would bring a random selection of additional transactions into scope merely due to some supporting role played by a U.S. based sales person, trader or other function caught up in ANE."[529]

Several commenters warn of negative implications for the SBS market from applying the trade execution requirements to ANE transactions.[530] One commenter expresses concern generally about the rule's "complexities and over-broad reach."[531] Another commenter states that firms and platforms would be required to make representations "that no ANE touchpoint is present in the U.S. for any SBS subject to the trading mandate" so as not to run afoul of Rule 832's requirements, which this commenter states would "require the development of a costly parallel infrastructure completely devoid of U.S. touchpoints…."[532] Similarly, another commenter states that, without regulatory certainty and clear jurisdictional boundaries, market participants may be unsure of which rules apply to a particular SBS transaction because "non-U.S. counterparties and platform operators frequently do not know whether a transaction involves U.S. ANE activities," which this commenter states will likely result in confusion among market participants and platform operators and may result in some market participants deciding not to transact in SBS at all.[533]

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528 *Id.* This commenter states that rules related to mandatory platform execution are intended to provide counterparties with a sufficient level of pre-trade price transparency and that they should be addressed by the market regulators in the jurisdiction where the majority of trading activity is taking place. *See id.*

529 *Id.* at 12.

530 *See* SIFMA AMG Letter, *supra* note 18, at 11; Tradeweb Letter, *supra* note 18, at 3–4; ISDA-SIFMA Letter, *supra* note 18, at 11–12.

531 SIFMA AMG Letter, *supra* note 18, at 11.

532 ISDA-SIFMA Letter, *supra* note 18, at 12.

533 Tradeweb Letter, *supra* note 18, at 4–5.

These commenters also state that foreign jurisdictions have adopted robust regulatory regimes that already subject non-U.S. persons and foreign trading venues to comparable and comprehensive regulations in their respective jurisdictions.[534] These commenters contrast the Commission's proposed approach with the CFTC's efforts "to curtail the U.S.' approach to extra-territoriality in light of the progress made by other jurisdictions in establishing robust derivatives regulatory regimes,"[535] with one noting that, in adopting its cross-border rules for certain swap-market participants in 2020, the CFTC announced that it would not consider ANE as a relevant factor in non-U.S. dealers' swap transactions.[536] Another commenter asks the Commission to be mindful of whether CFTC-registered SEFs would be forced to change their rules in order comply with the new proposed SBSEF rules.[537]

Finally, one commenter requests that the Commission make more explicit that the "covered person" definition in Rule 832 is a transaction-based test,[538] while another commenter requests additional clarity about the application of the rule.[539]

The Commission has considered the comments received for Rule 832 and is adopting the rule as proposed, with minor technical modifications.[540] As an initial matter, the Commission disagrees with those comments suggesting that Rule 832 may exceed the Commission's statutory authority. The trade execution requirement of section 3C(h)(1) provides that the Commission's

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534 *See id.* at 4; ISDA-SIFMA Letter, *supra* note 18, at 12. *See also* SIFMA AMG Letter, *supra* note 18, at 11.

535 ISDA-SIFMA Letter, *supra* note 18, at 12. *See also* Tradeweb Letter, *supra* note 18, at 4; SIFMA AMG Letter, *supra* note 18, at 11. Section VII.B, *infra*, discusses the exemptions under Rule 833.

536 ISDA-SIFMA Letter, *supra* note 18, at 12 n.28. *See also* CFTC, Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants, 85 FR 56924, 56961–63 (Sept. 14, 2020); CFTC Release No. 8212-20 (July 23, 2020) (CFTC Withdraws "ANE" Staff Advisory and Issues New Cross-Border No-Action Relief).

537 SIFMA AMG Letter, *supra* note 18, at 11.

538 *See* ISDA-SIFMA Letter, *supra* note 18, at 11 n.26. Specifically, this commenter appreciates the Commission's clarification that the "covered person" definition is a transaction-based test but believes that the rule text could be more explicit in such regard by replacing: in prong (2) of the definition "a security-based swap" with "that security-based swap;" and in prong (3) of the definition "a transaction" with "that security-based swap transaction."

539 *See* SIFMA AMG Letter, *supra* note 18, at 11–12.

540 *See supra* note 32.

authority with respect to trade execution is co-extensive with the Commission's authority to require SBS clearing under section 3C(a)(1) of SEA.[541] And the clearing requirement of section 3C(a)(1) provides for SBS clearing when a person is "engage[d] in a security-based swap" in the United States.[542] Thus, consistent with the Commission's territorial approach and Title VII, the relevant domestic activity that triggers the execution requirement is engaging in an SBS in the United States.

Rule 832 fits comfortably within the bounds of that statutory authority. A U.S. person undertaking SBS transactions within the United States is, as no commenter disputes, engaging in an SBS in the United States (irrespective of whether the counterparty is overseas). And this is true even if the U.S. person is undertaking the SBS transaction from a foreign office. As the Commission has explained, "a foreign office has no separate existence from the U.S. person itself."[543] It is the U.S. based entity that has legal and financial responsibility for the SBS transaction and for the ensuing obligations that will flow from the transaction over the life of the SBS. Thus, it is reasonable to understand the U.S. entity to have engaged in the United States in the SBS even if the initial undertaking (i.e., the SBS transaction) occurred in the entity's foreign office.

For similar reasons, a non-U.S. person who enters an SBS with another non-U.S. person has nonetheless engaged in an SBS in the United States (at least in part) if that SBS arrangement is guaranteed by a U.S. person. When a non-U.S. person operates with a guarantee from a U.S. person for the non-U.S. person's performance under an SBS, the SBS arrangement is economically equivalent and substantially identical with a transaction entered into directly with

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541 Section 3C(h)(1) of the SEA (requiring trade execution "[w]ith respect to transactions involving security-based swaps subject to the clearing requirement of subsection (a)(1)" of the SEA).

542 Section 3C(a)(1) of the SEA ("It shall be unlawful for any person to engage in a security-based swap unless that person submits such security-based swap for clearing to a clearing agency that is registered under this Act or a clearing agency that is exempt from registration ….").

543 Proposing Release, *supra* note 1, 87 FR at 28923 (citing Application of "Security-Based Swap Dealer" and "Major Security-Based Swap Participant" Definitions to Cross-Border Security-Based Swap Activities; Republication, SEA Release No. 72472 (June 25, 2014), 79 FR 47278, 47289 (Aug. 12, 2014) ("2014 Cross-Border Adopting Release")).

the U.S. guarantor. With such an arrangement, an essential element of the transaction from the viewpoint of the guaranteed person's counterparty is the legal and financial obligations such a guarantee imposes on the U.S. guarantor (without which there would be no need to include the U.S. guarantor) and brings the U.S. person legally and financially into the transaction as an interested party. This economic reality makes it appropriate to include guaranteed non-U.S. persons within the definition of "covered persons" in Rule 832.

Further, the statutory language is, in the Commission's view, reasonably understood to encompass 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 an SBS transaction. These activities rise to the level of engaging in an SBS in the United States. Undertaking critical steps in an SBS transaction qualifies as engaging in an SBS in the United States, no less than placing ultimate legal or financial responsibility for an SBS with a person in the United States (as occurs in the cases discussed above of an SBS transaction involving either a foreign office of a U.S. person or a U.S. guarantor).

The Commission's assessment of the relevant domestic activities that constitute engaging in an SBS is consistent not only with the statutory text, but also the statutory objectives underlying the execution requirement. These objectives include, among other things, helping to ensure the financial stability of U.S. persons engaged in SBS transactions, the promotion of transparency in price formation for SBS transactions that have a nexus to the U.S. securities markets, and the prevention of manipulation, price distortion and disruptions of the delivery or cash settlement process within the U.S. market system. Each of the components of Rule 832 helps to advance one or more of these statutory goals and, thus, further supports the

Commission's reasonable understanding of what constitutes engaging in an SBS in the United States.[544]

With that general explanation of how Rule 832 fits comfortably within our statutory authority, the Commission will address the specific comments that were received on the rule. For the reasons discussed above, the Commission disagrees with the comment that Rule 832 should not extend the trade execution requirement to transactions involving foreign branches of U.S. persons or guaranteed person transactions.[545] With respect to the commenter that believes Rule 832's definition of "covered person" should also cover a transaction that includes a "de facto guarantee" by a U.S. person,[546] the Commission appreciates that, even for an affiliate that is not a guaranteed person, a dealer or large trader might be unwilling to allow such an affiliate to fail because of the reputational and other consequences such a failure might have on its interactions with potential counterparties. At the same time, given the lack of a legal obligation by the "de facto guarantor," it is not clear how the Commission could determine—before the fact—which "de facto guarantees" exist and which such "de facto guarantors" should be included, or how market participants, including counterparties, would be able to determine the applicability of Regulation SE to a transaction potentially subject to a "de facto guarantee." Thus, the Commission is not including "de facto guarantee" transactions within Rule 832's definition of "covered persons."

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544 In the alternative, the Commission relies on the anti-evasion authority of section 30(c) of the SEA, 15 U.S.C. 78dd(c), as statutory authority for Rule 832. Section 30(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 example, without Rule 832(b)(2), 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. *See* Proposing Release, *supra* note 1, 87 FR at 28923 n.228. And, without Rule 832(b)(3), non-U.S. persons could retain the benefits of operating in the United States while avoiding compliance with the trade execution requirement. *See id.* at 28923 n.230.

545 *See supra* note 523 and accompanying text.

546 *See supra* note 519 and accompanying text.

For the reasons discussed above, as well as the reasons discussed immediately below, the Commission also disagrees with the argument that the Commission should not extend SBSEF rules, which include mandatory trade execution, to transactions with non-U.S. counterparties (even if they involve guaranteed persons) where the lack of such rules would have no ability of posing risk to the U.S. financial system.[547] While Title VII's trade execution requirements do not relate to systemic risk in precisely the same manner that certain other Title VII rules—such as capital, margin, and segregation requirements for SBSDs and MSBSPs,[548] post-trade reporting and public dissemination of SBS transactions,[549] registration and regulation of SBSDs and MSBSPs,[550] among others—the Commission disagrees with the notion that the trade execution and other SBSEF requirements are not important in addressing and mitigating risk, including potentially systemic risk, to the U.S. financial system. The application of the trade execution requirement to a cross-border SBS transaction is not simply a matter of whether a particular form of execution (such as RFQ-to-3 or the use of an order book) is required. Instead, the application of this requirement to such a transaction would subject the transaction to the various requirements of Regulation SE, many of which relate to mitigating risks to the counterparties of the transaction and, ultimately, the U.S. financial system. The Core Principles for SBSEFs—which are set forth in the Dodd-Frank Act[551] and implemented in the rules of Regulation SE—seek to, among other things, provide for transparency in price formation for SBS,[552] impartial access to SBS trading,[553] the financial resources of SBS trading venues,[554] the efficient

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547 *See supra* note 524 and accompanying text.

548 *See* Capital, Margin, and Segregation Release, *supra* note 100.

549 *See* Regulation SBSR Release, *supra* note 102.

550 *See* SBSD and MSBSP Registration Release, *supra* note 99.

551 Core Principles of section 3D(d) of the SEA, 15 U.S.C. 78c-4(d).

552 *See, e.g.*, Rule 815 (methods of execution); Rule 816 (trade execution requirement); Rule 825 (Core Principle 8—timely publication of trading information).

553 *See, e.g.*, Rule 819(c) (Core Principle 2—access requirements).

554 *See, e.g.*, Rule 829 (Core Principle 12—financial resources).

submission of eligible SBS transactions to central clearing,[555] and the prevention of manipulation, price distortion, and disruptions of the delivery or cash settlement process.[556]

With respect to commenters' views opposing the inclusion of ANE transactions in Rule 832,[557] the Commission understands that this differs from the CFTC's policy towards ANE transactions and is cognizant of the potential complexities and costs that can arise if market participants are unsure of which jurisdictions' rules apply to a particular SBS transaction. The Commission also recognizes commenters' views that certain foreign jurisdictions have adopted "robust" regulatory regimes.[558] However, the purpose of Rule 832 is to "address when the … trade execution requirement applies to a cross-border SBS transaction."[559] Absent an exemption, the trade execution requirement applies in cross-border contexts wherever covered persons are involved in an SBS transaction, regardless of whether the relevant foreign jurisdictions have robust regulatory regimes—such as those the Commission may consider in connection with a foreign trading venue's application to the Commission for an exemption from the trade execution requirement under Rule 833(b).[560]

In adopting Rule 832, the Commission has been mindful of its impact on CFTC-registered SEFs and, as a commenter suggests,[561] whether they might be forced to change their rules because of the Commission's ANE approach for SBSEFs. As discussed below in section VII.B with respect to applications for exemptions relating to the trade execution requirement under Rule 833(b), foreign trading venues that have already received exemptive relief from the

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555 *See, e.g.*, Rule 823(c) (Core Principle 6—financial integrity of transactions).

556 *See, e.g.*, Rule 820 (Core Principle 3—SBS not readily susceptible to manipulation); Rule 821(Core Principle 4—monitoring of trading and trade processing); Rule 823 (Core Principle 6—financial integrity of transactions).

557 *See supra* notes 527–537 and accompanying text.

558 *See supra* note 534 and accompanying text.

559 Proposing Release, *supra* note 1, 87 FR at 28924.

560 *See infra* section VII.B (discussing cross-border exemptions under Rule 833, including exemptions relating to the trade execution requirement under Rule 833(b)). The Commission may consider, among other things, the extent to which the SBS traded in a foreign jurisdiction are subject to a comparable trade-execution requirement.

561 *See supra* note 537 and accompanying text.

CFTC for swaps trading where robust regulatory regimes may exist with requirements comparable to those applicable to SBS transactions in the United States may apply for exemptive relief under Rule 833(b). If exempted under Rule 833(b), trading of SBS on such foreign trading venues would not require CFTC-registered SEFs to change their rules.[562] Similarly, for SBS transactions that the Commission exempts from the trade execution requirement based on an application submitted under Rule 833(b), the concerns expressed by commenters regarding complexities and costs would no longer be applicable,[563] and commenters' concerns regarding the Commission's treatment of ANE transactions should be allayed as well, because the effect of such exemptions would likely result in SBS transactions in foreign jurisdictions with what may be considered robust regulatory regimes being exempt from the Commission's trade execution requirement and, in practice, have similar treatment of transactions on applicable foreign trading venues as the CFTC. On the other hand, if the Commission does not grant an exemption to such an SBS transaction, that would mean that the Commission would not have made a finding that granting such an exemption would be in the public interest and consistent with the protection of investors, in light of any information submitted with the application which the Commission may have considered regarding comparable requirements in that foreign jurisdiction. For such SBS transactions, it would be appropriate for the trade execution requirements to apply.

The Commission also disagrees with the characterization of Rule 832 with respect to ANE transactions as bringing "a random selection of additional transactions into scope" and the belief that the location of personnel in the United States should not form the basis for applying

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562 *See infra* notes 624–627 and accompanying text.

563 According to one commenter, these issues no longer apply in the SBS markets given that the CFTC resolved it "when it granted equivalency to major foreign trading platforms in Europe and Asia." *See supra* note 526 and accompanying text. The CFTC has granted orders of exemptions to certain markets pursuant to CEA section 5h(g), which authorizes the CFTC to exempt, conditionally or unconditionally, a SEF from registration under CEA section 5h if the CFTC finds that the facility is "subject to comparable, comprehensive supervision and regulation on a consolidated basis by … the appropriate governmental authorities in the home country of the facility." *See* "Exemption of Foreign Swap Trading Facilities from SEF Registration," *available at* https://www.cftc.gov/International/ForeignMarketsandProducts/ExemptSEFs.

the Commission's trade execution requirement.[564] The mere fact that an entity has personnel located in the U.S. does not subject an SBS transaction to the trade execution requirement; rather, it is the role such personnel play in arranging, negotiating, or executing the transaction that brings them within the definition of "covered person" for purposes of Rule 832. ANE transactions would not be a "random selection of additional transactions;"[565] instead, it would be appropriate to apply its carefully considered and tailored guidance given in other Title VII requirements for the phrase "arranged, negotiated, or executed" for the purposes of the application of the trade execution requirement in the cross-border context.

Specifically, the Commission has clarified that Title VII requirements using an "arranged, negotiated, or executed" test are not triggered in certain circumstances where the market-facing activity of U.S. personnel is "so limited that it would not implicate the regulatory interests underlying the relevant Title VII requirements."[566] Such instances arise when U.S. personnel provide "market color" in connection with SBS transactions, where such market color is "limited to background information regarding pricing or market conditions associated with particular instruments or with markets more generally"[567] and when the U.S. personnel have no client responsibility[568] and do not receive any transaction-linked compensation.[569] However, market-facing activity by personnel located in the United States also would not be "market color" (i.e., would be considered to be "arranged, negotiated, or executed") if such activity involves: providing recommendations, such as recommending particular instruments; providing

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564 *See supra* notes 527 and 529 and accompanying text.

565 *See supra* note 564 and accompanying text.

566 *See* 2019 Cross-Border Adopting Release, *supra* note 218, 85 FR at 6274.

567 *Id.* at 6275–76. Background information includes information regarding (1) current or historic pricing, volatility or market depth, and (2) trends or predictions regarding pricing, volatility, or market depth, as well as information related to risk management. *See id.* at 6275.

568 No client responsibility would mean that the U.S. personnel have not been assigned, and do not otherwise exercise, client responsibility in connection with the transaction. *See id.* at 6275–76.

569 Not receiving any transaction-linked compensation means the U.S. personnel do not receive compensation based on, or otherwise linked to, the completion of individual transactions on which the U.S. personnel provide market color. *See id.*

predictions regarding potential merits or risks of, or providing trading ideas or strategies relating to, a proposed security-based swap transaction; structuring a particular SBS transaction; or finalizing or reaching agreement with respect to any pricing or non-pricing element, such as underlier, notional amount or tenor, that must be resolved to complete an SBS transaction.[570]

With this existing guidance that applies to cross-border ANE transactions subject to Rule 832,[571] declining to apply Title VII requirements to SBS transactions of foreign 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.[572] This is problematic because, as the Commission stated in the Proposing Release, "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."[573]

Finally, with respect to the request by one commenter that the Commission revise the "covered person" definition in Rule 832 to make more explicit that it is a transaction-based test,[574] the Commission affirms again that the definition is intended to apply on a transaction-by-

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570 *See id.* at 6275.

571 *See supra* notes 566–570 and accompanying text.

572 *See* Proposing Release, *supra* note 1, 87 FR at 28923 (citing Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, SEA Release No. 78321 (July 14, 2016), 81 FR 53546, 53591 (Aug. 12, 2016) ("Regulation SBSR Adopting Release II")).

573 Proposing Release, *supra* note 1, 87 FR at 28923 n.230. *See also supra* note 521 and accompanying text (providing an example of swap dealers strategically choosing the location of the desk executing a particular trade in order to avoid trading in a more transparent and competitive setting after no-action relief from the trade execution requirement for ANE transaction).

574 *See supra* note 538 and accompanying text.

transaction basis,[575] and views the language in the rule (e.g., "with respect to a particular security-based swap") as sufficiently clear in this regard.[576]

Accordingly, for the reasons discussed above, the Commission is adopting Rule 832 as proposed, with minor technical modifications.[577]

B. Rule 833—Cross-border Exemptions for Foreign Trading Venues and Relating to the Trade Execution Requirement

As discussed above, Rule 832 specifies when the trade execution requirement applies to an individual cross-border SBS transaction. When covered persons (as defined in Rule 832) are members of a foreign trading venue for SBS (a "foreign SBS trading venue") with respect to SBS transacted on that venue, whether or not such SBS are subject to the trade execution requirement, the foreign SBS trading venue could be required to register with the Commission as a national securities exchange or SBSEF[578] or, because the foreign SBS trading venue would be facilitating the execution of SBS between persons, a broker.[579]

To address the situation of a foreign SBS trading venue that wishes to avoid registering with the Commission in one or more of these capacities, the Commission proposed Rule 833(a). Rule 833(a), which would specify that a foreign SBS trading venue can request that the

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575 *See* Proposing Release, *supra* note 1, 87 FR at 28922 n.221 ("The proposed term 'covered person' is designed to apply on a transaction-by-transaction basis.").

576 With respect to the commenter that requested additional clarity with respect to Rule 832, *see supra* note 539 and accompanying text, the Commission's discussion of the rule in this section including, for example, the applicability of existing guidance with respect to ANE transactions and the availability of exemptions under Rule 833(b) from the mandatory trade execution requirement as discussed in section VII.B below, should provide market participants with more clarity on when and to whom the rule's requirements would apply.

577 *See supra* notes 32 and 540.

578 *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).

579 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. 78*o*(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 XI (discussing Rule 15a-12).

Commission grant it an exemption under section 36(a)(1) of the SEA[580] by submitting, pursuant to SEA Rule 0-12,[581] a complete application for exemptive relief. Rule 833(a) would also provide that such an application under section 36(a)(1) and Rule 0-12, relating to the status of the foreign SBS trading venue under the SEA, may state that the application is also submitted pursuant to Rule 833(a).[582] When such an application is submitted pursuant to Rule 833(a), 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[583]; the definition of "security-based swap execution facility" in section 3(a)(77) of the SEA[584]; the definition of "broker" in section 3(a)(4) of the SEA[585]; and section 3D(a)(1) of the SEA.[586] Because a foreign SBS trading venue for which the Commission grants an exemptive order under SEA section 36 and Rule 833(a)[587] 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 to comply with other requirements applicable to such entities under the SEA or Commission rules thereunder.[588]

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580 15 U.S.C. 78mm(a)(1).

581 17 CFR 240.0-12 (setting forth procedures for filing applications for orders for exemptive relief under section 36 of the SEA).

582 An application for an exemption under Rule 833(a) could be submitted by a foreign SBS trading venue itself or by another interested party. For example, a financial regulatory authority in a foreign jurisdiction could submit an application under Rule 833(a) on behalf of one or more SBS trading venues licensed and regulated in that jurisdiction.

583 15 U.S.C. 78c(a)(1).

584 15 U.S.C. 78c(a)(77).

585 15 U.S.C. 78c(a)(4).

586 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).

587 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 Rule 833(a), the covered trading venue would no longer be an exchange, SBSEF, or broker (as defined by the SEA).

588 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, with respect to such other SBS-related activity or any activity

As with other exemptions issued pursuant to section 36, to issue a Rule 833(a) 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.[589] As contemplated in section 36(a)(1), the Commission may issue a Rule 833(a) exemption with conditions.

The Commission also proposed Rule 833(b), which would address requests for exemptive relief relating to the application of the trade execution requirement to transactions executed on a foreign SBS trading venue. 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 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 exemptive order contemplated by 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.[590]

As with other exemptions issued pursuant to section 36, to issue a Rule 833(b) 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. As

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involving non-SBS securities, still be subject to any applicable requirements to register with the Commission as a national securities exchange, SBSEF, or broker, or to comply with other requirements applicable to such entities under the SEA or Commission rules thereunder.

589 *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.

590 For a more detailed discussion of the items in Rule 833(b)(2) that the Commission may consider, *see* Proposing Release, *supra* note 1, 87 FR at 28925–26.

contemplated by section 36(a)(1), the Commission may issue a Rule 833(b) exemption with conditions.

One commenter expresses general support for the establishment of a rule granting exemptions for foreign trading venues and for cross-border trade execution exemptions, noting that "difficulties that can arise when the trade execution requirement applies in two separate jurisdictions" and that "it is important for market participants and trading venues to have regulatory certainty while maintaining flexibility in where transactions may be consummated."[591]

Another commenter believes the Commission's proposed exemption rule should be made more robust to prevent evasion of the SBSEF registration and trade execution requirements. This commenter believes that Rule 833 does not provide meaningful standards for how the Commission will assess requests for such exemptions, which this commenter believes is insufficient, and provides the Commission with "unreasonably broad, nearly unlimited, discretion, in how it assess foreign swaps regulatory frameworks," which this commenter believes may result in the Commission "facilitating evasion of Title VII."[592] This commenter states that the Dodd-Frank Act "requires that the SEC must, at the very least … make an affirmative determination that such an application demonstrates that the exemption could not be used to evade those requirements[, which would] require the SEC [to] make a credible, comprehensive determination that the foreign regulatory requirements applicable to the applicant is actually written, applied and enforced, are the same as those that would otherwise apply to the applicant absent an exemption."[593]

One commenter argues that Rule 833(b)'s requirements are unnecessary if a foreign trading venue has received an exemption under Rule 833(a), given that the Commission would be required to find that the Rule 833(a) exemption is "necessary or appropriate in the public

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591 Bloomberg Letter, *supra* note 18, at 18. However, as discussed below in this section VII.B, this commenter criticizes various aspects of Rule 833.

592 Better Markets Letter, *supra* note 18, at 16.

593 *Id.*

interest and consistent with the protection of investors," which this commenter believes "should be sufficient for the purposes of trading SBS on foreign trading venues, even when the trade execution requirement applies."[594] Thus, this commenter requests that the Commission "remove the 833(b) exemption and clarify that … if a foreign trading venue has been granted an 833(a) exemption …, a market participant should be permitted to trade SBS on that venue."[595]

Another commenter does not believe the exemptions in Rule 833 are sufficiently clear, and requests that the Commission consider setting forth charts or examples to better facilitate compliance.[596]

With respect to Rule 833(b) specifically, several comments appear to anticipate that, in order for a transaction on a foreign SBS trading venue to qualify for the trade execution exemption under Rule 833(b), the relevant foreign jurisdiction would have to require RFQ-to-3 or an order book for Required Transactions.[597] One commenter states that "the CFTC, appropriately in our view, recognized that there are multiple ways that a regulator can ensure appropriate pre-trade transparency and competition, such that restricting execution methods to [central limit order books] and RFQ-to-3 systems are not the only ways to achieve these objectives. Failing to recognize this fact in the course of making comparability determinations would incorrectly turn the statutory comparability standard into a test for identical rules."[598] Two commenters state that it would be difficult for many foreign SBS trading venues to demonstrate comparability if RFQ-to-3 and an order book were required, with one stating that "[f]ew

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594 Bloomberg Letter, *supra* note 18, at 7.

595 *Id.*

596 *See* SIFMA AMG Letter, *supra* note 18, at 11–12.

597 *See* Bloomberg Letter, *supra* note 18, at 6; Tradeweb Letter, *supra* note 18, at 5–6; ISDA-SIFMA Letter, *supra* note 18, at 14. *See also* ICE Letter, *supra* note 18, at 4.

598 Tradeweb Letter, *supra* note 18, at 6.

jurisdictions require RFQ to 3, and some do not require SBS to be traded on an organized trading venue."[599]

Two commenters oppose requiring an exemption under Rule 833 to depend upon a "rule-by-rule" comparison or analysis. One commenter states that this would be "unduly burdensome and at odds with the overall goal of achieving comparable outcomes."[600] The other commenter requests that the Commission adopt "a more flexible approach to the recognition of foreign trading venues—one that relies on holistic outcomes and governing principles, rather than a rule-by-rule analysis."[601]

Several commenters believe that Rule 833, as they understand it, would result in various negative consequences. One commenter states that covered persons would not be able to fulfill the trade execution requirement and that, as a result, market participants would then be forced to trade on a limited subset of venues, disrupting liquidity and requiring them to expend time and resources in onboarding to a compliant trading venue.[602] Another commenter warns that "the limited liquidity in the SBS market is not going to withstand significant disruptions, increased costs, and market fragmentation, thus making it more likely for market participants to exit the SBS markets entirely."[603] This commenter believes that the Commission's approach "will force market participants to trade SBS within the jurisdictional borders of the United States, restricting access to global liquidity and thus further diminishing already thin SBS markets," rather than

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599 Bloomberg Letter, *supra* note 18, at 6. *See also* ICE Letter, *supra* note 18, at 4 (stating that "EU and UK based multilateral trading facilities are not required under their home country regulation to ensure that a request-for-quote be sent to three different recipients or offer a central-limit-order-book" and thus the proposed criteria cannot be satisfied from the outset); Bloomberg Letter, *supra* note 18, at 19 (stating that "at least three Bloomberg-affiliated [foreign venues] would seek an exemption" but may be "effectively barred at the door by the Proposal's requirement that security-based swaps are subject to a trade execution requirement in the foreign jurisdiction that is comparable to that in 15 U.S.C. 78c-3(h) and the Commission's rules thereunder"); ISDA-SIFMA Letter, *supra* note 18, at 14 (stating that hardly any (if any at all) foreign trading venues would be able to enjoy an Exempt SBSEF status and that, as far as the commenter is aware, none of the CFTC recognized multilateral trading facilities or organized trading facilities are required to offer a central limit order books on their platforms).

600 Bloomberg Letter, *supra* note 18, at 7.

601 ISDA-SIFMA Letter, *supra* note 18, at 15.

602 *See* Bloomberg Letter, *supra* note 18, at 6–7. *See also* Tradeweb Letter, *supra* note 18, at 6.

603 ISDA-SIFMA Letter, *supra* note 18, at 15. *See also* Tradeweb Letter, *supra* note 18, at 6.

"the decision where to trade the most standardized and liquid swaps [being] dictated by the available liquidity and prices in global markets."[604] Similarly, another commenter contrasts the approach taken under Rule 833 with the approach the CFTC has taken to exempt certain foreign SEFs from SEF registration, and states that Rule 833 would prevent covered persons from trading SBS on such exempt SEFs and would impair their ability to manage risk effectively.[605] If covered persons are no longer able to trade SBS on these venues, this commenter states, they also "may not find it feasible to trade other instruments, such as swaps and foreign corporate debt, due to the bifurcation of liquidity that will result."[606] This commenter states that the ability to combine trading interest in related products on the same trading platform is critical to the effective transfer of risk within the financial system, and preventing "this single pool of liquidity jeopardizes that risk transfer and impairs price formation and ultimately increases systemic risk."[607]

These commenters argue that the Commission should instead align with the CFTC's approach to exemptions, which does not require exempt foreign SEFs to have order books or to satisfy the RFQ-to-3 requirement, stating that the CFTC's "flexible, outcomes-based approach serves market participants well."[608] One commenter argues for the Commission to avoid the "unintended economic disadvantage if other global market participants avoid trading with the managers' non-US fund clients solely to avoid being subject to the Commission's SBSEF requirements" and the significant costs and burdens that would arise if the two regulatory approaches produce different outcomes for swaps and SBS.[609] These commenters state that the CFTC has "already granted exemptions to a number of foreign trading venues across

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604 ISDA-SIFMA Letter, *supra* note 18, at 14.

605 *See* ICE Letter, *supra* note 18, at 4.

606 *Id.*

607 *Id.* at 4–5.

608 Bloomberg Letter, *supra* note 18, at 7. *See also* ISDA-SIFMA Letter, *supra* note 18, at 14–15; Tradeweb Letter, *supra* note 18, at 6.

609 ICI Letter, *supra* note 18, at 14.

jurisdictions in Europe and Asia,"[610] with one commenter stating that the "CFTC process, while imperfect, provides a more streamlined and workable approach for the Commission."[611]

These commenters argue that the Commission should "ensure that its proposed approach to granting exemption will produce outcomes similar to those of the CFTC" so as to "further harmonize with the CFTC's SEF framework, and promote consistency and simplicity…."[612] Several of these commenters recommend that the Commission grant automatic exemptions for trading venues that are currently exempt under the CFTC's rules.[613] Some commenters stated that this approach would be consistent with the Commission's general approach of harmonizing closely with the CFTC's SEF rules where appropriate and also stated that, as there are no distinctions outside of the United States between the regulation of swaps and the regulation of SBS, SBS are currently traded on foreign venues that have been recognized by the CFTC.[614] Three commenters requested that the Commission recognize such exemptions (i.e., CFTC-exempt SEFs as "exempt" SBSEFs) at the adoption of Regulation SE.[615] And one of these three commenters also requests that, in the alternative, and "in order to avoid duplicative or conflicting regulation … the Commission grant an exemption from the trade execution requirement if the SBS transaction at issue is subject to mandatory trading in another jurisdiction."[616]

The Commission has considered the comments received for Rule 833 and is adopting the rule as proposed. As the Commission stated in the Proposing Release,[617] Rule 833(a) is designed

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610 Bloomberg Letter, *supra* note 18, at 7. *See also* ICE Letter, *supra* note 18, at 4. *See also* ISDA-SIFMA Letter, *supra* note 18, at 14.

611 Bloomberg Letter, *supra* note 18, at 7.

612 ICI Letter, *supra* note 18, at 14. *See also* Bloomberg Letter, *supra* note 18, at 7, 18; ISDA-SIFMA Letter, *supra* note 18, at 14–15; Tradeweb Letter, *supra* note 18, at 6.

613 *See* Bloomberg Letter, *supra* note 18, at 7, 18; ISDA-SIFMA Letter, *supra* note 18, at 14–15; Tradeweb Letter, *supra* note 18, at 6.

614 *See* Bloomberg Letter, *supra* note 18, at 18–19; ISDA-SIFMA Letter, *supra* note 18, at 14–15.

615 *See* ICE Letter, *supra* note 18, at 5; ISDA-SIFMA Letter, *supra* note 18, at 15; Tradeweb Letter, *supra* note 18, at 6.

616 ISDA-SIFMA Letter, *supra* note 18, at 15.

617 *See* Proposing Release, *supra* note 1, 87 FR at 28924.

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.[618] A foreign SBS trading venue covered by an exemptive order under Rule 833(a) might offer trading in other types of securities; however, the exemptive 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 a national securities exchange, SBSEF, or broker. The exemptive order would not address any registration obligations that might arise from any other SBS-related activity or any activity involving non-SBS securities by the foreign trading venue.[619]

The bulk of the comments received opposing Rule 833 appear to emanate from commenters' interpretation—and misunderstanding—of what would be required in order to receive a Rule 833(b) exemption. The Commission proposed Rule 833(b) to 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 section 3D(e) of the SEA.[620] As a result, a covered person (as defined in 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

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618 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.

619 The Commission also emphasizes that a Rule 833(a) exemption would not have any impact on section 6(*l*) of the SEA, 15 U.S.C. 78f(*l*), 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.

620 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).

Commission as a national securities exchange or an SBSEF, or has received an exemption under section 3D(e) of the SEA.

Several commenters interpret the rule and the Commission's discussion of the rule in the Proposing Release to mean that a foreign SBS trading venue must have RFQ-to-3 and an order book for Required Transactions in order for transactions on that venue to qualify for a Rule 833(b) exemption.[621] These commenters, however, are incorrect in this understanding of the requirements for a Rule 833(b) exemption.

First, Rule 833(b)(2) does not contain a list of items that "are required," but rather lists items that the Commission "may consider" when it receives a request for a Rule 833(b) exemption.[622] And second, Rule 833(b)(2)(i) states, in relevant part, that the Commission may consider "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 … and the Commission's rules thereunder." (Emphasis added.) In the Proposing Release, the Commission described this requirement by stating 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 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)."[623] That is, the Commission's proposed rule would not require foreign SBS trading venues to have RFQ-to-3 and an order book in order for the Commission to consider their SBS executions for an exemption under Rule 833(b).

While, as commenters correctly state, for Required Transactions, Rule 815 requires SBS transactions to be executed through a limit order book or an RFQ-to-3 system,[624] neither the text

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621 *See supra* notes 597–599 and accompanying text.

622 Rule 833(b)(2).

623 Proposing Release, *supra* note 1, 87 FR at 28925 (emphasis added).

624 *See supra* section V.E (discussing methods of execution and Rule 815).

of Rule 833(b) nor the Commission's description of Rule 833(b) states that a limit order book or an RFQ-to-3 system is required to receive a Rule 833(b) exemption.[625] The phrase "comparable to" does not carry the same meaning as phrases such as "identical to" or "substantially similar to," and the Commission uses this phrase with respect to Rule 833(b) exemptions because SBS transactions would not be disqualified from receiving a Rule 833(b) exemption simply because they were not executed through a limit order book or an RFQ-to-3 system. Rather, the Commission agrees with commenters that there may be foreign SBS trading venues—many of which have already received exemptive relief from the CFTC for swaps trading[626]—that may be appropriate candidates for exemptive relief, that are subject to what may be considered robust regulatory regimes for SBS trading. With respect to such foreign SBS trading venues, the Commission encourages market participants to submit a request for exemptive relief under Rule 833(b) if they seek to be exempt from the Commission's trade execution requirement for their SBS transactions.[627]

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625 In the Proposing Release, the Commission stated its preliminary belief that "the use of single-dealer platforms to discharge any mandatory trading execution requirement" would not meet the proposed rule's requirements. *See* Proposing Release, *supra* note 1, 87 FR at 28925.

626 *See* www.cftc.gov/International/ForeignMarketsandProducts/ExemptSEFs (listing foreign swap trading facilities that the CFTC has exempted from its SEF registration requirements, including certain such facilities in the European Union, Japan, and Singapore). Market practices continued in this regard without change after the United Kingdom ("UK") withdrew from the European Union, based upon a CFTC staff no-action letter addressing certain UK swap trading facilities. *See* CFTC Letter No. 22-16 (Dec. 1, 2022), *available at* https://www.cftc.gov/csl/22-16/download.

627 Several commenters describe the negative consequences that would occur because, they believe, the Commission's Rule 833(b) exemption would require foreign jurisdictions to require RFQ-to-3 and order book methods of execution, which these commenters believe forecloses many foreign trading venues from obtaining exemptive relief from the Commission for their SBS trading even though they have received similar exemptions from their CFTC. *See supra* notes 602–611 and accompanying text. Similarly, one commenter requests that, in the alternative, the Commission grant an exemption from the trade execution requirement if the SBS transaction at issue is subject to mandatory trading in another jurisdiction. *See supra* note 616 and accompanying text. As the Commission has explained, Rule 833(b) exemptions are not limited to those jurisdictions that require RFQ-to-3 and order books, but rather Rule 833(b)(2)(i) states that the Commission may consider the extent to which SBS transactions are subject to a trade execution requirement comparable to such methods of execution. Accordingly, SEFs would not be foreclosed from obtaining exemptive relief from the Commission for their SBS trading. For this reason, the Commission also does not agree with the commenter's suggested alternative to grant an exemption from the trade execution requirement if the SBS transaction at issue is subject to mandatory trading in another jurisdiction, because exemptive relief under 833(b) may be applied for in such instances, which would give the Commission the opportunity to appropriately consider the applicable facts and circumstances.

Certain commenters also object that, in their understanding, a Rule 833(b) exemption request would require a "rule-by-rule" comparison or analysis,[628] which one commenter characterized as unduly burdensome.[629] In addition to Rule 833(b)(2)(i) discussed above, another relevant factor (among others) that the Commission may consider is 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, which the Commission described in the Proposing Release to include being subject to rules designed to foster comparable levels of pre- and post-trade transparency, access, and liquidity.[630]

An 833(b) exemptive request generally should include an analysis that could assist the Commission's determination as to whether the regulation and supervision of a foreign SBS trading venue in an applicable foreign jurisdiction is subject to regulation and supervision comparable to that under the SEA. Given the central roles the jurisdiction's applicable laws, rules and regulations, as well as a foreign SBS trading venue's own rules, play in such a determination, an exemptive request generally should include an analysis of these requirements. A precise form of any such analysis—whether it is done as a "rule-by-rule" comparison or through some other methodology (e.g., in a more holistic manner)—is not specified by Rule 833(b), would be at the discretion of the entity submitting the exemptive request, and should be provided in order to help the Commission and its staff understand what requirements apply to the foreign SBS trading venue.

With respect to the comments that the Commission should automatically provide exemptions for foreign trading venues that have received a parallel exemption from the CFTC for their SEF trading,[631] and that the Commission should do so contemporaneously with adopting

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628 *See supra* notes 600–601 and accompanying text.

629 *See supra* note 600 and accompanying text.

630 *See* Proposed Rule 833(b)(2)(ii) and Proposing Release, *supra* note 1, 87 FR at 28925.

631 *See supra* notes 612–615 and accompanying text.

Regulation SE,[632] while doing so would promote consistency, simplicity, and harmonization with the CFTC's SEF rules, such a blanket exemption would not afford the Commission the opportunity to appropriately consider the relevant facts and circumstances in support of a finding that an exemption is necessary or appropriate in the public interest and consistent with the protection of investors. However, persons interested in submitting a request for exemptive relief should be mindful of the implementation period that will take place before Regulation SE's requirements take effect, as described in more detail below.[633]

With respect to the comment that the provisions of Rule 833 are not robust enough,[634] the Commission disagrees. Importantly, in order to issue any exemption under Rule 833, 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, and the Commission may issue the exemptive relief with conditions. A blanket grant of exemptive relief would be inconsistent with carefully considering whether a specific exemptive request meets the applicable standard and might lead to a greater percentage of SBS transactions being executed beyond the scope of any U.S. regulatory oversight.

Finally, the Commission disagrees with the commenter that suggested that Rule 833(b)'s requirements are unnecessary if a foreign trading venue has received an exemption under Rule 833(a).[635] The two exemptions under Rule 833 provide exemptive relief from different requirements of the SEA and are also directed at different entities. Specifically, a Rule 833(a) exemption provides exemptive relief to a foreign trading venue that, absent the exemption, could be required to register with the Commission as an exchange, SBSEF, and/or broker if it traded SBS (regardless of whether such SBS are subject to the trade execution requirement). On the

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632 *See supra* note 615 and accompanying text. *See also supra* note 626.

633 *See infra* section VIII. *See also infra* note 787 and accompanying text.

634 *See supra* note 593 and accompanying text.

635 *See supra* note 595 and accompanying text.

other hand, Rule 833(b)'s exemption provides exemptive relief to the counterparties of an SBS transaction with respect to the trading execution requirement in section 3C(h) of the SEA.[636]

Accordingly, for the reasons discussed above, the Commission is adopting Rule 833 as proposed.

VIII. 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[637] 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.[638] 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

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636 With respect to the commenter that requested additional clarity with respect to Rule 833, *see supra* note 596 and accompanying text, the Commission's discussion of the exemptions, including the standard of "comparable to" and the type of analysis that should be presented, should provide market participants with more clarity on how a person could seek exemptive relief.

637 15 U.S.C. 8343.

638 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, adopting rules under section 765 is a necessary and appropriate first step to guard against conflicts of interest arising on SBSEFs and SBS exchanges. *See* Proposing Release, *supra* note 1, 87 FR at 28930.

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.

In 2010, the Commission proposed Regulation MC to implement section 765.[639] In view of the significant amount of time that had elapsed and the significant evolution in the swap and SBS markets since the proposal of Regulation MC, the Commission withdrew that proposal,[640] and proposed Rule 834 to implement section 765 of the Dodd-Frank Act with respect to SBSEFs and SBS exchanges.[641]

A. Rule 834(a)

Paragraph (a) of Proposed Rule 834 would define terms used in Rule 834. The Commission received no comments on of Proposed Rule 834(a) and is adopting Rule 834(a) as proposed for the reasons stated in the Proposing Release.

B. Rule 834(b)

Paragraph (b) of Proposed Rule 834 would impose a cap on the size of the voting rights that an individual member of an SBSEF or SBS exchange may own or direct, barring 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.

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639 *See* Regulation MC Proposal, *supra* note 21.

640 *See* Proposing Release, *supra* note 1, 87 FR at 28874.

641 *See id.* at 29001–03.

One commenter supports the Commission's goal to adopt rules that aim to achieve better governance and mitigation of conflicts of interest that arise out of the operation of SBSEFs, but the commenter opposes Rule 834 because it believes that the rule would disrupt the closely harmonized rules with the CFTC, as the CFTC has not adopted corresponding provisions for its SEF registrants. This commenter recommends that the Commission, like the CFTC, should focus on board governance, conflicts of interest, and antitrust considerations rather than proscriptive, bright line rules. The commenter states that the Commission's concerns regarding conflicts of interest "can best be addressed by ensuring compliance with the SBSEF Core Principles rather than an additional regulation,"[642] and specifically that the proposed 20 percent limitation on the voting interest that may be held by members of any SBSEF or SBS exchange "goes beyond what is necessary to effectively mitigate conflicts of interest."[643] Rather, this commenter states, the ownership limit would limit access to necessary capital and act as barriers to entry for SBSEFs and SBS exchanges. The commenter also states that section 765 of Dodd-Frank does not require the Commission to restrict the ability to hold significant ownership interests in SBSEFs and that the statutory language instead provides that the Commission is authorized to adopt rules upon determining, after review, that such restrictions are necessary or appropriate to improve the governance of SBSEFs or to mitigate systemic risk, to promote competition, or mitigate conflicts of interest.[644]

Another commenter states that that the proposed 20% voting cap requirement could potentially thwart the Commission's objective to ensure that only incremental changes would be necessary to adopt the SBSEF framework. The proposed cap, this commenter states, may require SEFs to set up an entirely new legal entity with a different governance structure, making it more challenging to obtain dual registration. The commenter also states that the conflicts of interest

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642 SIFMA AMG Letter, *supra* note 18, at 12.

643 *Id.*

644 *See id.*

rules implemented by the CFTC, which do not include a 20% voting cap, sufficiently address any conflicts of interest concerns, as SEFs have operated under those rules for almost 10 years, and there have been no observable issues that would warrant such a regulatory shift.[645]

One commenter states that it strongly opposes Rule 834 and that, as written, Rule 834 would have the effect of prohibiting certain SBSEF participants from having common ownership and control as the SBSEF. An SBSEF, the commenter states, would likely not be able to onboard an affiliated introducing broker, even if the introducing broker would be subject to the same rules and practices as an unaffiliated participant. The commenter states that some CFTC-registered SEFs, including the commenter's member firms, have affiliated introducing-broker participants that execute their respective swaps business on their affiliated SEFs, and the affiliated transactions make up a majority of the SEF's business. The commenter states that these firms may choose not to register as an SBSEF and take on the costs and burdens of being an SBSEF if they cannot accommodate their affiliate's trade execution needs, which would thwart the goal of developing a competitive landscape of regulated SBS market places.[646]

This commenter further states that it and many others previously opposed these hard caps when they were proposed in 2010, and that—with a decade of experience operating SEFs and venues for other financial products, including Commission regulated alternative trading systems—the commenter still believes the rule's approach is "too heavy-handed" a way to solve a problem that has been more than adequately addressed through less burdensome measures.[647] The commenter states that the CFTC never adopted its proposed ownership/governance prohibition for SEFs, that the CFTC's existing conflicts of interest rules have proven satisfactory, and that, rather than mandating ownership limits, the Commission should instead permit SBSEFs to exercise reasonable discretion as to its mechanisms for mitigating conflicts of

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645 *See* ISDA-SIFMA Letter, *supra* note 18, at 16.

646 *See* WMBAA Letter, *supra* note 18, at 2.

647 *Id.*

interest and should rely instead on the conflict of interest and antitrust provisions already embedded in the SBSEF regulatory regime.[648]

The Commission has considered the comments and, as discussed below, is modifying Proposed Rule 834 to provide an exemption from the ownership and voting caps for an SBSEF that has mitigated the potential conflict of interest with respect to compliance with the rules of the SBSEF by entering into an agreement with a registered futures association or a national securities association for the provision of regulatory services that encompass, at a minimum, real-time market monitoring, investigations, and investigation reports.

The 20% cap in Proposed Rule 834(b) is designed to balance competing policy interests. On 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. Too low a cap, even if imposed in the name of eliminating conflicts of interest, could have the unintended effect of impeding 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 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

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648 *See id.* at 2–3.

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.

Capping a member's voting interest at 20% strikes a reasonable balance between these competing interests, absent additional measures to ensure that a member or members with large voting power could tilt the playing field in their favor. And the Commission does not agree with the comment that a more general focus on board governance, conflicts of interest, and antitrust considerations, or on simply ensuring compliance with the SBSEF Core Principles,[649] is sufficient to address this concern because, based on its long experience in regulating the markets on which the instruments underlying SBS trade, the ownership and voting structure of a regulated entity can give rise to conflicts of interest between the organization's business interests and its regulatory obligations. Further, even if the CFTC has not to date adopted its own ownership and governance prohibitions for SEFs, the appropriate comparison with respect to ownership and governance for SBSEFs is national securities exchanges, because both types of entities operate markets to which fair or impartial access requirements comprehensively apply.[650] Therefore, SBSEFs should be subject to ownership restrictions that are similar to those in the rules of national securities exchanges, as approved by the Commission, which limit ownership by any one member and do not permit an exchange to merely "exercise reasonable discretion" with respect to its mechanisms for mitigating conflicts of interest.

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649 *See supra* note 642.

650 *See* SEA sections 6(b)(2) and 6(c), 15 U.S.C. 78f(b)(2) and 78f(c). Alternative Trading Systems, by contrast, are subject to "fair access" requirements only if they meet certain volume trading thresholds. *See* Rule 301(b)(5)(i), 17 CFR 242.301(b)(5)(i).

The Commission, however, appreciates the concerns expressed by commenters that a cap of 20% on voting interest in all cases could prevent would-be SBSEFs from onboarding their affiliated introducing brokers, and that the burdens imposed in setting up an SBSEF that is legally remote from affiliated introducing brokers may dissuade current SEFs from registering as SBSEFs, which would lead to their ceasing to offer SBS trading on their platforms.[651] Therefore, the Commission is modifying Rule 834 as proposed to add new paragraph (b)(3) to provide an exemption from the 20% cap for an SBSEF that has entered into an agreement with a registered futures association or a national securities association for the provision of regulatory services that encompass, at a minimum, real-time market monitoring and investigations and investigation reports.

This exemption, which is conditioned upon an SBSEF conducting its market monitoring and investigative activities through a self-regulatory body that has broader membership than an individual SBSEF and that does not operate its own SBSEF, would mitigate concerns that members with large ownership shares might be given preferential treatment with respect to their compliance with the SBSEF's rules. And the exemption should also, by permitting SBSEFs to exceed the 20% ownership and voting cap, serve to facilitate the formation and registration of SBSEFs, thereby also facilitating the movement of SBS trading to venues that are more transparent and that have affirmative regulatory obligations.

The Commission acknowledges that this exemption, because it focuses on surveillance and compliance functions, does not directly address concerns about an SBSEF adopting rules that hamper impartial access to an SBSEF, restrict the scope of SBS that might trade on a given SBSEF, or degrade the capability of a given SBSEF in ways that would favor a member's OTC SBS business. These concerns, however, can be addressed in other ways. With respect to impartial access, the requirements of Proposed Rule 819(c), together with the guidance the

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651 *See supra* notes 645–648.

Commission has provided regarding the application of that rule,[652] set clear limits on the ability of an SBSEF to favor the interest of any members, including its large members, by unfairly excluding other market participants. And competition among SBSEFs will discourage any individual SBSEF from declining to list particular SBS or from degrading the capability of the SBSEF to favor a member, as trading in the affected SBS may migrate not to the OTC market, but to a direct competitor.

Because the Commission has modified Proposed Rule 834 to provide for an exemption from the 20% ownership and voting cap, it is not the case that, as one commenter states, existing SEFs would necessarily be required to set up a new legal entity to operate an SBSEF, making it more challenging to obtain dual registration and potentially thwarting the Commission's objective to ensure that only incremental changes would be necessary to adopt the SBSEF framework. And although the Commission's proposed ownership rule departs from the CFTC's rules for SEFs, which do not include caps on ownership or voting, the Commission is also mindful of the trading relationship between SBS and their underlying securities—which trade on exchanges that have a similar 20% ownership and voting cap as a result of their Commission-approved rules—and the Commission wishes to avoid creating a regulatory incentive for activity to migrate from trading securities on national securities exchanges to trading SBS on SBSEF. For similar reasons, it would not be appropriate to extend the exemption in new paragraph (b)(3) of Proposed Rule 834 to SBS exchanges. Providing an exemption from the 20% ownership and voting cap requirements for SBS exchanges in Proposed Rule 834(b)(1) would result in different treatment from other national securities exchanges simply because one set of exchanges trades SBS, and this is not a sufficient reason to permit different ownership structures only for those exchanges, as this could lead to regulatory arbitrage by creating incentives for new exchanges to register first as SBS exchanges, without the ownership and voting caps, and then seek to amend

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652 *See infra* section VI.B.3.

their rulebooks to commence trading in cash equities. As it stated in the Proposing Release, the Commission proposed to apply the 20% ownership and voting on SBS exchanges based on its "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,"[653] and SBSEF rules seeking to manage conflicts of interest would not by themselves be sufficient to mitigate conflict-of-interest concerns when those concerns arise from one or a few SBS dealers or a major SBS participants having majority voting rights in an SBSEF or SBS exchange in which they are a member.

Finally, the Commission reiterates that Proposed Rule 834(b) would cover both direct and indirect voting interests. The purpose of including indirect voting interest is to prevent potential circumvention of the 20% cap 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, 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 the child trading venue.

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653 *See* Proposing Release, *supra* note 1, 87 FR at 28927 and n.257.

And, 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, thereby potentially acting as a conflict of interest. The Commission did not receive comments on the aggregation-of-interest aspect of Proposed Rule 834(b).

For these reasons, the Commission is adopting Rule 834(b) with the modifications discussed above.

C. Rule 834(c)

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.

The Commission received no comments on Proposed Rule 834(c) and is adopting Rule 834(c) as proposed, with minor technical modifications,[654] for the reasons stated in the Proposing Release.

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[654] The Commission has corrected an internal cross-reference within Proposed Rule 834.

D. Rule 834(d)

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." Paragraph (d) of Proposed Rule 834 would recognize that one way that a conflict of interest could manifest itself is in the disciplinary process. Therefore, the Commission proposed, 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.[655] Proposed Rule 834(d) would reflect the Commission's 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.

The Commission received no comments on Proposed Rule 834(d) and is adopting Rule 834(d) as proposed for the reasons stated in the Proposing Release.

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[655] Proposed Rule 834(a)(2) 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 involve fraud, deceit, or conversion.

E. Rule 834(e)

Paragraph (e) of Proposed Rule 834 is closely modeled 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) and would 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;[656] 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, modeled 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.

The Commission did not receive comments on Proposed Rule 834(e) and is adopting Rule 834(e) as proposed, for the reasons stated in the Proposing Release.

F. Rule 834(f)

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

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[656] Proposed Rule 834(e)(1)(ii), read together with Proposed Rule 834(b), would allow 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.

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.

The Commission received no comments on Proposed Rule 834(f) and is adopting Rule 834(f) as proposed for the reasons stated in the Proposing Release.

G. Rule 834(g)

Paragraph (g) of Proposed Rule 834 is modeled on § 1.69, which requires an SRO to further address the avoidance of conflicts of interest in the execution of its self-regulatory functions. 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.[657] Second, Proposed Rule 834(g)(1)(ii)(C) is a simplified version of § 1.69(b)(2)(iii). Rather than incorporating the first four prongs of § 1.69(b)(2)(iii), which cross-reference definitions elsewhere in the CFTC's rules, Rule 834(g)(1)(ii)(C) would instead incorporate only the final, catch-all prong, which would cover any positions held by any member of an SBSEF's governing board, disciplinary committees, or oversight committees that would have been covered under the other four prongs.[658] Third, Proposed Rule 834(g)(1)(ii)(C) would omit a requirement in § 1.69(b)(2)(iv)

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657 Paragraph (g)(1)(i)(A) of Proposed Rule 834, however, would incorporate only four of the five prongs in § 1.69(b)(1)(i). The Commission did not propose 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.

658 Thus, the relevant language in Rule 834(g)(1)(ii)(C) would read, "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." Proposed Rule 834(a)(3) would define a "member's affiliated firm" as a firm in which the member is a principal or an employee, and Proposed Rule 834(a)(5) would define "significant action" to include several types of actions or rule changes by an SBSEF or SBS exchange that could be

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 market. 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 proposed it as Rule 834(g)(1)(ii)(C)(*2*).

The Commission did not receive comments on paragraph (g) of Proposed Rule 834 and is adopting Rule 834(g) as proposed, for the reasons stated in the Proposing Release.

H. Rule 834(h)

Proposed Rule 834(h) would require each SBSEF and SBS exchange to maintain in effect various rules that would be required under Rule 834. An SBSEF would be required to file these rules under Rule 806 or Rule 807 of Regulation SE; an SBS exchange would be required to file such rules under existing SEA Rule 19b-4.[659] Proposed Rule 834(h) is loosely modeled 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 received no comments on Proposed Rule 834(h) and is adopting Rule 834(h) as proposed for the reasons stated in the Proposing Release.

IX. RULE 835—NOTICE TO COMMISSION BY SBSEF OF FINAL DISCIPLINARY ACTION, DENIAL OR CONDITIONING OF MEMBERSHIP, OR DENIAL OR LIMITATION OF ACCESS

The Commission proposed 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

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implemented without the Commission's prior approval related to addressing an emergency and certain changes in margin levels.

659 17 CFR 240.19b-4.

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 would also 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) would use 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[660] 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 Rule 819(g)(13)(ii).[661] In addition, paragraph (b)(2) of Proposed Rule 835 would provide that,

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[660] 15 U.S.C. 78c-4(d)(2).

[661] As discussed above, *see supra* section VI.B.7, 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

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.

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 would be required to include the effective date of such final disciplinary

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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. 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).

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 received no comments on Proposed Rule 835. Because the language of paragraphs (b)(1)(i) and (b)(2) should more clearly state that certain actions by an SBSEF shall not be "final" unless the affected person has exhausted their administrative remedies at the SBSEF, the Commission is modifying the phrase "person has sought an adjudication or hearing, or otherwise exhausted their administrative remedies" in both paragraphs (b)(1)(i) and (b)(2) so that it now reads simply, "person has exhausted their administrative remedies," and is adopting Rule 835 as modified.

X. 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" would also likely meet the definition of "exchange" set forth in section 3(a)(1) of the SEA[662] and the interpretation of that definition set forth in Rule 3b-16 thereunder.[663] Thus, absent an exemption, an entity needing to register with the Commission as an SBSEF would also likely need to register with the Commission as a national securities exchange.[664] The Commission has previously 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."[665]

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662 15 U.S.C. 78c(a)(1).

663 17 CFR 240.3b-16. *See also supra* section III.A (discussing Rule 803 and the requirements and procedures for registration, including the overlap between the definitions of "exchange" and "security-based swap execution facility"). *See also infra* note 678 and accompanying text (discussing the Commission's proposed amendments to Rule 3b-16).

664 *See* § 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").

665 2011 SBSEF Proposal, *supra* note 6, 76 FR at 10958.

Therefore, the Commission proposed to exercise its authority under section 36(a)(1) of the SEA[666] 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 securities other than SBS) and has registered with the Commission as an SBSEF. To effect this exemption, the Commission proposed to amend Rule 3a1-1 under the SEA[667] by adding new paragraph (a)(4).

The proposed amendment would add new paragraph (a)(4) to existing Rule 3a1-1 to provide that an organization, association, or group of persons that has registered with the Commission as an SBSEF pursuant to Rule 803 and provides a market place for no securities other than SBS is exempt from the definition of "exchange" under section 3(a)(1) of the SEA, 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.[668]

In addition, the Commission proposed 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 that 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.[669] As noted above, this provision would codify a series of exemptions that the Commission has granted over several years to SBS clearing agencies that

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666 15 U.S.C. 78mm(a)(1).

667 17 CFR 240.3a1-1.

668 An SBSEF that fails to comply with the condition to the exemption provided under paragraph (a)(4) of Rule 3a1-1 would no longer qualify for the exemption and might thus be operating as an unregistered exchange under the section 5 of the SEA. 15 U.S.C. 78e. Section 5 also generally provides that a broker or dealer may not use any facility of an exchange to effect or report any transaction in a security unless that exchange is registered as a national securities exchange or is exempt from registration by reason of the limited volume of transactions effected on the 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 Rule 3a1-1(a)(4) would not be an exchange within the meaning of section 5.

669 As discussed above, *see supra* note 37 and accompanying text, such a trading session is also referred to as a "forced-trading session."

operate "forced trading" sessions.[670] 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 settlement prices for SBS products, and, to provide an incentive for accurate submissions, the clearing agency can require those members to trade at those quoted prices. 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 has previously 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,"[671] and the Commission proposed to codify this exemption.[672]

Finally, the Commission proposed to amend the introductory language of paragraph (b) of Rule 3a1-1 to cover only paragraphs (a)(1) through (a)(3), not paragraph (a) as a whole.[673] The changed language is designed to clarify that the revocation provisions would not apply to organizations, associations, or groups of persons who fall within amended Rule 3a1-1(a)(4) or (a)(5). Thus, even if a registered SBSEF were to become a substantial market, Rule 3a1-1(b), as proposed to be amended, would not afford a basis for the Commission to revoke an SBSEF's exemption from the definition of "exchange" under Rule 3a1-1(a)(4), which would force the SBSEF to register as a national securities exchange (to avoid being an unregistered exchange).

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670 *See supra* note 37; Proposing Release, *supra* note 1, 87 FR at 28878.

671 *See id.*

672 *See* Proposing Release, *supra* note 1, 87 FR at 28878. 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 to the SEA provisions and the Commission's rules thereunder applying to national securities exchanges or alternative trading systems.

673 Specifically, the Commission proposed 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 revoke 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 received two comment letters regarding the proposed amendments to Rule 3a1-1.[674] One commenter does not support an exemption for clearing agencies from the definition of exchange, stating that the exemption would create a loophole.[675] However, the limited scope of the exemption—which applies solely to trades that a clearing agency requires its members to undertake in support of the accuracy of the clearing agency's end-of-day valuation process—is sufficiently narrow to prevent use of the exemption as a loophole allowing clearing agencies to act as, or on behalf of exchanges, without sufficient public reporting. The language of new paragraph (a)(5) of Rule 3a1-1, however, should more precisely reflect that the Commission is codifying exemptive relief that was provided with respect to trading sessions to support end-of-day valuations of SBS,[676] and the Commission is therefore modifying paragraph (a)(5) to add the words "of security-based swaps" at the end of the paragraph.

Another commenter supports the proposed amendments and also addresses another Commission rulemaking related to the definition of "exchange."[677] The Commission has separately proposed certain amendments to Rule 3b-16, a rule which defines certain terms used in the statutory definition of "exchange" under section 3(a)(1) of the SEA.[678] The commenter states that the Commission should exempt from the definition of "exchange" any market place

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674 *See* Keeney Letter, *supra* note 95; ISDA-SIFMA Letter, *supra* note 18, at 17.

675 *See* Keeney Letter, *supra* note 95 (stating that the exemption would permit clearing agencies to "do the bidding of exchanges" while being exempt from reporting requirements).

676 *See* Proposing Release, *supra* note 1, 87 FR at 28932 ("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 to the SEA provisions and the Commission's rules thereunder applying to exchanges.").

677 *See* ISDA-SIFMA Letter, *supra* note 18, at 17.

678 *See* Amendments Regarding the Definition of "Exchange" and Alternative Trading Systems (ATSs) That Trade U.S. Treasury and Agency Securities, National Market System (NMS) Stocks, and Other Securities, SEA Release No. 94062 (Jan. 26, 2022), 87 FR 15496 (Mar. 18, 2022) (File No. S7-02-22) ("Rule 3b-16 Proposal"). *See also* Reopening of Comment Periods for "Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews" and "Amendments Regarding the Definition of 'Exchange' and Alternative Trading Systems (ATSs) That Trade U.S. Treasury and Agency Securities, National Market System (NMS) Stocks, and Other Securities," SEA Release No. 94868 (May 9, 2022), 87 FR 29059 (May 12, 2022) (S7-02-22); Supplemental Information and Reopening of Comment Period for Amendments Regarding the Definition of "Exchange," SEA Release No. 97309 (Apr. 14, 2023), 88 FR 29448 (May 5, 2023) (File No. S7-02-22).

that solely trades SBS, whether or not that market place is registered as an SBSEF.[679] This commenter states that the Commission has "proposed to expand Rule 3b-16 substantially" and that this proposal, if adopted, would "reverse the previous relationship between the 'exchange' definition (as interpreted in Rule 3b-16) and the SBSEF definition."[680] This commenter states that an organization that makes available certain methods for parties to interact regarding SBS might fall within the expanded definition of exchange but outside the definition of SBSEF and therefore be required to register as an exchange because SBSEF registration would be unavailable.[681]

The Commission does not agree with the commenter's request to extend the Rule 3a1-1 exemption from the "exchange" definition to any entity that provides a market place for no securities other than SBS, regardless of whether they are registered as an SBSEF.

The purpose of the exemption under Rule 3a1-1(a)(4) is not to universally exempt from the definition of "exchange" all entities that provide a market place for no securities other than SBS. Rather, given that Congress has provided a regulatory framework for SBSEFs through the Dodd Frank Act, the exemption is narrowly designed to avoid burdening registered SBSEFs with a second regulatory framework—namely, registration as national securities exchanges. Further, creating that commenter's suggested exemption in Rule 3a1-1(a) would create a regulatory gap in which some entities that meet the definition of exchange are registered neither as national securities exchanges nor as SBSEFs. The language of new paragraph (a)(4) of Rule 3a1-1, however, should more closely track the language and scope of section 3(a)(1) of the SEA, which uses the term "market place or facilities," rather than the term "market place,"[682] and the Commission is therefore modifying proposed paragraph (a)(4) of Rule 3a1-1 to replace the term "market place" with the term "market place or facilities."

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679 *See* ISDA-SIFMA Letter, *supra* note 18, at 17.

680 *Id.*

681 *See id.*

682 *See* 15 U.S.C. 78c(a)(1).

Accordingly, for the reasons discussed above, the Commission is adopting the amendments to Rule 3a1-1 with the modifications to paragraphs (a)(4) and (a)(5) discussed above and with minor technical modifications.[683]

XI. 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."[684] Absent an exception or exemption, an SBSEF—in addition to being subject to the registration and regulatory requirements for SBSEFs—would also be required to register with the Commission as a broker pursuant to sections 15(a) and 15(b) of the SEA[685] and would be subject to all regulatory requirements applicable to brokers.[686] 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.[687]

The Commission proposed new Rule 15a-12 under the SEA, which would deem registration with the Commission as an SBSEF to also constitute registration as a broker, and which would exempt a registered SBSEF from many broker requirements in light of the SBSEF regulatory regime to which it would also be subject. The accommodation provided in Rule 15a-

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683 *See supra* note 32.

684 *See* SEA section 3(a)(4), 15 U.S.C. 78c(a)(4).

685 15 U.S.C. 78*o*(a) and 78*o*(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.

686 As discussed in note 47, *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 earliest compliance date for the Commission's final rules regarding SBSEF registration.

687 *See* 17 CFR 240.10b-10 and 240.10b-16.

12, however, would not be available to an SBSEF that engages 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 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 avail itself of Rule 15a-12 because it would not be an SBSEF-B under the rule.

Paragraph (b) of Proposed Rule 15a-12 would provide that an SBSEF-B, if it registered as an SBSEF pursuant to Rule 803, would be deemed also to have registered with the Commission pursuant to sections 15(a) and (b) of the SEA.[688]

Paragraphs (c) and (d) of Proposed Rule 15a-12 would set out the scope of broker requirements from which an SBSEF-B is exempt 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,

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688 The Commission's proposal would not have exempted SBSEFs from registration as brokers. Rather, given the registration and regulatory requirements that were being proposed for SBSEFs through Regulation SE, the Commission proposed for such SBSEFs to be deemed registered as brokers so as to prevent subjecting those entities to a second, separate registration process as well as duplicative additional regulatory requirements. As discussed in the Proposing Release, an additional layer of registration processes and duplicative requirements would not be appropriate or necessary. *See* Proposing Release, *supra* note 1, 87 FR 28933.

notwithstanding paragraph (c), an SBSEF-B is still subject to section 15(b)(4),[689] section 15(b)(6),[690] and section 17(b) of the SEA.[691]

Finally, paragraph (e) of Proposed Rule 15a-12 would exempt an SBSEF-B from the Securities Investor Protection Act ("SIPA").[692] 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.[693] SIPC protection is funded by assessments made on member firms.[694]

Section 2 of SIPA[695] 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. It would not be equitable to require an SBSEF-B to become a member of SIPC and pay SIPC assessments, because 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,[696] the Commission finds 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 codifying this exemption as Rule 15a-12(e).

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689 15 U.S.C. 78*o*(b)(4).

690 15 U.S.C. 78*o*(b)(6).

691 15 U.S.C. 78q(b).

692 15 U.S.C. 78aaa, *et seq*.

693 *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).").

694 *See* 15 U.S.C. 78ddd(d).

695 15 U.S.C. 78bbb.

696 15 U.S.C. 78mm(a)(1) (giving the Commission 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).

The Commission received no comments on Proposed Rule 15a-12 and is adopting Rule 15a-12 as proposed, with minor technical modifications,[697] for the reasons stated in the Proposing Release.

XII. TERMINATION OF TEMPORARY EXEMPTIONS

As discussed above and in the Proposing Release, after issuing the 2011 SBSEF Proposal,[698] the Commission granted the Temporary SBSEF Exemptions.[699] In relevant part, Temporary SBSEF Exemptions have:

(1) Allowed an entity that trades SBS and is not currently registered as a national securities exchange, or that cannot yet register as an SBSEF because final rules for such registration have not yet been adopted, to continue trading SBS during this temporary period without registering as a national securities exchange or SBSEF[700];

(2) Exempted national securities exchanges (to the extent that they also operate an SBSEF and use the same electronic trade execution system for listing and executing trades of SBS on or through the exchange and the facility) from the requirement to identify whether electronic trading of those SBS is taking place on or through the national securities exchange or the SBSEF[701];

(3) Exempted any person, other than a clearing agency acting as a central counterparty in security-based swaps, that, solely due to its activities relating to security-based swaps, would fall within the definition of exchange and thus be required to register as an exchange from the requirement to register as a national securities exchange in sections 5 and 6 of the Exchange Act[702];

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697 *See supra* note 32.

698 *See supra* note 6.

699 *See supra* notes 45–47 and accompanying text.

700 *See* June 2011 Exemptive Order, *supra* note 46, 76 FR at 36293 (granting temporary exemptive relief from SEA section 3D(a)(1), 15 U.S.C. 78c-4(a)(1)).

701 *See id.* at 36293 (granting temporary exemptive relief from SEA section 3D, 15 U.S.C. 78c-4).

702 *See* July 2011 Exemptive Order, *supra* note 46, 76 FR at 39934.

(4) Permitted brokers and dealers to effect transactions in SBS on an exchange that is operating without registering as a national securities exchange in reliance on the exemption described above[703];

(5) Exempted SBSEFs from the broker registration requirements of section 15(a)(1) of the SEA[704]; and

(6) Exempted any SBS contract entered into on or after July 16, 2011, from being void or considered voidable by reason of section 29 of the SEA[705] because any person that is a party to the SBS contract violated a provision of the Exchange Act that was amended or added by subtitle B of Title VII of the Dodd Frank Act and for which the Commission has taken the view that compliance will be triggered by registration of a person or by adoption of final rules by the Commission, or for which the Commission has provided an exception or exemptive relief herein, until such date as the Commission specifies.[706]

In the Temporary SBSEF Exemptions, the Commission specified that the exemptive relief would expire "on the earliest compliance date set forth in any of the final rules regarding registration of SBSEFs,"[707] or in the case of the relief regarding section 29 of the SEA, "until such date as the Commission specifies."[708]

Additionally, in 2020, the Commission adopted Rule 17Ad-24 under the SEA[709] to exempt from the definition of "clearing agency" in section 3(a)(23) of the SEA[710] certain entities, including a registered SBSEF, that would be deemed to be a clearing agency solely by reason of

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703 *See id.*

704 *See id.*; *see also* 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 (Sept. 19, 2019), 84 FR 68550, 68602 (Dec. 16, 2019) ("Recordkeeping and Reporting Adopting Release").

705 15 U.S.C. 78cc(b).

706 *See* June 2011 Exemptive Order, *supra* note 46, 76 FR at 36305–06.

707 *See id.* at 36293; July 2011 Exemptive Order, *supra* note 46, 76 FR at 39934.

708 *See* June 2011 Exemptive Order, *supra* note 46, 76 FR at 36306.

709 17 CFR 240.17Ad-24.

710 15 U.S.C. 78c(a)(23).

(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.[711] 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.[712] In the Proposing Release, the Commission sought public comment on whether it should "sunset" the 2011 Clearing Agency Exemption and stated that it preliminarily believed that, if it adopted a framework for the registration of SBSEFs, the 2011 Clearing Agency 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.[713]

The Commission received no comment regarding the sunsetting of past exemptive relief for entities operating as SBSEFs. Upon the effectiveness of Regulation SE, the exemptive relief described above would no longer be necessary, because SBSEFs will be able to register with the Commission and will be subject to regulatory obligations under Regulation SE. Therefore, the Commission is sunsetting the exemptive relief consistent with the compliance schedule for Regulation SE.[714] Thus, the exemptive relief described above will terminate 180 days after the Effective Date of Regulation SE, which will be 60 days after the date of publication in the

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711 *See* SEA Release No. 90667 (Dec. 16, 2020), 86 FR 7637 (Feb. 1, 2021).

712 *See id.*, 86 FR at 7650; SEA Release No. 64796 (July 1, 2011), 76 FR 39963, 39964 (July 7, 2011) ("2011 Clearing Agency Exemption").

713 *See* Proposing Release, *supra* note 1, 87 FR at 28934.

714 *See infra* section XVI (discussing compliance schedule).

Federal Register, except that (1) with respect to an SBSEF that has filed an application to register with the Commission on Form SBSEF within 180 days of the Effective Date of Regulation SE, as well as trading of SBS on such an SBSEF, the relief will terminate 240 days after the Effective Date of Regulation SE; and (2) with respect to an SBSEF that filed an application to register on Form SBSEF within 180 days after the Effective Date of Regulation SE and whose application on Form SBSEF is complete for purposes of Rule 803(b)(5) (having responded to requests by the Commission's staff for revisions or amendments) within 240 days after the effective date, as well as trading of SBS on such an SBSEF, the exemptive relief will terminate 30 days after the Commission acts to approve or deny the SBSEF's application on Form SBSEF. Specifically with respect to the exemptive relief providing that any SBS contract entered into on or after July 16, 2011, will not be void or considered voidable by reason of section 29 of the SEA[715] because any person that is a party to the SBS contract violated a provision of the Exchange Act that was amended or added by subtitle B of Title VII of the Dodd Frank Act and for which the Commission has taken the view that compliance will be triggered by registration of a person or by adoption of final rules by the Commission, or for which the Commission has provided an exception or exemptive relief herein, this exemptive relief will continue to apply to SBS entered into between July 16, 2011, and the date 30 days after the Commission acts to approve the first SBSEF registration.

For any entity currently relying on the 2011 Clearing Agency Exemption that becomes required to register as a clearing agency, the exemptive relief will terminate 180 days after the Effective Date of Regulation SE, which will be 60 days after the date of publication in the *Federal Register*, except that (1) with respect to an entity that has filed an application to register as a clearing agency with the Commission on Form CA-1 within 180 days of the Effective Date of Regulation SE, the relief will terminate 240 days after the Effective Date of Regulation SE;

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[715] 15 U.S.C. 78cc(b).

and (2) with respect to an entity that has filed an application on Form CA-1 within 180 days after the Effective Date of Regulation SE and whose application on Form CA-1 is complete (having responded to requests by the Commission's staff for revisions or amendments) within 240 days after the effective date, the exemptive relief will terminate 30 days after the Commission acts to approve or disapprove the application on Form CA-1.

XIII. ELECTRONIC FILINGS UNDER REGULATION SE

A. Use of Electronic Filing Systems and Structured Data

Various provisions of proposed Regulation SE would have required registered SBSEFs (or SBSEF applicants) to file specified information electronically with the Commission using the EDGAR system in Inline XBRL, a structured, machine-readable data language.[716] These provisions include:

- Rule 803(b)(1)(i) and (b)(3), regarding filings of, and amendments to, a Form SBSEF application.
- Rules 803(e) and 803(f), regarding requests to withdraw or vacate an application for registration.
- Rule 804(a)(1), regarding filings for listing products for trading by certification.
- Rule 805(a)(1), regarding filings for voluntary submission of new products for Commission review and approval.
- Rule 806(a)(1), regarding filings for voluntary submission of rules for Commission review and approval.
- Rule 807(a)(1), regarding filings for self-certification of rules.

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716 The structured data requirements are generally consistent with objectives of the recently enacted Financial Data Transparency Act ("FDTA"), which directs the Commission and other financial regulators of data standards for collections of information. Such data standards would need to meet specified criteria relating to openness and machine-readability and promote interoperability of financial regulatory data across members of the Financial Stability Oversight Council. *See* James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, P.L. 117-263, tit. LVIII, 136 Stat. 2395, 3421–39 (Dec. 23, 2022).

- Rule 807(d), regarding filings of weekly notifications to the Commission of rules and rule amendments that were not required to be certified.
- Rule 829(g)(6), regarding submission to the Commission of reports related to financial resources and related documentation.
- Rule 831(j)(2), regarding submission to the Commission of the annual compliance report of SBSEF's CCO.

In addition to including these requirements in each of the rules listed above, the Commission proposed to amend Rule 405 of Regulation S-T to reflect these requirements.[717] The Commission received comments specifically regarding the proposed methods and formats of electronic filing in Regulation SE discussed above.[718] One commenter states that if certain entities report a portion of needed data to one regulator (CFTC) and the rest of the data to a different regulator (SEC), data consumers will be required to extract data from two different datasets to provide a complete picture. The commenter states that if data reported to the CFTC is in PDF or HTML format, and data reported to the SEC is in machine-readable (XBRL) format, this will increase the complexity of data access.[719] Another commenter does not believe that EDGAR is the appropriate system for these filings. The commenter believes that requiring the use of EDGAR will require most filers to retain a third-party vendor and incur substantial costs and may have the potential to deter market participants from entering this space, noting that a more appropriate alternative filing process, the Commission's Electronic Form Filing System (EFFS), a secure, web-based electronic filing application used to process filings from SROs and SCI entities, is already available, and its use would harmonize the filing approach with SBS exchanges, and more broadly with the approach taken by the CFTC. Alternatively, the commenter encourages the Commission to adopt the process used by the CFTC, which permits

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717 *See* Proposing Release, *supra* note 1, 87 FR at 28872, 28972–73.

718 *See* Letter from Campbell Pryde, President and CEO, XBRL US, to Secretary, Commission, at 2 (June 10, 2022) ("XBRL US Letter"); Bloomberg Letter, *supra* note 18, at 20–21.

719 *See* XBRL US Letter, *supra* note 718, at 2.

filings (including initial registration filings, quarterly financial filings and rulebook filings) to be made via a dedicated portal in PDF form.[720] As discussed in further detail below, taking into account comments received, the Commission is requiring SBSEFs to submit the information related to rule and product filings under Rules 804 to 807 of Regulation SE in unstructured format via EFFS in order to alleviate compliance burdens on SBSEFs.

The Commission has considered the comments received on the provisions regarding electronic filing in Regulation SE discussed above and is adopting Inline XBRL and EDGAR requirements for some, but not all, of the disclosures that Regulation SE will require. Specifically, Regulation SE will require SBSEFs to file the information under the following rules electronically via EDGAR using Inline XBRL:

- Rule 829, regarding submission to the Commission of reports related to financial resources and related documentation.
- Rule 831, regarding submission to the Commission of the annual compliance report of the SBSEF's CCO.
- Exhibits C through F to Form SBSEF, regarding governing board fitness standards and composition; organizational structure; personnel qualifications; and staffing requirements, respectively.
- Exhibits H through L to Form SBSEF, regarding material pending legal proceedings; financial information (except for any copies of agreements filed with the exhibit); affiliate financial information; dues, fees, and other charges for services; and compliance with Core Principles, respectively.
- Exhibit P through S to Form SBSEF, regarding disciplinary and enforcement protocols; operation of trading systems or platforms; rules prohibiting specific trade practices; and the maintenance of trading data, respectively.

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720 *See* Bloomberg Letter, *supra* note 18, at 20–21.

For these specific disclosures, the Commission is adopting as proposed the requirement that they be made through EDGAR using Inline XBRL and is adopting the amendments to Rule 405 as proposed, with minor technical modifications.[721]

For certain other disclosures required under Regulation SE, in a change from the proposal, the Commission is requiring the use of a custom XML data language rather than Inline XBRL. Specifically, Regulation SE will require SBSEFs to file the following information electronically via EDGAR using custom XML:

- Rules 803(e) and 803(f), regarding requests for withdrawal or vacation applications.
- The Form SBSEF Cover Sheet.
- Exhibit A to Form SBSEF, regarding the SBSEF's ownership information (except for any copies of agreements filed along with the Exhibit).
- Exhibit B to Form SBSEF, regarding the officers, directors, and other control persons of the SBSEF.
- Exhibit G to Form SBSEF, regarding organizational documents (except for copies of organizational documents filed with the Exhibit).
- Exhibit M to Form SBSEF, regarding rules and technical manuals (except for copies of rules and technical manuals filed with the Exhibit).
- Exhibit N to Form SBSEF, regarding agreements and contracts (except for copies of agreements and contracts).
- Exhibit T to Form SBSEF, regarding clearing agencies.[722]

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721 The Commission is, in light of its renumbering of the provisions relating to Form SBSEF, *see supra* section III.B, and because Form SBSEF will not appear in the Code of Federal Regulations, replacing "17 CFR 249.2001 of this chapter" with "referenced in 17 CFR 249.1701 of this chapter."

722 In addition to the custom XML exhibits to Form SBSEF that will be submitted via EDGAR, the Commission is also adopting as proposed the requirement in Rule 825 of Regulation SE that SBSEFs post Daily Market Data Reports on their websites using a custom XML schema and a PDF renderer, both of which the Commission will make available on its website. *See supra* section VI.H.

The Commission is requiring some disclosures to be structured in Inline XBRL, and other disclosures to be structured in custom XML, because Inline XBRL is well-suited for certain types of content—such as financial statements and extended narrative discussions—whereas other types of content can be readily captured using custom XML data languages that yield smaller file sizes than Inline XBRL and thus facilitate more streamlined data processing. Such custom XML languages also enable EDGAR to generate fillable web forms that will permit SBSEFs to input disclosures into form fields rather than encode their disclosures in custom XML themselves, thus likely easing compliance burdens on SBSEFs.

Certain Form SBSEF exhibits also include requirements to attach copies of existing documents, such as copies of by-laws, written agreements, and compliance manuals. The Commission is requiring SBSEFs to file these copies of documents as unstructured PDF attachments to the otherwise structured Form SBSEF filing.[723] Requiring SBSEFs to retroactively structure such existing documents, which were prepared for purposes outside of fulfilling the Commission's disclosure requirements, could impose compliance burdens on SBSEFs that may not be justified in light of the commensurate informational benefits associated with having such documents in structured form. The specific requirements to include these attached copies are included in the following provisions of Regulation SE:

- Exhibit A to Form SBSEF (specifically, copies of agreements through which persons may control or direct the management or policies of the SBSEF).
- Exhibit G to Form SBSEF (specifically, copies of the SBSEF's organizational documents).

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723 In addition to these copies of existing documents, the Commission is requiring Exhibit U to Form SBSEF, which includes any information in the application that is subject to a confidential treatment request, to be filed as an unstructured PDF attachment. The confidential information that an applicant includes on Exhibit U could be responsive to disclosure requirements set forth in multiple other Form SBSEF Exhibits (potentially spanning multiple different data languages or formats). As a result, implementing technical validations on the structuring of the information on Exhibit U would not be technically feasible.

- Exhibit I to Form SBSEF (specifically, copies of agreements supporting the SBSEF's conclusions regarding the liquidity of its financial assets).
- Exhibit M to Form SBSEF (specifically, copies of the SBSEF's rules, technical manuals, guides, or other instructions).
- Exhibit N to Form SBSEF (specifically, copies of agreements or contracts that enable the SBSEF's compliance with Core Principles).
- Exhibit O to Form SBSEF (specifically, copies of the SBSEF's compliance manual).

To implement the reduced scope of Inline XBRL requirements for Form SBSEF compared to the proposed rules, the Commission is making changes to the rule text for Form SBSEF, Rule 803 of Regulation SE, and Rule 405 of Regulation S-T. In the Registration Instructions to Form SBSEF, rather than requiring the disclosures on Form SBSEF to be provided as an Interactive Data File in accordance with Rule 405 of Regulation S-T as proposed, the final rule text lists a subset of Form SBSEF Exhibits that are to be provided as an Interactive Data File in accordance with Rule 405 of Regulation S-T, and clarifies that the Interactive Data File requirement does not extend to copies of existing documents.[724] In Rule 803 of Regulation SE, rather than requiring SBSEF applicants to file Form SBSEF as an Interactive Data File in accordance with Rule 405 of Regulation S-T as proposed, the final rule text requires SBSEF applicants to file the information specified in the Registration Instructions to Form SBSEF (i.e., the listed Exhibits) as an Interactive Data File in accordance with Rule 405 of Regulation S-T.[725] In Rule 405 of Regulation S-T, the final rule text omits references to subparagraphs of Rule 803

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[724] *See* Registration Instructions to Form SBSEF, referenced in 17 CFR 249.1701. Rule 405 of Regulation S-T sets forth the requirements for Interactive Data File submissions. Rule 405(b) of Regulation SE sets forth the content to be included within the Interactive Data File, and Rule 405(a)(3) of Regulation S-T specifies Inline XBRL as the data language to be used for Interactive Data File submissions. In a technical change from the proposed rule text, the Commission is expanding the group of entities listed within Rule 405(a)(3) of Regulation S-T to add electronic filers subject to Regulation SE, reflecting the addition of electronic filers subject to Regulation SE to Rule 405(b) of Regulation S-T in the proposed and final rule text.

[725] *See* Rule 803(b)(1)(i) of Regulation SE. We have made conforming changes to Rules 803(b)(3), (e), and (f) to narrow the proposed Inline XBRL requirements for Form SBSEF amendments, withdrawal requests, and vacation requests. *See* Rules 803(b)(3), 803(e), and 803(f) of Regulation SE.

that were included within the scope of the proposed rule text, while retaining the references to information specified in the Registration Instructions to Form SBSEF.[726]

Requiring use of EDGAR and structured data languages for certain disclosures under Regulation SE has benefits. Requiring SBSEFs to make required certain filings via EDGAR will provide the Commission and the public with a centralized, publicly accessible electronic database for SBSEF-provided data in the form that is most accessible and useful to regulators, market participants, and the public alike. The use of EDGAR also enables technical validation of the disclosures, thus potentially reducing the incidence of non-discretionary errors (e.g., the inclusion of text for a disclosure that should contain only numbers) in those Regulation SE disclosures that are filed via EDGAR. Moreover, requiring structured data languages for many of the reported disclosures will make those 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 those disclosures.[727] Permitting all Regulation SE disclosures to be filed entirely in PDF, HTML, or ASCII format, while perhaps simpler for the SBSEF making the filings, would reduce the accessibility of information in the filings to the Commission and to market participants who will access these filings through EDGAR. Further, harmonizing with the CFTC in this regard by permitting all Regulation SE filings to be made entirely in PDF format, as the CFTC does, would not carry comparable benefits to harmonization of other aspects of Regulation SE. The benefits of using EDGAR and structured data highlighted above justify the potential inconvenience to registrants, as well as to data users, of having to access two separate databases to extract information regarding SEC-regulated SBSEFs and CFTC-regulated SEFs.

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726 *See* the introductory text, subparagraphs (a)(2), (a)(4), and (b)(5)(ii), and Note 1 to Rule 405 of Regulation S-T.

727 *See* Securities Act Release No. 10514 (June 28, 2018), 83 FR 40846, 40847 (Aug. 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.

As discussed above, in a change from the proposal, the Commission is requiring SBSEFs to provide the rule and product filings required under Rules 804 through 807and 816 of Regulation SE through EFFS in an unstructured format, rather than providing them through EDGAR in Inline XBRL. While the information in SBSEF rule and product filings will not be machine-readable, the absence of structuring requirements for rule and product filings under Regulation SE (which aligns with the current rule and product filing process for SROs)[728] will help contain compliance burdens for SBSEFs, because SBSEFs will not be subject to compliance costs associated with structuring those filings.[729] In light of the significant volume of other machine-readable data regarding SBSEFs that will be available to the market and data users under Regulation SE, this requirement having a lower compliance burden justifies the lack of machine-readability for the information in rule and product filings required under Rules 804 through 807 and 816 of Regulation SE.

To implement the change from the proposed Inline XBRL and EDGAR filing requirement to the final unstructured format and EFFS requirement for rule and product filings, the Commission is modifying the rule text for Rules 804 through 807 of Regulation SE, the Security-Based Swap Execution Facility Cover Sheet that the Commission is adopting as § 249.1702, and Rule 405 of Regulation S-T. For Rules 804 through 807, the final rule text specifies that SBSEFs must file the rule and product filings through the EFFS system, rather than through the EDGAR system as an Interactive Data File in accordance with Rule 405 of Regulation S-T as proposed.[730] The Commission is not making analogous changes to Rule 816 of Regulation SE, because Rule 816 instructs SBSEFs to follow the procedures under Rule 806 or 807 of Regulation SE.[731] For the Security-Based Swap Execution Facility Cover Sheet, the final rule text specifies that SBSEFs must file the cover sheet using the EFFS system, rather than

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728 *See supra* note 139.

729 *See infra* section XVII.C.3(f).

730 *See* Rules 804(a)(1), 805(a)(1), 806(a)(1), 807(a)(1), and 807(d)(1) of Regulation SE.

731 *See* Rule 816(a)(1) of Regulation SE.

using the EDGAR system in accordance with Rule 405 of Regulation S-T as proposed.[732] In Rule 405 of Regulation S-T, the final rule text omits references to subparagraphs of Rules 804 through 807 and the Security-Based Swap Execution Facility Cover Sheet that were included within the scope of the proposed rule text.[733]

B. Use of Identifiers

As discussed above, the Commission is adopting, as § 249.1702, a submission cover sheet and instructions that an SBSEF must use for filings submitted pursuant to Rules 804 through 807 and 816.

Paragraph (a) of the submission cover sheet instructions provides that a properly completed submission cover sheet must accompany all rule and product submissions submitted electronically to the Commission by an SBSEF.[734] Per paragraph (a), a properly completed submission cover sheet would include, among other things, the name and platform ID of the SBSEF.[735] Currently, LEIs issued through the GLEIS are the only allowable platform IDs that may be used by registered SBSEFs.[736]

The Commission received comments on the use of LEIs, as well as the potential use of other identifiers in filings to the Commission under Regulation SE.[737] One commenter supports the Commission's effort to include the LEI for identifying SBSEFs, stating that the Commission's decision to include the LEI creates consistency and transparency for the identification of execution facilities, while also enabling information sharing across agencies.[738] The commenter points out that the LEI is the only global standard for legal entity identification

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732 *See* Instruction (a) to the Security-Based Swap Execution Facility Sheet adopted as § 249.1702.

733 *See* the introductory text, subparagraphs (a)(2), (a)(4), and (b)(5)(ii), and Note 1 to Rule 405 of Regulation S-T.

734 *See supra* section IV.E.

735 *See supra* note 140.

736 *Id.*

737 *See* Letter from Stephan Wolf, CEO, Global Legal Entity Identifier Foundation, at 1–2 (June 10, 2022) ("GLEIF Letter") at 1–2; Bloomberg Letter, *supra* note 18, at 11–12.

738 *See* GLEIF Letter, *supra* note 737, at 1.

and argues that by implementing the LEI more comprehensively the Commission would set forth a consistent identification scheme highlighted by the LEI. The commenter also supports the inclusion of the Unique Product Identifier ("UPI"), which is also an International Organization for Standardization ("ISO") standard, as well as the Financial Instrument Global Identifier ("FIGI"), an adopted U.S. standard, arguing that open, non-proprietary data standards, which are established by voluntary standard bodies, facilitate the open exchange of information for regulators.[739]

Another commenter agrees that standard identifiers such as LEI, FIGI, and UPI should be included in an SBSEF's other reporting obligations under Regulation SE. In particular, this commenter highlights a number of the potential benefits of FIGI, a unique, publicly available identifier that covers financial instruments across asset classes that arise, expire, and change on a daily basis. The commenter states that it developed FIGI to help solve licensing challenges and shortcomings in data organizations and governance that persist in the current regionally based security identifier numbering approaches. The commenter states that one of the benefits of FIGI is that it enables interoperability between other identification systems and does not force the use of a single identification system, which could lower costs when interacting between legacy systems, which may depend upon a single identifier, and newer systems, which typically have a more modern architecture. As a general matter, the commenter believes that firms should be permitted to choose among identifiers and have the flexibility to adopt, integrate, or switch to other identifiers as appropriate. According to the commenter, this would allow firms to orient decisions around reducing costs of integration or realizing added benefits that offset any such integration cost concerns.[740]

The Commission has considered the comments received on the provisions regarding LEIs and other identifiers. The Commission is adopting the submission cover sheet and instructions as

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739 *See id.* at 1–2.

740 *See* Bloomberg Letter, *supra* note 18, at 11–12.

proposed because LEIs issued through the GLEIS are currently the only allowable platform IDs that may be used by registered SBSEFs, and as such it is appropriate and acceptable for them to be used on the submission cover sheet. With respect to other identifiers discussed by the commenters (i.e., UPI and FIGI), as well as other identifiers that may be under development globally by various entities, because they are not currently allowable IDs, it would not be appropriate or acceptable for them to be used on the submission cover sheet.

XIV. AMENDMENTS TO COMMISSION'S RULES OF PRACTICE FOR APPEALS OF SBSEF ACTIONS

As noted above,[741] SEA Core Principle 2 directs an SBSEF to exercise regulatory powers over its market.[742] Under 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.[743] SEA Core Principle 2 also requires an SBSEF to establish rules governing access to its market.[744] 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 without due process. Recognizing these concerns, in the Proposing Release, the Commission proposed a number of amendments to its Rules of Practice to allow for appeals for final disciplinary actions taken by an SBSEF, for denials or conditionings of membership, and for limitations or denials of access, noting that the CFTC has similar procedures with respect to SEFs.[745]

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741 *See supra* section VI.B.

742 *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).

743 *See supra* section VI.B. *See also* Rule 819(c)(3) (relating to limitations on access, including suspensions and permanent bars); Rule 819(g) (relating to disciplinary procedures and sanctions).

744 *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).

745 *See* Proposing Release, *supra* note 1, 87 FR at 18935–37; *See also* 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.

The Commission did not receive any comments on these proposed amendments to its Rules of Practice. General principles of due process necessitate an appeals procedure for SBSEF members aggrieved by disciplinary action taken by an SBSEF. Therefore, the Commission is adopting the amendments to its Rules of Practice as proposed, as detailed below, with a minor modification to Rule 442.

A. Amendment to Rule 101

Existing Rule 101 of the Commission's Rules of Practice[746] sets out definitions for 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 proposed a new paragraph (a)(9)(ix) of Rule 101 that provides 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 the applicability of the Rules of Practice.

The Commission received no comment on the proposed amendment to Rule 101 and is adopting this amendment to Rule 101 as proposed.

B. Amendment to Rule 202

Existing Rule 202 of the Commission's Rules of Practice[747] 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 Public Company Accounting Oversight Board ("PCAOB"). Because the Commission proposed new Rules 442 and 443, which set out specific procedures

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[746] 17 CFR 201.101.

[747] 17 CFR 201.202.

with respect to proceedings to review a determination of an SBSEF,[748] the Commission proposed to revise Rule 202(a) to add these SBSEF-related proceedings to the list of exclusions.

The Commission received no comment on the proposed amendment to Rule 202 and is adopting this amendment to Rule 202 as proposed.

C. Amendment to Rule 210

Existing Rule 210 of the Commission's Rules of Practice[749] 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 proceedings). Because the Commission proposed new Rules 442 and 443, which set out specific procedures with respect to proceedings to review a determination of an SBSEF,[750] the Commission proposed to revise Rule 210 to exclude proceedings to review a determination by an SBSEF among the types of proceedings from which persons may be granted leave to become a party or a non-party participant on a limited basis.

The Commission received no comment on the proposed amendment to Rule 210 and is adopting this amendment to Rule 210 as proposed.

D. Amendment to Rule 401

The Commission proposed to amend existing Rule 401 of its Rules of Practice by adding a new paragraph (f). Paragraph (f)(1) would permit any person aggrieved by a stay of action by an SBSEF entered in accordance with Rule 442(c) to make a motion to lift the stay. The

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748 *See infra* sections XIV.E and F.

749 17 CFR 201.210.

750 *See infra* sections XIV.E and F.

Commission could also, at any time, on its own motion determine whether to lift the automatic stay. Paragraph (f)(2) would provide that the Commission may lift a stay summarily, without notice and opportunity for hearing. Finally, 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.

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 Rule 442, an aggrieved person can 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 an application would operate as a stay of the SBSEF's determination, and because of this automatic 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 Rule 401(f)(2) to lift a stay summarily, without notice and opportunity of hearing.

The Commission received no comment on Proposed Rule 401(f) and is adopting Rule 401(f) as proposed.

E. Rule 442—Right to Appeal

Proposed Rule 442 would establish the right to an appeal to the Commission of certain final actions taken by an SBSEF and would set out certain procedural matters relating to any such appeal. Paragraph (a) of Rule 442 provides 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 Rule 835(b)(1); (2) final action with

respect to a denial or conditioning of membership, as defined in 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 Rule 835(b)(2).

Paragraph (b) of Rule 442 sets forth the procedure in such cases. Specifically, an aggrieved person can 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 Rule 835 is received by the aggrieved person, and must serve the application on the SBSEF at the same time.[751] The Commission is modifying the text of Rule 442(b) from the proposal to clarify that the 30-day period for filing an application for review will not be extended absent a showing of extraordinary circumstances and that Rule 442(b) will be the exclusive remedy for seeking an extension of the 30-day period. Strict compliance with filing deadlines facilitates finality and encourages parties to act timely in seeking review.

Paragraph (c) of Rule 442 provides that filing an application for review with the Commission pursuant to 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 accordance with Rule 401(f) or upon its own motion.[752]

It is appropriate for the filing of an application for review to operate as an automatic stay of the SBSEF's determination, because that 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.[753] In addition, the Commission proposed

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751 Such an 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.

752 17 CFR 201.442(c).

753 The Commission received one comment describing the ability of persons aggrieved by certain actions by an SBSEF to apply for Commission review as "some kind of mandatory arbitration process, overseen by a self governing regulatory body," and stating that this would not help retail investors. *See* Kevin Letter, *supra*

in Rule 401(f) a procedure whereby a person aggrieved by such stay, including the SBSEF, can request that the Commission lift the stay.[754] The rules also contain certain requirements relating to certification of the record and service of the index.[755] 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 the record and serve one copy of the index on each party, subject to the requirements in Rule 442(d)(2) relating to sensitive personal information; if applicable, these filings would have to be certified that they have complied with the requirements relating to sensitive personal information. 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.

The Commission received no comment on Proposed Rule 442 and is adopting Rule 442 as proposed, with the modification to Rule 442(b) described above.

F. Rule 443—*Sua sponte* Review by Commission

New Rule 443[756] provides that the Commission, on its own initiative, can 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 application for review pursuant to Rule 442(a) within 40 days after the SBSEF filed notice thereof.

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note 95. The review of SBSEF action under Rule 442 would not be arbitration by a self-governing regulatory body but instead review by the Federal agency tasked by Congress with regulating SBSEFs. Further, only ECPs would be eligible to trade SBS on an SBSEF, and any offer or sale of SBS to "retail investors" would have to be effected on a national securities exchange. *See* SEA section 6(*l*), 15 U.S.C. 78f(*l*) ("It shall be unlawful for any person to effect a transaction in a security-based swap with or for a person that is not an eligible contract participant, unless such transaction is effected on a national securities exchange….").

754 *See supra* section XIV.D.

755 17 CFR 201.442(d) and (e).

756 17 CFR 201.443.

Rule 443 further provides that the Commission can, at any time before issuing its decision, raise or consider any matter that it deems material, whether or not raised by the parties. If it does so, the Commission must, under Rule 443, 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. It is appropriate that the Commission have the ability to review any determination filed by an SBSEF that could be subject to an application for review under Rule 442(a), even without an appeal of that determination by an aggrieved party, should the Commission believe that further consideration is warranted. Therefore, the rule provides the Commission authority to obtain additional information through supplemental briefings, as needed.

The Commission received no comment on Proposed Rule 443 and is adopting Rule 443 as proposed.

G. Amendment to Rule 450

Existing Rule 450 of the Commission's Rules of Practice[757] 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 proposed to amend Rule 450 by adding a new paragraph (a)(2)(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)."

The Commission received no comment on the proposed amendment to Rule 450 and is adopting this amendment to Rule 450 as proposed.

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[757] 17 CFR 201.450.

H. Amendment to Rule 460

Existing Rule 460 of the Commission's Rules of Practice[758] states that the Commission shall determine each matter on the basis of the record. Rule 460(a) defines the contents of the record with respect to various types of action. The Commission proposed a new paragraph (a)(4) of Rule 460, which states 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.

The Commission received no comment on the proposed amendment to Rule 460 and is adopting this amendment to Rule 460 as proposed.

XV. AMENDMENTS TO DELEGATIONS OF AUTHORITY IN RULE 30-3 AND RULE 30-14

In connection with the adoption of Regulation SE, the Commission is revising its rules delegating authority to the Director of the Division of Trading and Markets ("TM Division Director") and to the General Counsel in order to delegate authority to take actions necessary to carry out the rules under Regulation SE and to facilitate the operation of the regulatory structure created in Regulation SE.[759] These revisions are intended to conserve Commission resources and increase the effectiveness and efficiency of the Commission's process for handling certain processes required by Regulation SE and for resolving appeals of SBSEF final actions.[760] Congress has authorized such delegation by Public Law 87-592, 76 Stat. 394, 15 U.S.C. 78d-1(a), which provides that the Commission "shall have the authority to delegate, by published order or rule, any of its functions to … an employee or employee board, including functions with

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758 17 CFR 201.460.

759 17 CFR 200.30-3.

760 In the Proposing Release, the Commission stated that it "may address delegations of its authority in the adopting release for Regulation SE." Proposing Release, *supra* note 1, 87 FR at 28877.

respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business or matter."

The Commission finds, in accordance with the Administrative Procedure Act ("APA"), that these amendments to the delegations of authority relate solely to agency organization, procedure, or practice.[761] Accordingly, the APA's provisions regarding notice of rulemaking and opportunity for public comment are not applicable to these rules. These rules do not substantially affect the rights or obligations of non-agency parties and pertain to increasing efficiency of internal Commission operations. For the same reasons, the provisions of the Small Business Regulatory Enforcement Fairness Act are not applicable to these rules.[762] Additionally, the provisions of the Regulatory Flexibility Act,[763] which apply only when notice and comment are required by the APA or other law, are not applicable to these rules.[764] The amendments to these rules do not contain any collection of information requirements as defined by the Paperwork Reduction Act of 1995.[765] 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. Further, because these amendments impose no new burdens on private parties, the amendments will not have any impact on competition for purposes of section 23(a)(2) of the Exchange Act.[766]

Accordingly, the Commission is amending its rules, by adding new paragraphs (95)–(102) to Rule 30-3, to delegate authority to the Division Director to perform certain actions necessitated by Regulation SE. The Commission is also amending paragraphs (4), (5), (7), and (8) of Rule 30-14 (17 CFR 200.30-14) to delegate authority to the General Counsel to perform certain actions in connection with Commission review proceedings of SBSEF actions. Under

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761 5 U.S.C. 553(b)(3)(A).

762 *See* 5 U.S.C. 804(3)(C) (the term "rule" does not include "any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties").

763 5 U.S.C. 60 *et seq.*

764 *See* 5 U.S.C. 601(2).

765 *See* 5 CFR 1320.3.

766 15 U.S.C. 78w(a)(2).

these delegations, the Division Director or the General Counsel, as applicable, (or, under his or her direction, such person or persons as might be designated from time to time by the Chairman of the Commission[767]) is authorized to perform the actions discussed below. Notwithstanding these delegations, the Division Director or the General Counsel, as applicable, may submit any matter he or she believes appropriate to the Commission.[768] Furthermore, any action taken by the Division Director or the General Counsel, as applicable, pursuant to delegated authority would be subject to Commission review as provided by Rules 430 and 431 of the Commission's Rules of Practice, 17 CFR 201.430-201.431 and 15 U.S.C. 78d-1(b).

A. Delegated Authority Related to SBSEF Registration and Form SBSEF

With respect to certain Commission actions related to the registration process for SBSEFs and the review of Form SBSEF under Rule 803 and Rule 808, the Division Director has delegated authority: to publish notice on the Commission's website of a completed Form SBSEF and make available on the Commission's website certain specified parts of a Form SBSEF; to notify the applicant that its application is incomplete; to request from the applicant additional information and documentation necessary; to notify the applicant that its application is materially incomplete and to specify the deficiencies in the application, for purposes of staying the 180-day period for Commission review of the Form SBSEF; and to issue an order vacating the SBSEF's registration and to send a copy of the related request and order of vacation to all other SBSEFs, SBS exchanges, and registered clearing agencies that clear security-based swaps.[769]

B. Delegated Authority Related to New Products Proposed by an SBSEF

With respect to certain Commission actions related to self-certification of new products by an SBSEF under Rule 804, the Division Director has delegated authority: to stay for a period of up to 90 days the effectiveness of a security-based swap execution facility's self-certification

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767 *See* 17 CFR 200.30-3 and 17 CFR 200.30-14 (sub-delegation language applicable as a result of the addition of subparagraphs related to Regulation SE to the existing rules).

768 17 CFR 200.30-3(l) and 17 CFR 200.30-14(l).

769 *See* 17 CFR 200.30-3(a)(95), as adopted herein.

of a new product; to publish notice on the Commission's website of a 30-day period for public comment; and to withdraw the stay or notify the security-based swap execution facility that the Commission objects to the proposed certification.[770]

With respect to certain Commission actions related to voluntary submission of new products by an SBSEF under Rule 805, the Division Director has delegated authority: to notify the submitting SBSEF that a submission for a new product does not comply with paragraph (a) of Rule 805; to make the SBSEF's submission publicly available on the Commission's website; to extend by an additional 45 days the period for consideration of a new product voluntarily submitted by an SBSEF if the product raises novel or complex issues that require additional time to analyze, and to notify the SBSEF of the same; to issue an extension of such longer period as to which the SBSEF agrees in writing; to approve a proposed new product and provide notice of the approval to the SBSEF; to notify the SBSEF that the Commission will not, or is unable to, approve the product, and to specify the nature of the issues raised and the specific provision of the SEA or the Commission's rules thereunder, that the product violates, appears to violate, or potentially violates but which cannot be ascertained from the submission.[771]

C. Delegated Authority Related to New Rules or Rule Amendments Proposed by an SBSEF

With respect to certain Commission actions related to proposed rules or rule amendments proposed by an SBSEF under Rule 806, the Division Director will have delegated authority: to notify the submitting SBSEF that a submission for a new rule or rule amendment does not comply with paragraph (a) of Rule 806; to make the SBSEF's submission publicly available on the Commission's website; to extend by an additional 45 days the period for consideration of a proposed rule or rule amendment voluntarily submitted by an SBSEF if the proposed rule or rule amendment raises novel or complex issues that require additional time to review or is of major

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770 *See* 17 CFR 200.30-3(a)(96), as adopted herein.

771 *See* 17 CFR 200.30-3(a)(97), as adopted herein.

economic significance, the submission is incomplete, or the requester does not respond completely to the Commission questions in a timely manner, and to notify the SBSEF of the same; to issue an extension of such longer period as to which the SBSEF agrees in writing; to approve a proposed rule or rule amendment and provide notice of the approval to the SBSEF; to notify the SBSEF that the Commission will not, or is unable to, approve the new rule or rule amendment, and to specify the nature of the issues raised and the specific provisions of the SEA or the Commission's rules thereunder, including the form or content requirements of Rule 806, with which the new rule or rule amendment is inconsistent or appears to be inconsistent; and to approve a proposed rule or a rule amendment, including changes to terms and conditions of a product, on an expedited basis under such conditions as shall be specified in the written notification.[772]

In addition, the Division Director has delegated authority to undertake certain Commission actions related to proposed rules or rule amendments self-certified by an SBSEF under Rule 807. Specifically, the Division Director has delegated authority: to make publicly available on the Commission's website a security-based swap execution facility's filing of new rules and rule amendments pursuant to the self-certification procedures of Rule 807; to stay for a period of up to 90 days the effectiveness of an SBSEF's self-certification of a new rule or rule amendment; to publish notice on the Commission's website of a 30-day period for public comment; and to withdraw the stay or notify the security-based swap execution facility that the Commission objects to the proposed certification.[773]

D. Delegated Authority Related to Request for Joint Interpretation

With respect to a request by an SBSEF, the Commission, or the CFTC, for a joint interpretation of whether a proposed product is a swap, security-based swap, or mixed swap under existing SEA Rule 3a68-2, as contemplated by Rule 809, the Division Director has

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772 *See* 17 CFR 200.30-3(a)(98), as adopted herein.

773 *See* 17 CFR 200.30-3(a)(99), as adopted herein.

delegated authority to provide written notice to an SBSEF of a stay or tolling pending issuance of a joint interpretation.[774]

E. Delegated Authority Related to SBSEF Submissions Contemplated by Rule 811

With respect to information relating to SBSEF compliance under Rule 811, the Division Director has delegated authority: to request pursuant to Rule 811(a) that an SBSEF file with the Commission information related to its business as a security-based swap execution facility, and to specify the form, manner, and timeframe for the filing; to request pursuant to Rule 811(b) that an SBSEF file with the Commission a written demonstration 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 and to specify the form, manner, and timeframe for such a filing; to specify, pursuant to Rule 811(c)(2), the form and manner of the notification required pursuant to Rule 811(c)(1) by an SBSEF 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, and to request supporting documentation of the transaction; to specify the form and manner of the certification required pursuant to Rule 811(c)(4) that an SBSEF meets all of the requirements of section 3D of the SEA and the Commission rules thereunder; and to specify the form and manner of the submission by an SBSEF of documents filed in any material legal proceeding to which the security-based swap execution facility is a party or its property or assets is subject, as specified in Rule 811(d)(1), or 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, as specified in Rule 811(d)(2), and to request further documents.[775]

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774 *See* 17 CFR 200.30-3(a)(100), as adopted herein.

775 *See* 17 CFR 200.30-3(a)(101), as adopted herein.

F. Delegated Authority Related to Information Sharing

With respect to certain Commission actions related to information sharing under Rule 822, the Division Director has delegated authority to require that an SBSEF provide information in its possession to the Commission and to specify the form and manner of that provision, and to require an SBSEF share information with other regulatory organizations, data repositories, and third-party data reporting services as necessary and appropriate to fulfill the SBSEF's regulatory and reporting responsibilities.[776]

G. Delegated Authority Related to Commission Review Proceedings

With respect to Commission review proceedings for final disciplinary actions taken by an SBSEF, for denials or conditionings of membership, and for limitations or denials of access, the General Counsel has delegated authority: to determine that an application for review has been abandoned and then to issue an order dismissing the application; to determine applications to stay Commission orders pending appeal of those orders to the federal courts and to determine application to vacate such stays; to grant or deny requests for oral argument before the Commission; and to determine whether to lift the automatic stay of a disciplinary sanction imposed by an SBSEF.[777]

XVI. COMPLIANCE SCHEDULE

In the Proposing Release, the Commission stated that it intended to include a compliance schedule along with any final rules, and it sought public comment to assist it in developing an appropriate compliance schedule.[778] The Commission received several comments.

One commenter agrees that SEF operators can leverage their experience with SEF registration and operation in order to comply with any final SBSEF rules, but states that creating and maintaining a new platform, regardless of any similarities to existing systems, will inevitably

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[776] *See* 17 CFR 200.30-3(a)(102), as adopted herein.

[777] *See* 17 CFR 200.30-14(4) through (5) and (7) through (8), as adopted herein.

[778] *See* Proposing Release, *supra* note 1, 87 FR at 28937.

require substantial time and resources to ensure operational, technical, and regulatory compliance. This commenter suggests that the Commission provide a compliance timeline of at least 12 months following the effective date of any final rules.[779]

Another commenter states that, while substantial harmonization should lower compliance and operations costs by allowing SBSEFs and market participants to use their existing procedures and systems, it is still important to allow sufficient lead time for potential SBSEFs and market participants to come into compliance with the new regulatory framework. The commenter states that existing SEFs will need to make certain technological changes to their platform to conform to the new rules and that additional time will be required for testing, finalizing a new rulebook, and putting in place the requisite agreements with SBSEF clients. This commenter states that the Commission should set a compliance date that is at least 18 months from the date of effectiveness of any final rule.[780]

One commenter states that, absent a phased-in implementation approach, the SBS market could suffer from significant disruptions. Therefore, this commenter states, the Commission should provide "phased-in compliance" with the required methods of execution, whereby a MAT SBS product may be executed on an SBSEF via any method of execution until such time as it is determined through notice and comment that an appropriate level of liquidity exists to enable an order book or RFQ-to-3 system. This commenter states that, when considering the lack of liquidity in SBS products, pre-trade price transparency via the proposed RFQ-to-3 requirement could negatively affect liquidity provision for end-users because, if clients are required to show their hand to three liquidity providers, it may lead to information leakage and an inability to hedge their risks through SBS markets. This is particularly so, the commenter says, because there are only a relatively small number of active dealers for many SBS products.[781]

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779 *See* Tradeweb Letter, *supra* note 18, at 6–7.

780 *See* Bloomberg Letter, *supra* note 18, at 21.

781 *See* ISDA-SIFMA Letter, *supra* note 18, at 6.

This commenter further states that an RFQ-to-3 requirement would also be problematic for SBS equities, where current execution processes are very different from their swaps counterpart, and where common trading practices and counterparty exchanges would not be possible on an RFQ-to-3 or order book system. The commenter states that it has compared the credit swaps activity that occurred on-venue in 2012 (before the CFTC trade execution requirement became effective) with the credit SBS activity that occurs on venue today. The commenter reports that the result is that 48.2% of AMRS CDX trading client volume was on-venue in 2012, while only 4.9% of AMRS SNCDS trading client volume occurred on-venue in 2022 (up to the date of the commenter's letter). The commenter states that this shows that the swaps market was much more ready for the implementation of the trade execution requirement than the credit SBS market is today.[782]

The Commission agrees that some period of time will be required for would-be SBSEFs not only to register with the Commission, but also to create a new platform; put in place policies, procedures, and arrangements to ensure operational, technical and regulatory compliance; establish its own rules; and put in place the requisite agreements with SBSEF clients. The Commission does not agree, however, with the comment that a separate, "phased-in" compliance schedule should be put in place for the required methods of execution and that the Commission should engage in future notice and comment before applying the required methods of execution to SBS that have been made available to trade. First, no SBS are currently subject to a clearing determination, so it would not be possible for any SBSEF to make an SBS available to trade and subject it to the required methods of execution. Second, as discussed above, before an SBS becomes subject to the trade execution requirement, the Commission would have had multiple opportunities to consider the trading characteristics of the SBS.[783] Even after the Commission has made a clearing determination with respect to an SBS, to make that SBS "available to trade,"

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782 *See id.*

783 *See supra* notes 181–185 and accompanying text.

an SBSEF would, under Rule 816(a)(1), have to make a filing with the Commission under Rule 806 or Rule 807—both of which would allow the Commission to find that a filing was not consistent with the requirements of the SEA or Regulation SE.[784] This filing would, under Rule 816(b), have to address, as appropriate, a number of relevant factors, including whether there are ready and willing buyers and sellers; the frequency or size of transactions; the trading volume; the number and types of market participants; the bid/ask spread; and the usual number of resting firm or indicative bids and offers. And a national securities exchange that wished to make an SBS "available to trade" would have to file a rule change under Rule 19b-4,[785] and that proposed rule change would be subject to Commission review for compliance with the requirements of the SEA. Therefore, the Commission is not adopting a separate, "phased-in" compliance schedule for the required methods of execution.

Further, with respect to commenters who proposed specific timeframes for implementation (e.g., 12 months or 18 months), the Commission's proposed compliance schedule is better designed to facilitate timely and achievable implementation of Regulation SE because it reflects that the entities that are likely to register as SBSEFs have been accustomed to operating SBS trading platforms pursuant to exemptive relief granted by the Commission.[786] Thus, it is appropriate to provide these entities with a reasonable period of time—through a compliance schedule tied to the completion of the steps required for registration as an SBSEF—to come into compliance with the requirements of Regulation SE. Further, because most, if not all, entities that seek to register as SBSEFs will be CFTC-registered SEFs—and because the Commission has sought to harmonize both the registration form and exhibits for SBSEFs and the substance of the rules applicable to SBSEFs with the CFTC regulations applicable to SEFs—the

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784 *See supra* sections IV.A and B.

785 17 CFR 240.19b-4.

786 *See supra* section XII.

entities seeking to register as SBSEFs will be able to complete the each of the steps necessary for registration in the allotted periods.

Therefore, the Commission is adopting the following compliance schedule for Regulation SE. The SBSEF rules shall become effective 60 days after the date of publication in the *Federal Register* ("Effective Date"). Once Regulation SE has become effective, any entity that meets the definition of SBSEF may file an application to register with the Commission on Form SBSEF at any time after the Effective Date.[787] As discussed above,[788] the Temporary SBSEF Exemptions will expire 180 days after the Effective Date for any entity that has not filed an application to register with the Commission on Form SBSEF. Thus, an entity that meets the definition of SBSEF and engages in such activities but fails to submit an application on Form SBSEF by 180 days after the Effective Date would be in violation of the registration requirement of Rule 803. For an entity that has submitted an application on Form SBSEF by 180 days after the Effective Date, the exemptive relief relating to SBSEF registration would expire 240 days after the Effective Date, except with respect to an entity whose application on Form SBSEF is *complete* (having responded to requests by the Commission's staff for revisions or amendments) within 240 days of the Effective Date. An entity that has submitted an application within 180 days of the Effective Date and whose application is complete within 240 days of the Effective Date will continue to benefit from the exemption from registration until 30 days after the Commission acts to approve or disapprove the application on Form SBSEF.

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787 Once Regulation SE has become effective, applications for exemptions under Rule 833 may also be submitted. *See supra* section VII.B (discussing cross-border exemptions for foreign trading venues and relating to the trade execution requirement).

788 *See supra* section XII (discussing the rescission of exemptive relief).

XVII. ECONOMIC ANALYSIS

A. Introduction

To increase the transparency and oversight of the OTC derivatives market,[789] 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[790] 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 adopting Regulation SE and associated forms under section 3D of the SEA that would create a regime for the registration and regulation of SBSEFs and address other issues relating to SBS execution generally.[791] One of the rules being adopted as part of Regulation SE, Rule 834, implements section 765 of the Dodd-Frank Act, which is intended to mitigate conflicts of interest at SBSEFs and SBS exchanges. Other rules being adopted as part of Regulation SE 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 amending 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 is also adopting 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 is also adopting 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.

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789 *See* Pub. L. No. 111-203 Preamble.

790 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 VI.

791 Among other things, the Commission is adopting 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.

Currently, SBS trade in the OTC market, rather than on regulated trading venues. 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.[792] SBS dealers can have hundreds of counterparties, consisting of end users and other SBS dealers. Trading venues may serve hundreds of end user and SBS dealer participants. 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 adopted rules and amendments will affect SBSEFs, SBS exchanges, foreign SBS trading venues, and ECPs (i.e., SBS dealers and end users).[793] In addition, the adopted rules and amendments will affect entities that act as third-party service providers to SBSEFs.

The Commission is mindful of the economic effects, including the costs and benefits, of the adopted rules and amendments. 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

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792 *See* also section VII.A *supra* and XVII.B.2 *infra* (discussing the global nature of the SBS market).

793 Only ECPs are eligible to trade on an SBSEF, and retail investors would have access to an SBS only after an SBS exchange has filed a proposed rule change with the Commission under Rule 19b-4, 17 CFR 240.19b-4, to amend its rules to permit the listing of a registered SBS, with that proposed rule change being published for public comment. *See supra* note 103.

on competition, and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the SEA.

The analysis below addresses the likely economic effects of the adopted rules and amendments, including their anticipated and estimated benefits and costs and their 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. The Commission received a number of comments related to various aspects of the economic analysis in the Proposing Release. The Commission has considered and responds to these comments in the sections that follow.

B. Economic Baseline

1. Existing Regulatory Framework

The economic analysis appropriately considers existing regulatory requirements, including recently adopted rules, as part of its economic baseline against which the costs and benefits of the adopted rules and amendments are measured.[794] 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,[795] the Cross-Border Adopting Release,[796] the SDR Rules and Core Principles Adopting

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794 *See, e.g.*, *Nasdaq v. SEC*, 34 F.4th 1105, 1111–15 (D.C. Cir. 2022). This approach also follows SEC staff guidance on economic analysis for rulemaking. *See* Staff's "Current Guidance on Economic Analysis in SEC Rulemaking" (Mar. 16, 2012), *available at* https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf ("The economic consequences of proposed rules (potential costs and benefits including effects on efficiency, competition, and capital formation) should be measured against a baseline, which is the best assessment of how the world would look in the absence of the proposed action."); *Id*. at 7 ("The baseline includes both the economic attributes of the relevant market and the existing regulatory structure."). The best assessment of how the world would look in the absence of the proposed or final action typically does not include recently proposed actions, because doing so would improperly assume the adoption of those proposed actions.

795 *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 (Apr. 27, 2012), 77 FR 30596 (May 23, 2012) ("Intermediary Definitions Adopting Release").

796 *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 (Aug. 12, 2014) ("Cross-Border Adopting Release").

Release,[797] the Regulation SBSR Adopting Release I,[798] the Registration Adopting Release,[799] the ANE Adopting Release,[800] the Business Conduct Adopting Release,[801] the Trade Acknowledgement and Verification Adopting Release,[802] the Regulation SBSR Adopting Release II,[803] the Rule of Practice 194 Adopting Release,[804] the Capital, Margin, and Segregation Adopting Release,[805] the Recordkeeping and Reporting Adopting Release,[806] the Risk Mitigation Adopting Release,[807] the Cross-Border Amendments Adopting Release,[808] and the Clearing Exemption Adopting Release.[809] The baseline also includes the Temporary SBSEF Exemptions[810] and the CFTC rules that apply to CFTC-registered SEFs.

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797 *See* Security-Based Swap Data Repository Registration, Duties, and Core Principles, SEA Release No. 74246 (Feb. 11, 2015), 80 FR 14438 (Mar. 19, 2015) ("SDR Rules and Core Principles Adopting Release").

798 *See* Regulation SBSR Adopting Release I, *supra* note 140.

799 *See* Registration Process for Security-Based Swap Dealers and Major Security-Based Swap Participants, SEA Release No. 75611 (Aug. 5, 2015), 80 FR 48964 (Aug. 14, 2015) ("Registration Adopting Release").

800 *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 (Feb. 10, 2016), 81 FR 8598 (Feb. 19, 2016) ("ANE Adopting Release").

801 *See* Business Conduct Standards Release, *supra* note 101.

802 *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").

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

804 *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 (Dec. 19, 2018), 84 FR 4906 (Feb. 19, 2019) ("Rule of Practice 194 Adopting Release").

805 *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 (Aug. 22, 2019) ("Capital, Margin, and Segregation Adopting Release").

806 *See* Recordkeeping and Reporting Adopting Release, *supra* note 704.

807 *See* Risk Mitigation Techniques for Uncleared Security-Based Swaps, SEA Release No. 87782 (Dec. 18, 2019), 85 FR 6359 (Feb. 4, 2020) ("Risk Mitigation Adopting Release").

808 *See* Cross-Border Application of Certain Security-Based Swap Requirements, SEA Release No. 87780 (Dec. 18, 2019), 85 FR 6270 (Feb. 4, 2020) ("Cross-Border Amendments Adopting Release").

809 *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 (Dec. 16, 2020), 86 FR 7637 (Feb. 1, 2021) ("Clearing Exemption Adopting Release").

810 *See supra* section III and note 46.

2. Security-Based Swap Data, Market Participants, Dealing Structures, Levels of Security-Based Swap Trading Activity, and Market Participant Domiciles

Final SBS Entity registration rules have been adopted and compliance was required as of November 1, 2021.[811] As of September 28, 2023, there were 51 entities registered with the Commission as SBS dealers, and no entity registered as a major SBS participant.[812] One commenter asserts that not all registered SBS dealers are consistently active in trading SBS. Trading activity in the SBS markets tends to be more concentrated among a subset of such registered SBS dealers, which increases liquidity concerns in these markets.[813]

Market participants such as SBS dealers and major SBS participants were required to report security-based swap transactions to registered security-based swap data repositories ("SBSDRs") pursuant to Regulation SBSR beginning on November 8, 2021.[814]

The Commission uses information reported pursuant to Regulation SBSR to two registered SBSDRs—Depository Trust & Clearing Corporation Data Repository ("DDR") and ICE Trade Vault ("ITV")—to describe the baseline.[815] Table 1 shows that U.S. security-based

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811 *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.

812 *See* List of Registered Security-Based Swap Dealers and Major Security-Based Swap Participants, *available at* https://www.sec.gov/files/list-sbsds-msbsps-9-28-2023-locked-final.xlsx (providing the list of registered SBS dealers and major SBS participants that was updated as of Sept. 28, 2023).

813 *See* ISDA-SIFMA Letter, *supra* note 18, at 2 n.5.

814 *See* SEC Approves Registration of First Security-Based Swap Data Repository; Sets the First Compliance Date for Regulation SBSR, *available at* https://www.sec.gov/news/press-release/2021-80.

815 DDR operates as a registered SBSDR for security-based swap transactions in the credit, equity, and interest rate derivatives asset classes. ITV operates as a registered SBSDR for security-based swap transactions in the credit derivatives asset class. *See* Security-Based Swap Data Repositories; DTCC Data Repository (U.S.) LLC; Order Approving Application for Registration as a Security-Based Swap Data Repository, Exchange Act Release No. 91798 (May 7, 2021), 86 FR 26115 (May 12, 2021); Security-Based Swap Data Repositories; ICE Trade Vault, LLC; Order Approving Application for Registration as a Security-Based Swap Data Repository, Exchange Act Release No. 92189 (June 16, 2021), 86 FR 32703 (June 22, 2021). The statistics presented herein are based on the Report on Security-Based Swaps Pursuant to section 13(m)(2) of the Securities Exchange Act of 1934, that the Commission issued on Mar. 20, 2023 and is available at https://www.sec.gov/files/report-security-based-swaps-032023.pdf ("SBS Report").

swaps market activity is split across three asset classes: credit, equity, and interest rate.[816] Based on information reported to DDR, as of November 25, 2022, there were approximately 523,000, 3.4 million, and 5,700 active security-based swaps in the credit, equity, and interest rate asset classes, respectively. The gross notional amounts outstanding in the credit, equity, and interest rate asset classes were respectively, approximately $2.8, $3.6, and $0.18 trillion.[817] Based on information reported to ITV, as of November 25, 2022, there were approximately 155,000 active credit security-based swaps with gross notional amount outstanding of approximately $1.9 trillion.

Table 1 also shows that U.S. SBS market participants trade a variety of security-based swaps in each of the three asset classes. Based on information reported to DDR, as of November 25, 2022, for active credit security-based swaps, single-name corporate CDS constitute the largest product type, with approximately 364,000 active CDS and $1.6 trillion gross notional amount outstanding. The second largest active credit security-based swaps product type consists of single-name sovereign CDS, with approximately 94,000 active CDS and $0.9 trillion gross notional amount outstanding.

For active equity security-based swaps, equity portfolio swaps constitute the largest product type, with approximately 2.3 million active equity portfolio swaps and $1.7 trillion gross notional amount outstanding. The second largest active equity security-based swaps product type

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816 In this release, interest-rate security-based swaps refer to non-CDS debt security-based swaps, which are primarily total return swaps that replicate the payoff of a bond or a narrow index of bonds, where the buyer usually pays either a fixed or floating benchmark rate to the seller in exchange for the total return of the bond or the narrow index of bonds. These swaps are a subset of over-the-counter derivatives in the interest-rate asset class.

817 Active security-based swaps are those that have been neither terminated nor reached their scheduled maturity and are therefore open positions as of Nov. 25, 2022. Gross notional amount outstanding represents the total outstanding notional value of active, market-facing security-based swaps on Nov. 25, 2022. Security-based swaps are considered to be "market-facing" when they are executed at arms-length between third parties. While a reporting party is only required to report a transaction to one SBSDR—either DDR or ITV—some uncleared security-based swaps in DDR also appear in ITV. As of Nov. 25, 2022, there were 605 active credit security-based swaps in ITV that were reported as uncleared (0.4% of the 154,903 active credit security-based swaps in ITV). The 605 active credit security-based swaps had a gross notional outstanding of $4.73 billion (0.3% of the approximately $1,900 billion gross notional outstanding of all active credit security-based swaps in ITV). These statistics provide an upper bound of the overlap between ITV and DDR and indicate that the overlap is very limited in scope. *See* SBS Report, *supra* note 815, at 4, 10.

consists of equity swaps, with approximately 492,000 active equity swaps and $1.2 trillion gross notional amount outstanding.[818]

In the interest rate asset class, exotics constitute the largest product type, with approximately $0.1 trillion gross notional amount and 4,400 active exotic swaps outstanding.

Based on information reported to ITV, as of November 25, 2022, active credit security-based swaps fall into two product types. Single-name corporate CDS constitute the largest product type, with approximately 135,000 active CDS and $1.3 trillion gross notional amount outstanding. The second largest active credit security-based swaps product type consists of single-name sovereign CDS, with approximately 20,000 active CDS and $0.5 trillion gross notional amount outstanding.

Table 1. Gross notional amount and active security-based swaps outstanding on Nov. 25, 2022, categorized by asset class and product classification.[a]

SBSDR	Asset Class	Product Type	Gross Notional Amount Outstanding (Millions of USD)	Active Security-Based Swap Count
DDR	Credit	Index	44,407	2,992
		Single-Name: Corporate	1,556,315	364,465
		Single-Name: Sovereign	900,072	93,807
		Total Return Swap[b]	156,849	49,867
		Other[c]	122,970	12,081
		Total	2,780,613	523,212
	Equity	Portfolio Swap	1,688,672	2,266,706
		Swap	1,183,279	491,508
		Contract For Difference	398,952	642,965
		Option	6,915	1,281
		Forward	5,663	1,393
		Other[d]	330,136	41,115
		Total	3,613,617	3,444,968
	Interest Rate	Exotic	153,306	4,419
		Forward	23,818	1,164
		Other[e]	868	122
		Total	177,992	5,705
ITV	Credit	Single-Name: Corporate	1,348,002	134,741
		Single-Name: Sovereign	544,414	20,162

[818] An equity swap references a single underlier while an equity portfolio swap involves a portfolio wrapper under which multiple swaps can be traded with operational efficiency. *See* ISDA, *Central Clearing in the Equity Derivatives Market: An ISDA Study* (June 2014) at 10, *available at* https://www.isda.org/a/6PDDE/central-clearing-in-the-eqd-market-final.pdf; ISDA Taxonomy 2.0 – Finalized, ISDA.org (Sept. 4, 2019), *available at* https://www.isda.org/a/o1MTE/ISDA-Taxonomy_EQ-CR-FX-IR_v2.0__3-_September_2019-FINAL.xls.

Total	1,892,416	154,903

[a] For cleared security-based swaps in DDR, this table incorporates only one of the two security-based swaps that result from the clearing process. For ITV, this table incorporates all of the cleared security-based swaps.

[b] As a general matter, total return swaps include non-CDS debt-based security swaps, equity-based security swaps, and mixed swaps. Counterparties in the total return swaps market use the contracts to obtain exposure, usually leveraged, to the total economic performance of a security or index and benefit from not having to own the security itself. Market participants, such as mutual funds, hedge funds, and endowments, use total return swaps to obtain exposure in markets where they would face difficulties purchasing or selling the underlying security (e.g., a market participant may find it difficult to buy a foreign company's security or locate a security to sell short) while taking advantage of the capital efficiencies of not holding the security in their inventories.

[c] Includes the following products reported to SBSDRs: exotic, index tranche, swaptions, and other single-name (e.g., asset-backed, loan, and municipal security-based swaps).

[d] "Other" is a category in the DDR Equity Product ID field. All Product ID categories are listed in the table.

[e] Includes the following products reported to SBSDRs: inflation, debt option, and cross-currency.

Table 2 shows that both SBS Entities and non-SBS Entities participate in all three asset classes in the U.S. security-based swap market. Based on information reported to DDR, as of November 25, 2022, SBS Entities and non-SBS Entities had, respectively, entered into approximately 813,000 and 234,000 active credit security-based swaps.[819] The gross notional amounts outstanding of the active credit security-based swaps held by SBS Entities and non-SBS Entities were, respectively, approximately $4.4 and $1.2 trillion.

In the equity asset class, SBS Entities and non-SBS Entities had, respectively, entered into approximately 4.0 million and 2.9 million active equity security-based swaps. The gross notional amounts outstanding of the active equity security-based swaps held by SBS Entities and non-SBS Entities were, respectively, approximately $4.5 and $2.7 trillion.

In the interest rate asset class, SBS Entities and non-SBS Entities had, respectively, entered into approximately 6,200 and 5,200 active interest rate security-based swaps. The gross notional amounts outstanding of the active interest rate security-based swaps held by SBS Entities and non-SBS Entities were, respectively, approximately $0.2 and $0.1 trillion.

[819] For cleared security-based swaps where at least one counterparty is an SBS Entity, Table 2 reflects the security-based swaps entered into by each of the original counterparties, but does not include the positions of the clearing agencies themselves. For uncleared security-based swaps, Table 2 reflects the security-based swaps entered into by each of the original counterparties. *See* SBS Report, *supra* note 815, at 5.

Based on information reported to ITV, as of November 25, 2022, SBS Entities and non-SBS Entities had, respectively, entered into approximately 123,000 and 33,000 active credit security-based swaps. The gross notional amounts outstanding of the active credit security-based swaps held by SBS Entities and non-SBS Entities were, respectively, approximately $1.6 and $0.3 trillion.

Table 2. Gross notional amount and active security-based swaps outstanding on Nov. 25, 2022, categorized by asset class and registrant type.[a]

SBSDR	Asset Class	Registrant Type	Gross Notional Amount Outstanding (Millions of USD)	Active Security-Based Swap Count
DDR	Credit	Total	5,561,226	1,046,424
		SBS Entities	4,403,130	812,647
		Other	1,158,096	233,777
	Equity	Total	7,227,234	6,889,936
		SBS Entities	4,490,592	4,013,393
		Other	2,736,642	2,876,543
	Interest Rate	Total	355,984	11,410
		SBS Entities	210,663	6,214
		Other	145,321	5,196
ITV	Credit	Total	1,897,249	155,578
		SBS Entities	1,632,251	122,831
		Other	264,998	32,747

[a] For cleared security-based swaps where at least one counterparty is an SBS Entity, Table 2 reflects the security-based swaps entered into by each of the original counterparties, but does not include the positions of the clearing agencies themselves. For uncleared security-based swaps, Table 2 reflects the security-based swaps entered into by each of the original counterparties.

In addition to information reported to registered SBSDRs, the Commission also uses nonpublic data from the DTCC Derivatives Repository Limited Trade Information Warehouse ("DTCC-TIW") to describe the baseline, specifically the single-name CDS market. DTCC-TIW provided data regarding the activity of market participants in the single-name CDS market during the period from November 2006 to September 2022.[820] The Commission acknowledges

[820] DTCC-TIW provided weekly positions and monthly transaction files for single-name and index-based CDS that had been received voluntarily from market participants. These data cover all positions and transactions

that limitations in the data constrain the extent to which it is possible to quantitatively characterize the security-based swap market.[821]

Firms that act as SBS dealers[822] play a central role in the single-name CDS market. Based on an analysis of single-name CDS data in DTCC-TIW in the 12-month period from October 2021 to September 2022, accounts of registered SBS dealer firms intermediated transactions with a gross notional amount of approximately $1.7 trillion, with approximately 66% of the gross notional intermediated by the top five SBS dealer accounts.

These SBS dealers transact with hundreds or thousands of counterparties. One SBS dealer (when accounts are sorted by number of counterparties) transacted with over a thousand counterparty accounts, consisting of both other SBS dealers and non-SBS dealers. The next 13% of SBS dealers each transacted with 500 to 1,000 counterparty accounts; the following 21% of SBS dealers each transacted with 100 to 500 counterparty accounts; and 64% of SBS dealers each transacted security-based swaps with fewer than 100 counterparty accounts in the 12-month period from October 2021 to September 2022. The median number of counterparty accounts across SBS dealers is 18 (the mean is approximately 172). Non-SBS dealer counterparties transacted almost exclusively with these SBS dealers. The median non-SBS dealer counterparty transacted with one SBS dealer account (with an average of approximately 1.8 SBS dealer accounts) in the 12-month period from October 2021 to September 2022.

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where one of the counterparties is a U.S. entity or the reference entity is a U.S. entity, with status as a U.S. entity determined by DTCC-TIW. In DTCC-TIW, the Commission observes end of week CDS positions for all U.S. entities, foreign counterparties to a U.S. entity, or foreign counterparties trading a CDS referencing a U.S. underlying entity. The DTCC-TIW data have limitations. The data do not address two foreign counterparties with CDS referencing foreign underlying entities. In addition, the DTCC-TIW data do not provide any intra-weekly CDS position information, nor any information on the underlying security holdings of reference entities. The Commission had used DTCC-TIW data in prior rulemakings, most recently in Prohibition Against Fraud, Manipulation, or Deception in Connection with Security-Based Swaps; Prohibitions Against Undue Influence over Chief Compliance Officers, SEA Release No. 97656 (June 7, 2023), 88 FR 42546 (June 30, 2023).

821 *See supra* note 820 (discussing DTCC-TIW data limitations). The Commission also relies on qualitative information regarding market structure and evolving market practices provided by commenters and the knowledge and expertise of Commission staff.

822 Dealers are generally persons engaged in the business of buying and selling securities for their own account, through a broker or otherwise. 15 U.S.C. 78c(a)(5). SEA Rule 3a71-1 defines the term security-based swap dealer. 17 CFR 240.3a71-1.

Non-SBS dealer single-name CDS market participants include, but are not limited to, investment companies, pension funds, private funds, sovereign entities, and industrial companies. The Commission observes that most users of CDS that are not SBS dealers do not engage in trading directly, but trade through banks, investment advisers, or other types of firms, which are collectively referred to as transacting agents, consistent with DTCC-TIW terminology.[823] Based on an analysis of DTCC-TIW data, there were 2,397 transacting agents that engaged directly in trading between November 2006 and September 2022.[824]

As shown in Table 3 below, approximately 79% of these 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.[825] Although investment advisers were the vast majority of transacting agents, the transactions they executed account for only 15% of all single-name CDS trading activity reported to DTCC-TIW, measured by number of transaction-sides (each transaction has two transaction sides, i.e., two transaction counterparties). The vast majority of transactions (81.3%) measured by number of transaction-sides were executed by ISDA-recognized SBS dealers.

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823 Transacting agents participate directly in the single-name CDS market, without relying on an intermediary, on behalf of their principals. For example, a university endowment may hold a position in a single-name CDS 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.

824 These 2,397 transacting agents, which are presented in more detail in Table 3 below, include all DTCC-defined "firms" shown in DTCC-TIW as transaction counterparties that report at least one transaction to DTCC-TIW as of Sep. 2022. The staff in the Division of Economic and Risk Analysis classified these transacting agents by matching names, automatically or manually, to third-party databases. *See, e.g.*, ANE Adopting Release, 81 FR 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 (*available at* https://adviserinfo.sec.gov/), and a firm's public website or the public website of the account represented by a firm. The staff also matched names using International Swaps and Derivatives Association (ISDA) protocol adherence letters available on the ISDA website. *See* ISDA, Small Bang Protocol List of Adhering Parties, *available at* https://www.isda.org/traditional-protocol/small-bang-protocol/adhering-parties/; ISDA, Small Bang Protocol List of Adhering Parties, https://www.isda.org/traditional-protocol/big-bang-protocol/adhering-parties/.

825 *See* 15 U.S.C. 80b-1 through 80b-21. The staff in the Division of Economic and Risk Analysis determined whether an entity is an SEC registered investment adviser using the Investment Adviser Public Disclosure website. *See supra* note 824.

Table 3. The number of transacting agents by counterparty type and the fraction of total trading activity, from Nov. 2006 through Sep. 2022, represented by each counterparty type.

Transacting Agents	Number	Percent	Transaction share
Investment Advisers	1891	78.9%	15.0%
- SEC registered	*762*	*31.8%*	*10.0%*
Banks (non-ISDA-recognized SBS dealers)	279	11.6%	3.3%
Pension Funds	31	1.3%	0.1%
Insurance Companies	49	2.0%	0.2%
ISDA-Recognized SBS Dealers[a]	17	0.7%	81.3%
Other[b]	130	5.4%	0.2%
Total	2,397	100.0%	100%

[a] 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. *See, e.g.*, ISDA, 2010 ISDA Operations Benchmarking Survey (2010), *available at* https://www.isda.org/a/5eiDE/isda-operations-survey-2010.pdf.

[b] 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 of the table 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.

Principal holders of CDS risk exposure are represented by "accounts" in DTCC-TIW.[826] The staff's analysis of these accounts in DTCC-TIW shows that the 2,397 transacting agents classified in Table 3 represent 16,061 principal risk holders. Table 4 below classifies these principal risk holders by their counterparty type and whether they are represented by a registered or unregistered investment adviser.[827] For instance, banks in Table 3 allocated transactions across 375 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 3 allocated transactions across 104 accounts. Private funds are the largest type of account holders that the Commission was able to classify.[828]

826 "Accounts" as defined in the DTCC-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-TIW account for its U.S. headquarters and one DTCC-TIW account for one of its foreign branches.

827 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.

828 Most of the funds that could not be classified appear to be private funds. For the purposes of this discussion, "private fund" encompasses various unregistered investment vehicles, including hedge funds,

Table 4. 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 Nov. 2006 through Sep. 2022.

Account Holders by Type	Number	Represented by a registered investment adviser		Represented by an unregistered investment adviser		Participant is a transacting agent[a]	
Private Funds	4,816	2,486	52%	2,271	47%	59	1%
DFA Special Entities	1,631	1,565	96%	44	3%	22	1%
Registered Investment Companies	1,454	1,367	94%	83	6%	4	0%
Banks (non-ISDA-recognized SBS dealers)	375	26	7%	9	2%	340	91%
Insurance Companies	356	219	62%	49	14%	88	25%
ISDA-Recognized SBS Dealers	104	0	0%	0	0%	104	100%
Foreign Sovereigns	98	71	72%	7	7%	20	20%
Non-Financial Corporations	129	96	74%	10	8%	23	18%
Finance Companies	62	46	74%	0	0%	16	26%
Other/Unclassified	7,036	4,262	61%	2,477	35%	297	4%
All	16,061	10,138	63%	4,950	31%	973	6%

[a] This column reflects the number of participants who are also trading for their own accounts.

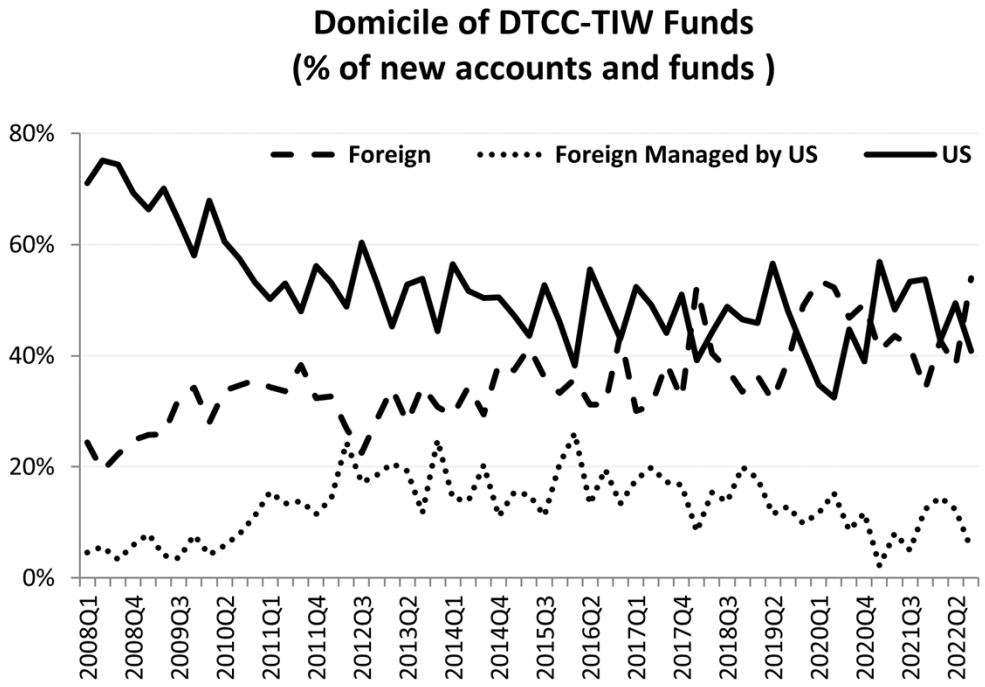
As depicted in Figure 1 below, domiciles of new accounts participating in the single-name CDS market have shifted over time. It is unclear whether these shifts represent changes in the types of participants active in this market, changes in reporting, or changes in transaction volumes in CDS referencing 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 53% in the third quarter of 2022, which might reflect an increase in participation by foreign account holders in the single-name CDS market, though the total number of new entrants that are foreign accounts decreased from 112 in the first quarter of 2008 to 62 in the third quarter of 2022.[829] 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 5.2% in the third quarter of 2022, and the absolute number changed from 21 to 6, which also might reflect more specifically

private equity funds, and venture capital funds. There remain over almost 7,000 DTCC-TIW accounts unclassified by type. Although unclassified, Commission staff manually reviewed each account to verify that it was not likely to be a special entity under SEA Rule 15Fh-2(d) and instead was likely to be an entity such as a corporation, an insurance company, or a bank.

829 These estimates were calculated by Commission staff using DTCC-TIW data.

the flexibility with which market participants can restructure their market participation in response to regulatory intervention, competitive pressures, and other incentives.[830] 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 DTCC-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.[831]

Figure 1



SOURCE: DTCC – 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.[a] Unique new accounts are aggregated each quarter and percentages are computed on a quarterly basis from Jan. 2008 through Nov. 2022.

[a] New accounts outside the United States for a foreign subsidiary of a U.S. person would likely only be subject to the trade execution requirement, should it be in force for single-name CDS, if the U.S. parent provided a guarantee. As such, not all of the "Foreign Managed by US" accounts in this figure would be subject to the trade execution requirement, should it be in force for single-name CDS.

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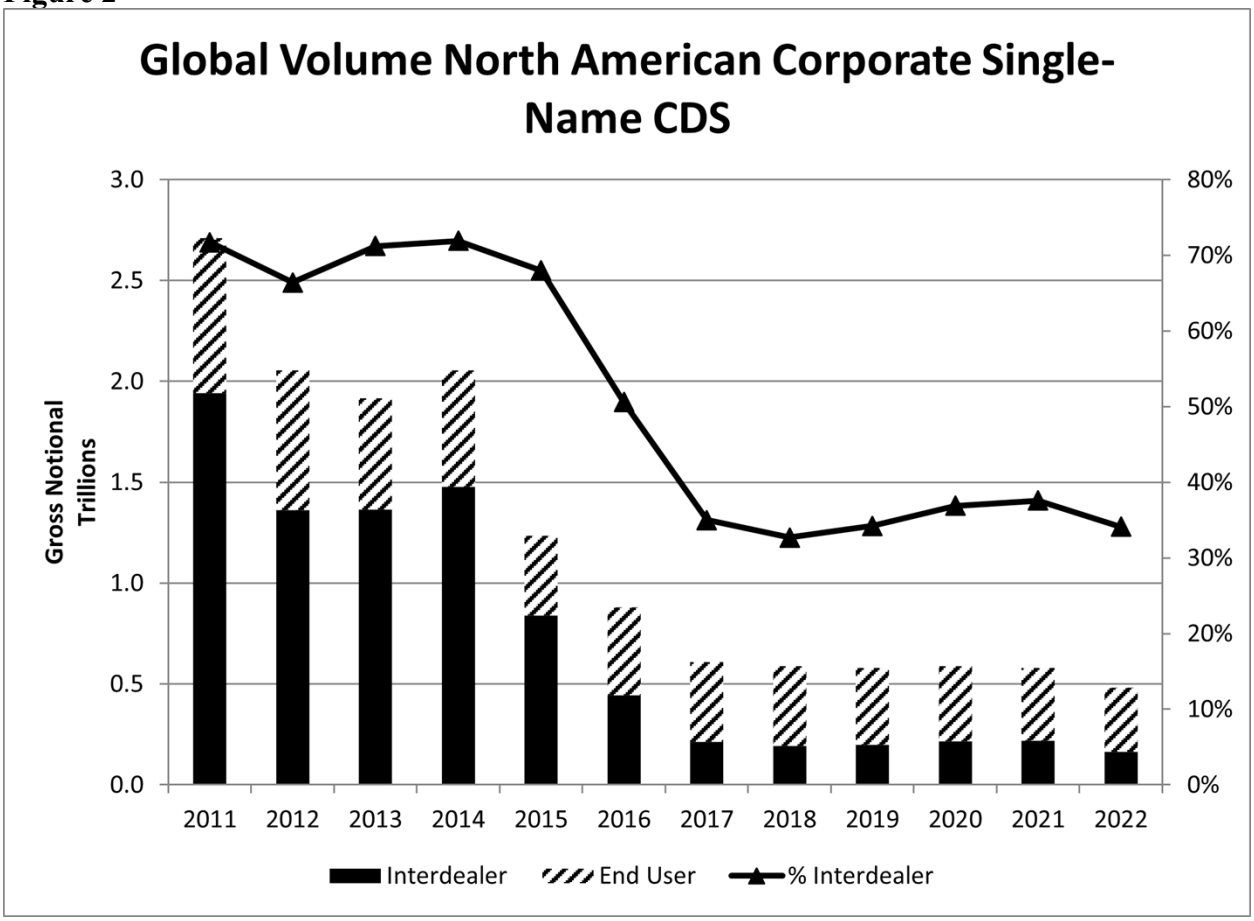
830 *See* Charles Levinson, *U.S. banks moved billions in trades beyond the CFTC's reach*, REUTERS (Aug. 21, 2015) (retrieved from Factiva database). The estimates of 21 and 6 were calculated by Commission staff using DTCC-TIW data.

831 *See supra* note 820 (discussing the single-name CDS transactions that are in the DTCC-TIW data).

Figure 2 below describes the percentage of global, notional transaction volume in North American corporate single-name CDS reported to DTCC-TIW between January 2011 and September 2022, 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 2022. This change 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 12 years,[832] from just under $2 trillion in 2011 to less than $500 billion in 2022.

[832] The start of this decline predates the enactment of the Dodd-Frank Act and the proposal of rules thereunder.

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. These statistics were calculated using data from the entire calendar year for 2011 through 2021. For 2022, these statistics were calculated using data from Jan. 2022 to Sep. 2022. 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 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 intermediate.

As shown in Figure 3 below, half of the trading activity in North American corporate single-name CDS was between counterparties domiciled in the United States and counterparties domiciled abroad. Using the self-reported registered office location of the DTCC-TIW accounts as a proxy for domicile, the Commission estimates that only 13% of the global transaction volume by notional volume between January 2008 and September 2022 was between two U.S.-

domiciled counterparties, compared to 50% entered into between one U.S.-domiciled counterparty and a foreign-domiciled counterparty, and 37% entered into between two foreign-domiciled counterparties.[833]

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 36% and remains at 50% for transactions entered into between a U.S.-domiciled counterparty and a foreign-domiciled counterparty.[834] By contrast, the proportion of activity between two foreign-domiciled counterparties drops from 37% to 14%. 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 majority (approximately 86%) 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 transactions on North American corporate single-name CDS between two ISDA-recognized SBS dealers and their branches or affiliates over the 12-month period from October 2021 to September 2022, 80.7% of

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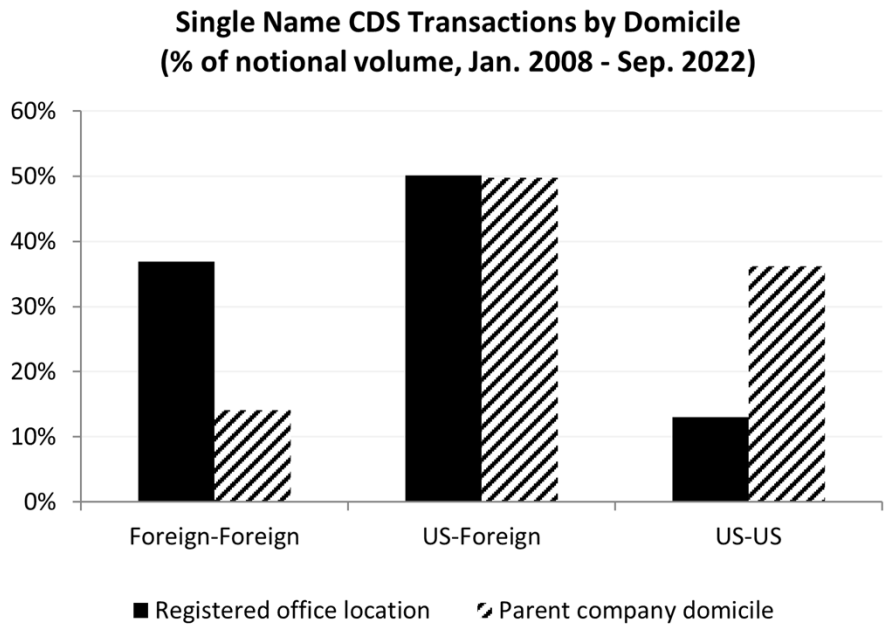
833 For purposes of this discussion, the Commission has assumed that the registered office location reflects the place of domicile for the fund or account, but this domicile does not necessarily correspond to the location of an entity's sales or trading desk. *See* ANE Adopting Release, 81 FR at 8607 n.83.

834 These estimates do not indicate the fraction of North American corporate single-name CDS transactions that would be subject to the trade execution requirement, if it were in force for such transactions. In particular, if the trade execution requirement were in force for North American corporate single-name CDS, a foreign subsidiary of a U.S. entity transacting in such CDS would only be subject to the trade execution requirement if the U.S. parent provides a guarantee to the foreign subsidiary.

transaction notional volume involved at least one account of an entity with a U.S. parent.[835] In addition, 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, 86% 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 14% of such transactions involved an ISDA-recognized SBS dealer and a U.S.-person non-SBS dealer.

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 Jan. 2008 through Sep. 2022.

3. 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.[836] This is

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835 Since the Commission is unable to pair up the same-day cleared trades, this 80.7% estimate is based on bilateral trades that were not same-day cleared in the 12-month period from Oct. 2021 to Sept. 2022.

836 *See* Rule 194 Proposing Release, 80 FR at 51711.

notwithstanding the fact that the SBS market is a small fraction of the swap market[837] and the single-name CDS market, which falls under SEC jurisdiction, is slightly smaller than the index CDS market, which falls under CFTC jurisdiction.[838] For example, persons who register as SBS 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,[839] 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 3,829 DTCC-TIW accounts that participated in the market for single-name CDS in the 12-month period from October 2021 to September 2022 revealed that approximately 2,836 of those accounts, or 74%,

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837 *See* ISDA-SIFMA Letter, *supra* note 18, at 2 (agreeing with the Commission's statement in the Proposing Release that the SBS market is a small fraction of the swap market).

838 As of Nov. 25, 2022, the SBS market had a gross notional amount outstanding of approximately $8.5 trillion (*see supra* section I and section XVII.B.2, Table 1), while the swap market (comprising, for purposes of this discussion, swaps in the interest rate, credit, and foreign-exchange asset classes) had a gross notional amount outstanding of approximately $352 trillion. *See supra* section I. The gross notional amount outstanding in single-name CDS (both corporate and sovereign) was approximately $4.3 trillion (*see supra* section XVII.B.2, Table 1), while the gross notional amount outstanding in index CDS (including index CDS tranches) was approximately $4.5 trillion. Data on gross notional amount outstanding in index CDS is from CFTC Swaps Report, *available at* https://www.cftc.gov/MarketReports/SwapsReports/L3Grossexp.html (accessed on Sept. 27, 2023).

839 "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).

also participated in the market for index CDS. Of the accounts that participated in both markets, data regarding transactions in these 12 months suggest that, conditional on an account transacting in notional volume of index CDS in the top third of accounts, the probability of the same account landing in the top third of accounts in terms of single-name CDS notional volume is approximately 53%; 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 12%. As a result of cross-market participation, informational efficiency, pricing, and liquidity may spill over across markets.[840]

Of the 51 registered SBS dealers, 44 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 51 registered SBS dealers, 30 have a prudential regulator.

4. 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. Three commenters are generally supportive of this belief, stating that the entities most likely to register as SBSEFs are those that are already registered with the CFTC as SEFs.[841] No commenters express disagreement with this belief. Currently, 24 SEFs are registered with the CFTC.[842] Of these SEFs, seven list index CDS for trading.[843] If these SEFs were to list single-name CDS or other SBS for trading, they would be

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840 *See* Business Conduct Standards Release, *supra* note 101, 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, Sept. 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).

841 *See* ICE Letter, *supra* note 18, at 1–2; ICI Letter, *supra* note 18, at 1; Tradeweb Letter, *supra* note 18, at 1–2.

842 *See* CFTC, Swap Execution Facilities (registered) (retrieved June 28, 2023), *available at* https://www.cftc.gov/IndustryOversight/IndustryFilings/SwapExecutionFacilities?Status=Registered&Date_From=&Date_To=&Show_All=0.

843 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 Derivative Markets, L.P. Contract Specifications (Oct. 31, 2022), *available at* http://www.bgcsef.com/wp-content/uploads/2022/11/BGC-SEF-Contract-Specifications_10-31-22.pdf; *Bloomberg SEF LLC Rulebook* (Dec. 5, 2022), *available at*

required to register as SBSEFs with the Commission. In 2022, 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 $10.6 trillion (68%); one SEF had the second largest share at $3.4 trillion (22%); and the remaining 10% of volume was shared among four other SEFs.[844] The number of SBSEF registrants most likely falls between two and seven, but there is uncertainty around the upper end of this estimate. The likely number of SBSEF registrants is five.

5. SBS Trading on Platforms

By analyzing SBS transactions reported to registered SBSDRs,[845] the Commission has estimated the extent of SBS trading on platforms. Of the new transactions in credit SBS executed between November 8, 2021, and December 2, 2022, 14,163 were executed on platforms (2% of all new transactions in credit SBS). During the same period, 329 new transactions in equity SBS were executed on platforms (less than 0.01% of all new transactions in equity SBS), while one new transaction in interest rate SBS was executed on a platform (0.01% of all new transactions

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https://assets.bbhub.io/professional/sites/10/BSEF-Effective-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: 2.42* (effective May 8, 2023), *available at* https://www.theice.com/publicdocs/swap_trade/Rulebook.pdf; TW SEF LLC, *Swap Execution Facility Rules* (effective Jan. 6, 2023), *available at* https://www.tradeweb.com/48ceb9/globalassets/our-businesses/market-regulation/sef-rulebook-jan-2023/tw-sef-rulebook-1.6.23.pdf; TRADITION SEF, *Appendix B to Tradition SEF Rulebook: Credit Product Listing, available at* https://www.traditionsef.com/assets/regulatory/Rulebook-Appendix-B-TSEF-Rulebook-6-02-2023.pdf; tpSEF Inc., *tpSEF Inc. Rulebook Appendix B: tpSEF Inc. Swap Specifications* (effective Mar. 7, 2023)*, available at* https://www.tullettprebon.com/swap_execution_facility/documents/tpSEF%20-%20Rulebook%20-%20Appendix%20B%20-%20Swap%20Specifications.pdf?2023411.

844 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.

845 The estimates presented in this section differ from those presented in the Proposing Release, *supra* note 1, 87 FR at 28946, because of a number of reasons. First, staff from the Division of Economic and Risk Analysis derived the estimates presented herein using reports of SBS transactions executed between Nov. 8, 2021, and Dec. 2, 2022, whereas in the Proposing Release, the staff used reports of SBS transactions executed between Nov. 8, 2021, and Feb. 28, 2022. Second, the staff implemented additional filters to the reports of SBS transactions to (1) more accurately identify and exclude from the analysis those SBS transactions that arise from the allocation of an executed bunched order; (2) exclude potentially erroneous reports (e.g., SBS transactions with extremely large or small notional amount or SBS transactions with improperly sequenced timestamps); (3) identify the current version of a given report; and (4) exclude duplicate reports.

in interest rate SBS). These observations suggest that the vast majority of SBS trading continues to be conducted bilaterally in the OTC market.

The Commission identified 18 platforms on which new SBS transactions were executed between November 8, 2021, and December 2, 2022. Of these 18 platforms, 14 are foreign SBS trading venues and four are U.S. SBS trading venues. Of the four U.S. SBS trading venues, two are CFTC-registered SEFs and two are affiliated with CFTC-registered SEFs. Of the new transactions in credit SBS executed between November 8, 2021, and December 2, 2022, 710 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 (0.1% of all new transactions in credit SBS). During the same period, 241 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).[846]

One commenter states that only a minority of SEFs currently offer trading in SBS and SEFs that do offer trading in SBS estimate that they have approximately 50 or fewer trades per day in SBS.[847] As discussed earlier, the Commission identified two CFTC-registered SEFs on which new SBS transactions were executed between November 8, 2021, and December 2, 2022. During this period, one CFTC-registered SEF had on average 2.4 new SBS transactions executed per day, while the other CFTC-registered SEF had on average 2.8 new SBS transactions executed per day. These estimates are broadly consistent with the commenter's estimate.

6. 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

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846 The one new transaction in interest rate SBS, discussed earlier in this section, was executed on a U.S. platform.

847 *See* ISDA-SIFMA Letter, *supra* note 18, at 2.

market. They expressed their view on a variety of issues relating to OTC derivatives contracts.[848] In subsequent summits, the G20 leaders have returned to OTC derivatives regulatory reform and reaffirmed their goal of completing such reform.[849]

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; (3) requiring post-trade reporting of transaction data to trade repositories; (4) establishing or enhancing capital requirements for non-centrally cleared OTC derivatives transactions; and (5) establishing or enhancing margin and other risk mitigation requirements for non-centrally cleared OTC derivatives transactions. The rules being adopted in this release concern the registration and regulation of SBSEFs, a type of organized trading platform.

As of the end of 2022, 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.[850] Eight foreign jurisdictions have made determinations with respect to the specific OTC derivatives that are required to be traded on platforms.[851]

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848 *See* G20, *Leaders' Statement: The Pittsburgh Summit* (Sept. 24–25, 2009) at para. 13.

849 *See, e.g.*, G20, Osaka Summit Declaration (June 28–29, 2019) at para. 19; Rome Summit Declaration (Oct. 30–31, 2021) at para. 40.

850 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 2022* Tables 1 & K (Nov. 7, 2022), *available at* https://www.fsb.org/wp-content/uploads/P071122.pdf (describing progress made towards implementing platform trading requirements in 2022) and FSB, *OTC Derivatives Market Reforms: 2019 Progress Report on Implementation* Table A (Oct. 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).

851 These jurisdictions are China (bond forwards; certain currency forwards, options, and swaps); the European Union (certain index CDS and certain IRS denominated in Euro); India (certain overnight index swaps); Indonesia (equity and commodity derivative products); Japan (selected Yen-denominated IRS); Mexico (certain Peso-denominated IRS); Singapore (certain IRS denominated in Euro, U.S. dollar, and British pound); and United Kingdom (certain index CDS and certain IRS denominated in Euro and certain IRS denominated in British pound). *See* FSB, *2019 Progress Report* (Table R); FSB, *Implementation Progress in 2022* (footnote 12), *supra* note 850, and Financial Conduct Authority, *Register of derivatives subject to the trading obligation under article 28 of UK MiFIR* (July 24, 2023), *available at* https://register.fca.org.uk/servlet/servlet.FileDownload?file=0150X000006gbbG. In its 2022 report, *see*

7. 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, ranging from bilateral negotiations carried out over the telephone, to RFQ systems (e.g., single-dealer and multi-dealer RFQ platforms), request-for-stream protocol, and 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 and incorporates comments received on the Proposing Release.

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.[852] In a bilateral negotiation, there might be no pre-trade or post-trade transparency available to the market 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

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supra note 850, the FSB noted no change in status in the implementation of platform trading requirements since its 2019 report.

852 *See, e.g.*, Trade Acknowledgement and Verification Adopting Release, *supra* note 802, 81 FR at 39809.

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.

One commenter elaborates on this model of trading, focusing specifically on dealer-to-client trading in the SBS market.[853] According to this commenter, at the moment, dealer-to-client trading in security-based swaps is largely opaque and fragmented, with most executions arising out of one-to-one private negotiations. When engaging with clients, liquidity providers typically provide "indicative" quotes (as opposed to firm binding quotes), inviting interested clients to follow-up bilaterally in order to obtain an executable price for a specific instrument.[854] Given that these executable prices are often only then honored at that exact moment in time, clients are unable to effectively put liquidity providers in competition and have little to no pre-trade transparency regarding other available prices in the market.[855] Instead clients face the choice of either accepting the first executable price received or starting over with a new one-to-one negotiation, where pricing could move against the client as its trading interest is sequentially disclosed to additional market participant.[856] The commenter states that this opaque and fragmented execution process impairs client access to best execution by denying clients the ability to effectively compare and evaluate the quality of prices.[857]

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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853 *See* Citadel Letter, *supra* note 18, at 8.

854 *Id.*

855 *Id.*

856 *Id.*

857 *Id.*

messages to one or more potential respondents (SBS dealers).[858] 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.[859] 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.[860] 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 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

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858 *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).

859 *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).

860 *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 (Jan. 26, 2022), 87 FR 15496 (Mar. 18, 2022) ("ATS-G Proposal"), section VIII.B.1.a therein.

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.

Two commenters describe the "request-for-stream" trading protocol, which allows liquidity providers to stream firm prices on trading platforms such as those run by SEFs.[861] These firm prices are not required to be communicated to clients sending an RFQ on these trading platforms.

A fourth 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.[862] 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.[863] 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 models described above, because participants can view bids and offers before placing their bids and offers. However, broadly communicating trading interest,

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861 *See* Citadel Letter, *supra* note 18, at 13; MFA Letter, *supra* note 18, at 8. *See* also *supra* section V.E.1(b)(iii). *See* also Lynn Riggs, Esen Onur, David Reiffen, and Haoxiang Zhu, *Swap Trading After Dodd-Frank: Evidence from Index CDS*, 137 J. Financial Economics 857 (2020) (documenting that this trading protocol—also referred to as "request for streaming"—is one of the trading protocols used in the trading of index CDS on SEFs).

862 With respect to swaps traded on CFTC-registered SEFs, CFTC regulation § 37.9(a) provides that Required Transactions that are not block trades must generally be executed via an order book or RFQ system. CFTC regulations §§ 37.9(d) and (e) contain exceptions to the § 37.9(a) execution requirements for certain package transactions and error trades, respectively. *See supra* section V.E.

863 Under CFTC rules applicable to the swaps markets, § 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 V.E (discussing Rule 815).

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.

The 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 and Costs

The Commission's consideration of the benefits and costs of the adopted rules and amendments takes into account the connection between the trade execution requirement and the mandatory clearing requirement mandated by Congress. Specifically, the Dodd-Frank Act amended 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;[864] 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.[865] The benefits and costs associated with the trade execution requirement will 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 general approach to finalizing requirements relating to SBS execution could mitigate costs associated with the adopted rules and amendments. As discussed in section I, the Commission's approach is to harmonize as closely as practicable with analogous CFTC rules for

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[864] *See* Pub. L. No. 111-203, § 763(a) (adding section 3C(a)(1) of the SEA).

[865] *See id. See also* Pub. L. No. 111-203, § 761(a) (adding section 3(a)(77) of the SEA to define the term "security-based swap execution facility").

SEFs, unless a reason exists to do otherwise in a particular area. Based on the Commission's 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 potentially will result in compliance costs for registered SBSEFs that are lower than compliance costs that would have resulted had the Commission chosen not to harmonize its approach as closely as practicable with analogous CFTC rules for SEFs.[866] Several commenters state that the Commission's general approach would mitigate costs for registered SBSEFs and SBS market participants.[867]

In assessing the economic impact of the adopted rules and amendments, the Commission considers the broader costs and benefits associated with the application of the adopted rules and amendments, including the costs and benefits of applying the substantive Title VII requirements to the trading of SBS.[868] 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 adopted rules and amendments. 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

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866 In section XVIII *infra*, for purposes of the PRA, the Commission estimates burdens applicable to a stand-alone SBSEF. However, the Commission anticipates 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 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.

867 *See* Bloomberg Letter, *supra* note 18, at 2, 10, 18; ICE Letter, *supra* note 18, at 2; ISDA-SIFMA Letter, *supra* note 18, at 2; SIFMA AMG Letter, *supra* note 18, at 5; Tradeweb Letter, *supra* note 18, at 1–2.

868 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, *supra* note 140.

of the SBS market likely will not differ from the current baseline and the potential costs and benefits discussed below will 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 will move trading of the products covered by the determinations onto SBSEFs, which can 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 Regulation SE 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 will 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 will 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 will arise. The Commission does not have the data to determine which of the above possibilities will prevail following the adoption of the rules and amendments considered herein.

The Commission has attempted to quantify economic effects where possible, but much of the discussion of economic effects is necessarily qualitative.

1. Overarching Benefits of the Rules and Amendments

Broadly, the Commission anticipates that the new rules and amendments may bring several overarching benefits to the SBS market.

Improved Transparency. The final rules would enable the Commission to obtain information about SBSEFs, thereby facilitating the Commission's oversight of these entities.[869]

In addition, the requirements relating to pre-trade transparency would increase pre-trade transparency in the market for SBS.[870] 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.[871] The requirements with respect to pre-trade price transparency should lead to more efficient pricing in the SBS market.[872]

Evidence from the swap market suggests that an increase in pre-trade transparency is associated with improved liquidity and reduced transaction costs.[873] The Commission is not 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

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869 For example, Rule 826, among other things, requires 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 infra* this section for a discussion of how Regulation SE would provide the means for the Commission to gain better insight into and oversight of SBSEFs and the SBS market.

870 Rules 803(a)(2) and (3) require an SBSEF to offer, at a minimum, an order book for SBS trading, subject to certain exceptions related to package transactions. Rule 815(a) requires SBS transactions subject to the trade execution requirement to be executed using either an order book or via an RFQ-to-3 system. Rule 816 sets forth the process by which an SBSEF would subject an SBS to the trade execution requirement. Rule 817 informs market participants of the date on which the trade execution requirement for a particular SBS commences. Rule 832 describes those cross-border SBS transactions that would be subject to the trade execution requirement.

871 *See, e.g.*, Ananth Madhavan, *Market Microstructure: A Practitioner's Guide*, 58 Fin. Analysts J., at 38 (2002) (nondisclosure of pre-trade price information benefits dealers by reducing price competition).

872 *See, e.g.*, Ekkehart Boehmer, *et al.*, *Lifting the Veil: An Analysis of Pre-trade Transparency at the NYSE*, 60 J. Fin. 783(2005) (greater pre-trade price transparency leads to more efficient pricing).

873 *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 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).

provision of liquidity by some market participants.[874] However, having two execution methods for Required Transactions (limit order book and RFQ-to-3) would provide market participants with flexibility in the degree of pre-trade transparency they wish to employ. Using RFQ-to-3, a market participant could choose to reveal its trading interest to no more than three market participants; using a limit order book, the market participant would reveal its trading interest to all other market participants that have access to the same limit order book, which may exceed three market participants. The flexibility in the degree of pre-trade transparency should diminish potential concerns associated with the exposure of pre-trade trading interest.

Two commenters agree that the proposal would increase transparency in the SBS market.[875] One of these commenters believes that the introduction of multilateral trading protocols would increase pre-trade transparency and competition, which should improve liquidity conditions, reduce transaction costs, and facilitate execution quality analysis, as clients will be able to put liquidity providers in direct competition.[876]

One commenter believes that proposed Rule 819(c) would help ensure that investment advisers to regulated funds will be able to participate on SBSEFs, accessing the pricing and other market information that may be available on SBSEF, which would increase transparency in the derivatives market.[877] The Commission agrees that Rule 819(c), by requiring an SBSEF to provide any ECP with impartial access to its market(s) and market services, would help ensure that ECPs, including investment advisers, are able to access pricing and other market information on SBSEFs thereby increasing transparency in the SBS market.

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874 *See, e.g.*, Ananth Madhavan, *et al*., *Should Securities Markets Be Transparent?*, 8 J. Fin.Markets 265 (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).

875 *See* Bloomberg Letter, *supra* note 18, at 1; Citadel Letter, *supra* note 18, at 8.

876 *See* Citadel Letter, *supra* note 18, at 8.

877 *See* ICI Letter, *supra* note 18, at 11 n.6.

Improved oversight of trading. Regulation SE requires, 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.[878] These requirements are designed to provide an SBSEF with sufficient information to oversee trading on its market, including detecting and deterring abusive trading practices. Additionally, an SBSEF shall permit trading only in SBS that are not readily susceptible to manipulation[879] and adopt rules that are reasonably designed to 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.[880]

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 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, Regulation SE 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.[881] 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 final rules provide a framework for allowing a number of

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878 *See* Rules 819, 821, 822, and 826.

879 *See* Rule 820.

880 *See* Rule 824(b)(1).

881 *See supra* section XVII.B.2.

trading venues to register as SBSEFs and thus more effectively compete for business in SBS. Furthermore, 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.

Rule 819(c), among other things, requires an SBSEF to provide any ECP with impartial access to its market(s) and market services. Rule 819(c)(4), Rule 819(g)(14), along with the new rules and amendments to the Commission's Rules of Practice 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 file an application for review by the Commission in a timely manner.[882] These rules and amendments are designed to improve access to, foster confidence in, and provide for the oversight of SBSEF functions by creating a procedure for making appeals to the Commission.

Taken together, these 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 on SBSEFs could increase competition in liquidity provision and lower trading costs, which may lead to increased participation in the SBS market. One commenter agrees that Rule 819(c), in particular, would increase competition in the SBS market. The commenter further states that the rule would increase liquidity, efficiency, and fairness in the SBS market.[883] The Commission agrees that Rule 819(c), together with the other rules described earlier, could increase competition in the SBS market, specifically competition in liquidity provision as discussed above. To the extent that increased competition in liquidity provision lowers bid-offer spreads and transaction costs, liquidity and efficiency in the SBS market would increase. Rule 819(c), by requiring an SBSEF to provide any ECP with impartial access to its

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882 *See* Rules 819(c)(4) and 819(g)(14); Rules 442 and 443; amendments to Rules 101, 202, 210, 401, 450, and 460. Rule 442(b), among other things, clarifies that the 30-day period for filing an application for review will not be extended absent a showing of extraordinary circumstances, which is intended to encourage parties to act timely in seeking review.

883 *See* ICI Letter, *supra* note 18, at 2.

market(s) and market services, would help ensure that all ECPs will receive the same treatment with respect to access to the SBSEF's market(s) and market services and thus help to increase fairness in the SBS market.

Two commenters believe that Proposed Rule 815(f), which is designed to prohibit post-trade name give up for an SBS that is executed anonymously on an SBSEF and intended to be cleared, would increase participation on SBSEFs and in turn increase competition, liquidity, and efficiency.[884] One of these commenters also believes the proposed rule would increase fairness in the SBS markets.[885]

Rules 815(f) and 815(g) could generate such beneficial effects. The practice of post-trade name give-up increases the risk of information leakage and can deter participation by liquidity seekers on SBSEFs. By prohibiting such a practice for an SBS that is executed anonymously on an SBSEF and intended to be cleared, Rule 815(f) would reduce the risk of information leakage and encourage more liquidity seekers to participate on SBSEFs. Further, by helping to protect the anonymity of market participants, Rule 815(f) could encourage a more diverse set of market participants to transact in anonymous order books.

Rule 815(g) specifies that SBSEFs shall establish and enforce rules that provide that a security-based swap that is intended to be cleared at the time of the transaction, but is not accepted for clearing at a registered clearing agency, shall be void *ab initio.* The rule would ensure that a trade that is rejected for clearing would not become a bilateral transaction, in which case the counterparties would have to divulge their identities. As such, the rule would reduce the risk of information leakage and protect the anonymity of market participants for SBS that is executed anonymously and intended to be cleared, but is nonetheless rejected for clearing. This in turn could increase participation on SBSEFs by liquidity seekers and those wishing to transact in anonymous order books, similar to Rule 815(f).

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884 *See id.*; SIFMA AMG Letter, *supra* note 18, at 11.

885 *See* ICI Letter, *supra* note 18, at 2.

Increased participation by liquidity seekers on SBSEFs could in turn increase participation by liquidity providers and promote competition in liquidity provision. Greater participation in anonymous order books also could promote competition in liquidity provision if erstwhile liquidity seekers choose to provide liquidity in competition with SBS dealers in these order books. To the extent that increased competition in liquidity provision lowers bid-offer spreads and transaction costs, liquidity and efficiency in the SBS market would increase.

By helping to protect the anonymity of those that transact in anonymous order books, the rule would deprive SBS dealers of a means of deterring access to and participation in such order books by buy-side market participants.[886] Thus, Rule 815(g) could help promote a level playing field by ensuring that both buy-side market participants and dealers can participate in these order books.

Regulation SE would promote competition among entities that act as third-party service providers to SBSEFs. Rule 819(c) would, among other things, require an SBSEF to provide any independent software vendor with impartial access to its market(s) and market services. The rule would provide a level playing field to software vendors with respect to access to SBSEFs and promote competition among these vendors as they vie for an SBSEF's business. Rule 819(e) would permit an SBSEF to contract with a registered futures association, a DCM, a national securities exchange, a national securities association, or another SBSEF for the provision of services to assist in complying with the SEA and Commission rules thereunder, as approved by the Commission. By permitting an SBSEF to choose from a range of regulatory services providers, Rule 819(e) could promote competition among regulatory services providers. To the extent that increased competition among independent software vendors and regulatory services providers incentivizes them to offer cheaper, higher quality services to SBSEFs thereby lowering their costs, market participants that are SBSEF members could benefit to the extent the SBSEFs

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886 *See* Citadel Letter, *supra* note 18, at 11 (stating that PTNGU, by revealing counterparty identities, can be used as a policing mechanism by dealers to deter buy-side access and participation).

pass on the cost savings in the form of lower fees to their members. Lower fees for SBSEF members would help reduce the overall costs of trading on SBSEFs and increase the efficiency of SBS trading.

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.[887] Regulation SE 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[888] and to obtain other relevant information from SBSEFs.[889]

Additionally, Rule 826(b) requires every SBSEF to keep full, complete, and systematic records of all activities relating to its business with respect to SBS. In addition, Rule 819(f) requires 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, Rule 835 requires 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, which facilitates the Commission's review of the SBSEF's disciplinary process and exercise of its regulatory powers, providing the

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887 *See* Pub. L. No. 111-203, Preamble.

888 *See* Rules 804, 805, 806, and 807.

889 *See* Rule 811.

Commission an additional tool to carry out its oversight responsibilities. Rule 813 provides for Commission oversight of SBSEFs in their use of information collected for regulatory purposes and is designed to deter the misappropriation or misuse of such information. Rule 824(c) requires an SBSEF to, among other things, promptly notify the Commission of its exercise of emergency authority and provide information related to the use of that authority. The registration requirements and related 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 Regulation SE's requirements 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.[890] The final 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 more rapidly and at a lower expense per transaction. Such increased efficiency could enable members of the SBSEF to handle increased volumes of SBS with greater efficiency and timeliness.

2. Benefits Associated with Specific Rules

In addition to the broad benefits that the Commission anticipates as a result of the rules and amendments adopted in this release, individual rules could bring particular benefits to the SBS market.[891] These include the following:

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890 *See* Rules 819(d)(4) and 826.

891 Unless otherwise stated, quantified benefits in this section are adjusted for CPI inflation using 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.

Registration requirements and Form SBSEF. SBSEF registration is required under the Dodd-Frank Act.[892] 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 Core Principles in section 3D(d) of the SEA and the Commission's rules thereunder. The registration process described in Rule 803 implements this statutory requirement and assists the Commission in overseeing and regulating the SBS market. The information to be provided on 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. 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. Finally, Rule 814(a) helps provide regulatory certainty for an entity that operates both an exchange and an SBSEF by clarifying that such an entity is required to separately register the two facilities pursuant to section 6 of the SEA and Rule 803, respectively.

Exemptions (Rule 833, Rule 816(e), amendments to Rule 3a1-1, and Rule 15a-12). Rule 833 is designed to preserve access to foreign markets by "covered persons" (as defined in Rule 832). As discussed in section XVII.B.2, 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 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 will 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

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892 *See* SEA section 3D(a)(1), 15 U.S.C. 78c-4(a)(1).

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.[893] Thus, removal of the existing exemption restores 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, Rule 833(a) allows foreign SBS trading venues to operate in conditions similar to the current baseline (if the Commission ultimately grants an exemption under Rule 833(a)).

Paragraph (a)(4) of Rule 3a1-1 provides that an entity that has registered with the Commission as an SBSEF and provides a market place for no securities other than SBS will not fall within the definition of "exchange" and thus will not be subject to the requirement in section

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[893] *See supra* section III.

5 of the SEA to register as a national securities exchange (or obtain a low-volume exemption). The benefit of the amendment is to clarify to prospective SBSEF applicants that, if they register with the Commission as SBSEFs, they will not face duplicative registration and regulatory requirements as exchanges. In addition, paragraph (a)(5) of Rule 3a1-1 codifies a series of exemptions that the Commission has granted over several years to SBS clearing agencies that operate "forced trading" sessions to support end-of-day valuations of SBS. Because the amendment is intended to codify existing exemptions, any associated economic effects would be minimal.

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 rule, such SBSEFs (defined as "SBSEF-Bs" for purposes of Rule 15a-12) will 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. Rule 15a-12 allows an SBSEF-B to satisfy the requirement to register as a broker by registering as an SBSEF under Rule 803 and exempts 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 rule, SBSEF-Bs could avoid incurring duplicative and unnecessary compliance burdens. Each SBSEF-B could save an estimated $345,826 in initial broker registration costs[894] and $62,878 in annual ongoing costs of meeting broker registration requirements.[895] In deriving these estimates, the Commission assumes that the activities an SBSEF-B performs to register and

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894 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 Dec. 2022, these costs are $345,826.

895 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 6312. Adjusted for inflation through Dec. 2022, these costs are $62,878. 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.

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 $821 in ongoing costs associated with satisfying broker minimum capital requirements.[896] The estimated aggregate initial and annual ongoing savings are $1,729,130 and $318,495, respectively.[897]

Rule and product filings. Rules 806 and 807 set forth alternative filing processes for a new rule or rule amendment of a registered SBSEF, and Rules 804 and 805 set forth alternative filing processes for an SBSEF to file an SBS product that it wishes to list. 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 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.[898] The information to be provided by the SBSEF under Rules 804, 805, and 810 will further the ability of the Commission to obtain information regarding SBS that an SBSEF intends to list on its market. The rules will 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, Rule 806(a)(5), which requires 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

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896 Absent the 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 estimates the cost of capital using the annual stock returns on a value-weighted portfolio of financial stocks from 1988 to 2022 (*see* Kenneth French, 48 Industry Portfolios, *available at* http://mba.tuck.dartmouth.edu/pages/faculty/ken.french/ftp/48_Industry_Portfolios_CSV.zip (accessed on May 18, 2023). These returns were averaged to arrive at an estimate of 16.41%. The cost of capital = 16.41% x $5,000 = $820.50 or approximately $821.

897 The Commission estimates the number of SBSEF-Bs as the number of entities that likely will register as SBSEFs. *See supra* section XVII.B.4. Aggregate initial savings = $345,826 x 5 (number of SBSEF-Bs) = $1,729,130. Aggregate annual ongoing savings = ($62,878 + $821) x 5 (number of SBSEFs) = $318,495.

898 *See* Rules 804(a)(3)(iv) and 807(a)(6)(iv).

SBSEFs to consider the positive as well as negative aspects of their proposed rules or rule amendments with respect to competition. Rule 808 is designed to facilitate the public's ability to obtain information from SBSEF applications as well as rule and product filings. Rule 808(a) specifies the parts of an SBSEF application that the Commission shall make publicly available unless confidential treatment is obtained pursuant to SEA Rule 24b-2. Rule 808(b) provides that the Commission shall make an SBSEF's rule and product filings publicly available unless confidential treatment is obtained pursuant to SEA Rule 24b-2. Rule 808(c) provides that the terms and conditions of a product submitted to the Commission pursuant to any of 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.

Rule 809 provides a mechanism for the staying of a product certification or the tolling of a review period for a filing by an SBSEF relating to a product while the appropriate jurisdictional classification of that product is determined. The 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, 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 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. Rule 831, among other things, requires the CCO of an SBSEF to submit an annual compliance report to the Commission. The report will 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 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, Rule 831 would promote regulatory compliance on SBSEFs and the SBS market generally.[899] 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. Rule 831, among other things, requires the CCO to resolve material conflicts of interest that may arise in consultation with the governing board or the senior officers of the SBSEF.[900] Rule 828(a) requires an SBSEF to establish and enforce rules to minimize conflicts of interest in its decision-making process and establish a process for resolving the conflicts of interest. Rule 828(b) would require an SBSEF to comply with the requirements of Rule 834, which is designed to implement section 765 of the Dodd-Frank Act with respect to SBSEFs and SBS exchanges. Rule 834, among other things, imposes a 20% cap on the voting interest held by an individual member of an SBSEF or SBS exchange, mitigates conflicts of interest in the disciplinary process of an SBSEF or SBS exchange, sets forth certain minimum requirements for the composition of the governing board of an SBSEF or SBS exchange, sets forth reporting requirements related to governing board elections, and addresses the avoidance of conflicts of interest in the execution of regulatory functions by an SBSEF or SBS exchange.[901]

The rules would mitigate conflicts of interest between an SBSEF or SBS exchange and its members as discussed in section VIII. Relative to the bilateral OTC SBS market, SBSEFs and

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899 The SBSEF remains responsible for establishing and administering required policies and procedures. *See supra* section VI.N.

900 *See* Rules 831(a)(2)(iii) and (h)(2).

901 *See* Rules 834(b) to (g).

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. Regulation SE, by mitigating such conflicts of interest could help ensure access to SBSEFs and SBS exchanges and in turn increase competition in liquidity provision and lower transaction costs. 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 SBSEFs and SBS exchanges already have rules in place that comply with the rules.

Structured Data Requirements. Rule 825(c)(3) requires 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.[902] Requiring the Daily Market Data Report to be provided in a structured, machine-readable data language (using a Commission-created XML schema) will 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 will be made available in a consistent and openly accessible manner that will allow for automatic processing by software applications, thus enabling search capabilities and statistical and comparative analyses across SBSEFs and date ranges.[903] This will ensure that SBS market participants and market observers seeking to use

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902 *See* Rule 825(c)(3).

903 In addition, the associated PDF renderer will provide users with a human-readable document for those who prefer to review manually individual reports, while still providing a uniform presentation.

the data will not have to spend time manually collecting and entering the data into a format that allows for analysis.

One commenter stated that using custom XML rather than Inline XBRL "would essentially require re-creating what XBRL already offers" and that the use of custom XML "would result in added costs for all stakeholders, reduced efficiencies in adapting to changes, and the inability to commingle datasets."[904] The Daily Market Data Report, which includes the trade count, the total notional amount traded, and the opening and closing price, is well-suited for custom XML as the information would easily fit within a table and the use of custom XML would make the file size of the document smaller than would be the case with Inline XBRL, which helps to reduce operating system overhead. Posting the Daily Market Data Report would not impose significant costs to prospective and actual SBSEFs due to the limited extent and complexity of the required data points to be reported, and because SBSEFs are already required to use structured data to fulfill their reporting requirements under Regulation SBSR[905] and therefore would have relevant systems in place to structure and publicly disseminate other SBS trading information.[906] While the use of custom XML will make it more difficult for data users to aggregate and compare the data points on the Daily Market Data Report with data points in other Inline XBRL datasets in an efficient manner, the streamlined schema and reduced file size justify that drawback.

Regulation SE requires SBSEFs to file disclosures required under various provisions in the EDGAR system using structured (machine-readable) data languages.[907] Requiring a

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904 *See* XBRL US Letter, *supra* note 718, at 2.

905 *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").

906 *See infra* section XVII.C.3 for a discussion of the specific content of the Daily Market Data Report and how it differs from the SBS transaction reports disseminated under Regulation SBSR.

907 This includes the documents required under: Rule 803(b)(1)(i) and (3) (filings of, and amendments to, specified exhibits in a Form SBSEF application); Rules 803(e) and 803(f) (requests to withdraw or vacate an application for registration); Rule 829(g)(6) (submission to the Commission of reports related to financial resources and related documentation); and Rule 831(j)(2) (submission to the Commission of the annual compliance report of the SBSEF's CCO). *See supra* section XIII.A.

centralized filing location and a machine-readable data language for these disclosures will 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 structured disclosures.

The structured data requirements under Regulation SE will facilitate access to the structured information in the filings, enabling Commission staff to perform more efficient retrieval, aggregation, and comparison across different SBSEFs and time periods, as compared to an unstructured PDF, HTML, or ASCII format requirement. The functionality enabled by a machine-readable data requirement will allow staff to better utilize the structured information in Regulation SE filings to ensure compliance with the SEA and rules and regulations thereunder applicable to SBSEFs (e.g., by enabling efficient staff identification of material changes to compliance policies or material non-compliance matters to gauge the soundness of SBSEF compliance programs), thus ultimately furthering the Commission's mission of maintaining fair, orderly, and efficient markets.

In a change from the proposal, Regulation SE will require some of the structured disclosures to be filed in custom XML rather than Inline XBRL.[908] Because both custom XML and Inline XBRL are structured data languages that result in machine-readable disclosures, the aforementioned benefits would apply in both cases. Inline XBRL specifically provides the ability to tag detailed facts within narrative text blocks, and is thus well-suited to accommodate many

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908 The custom XML requirements apply to information required under Rules 803(e) and (f) regarding withdrawal or vacation applications; the Form SBSEF Cover Sheet; and Exhibits A, B, G, M, N, and T to Form SBSEF. The Inline XBRL requirements apply to information required under Rules 829 and 831 regarding financial resources reports and CCO compliance reports, respectively; and Exhibits C through F, H through L, and P through S to Form SBSEF. *See supra* section XIII.A. *See also supra* notes 724–726 and accompanying text (discussing the final rule text revisions that implement the reduced scope of Inline XBRL requirements for Form SBSEF).

disclosures required under proposed Regulation SE, several of which require extended narrative discussions (e.g., the chief compliance officer's report required under Rule 831).[909] In addition, certain required 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. A benefit specific to custom XML disclosures is that EDGAR can create fillable web forms allowing SBSEFs, at their option, to input their disclosures manually and have EDGAR convert them into the specific custom XML data language, removing the need for SBSEFs to structure the disclosures in the custom XML data language themselves. This added flexibility may ease compliance burdens for any SBSEFs that choose to use the fillable web form.

One commenter noted that an Inline XBRL requirement for the proposed disclosures would allow financial identification and textual data in both a human- and machine-readable format consistently in a fashion that would allow Form SBSEF data to be commingled with other SEC-reported datasets.[910] While we generally agree that Inline XBRL provides such benefits related to data use, the greater compliance flexibility afforded by custom XML merits using custom XML for the specified disclosures.

In another change from the proposal, where Regulation SE requires copies of existing documents (e.g., copies of manuals, contracts, organizational documents) to be attached to filings, those copies will be filed as unstructured PDF attachments.[911] The absence of structuring requirements for these documents will further reduce compliance burdens on SBSEFs, and although the content of those copies will not be machine-readable, we do not believe the informational benefits associated with having such documents in structured form would be

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909 *See* Rule 831.

910 *See* XBRL US Letter, *supra* note 718, at 2.

911 This includes attached copies of existing documents required under Exhibits A, G, I, M, N, and O to Form SBSEF. *See supra* section XIII.A. *See also supra* notes 724–726 and accompanying text (discussing the final rule text revisions that implement the reduced scope of Inline XBRL requirements for Form SBSEF).

significant enough to merit requiring SBSEFs to retroactively structure such existing documents. In addition, filings related to new SBSEF rules and products under Rules 804 through 807 and 816 will be filed as unstructured documents through the EFFS system rather than through EDGAR. As noted by one commenter, the absence of structuring requirements for these filings will similarly reduce compliance burdens on SBSEFs.[912]

3. Costs

Although Regulation SE would benefit the SBS market, the Commission recognizes that Regulation SE also would entail certain costs.[913] 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 adopted 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 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.[914] Even if the trade execution requirement is triggered for an SBS, market participants that wish to avoid being subject to the requirement may do so by strategically choosing the location of the desk executing a trade in that SBS.[915] At the same time, if the rules

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912 *See* Bloomberg Letter, *supra* note 18, at 20. *See also supra* notes 730–733 (discussing the final rule text revisions that implement the requirement for SBSEFs to file rule and product filings in unstructured format using the EFFS system).

913 Unless otherwise stated, quantified costs in this section are adjusted for CPI inflation using 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.

914 *See supra* section XVII.C (noting that the benefits and costs associated with the trade execution requirement would not materialize unless and until the Commission makes a mandatory clearing determination).

915 *See* Citadel Letter, *supra* note 18, at 16.

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 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 is perceived costs associated with front-running, if customers or SBS dealers are 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.[916] These potential costs would likely vary based on the notional size of the SBS transaction and, in particular, would likely be greater for market participants engaging in SBS trades of a larger notional size.[917] If market participants view Regulation SE 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 Rules 815(d)(2) and Rules 815(d)(3) that provide an exception for certain package transactions that allows for flexible methods of execution for what would be otherwise Required Transactions.[918]

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916 *See, e.g.*, Ananth Madhavan, *Market Microstructure: A Survey*, J. of Fin. Markets, Vol. 3(2000).

917 The potential costs associated with SBS trades of a larger notional size could be affected by a definition of "block trade" that includes a block trade threshold that market participants could rely on for the exception from the Required Transaction requirement in Rule 815(a)(2). As discussed in section V.E.1(c)(i), *supra*, a block-trade exception for SBSs subject to the trade-execution requirement, provided that "block trade" is appropriately defined for those SBSs, can help ensure that large trades are not significantly more difficult and costly to execute because of the risks posed by information leakage and the potential for adverse price movement, which could significantly impair liquidity in the markets for those SBSs.

918 *See* Rule 815(d)(2) and Rule 815(d)(3). Neither an SBS that is intended to be cleared (even if it is not required to be cleared) nor a swap subject to a CFTC trade execution requirement would create an exception from required methods of execution for a Required Transaction that is part of the same package.

On the other hand, if the requirements with respect to pre-trade transparency bring about only a marginal increase in pre-trade transparency, 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 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.

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. In the Proposing Release, the Commission invited comment 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. Commenters did not provide estimates of likely fees and costs associated with transacting on SBSEFs or fees and costs associated with transacting on unregulated trading venues.

As discussed in section XVII.B, prospective SBSEF registrants are likely to be CFTC-registered SEFs that are active in the index CDS market. Because the final rules are harmonized as closely as practicable with analogous CFTC rules for SEFs, unless a reason exists to do otherwise in a particular area, 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[919] and making limited changes to their systems, policies, and procedures to comply with SEC rules that differ slightly from analogous CFTC rules. The Commission estimates the one-time costs associated with such changes to systems, policies, and procedures would range between $26,393 and $1,583,550 per SBSEF and between $131,965 and $7,917,750 in the aggregate, depending on the changes needed. These cost ranges reflect significant uncertainties about the extent of changes that different registrants might need. 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 $1,055,700 to $2,111,400 per SBSEF and in the range of $5,278,500 to $10,557,000 in the aggregate.[920]

Several commenters agree that the Commission's general approach to finalizing requirements relating to SBS execution would mitigate costs for registered SBSEFs.[921]

One commenter is concerned that Rule 816 as proposed would permit SBSEFs to make an SBS available to trade even absent objective evidence of a sufficiently liquid trading

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919 *See infra* section XVII.C.3(c) (discussing the costs that these entities might incur to list SBS products).

920 In the Proposing Release, the Commission estimated that the one-time costs associated with changes to systems, policies, and procedures would range between $25,000 and $1.5 million per SBSEF, depending on the changes needed. The Commission estimated the annual ongoing costs to be between $1 million and $2 million. *See* Proposing Release, *supra note* 1, 87 FR at 28953. Adjusting for inflation in 2022, the Commission now estimates that the one-time costs associated with changes to systems, policies, and procedures would range between $25,000 x 1.0557 (CPI inflation adjustment for 2022) = $26,392.50 or approximately $26,393 and $1.5 million x 1.0557 (CPI inflation adjustment for 2022) = $1,583,550 per SBSEF, depending on the changes needed. In the aggregate, the one-time costs associated with changes to systems, policies, and procedures would range between $26,393 x 5 SBSEFs = $131,965 and $1,583,550 x 5 SBSEFs = $7,917,750, depending on the changes needed. Adjusting for inflation in 2022, the Commission now estimates the annual ongoing costs per SBSEF to be between $1 million x 1.0557 (CPI inflation adjustment for 2022) = $1,055,700 and $2 million x 1.0557 (CPI inflation adjustment for 2022) = $2,111,400. In the aggregate, the annual ongoing costs would be between $1,055,700 x 5 SBSEFs = $5,278,500 and $2,111,400 x 5 SBSEFs = $10,557,000. One commenter states that any potential differences between SEC rules and analogous CFTC rules would require SBSEF registrants to devote resources toward assessing the potential gaps and consequences of regulatory divergence. *See* Bloomberg Letter, *supra* note 18, at 10. Such costs would be part of the one-time costs associated with changes to systems, policies, and procedures. It is possible that SBSEF registrants might incur additional costs toward assessing the potential gaps and consequences of regulatory divergence. In that case, the one-time costs associated with changes to systems, policies, and procedures could be higher than the Commission's estimates.

921 *See supra* section XVII.C and note 867.

market.[922] According to the commenter, requiring SBS with insufficient liquidity to be traded via an order book or an RFQ system would raise a significant risk of revealing investment advisers' sensitive portfolio management strategies.[923] Such information leakage could lead to front-running of funds' trades and to other abusive trading practices that would negatively affect the pricing of SBS and of other related instruments, resulting in higher investment costs for investment advisers' clients, including funds and their investors.[924] The Commission agrees that an inappropriate MAT determination such as the one described by the commenter could result in higher investment costs for investment advisers' clients by increasing the risk of information leakage, front-running, and other abusive trading practices. Regulation SE as adopted would address concerns related to inappropriate MAT determinations. As discussed in section V.F.2, the Commission will have the opportunity to review all SBSEF MAT determinations, whether they are self-certified or voluntarily filed for Commission approval, to consider whether those determinations are adequately supported by evidence and consistent with the SEA and the rules thereunder, including the six factors to be considered for MAT determinations under Rule 816(b).[925] In the absence of such evidence, the Commission can decline to approve or can stay and then object to a MAT petition, which will ultimately allow the Commission to prevent an inappropriate MAT determination from taking effect.

One commenter states that requiring a fund to disclose its trading interest in an SBS of a large notional size to multiple participants—via an order book or an RFQ system—would enable opportunistic market participants to piece together information about the fund's holdings or investment strategy and lead to front-running of those potential trades.[926] The Commission

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922 *See* ICI Letter, *supra* note 18, at 5.

923 *See id.* at 6.

924 *Id.*

925 These six factors are: (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. *See* Rule 816(b).

926 *See* ICI Letter, *supra* note 18, at 11.

agrees that requiring a fund to disclose its trading interest in an SBS of a large notional size to multiple participants via an order book or an RFQ system could impose costs associated with information leakage and front-running. However, these costs have to be considered in light of the benefits of increased pre-trade transparency: increased price competition, increased price efficiency, improved liquidity, and reduced transaction costs.[927] By adopting 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 diminish potential concerns associated with the exposure of pre-trade trading interest. Further, a market participant that wishes to engage in Permitted Transactions of a large notional size can choose any method of execution that is offered by an SBSEF and is not restricted to using a limit order book or RFQ-to-3. For these transactions, any costs associated with information leakage and front-running likely would not be different from those costs that would prevail under the baseline.

One commenter states that Proposed Rule 834 would have the effect of prohibiting certain SBSEF participants from having common ownership and control as the SBSEF. The commenter is concerned that the proposed rule would prevent prospective SBSEFs that are CFTC-registered SEFs from onboarding their affiliated introducing brokers because doing so would exceed the ownership and voting caps set forth in Proposed Rule 834(b).[928] Another commenter is concerned that the rule's 20% ownership cap would limit access to capital and act as barriers to entry for SBSEF and SBS exchanges.[929] Observing that the CFTC did not adopt rules analogous to Proposed Rule 834, the commenters suggest that the proposed rule, if adopted, would be a fundamental departure from the CFTC's rules, minimizing many of the other benefits of a harmonized regime, and thwart efforts to smoothly implement Regulation SE.[930] One

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927 *See supra* section XVII.C.1 (discussing the benefits of increased pre-trade transparency).

928 *See* WMBAA Letter, *supra* note 18, at 2.

929 *See* SIFMA AMG Letter, *supra* note 18, at 12.

930 *See id.*; WMBAA Letter, *supra* note 18, at 3.

commenter further states that some CFTC registered SEFs, which are prospective SBSEFs, might have to review their ownership and governance structure and, possibly, amend their organization.[931]

In response to these concerns, the Commission is adopting Rule 834(b)(3), which provides an exemption from the ownership and voting caps for an SBSEFs that has mitigated the potential conflict of interest with respect to compliance with the rules of the SBSEF by entering into an agreement with a registered futures association or a national securities association for the provision of regulatory services that encompass, at a minimum, real-time monitoring under Rule 819(d)(5) and investigations and investigation reports under Rule 819(d)(6). This exemption should address concerns regarding certain SBSEF participants not being able to have common ownership and control as the SBSEF (provided these appropriate conditions are met); the onboarding of affiliated introducing brokers by certain prospective SBSEFs; access to capital and entry barriers; and potential disruption or delays to the implementation of Regulation SE.

With respect to the Daily Market Data Report required by Proposed Rule 825, one commenter states that the Daily Market Data Report would require inappropriate and detrimental disclosures that would undermine the Commission's goal of fostering a competitive and efficient market for SBS trading. This commenter states that there are significant differences in the information required to be reported under the SEC and CFTC regimes. The commenter states that Proposed Rule 825(c)(1) increases the burden on SBSEFs compared to SEFs by requiring additional information regarding sale and offer prices, as well as qualitative descriptions of certain data that are reported.[932]

This commenter further states that the Commission's proposal does not address why the CFTC's approach would not be acceptable in the context of SBSEFs and does not justify the increased operational costs to SBSEFs (which will ultimately be passed on to members). The

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931 *See* WMBAA Letter, *supra* note 18, at 3.

932 *See* MFA Letter, *supra* note 18, at 13.

commenter also states that the Commission has not considered the costs and potential for duplicative requirements in the context of Regulation SBSR reporting requirements. The commenter concludes that, in sum, the Daily Market Data Report is overly granular and duplicative, is unnecessary for transparency purposes, and could negatively impact the market and market participants. The commenter states that the Commission should therefore remove the Daily Market Data Report in favor of harmonizing with the analogous CFTC rules and that, if the Commission does not eliminate the Daily Market Data Report requirement altogether, it should adopt additional masking protections for trades, specifically with respect to block trades. Failure to do so, the commenter states, would cause inappropriate and detrimental disclosures and would "negate the benefits that the rule purports to achieve by exempting block trades from clearing [sic] requirements."[933]

As discussed in Section IV.H, many of the reporting requirements of the Daily Market Data Report under Proposed Rule 825 are closely aligned with the data required to be disclosed on a daily basis by SEFs under § 16.01 of the CFTC's rule. Further, the Commission is modifying Proposed Rule 825 to resolve the two differences between the proposed Daily Market Data Report and the existing CFTC reporting scheme under § 16.01: (1) that the Daily Market Data Report would include the number of block trades executed[934]; and (2) that the Daily Market Data Report would be posted on the SBSEF's website no later than *the beginning of trading* on the next business day,[935] while the information required by § 16.01 must be made public no later than the next business day.[936]

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933 *See id.* Regulation SE does not address any exemption from clearing requirements.

934 *See* Proposed Rule 825(c)(1)(iii).

935 *See* Proposed Rule 825(c)(4).

936 *See* 17 CFR 16.01(e). The Commission views the requirement to keep each Daily Market Data Report on an SBSEF's website for one year, *see* Proposed Rule 825(c)(5), as a small additional burden for an SBSEF and does not view it as a significant departure from harmonization with the CFTC's SEF regime.

Rule 825(c)(1), as adopted, does not require the disclosure of the number of block trades.[937] Further, Rule 825(c)(4), as adopted, requires the publication of the Daily Market Data Report "as soon as reasonably practicable on the next business day after the day to which the information pertains, but in no event later than 7 a.m. on the next business day." With these modifications, the data called for by Rule 825(c)(1) is consistent with the required daily disclosures for SEFs. These modifications should help address concerns regarding increased burden on SBSEFs compared to SEFs, increased operational costs to SBSEFs, the Daily Market Data Report being overly granular, and negative impact on the market and market participants. The fact that Rule 825(c)(1), as adopted, does not require the disclosure of the number of block trades would obviate the need to adopt masking protections for block trades and address the commenter's concern about inappropriate and detrimental disclosures that would adversely affect competition and efficiency in the SBS market. To the extent that the disclosure of the number of block trades prompts market prices to move against the dealers that facilitated such block trades thereby raising their hedging costs, dealers could raise the price of liquidity provision (e.g., by widening the bid-ask spread) charged to market participants, increase transaction costs, and reduce the efficiency of SBS trading. To the extent that the cost of transacting block trades increases, market participants may choose to exit the SBS market and trade alternative securities. This in turn could reduce participation and competition in the SBS market. Rule 825(c)(1), by not requiring the disclosure of the number of block trades, should mitigate these potential adverse effects on competition and efficiency in the SBS market.

With respect to the concern that the Daily Market Data Report is duplicative of Regulation SBSR and unnecessary for transparency purposes, the former performs a function that is different from the reporting and public dissemination of SBS transactions required by

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[937] The Commission is also, pursuant to its determination not to adopt a definition of "block trade" at this time, deleting the words "including block trades but" from the text of paragraph (c)(i) and (ii) of Rule 825, and is adding the words "after such time as the Commission adopts a definition of 'block trade'" to paragraph (c)(iii) of Rule 825 (formerly paragraph (c)(iv) of Proposed Rule 825) which will have no effect on the requirement as compared to the proposed rule. *See supra* section VI.H.

Regulation SBSR.[938] The Daily Market Data Report would consolidate trading information by venue and provide useful summary information about SBS trading on an SBSEF for all market participants without requiring them to incur costs to collect, process, and aggregate information from individual reports of SBS transactions that are executed on an SBSEF and publicly disseminated pursuant to Regulation SBSR. In addition, the Daily Market Data Report provides information regarding trading on an SBSEF that is not available in the SBS transaction reports that are publicly disseminated pursuant to Regulation SBSR. Among other things, the Daily Market Data Report would provide the opening and closing price; the price that is used for settlement purposes, if different from the closing price; the lowest price of a sale or offer, whichever is lower; the highest price of a sale or bid, whichever is higher; the method used by the SBSEF in determining nominal prices and settlement prices; and a description of the manner in which discretion is used to determine the opening and/or closing ranges or the settlement prices.[939] Further, because the transaction reports for credit SBS are permitted to be capped at a notional volume of $5 million,[940] market participants would be unable to glean the information provided by the Daily Market Data Report—which would publish daily total notional volumes based on uncapped transaction amounts—from the individual reports of SBS transactions under Regulation SBSR. Thus, the Daily Market Data Report would provide market participants, at little to no cost, with information about pricing and trading volume for SBS on SBSEFs that goes beyond the information that could be obtained from SBS transaction reports that are publicly disseminated pursuant to Regulation SBSR.

Several commenters are concerned that Proposed Rule 832(b)(3), which would apply the trade execution requirement to ANE transactions, could create complexities,[941] prompt market

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938 *See* 17 CFR 242.900 *et seq*.

939 *See* Rules 825(c)(1)(iv) through (vi) and 825(c)(2).

940 *See* 2019 Cross-Border Adopting Release, *supra* note 218, 85 FR at 6347 (providing no-action relief with respect to Rule 902 of Regulation SBSR, 17 CFR 242.902, for reports of credit SBS transaction disseminated with a capped size of $5 million).

941 *See* SIFMA AMG Letter, *supra* note 18, at 11.

participants and platforms to develop costly infrastructure to avoid engaging in ANE transactions,[942] confuse market participants and platforms and reduce market participation.[943] One commenter asks the Commission to be mindful of whether CFTC-registered SEFs would be forced to change their rules in order comply with the new proposed SBSEF rules.[944] With respect to the concern that CFTC-registered SEFs might be forced to change their rules because of the Commission's ANE approach for SBSEFs, foreign trading venues that have already received exemptive relief from the CFTC for swaps trading where robust regulatory regimes may exist with requirements comparable to those applicable to SBS transactions in the United States might seek and obtain exemptive relief under Rule 833(b). If exempted under Rule 833(b), trading of SBS on such foreign trading venues would not require CFTC-registered SEFs to change their rules.[945] Similarly, for SBS transactions that the Commission exempts from the trade execution requirement based on an application submitted under Rule 833(b), the concerns expressed by commenters regarding complexities and costs would no longer be applicable. The effect of such exemptions would likely result in SBS transactions in foreign jurisdictions with what may be considered robust regulatory regimes to be exempt from the Commission's trade execution requirement and, in practice, have similar treatment of transactions on applicable foreign trading venues as the CFTC. This should address concerns about confusion among market participants and platforms in foreign jurisdictions; the regulatory certainty provided by the exemptions should help to mitigate any adverse effects on market participation and obviate the need to develop costly infrastructure to avoid engaging in ANE transactions.

Several commenters are concerned that many foreign SBS trading venues would not be able to obtain a Rule 833(b) exemption because they believe the rule would require foreign jurisdictions to require RFQ-to-3 and order book methods of execution, while hardly any foreign

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942 *See* ISDA-SIFMA Letter, *supra* note 18, at 12.

943 *See* Tradeweb Letter, *supra* note 18, at 4–5.

944 *See* SIFMA AMG Letter, *supra* note 18, at 11.

945 *See supra* notes 624–627 and accompanying text.

jurisdictions have identical requirements, with some jurisdictions not requiring SBS to be traded on an organized trading venue.[946] These commenters believe that the inability of foreign trading venues to obtain a Rule 833(b) exemption would result in various negative consequences: increased costs; disruption and fragmentation of the SBS markets; reduced liquidity and participation in the SBS markets; impaired risk transfer, risk management, and price formation; and increased systemic risk.[947]

The Commission acknowledges the concerns raised by commenters, which appear to emanate from commenters' interpretation—and misunderstanding—of what would be required in order to receive a Rule 833(b) exemption. Specifically, several commenters interpret the rule and the Commission's discussion of the rule in the Proposing Release to mean that a foreign SBS trading venue must have RFQ-to-3 and an order book for Required Transactions in order for transactions on that venue to qualify for a Rule 833(b) exemption.[948] As discussed in Section VII.B, the proposed rule would not require foreign SBS trading venues to have RFQ-to-3 and an order book in order for the Commission to consider their SBS executions for an exemption under Rule 833(b). Neither the text of Rule 833(b) nor the Commission's description of Rule 833(b) states that a limit order book or an RFQ-to-3 system is required to receive a Rule 833(b) exemption.[949] There may be foreign SBS trading venues—many of which have already received exemptive relief from the CFTC for swaps trading[950]—that may be appropriate candidates for exemptive relief, that are subject to what may be considered robust regulatory regimes for SBS trading. With respect to such foreign SBS trading venues, the Commission encourages market participants to submit a request for exemptive relief under final Rule 833(b) if they seek to be

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946 *See supra* note 599; Bloomberg Letter, *supra* note 18, at 6, 19; ICE Letter, *supra* note 18, at 4; ISDA-SIFMA Letter, *supra* note 18, at 14; Tradeweb Letter, *supra* note 18, at 6.

947 *See supra* note 602–607 and accompanying text.

948 *See supra* notes 597–599 and accompanying text.

949 In the Proposing Release, the Commission stated its preliminary belief that "the use of single-dealer platforms to discharge any mandatory trading execution requirement" would not meet the proposed rule's requirements. *See* Proposing Release, *supra* note 1, 87 FR at 28925.

950 *See supra* note 626.

exempt from the Commission's trade execution requirement for their SBS transactions. This discussion should address concerns about the potential unavailability of a Rule 833(b) exemption to SBS foreign trading venues and the negative consequences that could arise if SBS foreign trading venues are unable to obtain a Rule 833(b) exemption.

We detail below cost estimates for specifics parts of the adopted rules. Many of these cost estimates are based on the PRA estimates of costs and burdens from section XVIII.[951]

(a) Registration Requirements for SBSEFs and Form SBSEF

The registration provisions would impose costs on entities that seek registration as SBSEFs. The Commission estimates that initial filings on Form SBSEF by prospective SBSEFs seeking to register with the Commission pursuant to Rule 803 would result in aggregate initial costs of $100,300 for prospective SBSEFs.[952]

(b) Ongoing Compliance with Other Requirements that Are Similar to the Remainder of Part 37

As discussed in section XVIII.D.2.b, the Commission estimates the aggregate annual paperwork burden for SBSEFs to comply with all of the SBSEF rules that have analogs in part 37 to be 1935 hours.[953] These burdens are estimated to impose aggregate ongoing annual costs of $131,580 on SBSEFs.[954]

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951 In section XVIII *infra*, for purposes of the PRA, the Commission 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 in Regulation SE. Therefore, the Commission's burden estimates are greater for stand-alone SBSEFs than may actually take place for those already registered with the CFTCs because of the effect of the CFTC's corresponding rules.

952 $100,300 = 1,475 burden hours x $68/hour blended hourly rate. The $68/hour blended hourly rate is the $59/hour blended hourly rate computed by the CFTC and adjusted for CPI inflation through Dec. 2022. The CFTC used the blended hourly wage to estimate PRA costs associated with part 37. *See infra* section XVIII.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.

953 *See infra* section XVIII.D.2(b). This estimate excludes the paperwork burdens associated with registration requirements for SBSEFs and Form SBSEF and provisions of certain rules to be discussed subsequently.

954 $131,580 = 1,935 burden hours x $68/hour blended hourly rate. *See supra* note 952 (derivation of the $68/hour blended hourly rate).

(c) Rule and Product Filing Processes for SBSEFs

The Commission estimates that the aggregate ongoing annual costs incurred by all SBSEFs to prepare and submit rule and product filings under Rules 804, 805, 806, and 807 (including the cover sheet) would be $33,000.[955]

(d) Rules 809, 811, 819, 826, 829, 833, 834, and 835

The Commission estimates the aggregate ongoing annual costs incurred by SBSEFs to comply with Rule 809 would be $604.[956]

The Commission estimates the aggregate ongoing annual costs incurred by SBSEFs to comply with requests for documents or information pursuant to Rule 811(d) would be $88.[957]

The Commission estimates the aggregate ongoing annual costs incurred by SBSEFs to comply with Rule 819(i) would be $27,142.[958]

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955 $33,000 = 300 hours x $110/hour blended hourly rate. The $110/hour blended hourly rate is the $96.26/hour blended hourly rate computed by the CFTC and adjusted for CPI inflation through Dec. 2022. The CFTC used the blended hourly rate to estimate PRA costs associated with part 40. *See infra* section XVIII.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. 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* section IV.E and n.140.

956 $604 = 1.25 hours x $483/hour national hourly rate for an attorney. 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 Dec. 2022) 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. *See infra* section XVIII.D.3(b)(ii); 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 (Dec. 23, 2021), *available at* https://omb.report/icr/202112-3235-018/doc/117438500.pdf.

957 $88 = 1.25 hour x $70/hour hourly rate for a financial manager. The $70/hour hourly rate is the $65/hour hourly rate computed by the CFTC and adjusted for CPI inflation through Dec. 2022. The CFTC used the hourly rate to estimate PRA costs associated with part 1.6. *See infra* section XVIII.D.4(a); OMB, Supporting Statement for New and Revised Information Collections: OMB Control Number 3038-0033 (Oct. 29, 2021), *available at* https://omb.report/icr/202110-3038-001/doc/115991000.pdf.

958 $27,142 = 399.15 hours x $68/hour blended hourly rate. The burdens associated with this rule are not different from burdens associated with rules that have part 37 analogs. Thus, it would be appropriate to apply the $68/hour blended hourly rate to estimate the paperwork related costs associated with this rule. *See infra* section XVIII.D.4(c). *See also supra* note 952 (derivation of the $68/hour blended hourly rate).

The Commission estimates the aggregate ongoing annual costs incurred by SBSEFs to comply with Rule 819(j) would be $1,208.[959]

The Commission estimates the aggregate ongoing annual costs incurred by SBSEFs to update information required by Rule 826(f) would be $162.[960] The Commission estimates that interested parties would incur aggregate one-time costs of $115,920 in the first year and $77,280 in each subsequent year to submit exemption requests under one or both paragraphs of Rule 833.[961]

The Commission estimates that SBSEFs and SBS exchanges would incur aggregate one-time costs of $50,880 associated with drafting and implementing rules to comply with Rules 834(b) and (c).[962]

The Commission estimates that SBSEFs and SBS exchanges would incur aggregate ongoing annual costs of $680 to comply with Rules 834(d), 834(e), and 834(f).[963]

The Commission estimates that SBSEFs and SBS exchanges would incur aggregate one-time costs of $1,088 to comply with Rule 834(g).[964]

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959 $1,208 = 2.5 hours x $483/hour national hourly rate for an attorney. *See infra* section XVIII.D.4. *See also supra* note 956 (derivation of the national hourly rate for an attorney).

960 $162 = 2 hours x $81/hour national hourly rate for a compliance clerk. *See infra* section XVIII.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 Dec. 2022) 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.

961 First year costs: $115,920 = 240 hours x $483/hour national hourly rate for an attorney. Costs in each subsequent year: $77,280 = 160 hours x $483/hour national hourly rate for an attorney. *See infra* section XVIII.D.5(a). *See also supra* note 956 (derivation of the national hourly rate for an attorney).

962 $50,880 = 120 hours x $424/hour national hourly rate for a compliance attorney. The estimate of 120 burden hours is based on the Commission's estimate that five SBSEFs and three SBS exchanges will incur paperwork burdens associated with Rules 834(b) and (c). *See infra* section XVIII.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 Dec. 2022) 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.

963 $680 = 10 hours x $68/hour blended hourly rate. Further, the costs incurred by SBSEFs = 5 (number of SBSEFs) x 1.25 hours per SBSEF x $68/hour blended hourly rate = $425. The burdens associated with this rule are not different from burdens associated with rules that have part 37 analogs. Thus, it is appropriate to apply the $68/hour blended hourly rate to estimate the paperwork related costs associated with this rule. *See infra* section XVIII.D.4(g). *See also supra* note 952 (derivation of the $68/hour blended hourly rate).

964 $1,088 = 16 hours x $68/hour blended hourly rate. The burdens associated with this rule are not different from burdens associated with rules that have part 37 analogs. Thus, it is appropriate to apply the $68/hour

The Commission estimates that SBSEFs would incur aggregate ongoing annual costs of $21,735 to comply with Rule 835.[965]

SBSEFs likely would incur costs to comply with the financial resources requirement of Rule 829(b). Assuming that SBSEFs satisfy this requirement by holding financial resources in the form of their own capital pursuant to Rule 829(c)(1), the Commission estimates that SBSEFs would incur an aggregate annual cost of capital of $35,436.[966] 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 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),[967] that tend to generate little or no return.

(e) Assessment Costs

The Commission estimates that 86 entities likely would incur assessment costs as a result of Rule 832, based on a staff analysis of counterparties to U.S. single-name CDS for the 12-

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blended hourly rate to estimate the paperwork related costs associated with this rule. *See infra* section XVIII.D.4(g). *See also supra* note 952 (derivation of the $68/hour blended hourly rate).

965 $21,735 = 45 hours x $483/hour national hourly rate for an attorney. *See infra* section XVIII.D.5(b). *See also supra* note 956 (derivation of the national hourly rate for an attorney).

966 The Commission estimates the financial resources that SBSEFs would need to hold pursuant to Rule 829(b) as their projected operating costs. *See* Rule 829(b). Further, the Commission estimates SBSEFs' projected operating costs as the sum of the aggregate ongoing annual costs incurred by SBSEFs to comply with Regulation SE. Thus, SBSEFs' estimated projected operating costs = $131,580 (ongoing compliance with other requirements that are similar to the remainder of part 37) + $33,000 (rule and product filing processes by SBSEFs) + $604 (Rule 809) + $88 (Rule 811(d)) + $27,142 (Rule 819(i)) + $1,208 (Rule 819(j)) + $162 (Rule 826(f)) + $425 (Rules 834(d), (e), and (f)) + $21,735 (Rule 835) = $215,943. Thus, the Commission estimates that SBSEFs would hold $215,943 in the form of their own capital to comply with Rule 829(b). The Commission estimates SBSEFs' cost of capital to be 16.41%. *See supra* note 896 (describing how the cost of capital is estimated). SBSEFs' aggregate annual cost of capital = $215,943 x 16.41% = $35,436. 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 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.

967 The CFTC's experience overseeing SEFs would appear to support the belief that SBSEFs would hold unencumbered, liquid financial assets rather than obtain a line of credit to comply with Rule 829(d). In a previous rulemaking, the CFTC noted that most SEFs satisfy the liquidity requirement of § 37.1303 (the analog of 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 (Feb. 11, 2021) ("2021 SEF Amendments Adopting Release").

month period from October 2021 to September 2022. 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. 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 assessment costs associated with 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. Such assessment costs would be approximately $19,320 per entity.[968] 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 one-time programming costs of $15,758 per entity.[969] Therefore, the Commission estimates the total

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968 $19,320 = 40 hours x $483/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 956 (derivation of the national hourly rate for an attorney).

969 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 Rule 832). $15,758 = (2 hours x $424/hour national hourly rate for a

one-time costs per entity associated with Rule 832 could be $35,078 and the aggregate one-time costs could be $3,016,708.[970] 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 Rule 832 may be less.

(f) Structured Data and Electronic Filing Costs

As mentioned previously, the Commission will require many of the disclosures required under Regulation SE to be provided via EDGAR in a structured data language. SBSEFs will 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 structured data to fulfill their reporting requirements under Regulation SBSR, the compliance cost associated with the Rule 825(c)(3) requirement will be limited to the cost prospective SBSEF registrants will incur to update their systems to incorporate the Commission's XML schema for Daily Market Data Reports.[971] 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.[972]

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compliance attorney) + (4 hours x $360/hour national hourly rate for a compliance manager) + (40 hours x $280/hour national hourly rate for a programmer analyst) + (4 hours x $266/hour national hourly rate for a senior internal auditor) + (2 hours x $603/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 Dec. 2022) 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 Adopting Release (*see* 78 FR 31140 n.1425) and adjusted for inflation through Dec. 2022.

970 Total one-time costs per entity = $19,320 (compliance policy and procedure) + $15,758 (systems) = $35,078. Aggregate one-time costs = 86 entities x $35,078 = $3,016,708.

971 *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").

972 *See supra* note 920 and accompanying text.

With respect to the Inline XBRL requirements for various disclosures required under Regulation SE, SBSEFs will 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 will result from the tagging requirements, because prospective SBSEF registrants are not currently subject to Inline XBRL requirements. The custom XML requirements under Regulation SE will not impose these costs on SBSEFs, because SBSEFs will have the option of complying with those requirements by completing a fillable web form rather than structuring the disclosures in custom XML themselves. Also, as discussed in greater detail below, the Inline XBRL implementation costs could be mitigated to some extent, because six of the seven SEFs that list index CDS for trading (i.e., the pool of likely SBSEF applicants) have parent or affiliate entities that make filings in Inline XBRL, which raises the possibility that some (if not most) SBSEFs might be able to take advantage of the knowledge of Inline XBRL possessed by their parent or affiliate entities.

Further, the compliance costs associated with the structured data requirements, as adjusted for inflation, will likely decrease over time. SBSEFs will likely comply with structuring requirements more efficiently after gaining experience over repeated filings, though such an effect will likely be diminished for affected entities that already have experience structuring similar data in other documents. Third-party vendors of structured data compliance software or services may decrease the prices of their products over time; the XBRL compliance costs reported in the 2018 AICPA survey of smaller operating companies reflect such a trend, as they represented a 45% decline in average cost and a 69% decline in median cost from 2014.[973]

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[973] AICPA, XBRL Costs for Small Companies Have Declined 45% since 2014 (2018), *available at* https://us.aicpa.org/content/dam/aicpa/interestareas/frc/accountingfinancialreporting/xbrl/downloadabledocuments/xbrl-costs-for-small-companies.pdf. This survey was limited to operating companies, and was conducted before the transition from XBRL to Inline XBRL and the implementation of cover page tagging requirements for periodic reports.

In addition to costs associated with structured data requirements, because prospective SBSEF registrants are not currently subject to EDGAR requirements, hey will incur a one-time compliance burden of submitting a Form ID as required by Rule 10(b) of Regulation S-T.[974] 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.[975]

As noted above, we are requiring SBSEFs to submit rule and product filings in unstructured format using EFFS, rather than structuring the filings and submitting them via EDGAR.[976] As a result of this change from the proposal, SBSEFs will not incur the compliance costs associated with applying Inline XBRL tags to their rule and product filings. We agree with one commenter who noted that an Inline XBRL requirement would cause SBSEFs to incur related compliance costs, although we do not agree that such costs would be so substantial as to serve as a potential market entry deterrent, or would create an unlevel playing field whereby national securities exchanges would have a competitive advantage over SBSEFs due to these discrepant costs. Rather, we are requiring rule and product filings to be filed through EFFS in unstructured format, because we believe the alleviation of compliance burdens resulting from the absence of a structuring requirement merits the lesser volume of machine-readable data, especially in light of the significant volume of structured SBSEF data available pursuant to other Regulation SE provisions.

D. Effects on Efficiency, Competition, and Capital Formation

The new rules and amendments would likely affect competition, capital formation, and efficiency in various ways discussed below.

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974 *See* 17 CFR 232.10(b).

975 *See supra* note 920 and accompanying text.

976 *See supra* section XVII.C.2.

1. Competition

As discussed earlier, currently, the SBS market is dominated by a small group of SBS dealers.[977] 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. The final rules provide a framework for allowing a number of trading venues to register as SBSEFs and thus more effectively compete for business in SBS. Furthermore, 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 impose any material anticompetitive burden on trading or clearing. Additionally, rules that improve access to SBSEFs by market participants (e.g., Rule 819(c)) could increase participation and competition in liquidity provision in the SBS market.[978] Rules that improve regulatory oversight, market integrity, and market predictability on SBSEFs and rules that reduce the risk of trading disruption on SBSEFs likely would increase market participants' confidence in the soundness of SBSEFs.[979] To the extent that greater confidence in the soundness of SBSEFs increases participation by liquidity providers on SBSEFs, competition in liquidity provision could increase. 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.

Rules 815(f) and 815(g), by reducing the risk of information leakage and protecting market participants' anonymity for an SBS that is anonymously executed on an SBSEF and

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977 *See supra* section XVII.B.2.

978 *See supra* sections XVII.C.1 (discussing improved access and competition as an overarching benefit of the rules and amendments) and XVII.C.2 (discussing how rules that mitigate conflicts of interest between an SBSEF or SBS exchange and its members could help ensure access to SBSEFs and SBS exchanges and in turn increase competition in liquidity provision and lower transaction costs).

979 *See infra* section XVII.D.2.

intended to be cleared, could increase participation on SBSEFs. This in turn could increase competition in liquidity provision, liquidity, and efficiency in the SBS market.[980]

Rule 806(a)(5), which requires 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 with respect to competition.[981]

As discussed earlier, Rules 819(c) and 819(e) would promote competition among entities that act as third-party service providers to SBSEFs. To the extent that increased competition among third-party service providers incentivizes them to offer cheaper, higher quality services to SBSEFs thereby lowering their costs, market participants that are SBSEF members could benefit if the SBSEFs pass on the cost savings in the form of lower fees to their members.[982] Lower fees for SBSEF members would help reduce the overall costs of trading on SBSEFs and increase the efficiency of SBS trading.

2. Capital Formation

Regulation SE could promote capital formation by helping to improve regulatory oversight, market integrity, and market predictability. Regulation SE requires, 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. These requirements are designed to provide an SBSEF with sufficient information to oversee trading on its market, including detecting and deterring abusive trading practices.[983] The audit trail and recordkeeping and reporting

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980 *See supra* section XVII.C.1 (discussing improved access and competition as an overarching benefit).

981 *See supra* section XVII.C.2 (discussing benefits associated with rule and product filings).

982 *See supra* section XVII.C.1 (discussing improved access and competition as an overarching benefit).

983 *See* Rules 819, 821, 822, 826 and *supra* section XVII.C.1 (discussing improved oversight of trading by SBSEFs as an overarching benefit of the rules and amendments).

requirements, by providing the Commission access to information about SBSEFs, will 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.[984] Further, Rule 831, the requirements relating to the CCO, would promote regulatory compliance on SBSEFs and the SBS market generally.[985] In addition, Regulation SE provides for various safeguards to help promote market integrity, including Rule 819(c) relating to impartial access to the SBSEF[986] and Rule 830 relating to systems safeguards. Rule 812(a) would help to improve predictability in the market by providing 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 as a result of a violation by the SBSEF of the provisions of section 3D of the SEA or the Commission's rules thereunder. Any resulting increase in regulatory oversight, market integrity, and market predictability likely would increase market participants' confidence in the soundness of SBSEFs, which in turn could spill over into increased confidence in the soundness 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 adopted rules would help encourage capital formation.

Also, by reducing the risk of trading disruptions on SBSEFs, Rules 829 and 830 could increase market participants' confidence in the soundness of SBSEFs, which in turn could lead to

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984 *See supra* section XVII.C.1 (discussing improved Commission oversight as an overarching benefit of the rules and amendments).

985 *See supra* section XVII.C.2 (discussing the benefits associated with Rule 831).

986 *See supra* note 978.

the greater use of SBS traded on SBSEFs thereby promoting capital formation as discussed above.

3. Efficiency

The general approach of harmonizing as closely as practicable with analogous CFTC rules for SEFs, unless a reason exists to do otherwise in a particular area, likely will generate cost efficiencies and reduced burdens for SBSEF registrants that likely would be registered SEFs that have established systems and policies and procedures to comply with CFTC rules.[987] Further, increased competition among third-party service providers, as a result of Rules 819(c) and 819(e), could lower SBSEFs' costs and bring about greater efficiency in their operation and SBS trading.[988]

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 more rapidly and at a lower expense per transaction. Such increased efficiency could enable members of the SBSEF to handle increased volumes of SBS with greater efficiency and timeliness.[989]

The requirements with respect to pre-trade price transparency could lead to more efficient pricing in the SBS market. The 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. Increased pre-trade price transparency, coupled with

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987 For example, the Commission's election to model Rules 804 through 810 closely on analogous rules in part 40 of the CFTC's rules that apply to SEFs (and other registered entities) would impose minimal burdens on dually registered SEF/SBSEFs while obtaining 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. *See supra* section XVII.C.2 (discussing the benefits associated with rule and product filings).

988 *See supra* section XVII.D.1.

989 *See supra* section XVII.C.1 (discussing improved automation as an overarching benefit of the rules and amendments).

increased competition in liquidity provision as discussed above,[990] could decrease the spread in quoted prices and lead to higher efficiency in the trading of SBS.

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. However, several factors mitigate such concerns. First, pursuant to 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 the desired, or at least preferred, amount of information about trading interest. Second, pursuant to Rule 815(a)(2), an SBSEF will 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 potential concerns associated with revealing too much information about trading interest.[991] 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.

E. Reasonable Alternatives

The Commission considered a number of alternatives when finalizing the rules and amendments in this release.

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990 *See supra* section XVII.D.1.

991 *See supra* section XVII.C.1 (discussing the different degrees of pre-trade transparency associated with limit order book and RFQ-to-3).

1. Abbreviated Registration Procedures for CFTC-Registered SEFs

Several commenters suggest that the Commission provide abbreviated registration procedures for CFTC-registered SEFs either by using the Commission's exemptive authority to provide a streamlined registration process for such applicants[992] or by permitting such applicants to register utilizing their current documentation filed pursuant to the requirements of Form SEF with an accompanying addendum reflecting only those changes necessary to fulfill the specific requirements of proposed Regulation SE, in lieu of filing a new Form SBSEF.[993] Some of these commenters believe that a streamlined registration process would ease the burden of new requirements imposed on potential dual-registrants, be more efficient, lower registration costs, encourage the entry of market participants, and expedite the establishment and operation of SBSEFs.[994] The Commission acknowledges that the alternative could potentially have such beneficial effects. However, the adopted approach is preferable to the alternative. As a general matter, the SBSEF registration process is intended for all applicants. While entities that will seek to register as SBSEFs are likely to be CFTC-registered SEFs,[995] the registration process should nevertheless address the possibility that some applicants might not be CFTC-registered SEFs. Requiring all applicants to follow the same registration process will provide a level playing field for all applicants by avoiding conferring a competitive advantage on applicants that are CFTC-registered SEFs. This in turn may encourage the entry of additional market participants. As discussed in section III.A.2., the adopted approach supports consistency in the review by the Commission and its staff of applications for registration of SBSEFs and avoids introducing bias or prejudice into the Commission's review. Such consistency could in turn increase the efficiency of the review process and help expedite the establishment and operation of SBSEFs.

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992 *See* SIFMA AMG Letter, *supra* note 18, at 5; Bloomberg Letter, *supra* note 18, at 11; WMBAA Letter, *supra* note 18, at 3; ICE Letter, *supra* note 18, at 5.

993 *See* ICE Letter, *supra* note 18, at 5.

994 *See* SIFMA AMG Letter, *supra* note 18, at 5; Bloomberg Letter, *supra* note 18, at 11; WMBAA Letter, *supra* note 18, at 3.

995 *See supra* section XVII.B.4.

2. Shorten Review Period for Self-Certified Product Listing

In connection with the ten-business-day review period under Proposed Rule 804(a)(2), two commenters recommend a shorter review period of one business day to harmonize with the CFTC's approach.[996] Alternatively, one of the commenters suggests a two-business-day review period.[997] According to these commenters, a shorter review period will allow market operators to meet participants' demands to transact on regulated platforms in a reasonable period of time; accommodate participants' needs to hedge risk in a timely manner; and increase the competitive benefit and innovation incentive to SBSEFs to develop new products by making it less attractive for other SBSEFs to list "look alike" products. In finalizing Rule 804(a)(2), the Commission has considered the trade-off between the benefits of a shorter review period as described by the commenters and the benefits of having sufficient time to review a new product filing and to issue a stay if warranted. The ten-business-day review period set forth in final Rule 804(a)(2) strikes an appropriate balance between these sets of benefits. To the extent that the ten-business-day review period limits market operators' ability to meet participants' demands to transact on regulated platforms in a reasonable period of time, that limitation is appropriate in light of the benefits of having sufficient time to review a new product filing and to issue a stay if warranted. While a shorter review period may accommodate market participants' need to hedge risk in a timely manner, these market participants also could hedge their risk during the ten-business-day review period, albeit in the OTC SBS market. The Commission does not believe the additional hedging benefit, if any, associated with a shorter review period is sufficient to justify adopting this alternative. Rule 804 may not necessarily limit the competitive benefit and innovation incentive to SBSEFs to develop new products. SBSEFs that wish to list "look alike" products

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[996] *See* WMBAA Letter, *supra* note 18, at 4; ICE Letter, *supra* note 18, at 2.

[997] *See* WMBAA Letter, *supra* note 18, at 4.

also will face a ten-business-day review period if they list such products pursuant to Rule 804.[998] Thus, such SBSEFs will lag behind the SBSEF that first lists a given SBS, which could capture a significant portion, if not most, of the revenues associated with the trading of that product. Even if the 10-day review period were to reduce the first-to-market competitive advantage of an SBSEF that first lists a given SBS, the extent of such an advantage may vary considerably based on other factors in the SBSEF market. Ultimately, the need for the Commission to have sufficient time to review a new product before it is listed and thereby help ensure it meets regulatory requirements aimed to protect investors and support fair and efficient markets justifies this potential competitive effect. Accordingly, the adopted approach is preferable to the alternative.

3. Incorporate CFTC's Impartial Access Requirement Guidance

Several commenters urge the Commission to incorporate the CFTC's impartial access requirement guidance with respect to access to SBSEFs into the text of Rule 819. According to these commenters, such an alternative would provide market participants with guidance and clarity regarding how Proposed Rule 819(c) will be interpreted and applied in practice. The commenters believe that the alternative would increase competition, transparency, and liquidity in the SBS markets; lower transaction costs through increased competition; and result in greater market-led innovation in the SBS markets.[999] The Commission acknowledges that the alternative could have beneficial effects on competition, transaction costs, transparency, liquidity, and innovation as the commenters asserts. However, the alternative raises several concerns. First, if, in the future, the CFTC's impartial access requirement guidance were to be modified, the regulatory regime for SEFs might differ from that for SBSEFs. This in turn could limit

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998 In this context, SBSEFs that wish to list products expeditiously likely will not choose to list them pursuant to Rule 805, which requires a 45-day review period that could be extended for an additional 45 days. *See* Rules 805(c) and (d).

999 *See* Bloomberg Letter, *supra* note 18, at 3, 16; Citadel Letter, *supra* note 18, at 6–7; MFA Letter, *supra* note 18, at 2, 9–11; SIFMA AMG Letter, *supra* note 18, at 4.

harmonization with the CFTC's regulatory regime and potentially increase compliance burdens for market participants if they have to comply with different requirements for SEFs and SBSEFs.

Second, as discussed in section VI.B.3 above, efforts to undermine the principle of impartial access may take myriad forms over time. It is preferable to emphasize the principle of impartial access in the rule text as an affirmative requirement with which to comply. The adopted approach would incentivize SBSEFs to constantly review their practices to ensure compliance with the principle of impartial access. The Commission also considered the alternative of incorporating into the text of Rule 819 a non-exclusive list of the means that may violate the principle of impartial access. This alternative would raise the same concerns discussed above.

The adopted approach may nevertheless generate the beneficial effects suggested by the commenters. Rule 819(c) is broad enough to permit market participants to use the same practices that they are using pursuant to the CFTC guidance. Consistent with the Commission's belief that prospective SBSEF registrants are likely to be CFTC-registered SEFs that are active in the index CDS market,[1000] prospective SBSEF registrants likely will use the systems, policies, and procedures that were created to comply with the CFTC guidance to comply with Rule 819(c) in order to limit their compliance burdens. The Commission is adopting Rule 815(g), which specifies that SBSEFs shall establish and enforce rules that provide that a security-based swap that is intended to be cleared at the time of the transaction, but is not accepted for clearing at a registered clearing agency, shall be void *ab initio.* This rule would obviate the need for breakage agreements for SBS that are intended to be cleared, one of the items prohibited by the CFTC's guidance.[1001] As discussed in section XVII.C, Regulation SE may bring several benefits to the

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[1000] *See supra* section XVII.B.

[1001] *See* Division of Clearing and Risk, Division of Market Oversight and Division of Swap Dealer and Intermediary Oversight Guidance on Application of Certain Commission Regulations to Swap Execution Facilities, CFTC (Nov. 14, 2013), n.3, *available at* https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/dmostaffguidance111413.pdf.

SBS market including, among other things, increased competition,[1002] transparency, and liquidity; reduced transaction costs[1003]; and market innovation in the form of new platforms and tools to execute and process SBS transactions more efficiently.[1004] In light of the above, the adopted approach is preferable to the alternative.

4. Harmonize with CFTC's STP Requirements

In connection with Proposed Rule 823, several commenters recommend that the Commission harmonize with CFTC's STP requirements by establishing STP standards, incorporating relevant CFTC guidance, and prohibiting breakage agreements for SBS that are intended to be cleared.[1005] The commenters suggest the alternative could reduce market, credit, and operational risks; facilitate hedging activity; avoid complexity and costs; increase competition; promote trading on SBSEFs and electronic trading; and increase transparency, liquidity, and fairness in the SBS markets.[1006] The Commission acknowledges that the alternative could have beneficial effects as suggested by the commenters. However, the alternative raises several concerns. First, if, in the future, the CFTC's staff guidance were to be modified, the regulatory regime for SEFs might differ from that for SBSEFs. This in turn could limit harmonization with the CFTC's regulatory regime and potentially increase compliance burdens for market participants if they have to comply with different requirements for SEFs and SBSEFs. Second, the timeframes for a clearinghouse to accept or reject a trade for clearing set forth in the

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1002 *See supra* sections XVII.C.1 (discussing improved access and competition as an overarching benefit of the rules and amendments) and XVII.D.1 (discussing how the new rules and amendments would likely affect competition).

1003 *See supra* section XVII.C.1 (discussing improved transparency, increased liquidity, and reduced transaction costs as overarching benefits of the rules and amendments).

1004 *See supra* section XVII.C.1 (discussing improved automation as an overarching benefit of the rules and amendments).

1005 *See* Citadel Letter, *supra* note 18, at 6; MFA Letter, *supra* note 18, at 11–12; SIFMA AMG Letter, *supra* note 18, at 9.

1006 *See* Citadel Letter, *supra* note 18, at 5; MFA Letter, *supra* note 18, at 12; SIFMA AMG Letter, *supra* note 18, at 9.

CFTC staff guidance could become outdated with advances in technology.[1007] If that were to occur, changing those timeframes would be more difficult if they were included as part of Regulation SE, or even as Commission guidance included as part of this release. Any delays in changing those timeframes could mean that market participants would not be able to benefit from any reductions in market, credit, and operational risks associated with the technological advances that render obsolete the timeframes set forth in the CFTC staff guidance.

The adopted approach may nevertheless generate the beneficial effects suggested by the commenters. As discussed in section VI.F.3, Rule 823(c) is broad enough to permit market participants to use the same practices that they are using pursuant to the CFTC guidance. Consistent with the Commission's belief that prospective SBSEF registrants are likely to be CFTC-registered SEFs that are active in the index CDS market,[1008] prospective SBSEF registrants likely will use the systems, policies, and procedures that were created to comply with the CFTC guidance to comply with Rule 823(c) in order to limit their compliance burdens. Further, to comply with the impartial access requirements of Rule 819(c), registered SBSEFs would, among other things, avoid acts that purposefully delay clearing submission in order to favor certain market participants over others. Lastly, the Commission is adopting Rule 815(g), which specifies that SBSEFs shall establish and enforce rules that provide that a security-based swap that is intended to be cleared at the time of the transaction, but is not accepted for clearing at a registered clearing agency, shall be void *ab initio.* This rule would obviate the need for breakage agreements for SBS that are intended to be cleared. Accordingly, the adopted approach is preferable to the alternative.

1007 CFTC staff guidance on STP states that "[derivatives clearing organizations] clearing swaps that are executed competitively on or subject to the rules of a … SEF and are accepting or rejecting trades within 10 seconds after submission are compliant with the timing standard of Regulation 39.12(b)(7)." *See* CFTC 2013 STP Guidance, supra note 273.

1008 *See supra* section XVII.B.

5. No Block Trade Exception

In finalizing Regulation SE, the Commission considered the alternative of not adopting a block trade exception from the Required Transaction requirement in Rule 815(a)(2) for credit SBS. This alternative could extend the benefits of increased pre-trade transparency[1009] to SBS transactions of a larger notional size. However, this alternative would deviate from the CFTC's approach to block trades and thus reduce harmonization with the CFTC regime for swaps. In addition, as one commenter expressed, under this alternative, market participants would have difficulty executing, or would be unable to execute, large bona fide trades, since they would be required to do so only through the order book. This would increase the cost of trading and hedging, the commenter says, which could reduce participation in certain markets, resulting in less liquidity and increased volatility.[1010] This commenter asserts that exempting block trades from order book and RFQ execution requirements is critical to the functioning of the SBS markets, particularly to execute large trades without affecting price.[1011] Another commenter states that the proposed exception for block trades would provide flexibility for market participants executing SBS transactions of a significantly large size and mitigate the risks of information leakage and impairment of market liquidity.[1012] Another commenter agrees with the Proposing Release's assessment that the block exception to the required methods of execution balances the promotion of price competition and all-to-all trading against the potential costs to the market participants who wish to trade large orders, the importance of which they note is more acute in the SBS market, which is a smaller and less liquid market than the swap market.[1013]

1009 *See supra* section XVII.C.1 (discussing that increased pre-trade transparency could increase price competition and price efficiency; improve liquidity; reduce transaction costs; and facilitate execution quality analysis).

1010 *See* MFA Letter, *supra* note 18, at 5–6.

1011 *Id.*

1012 *See* ICI Letter, *supra* note 18, at 10.

1013 *See* Bloomberg Letter, *supra* note 18, at 14.

The Commission agrees with commenters that a block-trade exception is appropriate for credit SBS, not only to maintain harmonization with the CFTC regime for swaps but also to facilitate trading of credit SBS. This approach, which is consistent with the approach of the CFTC for swaps, will be especially important in the smaller, less liquid credit SBS markets if and when a clearing determination has been made for one or more SBS. A block-trade exception for credit SBSs subject to the trade-execution requirement, provided that "block trade" is appropriately defined for those SBSs, can help ensure that large trades are not significantly more difficult and costly to execute because of the risks posed by information leakage and the potential for adverse price movement, which could significantly impair liquidity in the markets for those SBSs.

Accordingly, the adopted approach is preferable to the alternative.

6. Adopting Proposed Block Trade Definition Now

In finalizing Regulation SE, the Commission considered the alternative of adopting the proposed definition of "block trade" under Rule 802. For the third prong of the "block trade" definition, the Commission proposed that the SBS be 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.[1014]

As discussed earlier,[1015] a number of commenters raise concerns that the proposed $5 million block-trade threshold for all credit SBSs would not be sufficiently tailored to the unique and varying trading and risk characteristics of the full range of credit SBS, creating the potential for the adverse market risks that commenters point out may arise from having a one-size-fits-all block threshold.

[1014] *See* Proposing Release, *supra* note 1, 87 FR at 28896.

[1015] *See supra* section V.E.1(c)(ii) and Citadel Letter, *supra* note 18, at 9; ICI Letter, *supra* note 18, at 10–12; MFA Letter, *supra* note 18, at 5–8; SIFMA AMG Letter, *supra* note 18, at 10; ISDA-SIFMA Letter, *supra* note 18, at 7–9.

As discussed above, the Commission acknowledges these commenters' concerns. Further, unless and until the Commission has made a mandatory clearing determination regarding an SBS, it is not necessary to define a block-trade threshold for SBS, and it would be appropriate for the Commission to identify a block-trade threshold in the future after considering credit SBS transaction data and credit SBS markets at that time. In addition, the Commission agrees with commenters that additional consideration of credit SBS transaction data would help the Commission determine the appropriate block-trade threshold for credit SBS products, including whether different thresholds should apply to different types or groups of SBS. The Commission also agrees with commenters that the credit SBS markets are likely to evolve over time and that analysis of market data continues to be an important aspect of setting appropriate thresholds for both block trades and credit SBS public trade reporting.[1016]

Therefore, as discussed above, the Commission is not adopting the proposed definition of "block trade" under Proposed Rule 802, or any other block-trade threshold. Instead, Rule 802 will include a note that a definition of "block trade" has not yet been adopted. This would allow the Commission to identify a block-trade threshold in the future after considering credit SBS transaction data and the evolution of the credit SBS markets. In light of the above, the adopted approach is preferable to the alternative.

7. Block Trade Definition for Equity SBS

In finalizing Regulation SE, the Commission considered the alternative of adopting a definition of "block trade" applicable to equity SBS. One commenter suggests that the alternative would facilitate timely and efficient executions of equity SBS thereby supporting risk management activities, encourage the use of equity SBS for legitimate business purposes, including hedging, and facilitate capital formation.[1017] Another commenter argues that the

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[1016] *See supra* note 219.

[1017] See MFA Letter, supra note 18, at 6–7.

alternative would avoid information leakage regarding a market participant's investment strategies.[1018]

The Commission acknowledges that the alternative could have beneficial effects as suggested by the commenters. However, as discussed in section V.E.1(c)(iii), an inappropriate block trade threshold for equity SBSs could create incentives for market participants to trade equity SBS over cash equities, listed equity options, and equity swaps. The Commission is concerned, in particular, that a shift in trading activity away from cash equities and listed equity options towards equity SBS could generate several adverse effects. First, such a shift in trading activity could reduce participation in the cash equities and listed equity options markets, including participation by liquidity providers. Reduced participation by liquidity providers could reduce competition in liquidity provision in these markets, which in turn could increase trading costs and decrease liquidity. Trading in these markets could become less efficient because of increased trading costs and decreased liquidity. Second, to the extent that trading becomes more costly in the cash equities and listed equity options markets, trading in these markets could be reduced, which could impede the incorporation of new information into the prices of cash equities and listed equity options through trading. This in turn could reduce price efficiency in the cash equities and listed equity options markets. Third, decreased liquidity in the cash equities market could raise the cost of capital for cash equities,[1019] which in turn could discourage firms from issuing cash equity securities to finance investment projects and reduce capital formation.

The adopted approach may nevertheless generate the beneficial effects suggested by the commenters. Regulation SE would increase pre-trade price transparency and competition in liquidity provision, which could decrease the spread in quoted prices and lead to higher

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1018 *See* ICI Letter, *supra* note 18, at 12–13.

1019 *See*, *e.g.*, Viral V. Acharya and Lasse Heje Pedersen, *Asset Pricing With Liquidity Risk*, 77 J. Fin. Econ. 375 (2005) and Yakov Amihud, *Illiquidity and Stock Returns: Cross-Section and Time-Series Effects*, 5 J. Fin. Markets 31 (2002) (suggesting that the expected return of a stock, or cash equity security, increases as its liquidity decreases. To the extent that a cash equity security's expected return measures the cost of capital associated with cash equity financing, the cited research suggests that when a cash equity security's liquidity decreases, its cost of capital may increase.).

efficiency in the trading of SBS.[1020] 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 more rapidly and at a lower expense per transaction. Such increased efficiency could enable members of the SBSEF to handle increased volumes of SBS with greater efficiency and timeliness.[1021] Further, increased competition among third-party service providers, as a result of Rules 819(c) and 819(e), could lower SBSEFs' costs and bring about greater efficiency in their operation and SBS trading.[1022]

As discussed in section XVII.D.2, Regulation SE could improve regulatory oversight, market integrity, and market predictability, which could lead to the greater use of SBS (including equity SBS) and promote capital formation. Also, by reducing the risk of trading disruptions on SBSEFs, Rules 829 and 830 could increase market participants' confidence in the soundness of SBSEFs, which in turn could lead to the greater use of SBS traded on SBSEFs thereby promoting capital formation.[1023]

Regulation SE would address concerns about information leakage in various ways. First, pursuant to Rule 815(c)(2), an SBSEF may offer any execution method for Permitted Transactions. Thus, a market participant engaging in a Permitted Transaction (e.g., a large trade in equity SBS) may choose to use an execution method that reveals the desired, or at least preferred, amount of information about trading interest. Second, pursuant to Rule 815(a)(2), an SBSEF will 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 potential concerns associated with revealing too much information about trading interest.[1024]

1020 *See supra* section XVII.D.3.

1021 *Id.*

1022 *Id.*

1023 *See supra* section XVII.D.2.

1024 *See supra* sections XVII.D.3 and XVII.C.1 (discussing the different degrees of pre-trade transparency associated with limit order book and RFQ-to-3).

In addition, until the Commission has made a clearing determination with respect to equity SBS, equity SBS will be able to trade OTC, just as their underlying cash equities can trade OTC. Moreover, before making a clearing determination for an equity SBS—which would create the circumstances in which equity SBS might be MAT and therefore subject to the trade-execution requirement—the Commission would have the opportunity to solicit and consider additional public comment on the effect of such a determination, including comment with respect to the concerns commenters have raised to date regarding, among other things, timely and efficient executions, hedging, and capital formation.

In light of the above, the adopted approach is preferable to the alternative.

8. Alternatives to Rule 833

In finalizing Rule 833, the Commission considered alternative approaches suggested by commenters. Four commenters suggest that the Commission grant automatic exemptions for foreign trading venues that are currently exempt under the CFTC's rules.[1025] One commenter suggests the Commission grant an exemption from the trade execution requirement if the SBS transaction at issue is subject to mandatory trading in another jurisdiction.[1026]

With respect to these alternatives, the Commission is concerned that granting automatic exemptions would not afford the Commission the opportunity to appropriately consider the relevant facts and circumstances in support of a finding that an exemption is necessary or appropriate in the public interest and consistent with the protection of investors. Further, to the extent that there are certain CFTC exempt foreign trading venues that do not intend to offer trading in SBS, it is unclear how the Commission's granting of an automatic exemption to these venues would benefit market participants that wish to trade SBS on regulated platforms. In light of the above, the adopted approach is preferable to these alternatives.

1025 *See* Bloomberg Letter, *supra* note 18, at 7, 18; ICE Letter, *supra* note 18, at 5; ISDA-SIFMA Letter, *supra* note 18, at 15; Tradeweb Letter, *supra* note 18, at 6.

1026 ISDA-SIFMA Letter, *supra* note 18, at 15.

9. Alternatives From Proposal

The Commission also considered certain alternatives discussed in the Proposing Release: (1) not harmonizing Regulation SE with analogous CFTC rules; (2) harmonizing the third prong of the definition of "block trade" with the third prong of the CFTC definition of "block trade"; (3) requiring SBSEFs to submit the information in the Daily Market Data Report directly to the Commission; (4) requiring an exemption order under Rule 833(a) to apply to a foreign trading venue only if it traded SBS and no other types of securities; (5) applying the revocation provisions of Rule 3a1-1(b) to SBSEFs and clearing agencies that are covered by paragraphs (a)(4) and (a)(5), respectively of Rule 3a1-1; and (6) not exempting SBSEF-Bs from section 17(a) of the SEA.[1027] With respect to the alternative of not harmonizing Regulation SE with analogous CFTC rules, commenters generally agreed with the Commission's approach vis-à-vis this alternative. The Commission did not receive comments addressing the other alternatives and continues to believe that its approach with respect to these alternatives is appropriate, and believes the rules as adopted are preferable to these alternatives.

10. Structured Disclosure Alternative

The Commission also considered the alternative of requiring, as proposed, Inline XBRL for all SBSEF filings other than Daily Market Data Reports under Rule 825. However, limiting the scope of Inline XBRL requirements under Regulation SE will ease compliance burdens for SBSEFs while maintaining a significant level of machine-readability for SBSEF data available to market participants and public data users as well as Commission staff. Some of the disclosures proposed with Inline XBRL structuring will still be structured in the final rule, but with a custom XML requirement rather than an Inline XBRL requirement. This will allow SBSEFs to, at their option, input those disclosures into fillable web forms rather than structure the disclosures in the custom XML data language themselves, thereby providing greater flexibility to SBSEFs and

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[1027] *See* Proposing Release, *supra* note 1, 87 FR at 28956–57.

potentially easing compliance burdens. For copies of existing documents attached to Form SBSEF, and for rule and product filings that were proposed with an Inline XBRL requirement will instead be filed in unstructured formats. Given the reduced compliance burdens on SBSEFs resulting from a more limited scope of Inline XBRL requirements, the adopted rules are preferable to the alternative.[1028]

XVIII. PAPERWORK REDUCTION ACT

Certain provisions of the rules in Regulation SE contain new "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[1029] The Commission published a notice requesting comment on these collections[1030] and submitted the proposed collection of information to the Office of Management and Budget ("OMB") for review in accordance with 44 U.S.C. 3507 and 5 CFR 1320.11. The title of the new collection of information is Regulation SE, and OMB Control Number 3235-0793 has been assigned. As adopted, Regulation SE creates a regime for the registration and regulation of SBSEFs and addresses other issues relating to SBS execution.

In addition, the Commission is amending Rule 3a1-1 under the SEA to exempt a registered SBSEF from the statutory definition of "exchange." Furthermore, the Commission is adopting new Rule 15a-12 under the SEA that, while affirming that an SBSEF would also be a broker under the SEA, would exempt a registered SBSEF from certain broker requirements under the SEA.

Regulation SE includes 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 implementing the Core Principles for SBSEFs under section 3D(d) of the SEA.[1031] An agency

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1028 *See supra* section XVII.C.3(f).

1029 44 U.S.C. 3501 *et seq*.

1030 *See* Proposing Release, 87 FR at 28958–69.

1031 15 U.S.C. 78c-4(d). As adopted, 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

may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

A. Summary of collection of information

The rules and rule amendments contained in Regulation SE include a collection of information within the meaning of the PRA for SBSEFs that are required to comply with Regulation SE and file a Form SBSEF with the Commission for registration as an SBSEF and, among other things, submit certain filings to the Commission pursuant to Rules 804–807 with respect to new products and proposed rule changes. In addition, Rule 833 includes a collection of information within the meaning of the PRA for persons that wish to seek an exemption order under that rule, and Rule 834 includes a collection of information within the meaning of the PRA for SBS exchanges (in addition to SBSEFs). The Commission generally is adopting Regulation SE as proposed, except for certain sections that have been modified in response to comments received. The modified Rules that have associated paperwork burdens are Rules 804, 815, 819, 825, and 834. Each of these modifications and their impact on the paperwork burden are described in more detail below.

Many of the rules that constitute Regulation SE are modeled 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 will allow these 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

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submission cover sheet (with instructions). If adopted, the form and the submission cover sheet would be located in 17 CFR 249.

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 modeled its methodology, assumptions, and calculations on those used by the CFTC with respect to its SEF regulations, while making adjustments that reflect differences between the scale of the market for swaps relative to the market for SBS—for example, the estimated number of SBSEFs, number of SBS market participants, and number of SBS transactions—as necessary. The Commission received no comments on its proposed PRA methodology, assumptions, calculations, and estimates, and such an approach continues to be appropriate. As noted above, almost all of the burden estimates are based on CFTC estimates that have been approved by OMB. The CFTC estimates that serve as the basis for the Commission's estimates have not changed since the Proposing Release has been published, with the exception of one estimate for Rule 811(d). Consequently, the Commission continues to estimate the burdens as those set forth in the Proposing Release, except for one adjustment to match a subsequent adjustment in the CFTC estimate relevant to Rule 811(d). As explained in more detail below, for rules that have been modified that contain associated paperwork burdens, the modifications do not result in any change in paperwork burden.

The following is a summary of the rules contained in Regulation SE.[1032] The paperwork burdens associated with each rule in Regulation SE are discussed in section XX(D) below.

[1032] *See supra* section II.A (discussing Rule 800); section II.B (discussing Rule 801); section II.C (discussing Rule 802); section III.A (discussing the registration provisions contained in Rule 803); section III.B (discussing Form SBSEF); section IV.A (discussing Rule 804); section IV.B (discussing Rule 805); section IV.C (discussing Rule 806); section IV.D (discussing Rule 807); section IV.GIV.F (discussing Rule 808); section IV.G (discussing Rule 809); section IV.H (discussing Rule 810); section V.A (discussing Rule 811); section V.B (discussing Rule 812); section V.C (discussing Rule 813); section V.D (discussing Rule 814); section V.E (discussing Rule 815); section V.F (discussing Rule 816); section V.G (discussing Rule 817); section VI.A (discussing Rule 818); section VI.B (discussing Rule 819); section VI.C (discussing Rule 820); section VI.D (discussing Rule 821); section VI.E (discussing Rule 822); section VI.F (discussing Rule 823); section VI.G (discussing Rule 824); section VI.H (discussing Rule 825); section VI.I (discussing Rule 826); section VI.J (discussing Rule 827); section VI.K (discussing Rule 828); section VI.L (discussing Rule 829); section VI.M (discussing Rule 830); section VI.N (discussing Rule 831); section

Rule Number and Title	Overview of Rule	Paperwork Burden Created?
800—Scope	States 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	Requires 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	Sets 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[a]
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
807—Self-certification of rules	Procedures by which an SBSEF can implement a new rule or rule amendment via self-certification	Yes
808—Availability of public information	Sets 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	Provides 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	Provides 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

VII.A (discussing Rule 832); section VII.B (discussing Rule 833); section VIII (discussing Rule 834); section IX (discussing the notice required by Rule 835); section X (discussing amendments to Rule 3a1-1); section XI (discussing proposed Rule 15a-12); section XIV (discussing new rules and amendments to the Commission's Rules of Practice).

811—Information relating to SBSEF compliance	Provides 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	Provides 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 requires 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	Provides 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 requires 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	Provides 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 provides 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	Provides 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 requires 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	Sets out a process and standards for an SBSEF to MAT an SBS; also establishes certain exemptions from the trade execution requirement	Yes
817—Trade execution compliance schedule	Provides 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	No

	approved or certified, respectively	
818—Core Principle 1 (Compliance with Core Principles)	Requires a registered SBSEF to comply with the SEA's Core Principles for SBSEFs	Yes
819—Core Principle 2 (Compliance with rules)	Requires 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 requires 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 requires 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)	Requires an 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)	Requires 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 requires 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)	Requires 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)	Requires 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 requires 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)	Requires 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)	Requires 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)	Sets forth recordkeeping and reporting obligations for SBSEFs and requires an SBSEF to maintain, for a period of five years and in a form and manner acceptable to the Commission, records of all activities relating to the business of the facility, including a complete audit trail,	Yes
827—Core Principle 10 (Antitrust considerations)	Provides 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)	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 such conflicts	Yes
829—Core Principle 12 (Financial resources)	Requires an SBSEF to have adequate financial, operational, and managerial resources to discharge its responsibilities; would also 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)	Requires 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; would also 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 changes to the SBSEF's systems safeguards	Yes
831—Core Principle 14 (Designation of CCO)	Requires an SBSEF to designate a CCO and set forth regulatory and reporting obligations for the CCO	Yes
832—Cross-border mandatory trade execution	Explains when the SEA's trade execution requirement applies to a cross-border SBS transaction	No
833—Cross-border exemptions	Provides 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	Provides 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 (with	Yes

	certain exceptions), and from exercising disproportionate influence in disciplinary proceedings; would also 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	
835—Notice to Commission by SBSEF of final disciplinary action or denial or limitation of access	Provides 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	Exempts 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	Exempts a registered SBSEF from certain broker requirements while affirming that an SBSEF is a broker under the SEA	No
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**
Amendments to Delegations of Authority in Rules 30-3 and 30-14	Amendments to Commission's rules delegating authority to the Division Director and to the General Counsel in order to delegate authority to take actions necessary to carry out the rules under Regulation SE and to facilitate the operation of the regulatory structure created in Regulation SE	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 revisions to the Commission's Rules of Practice, as well as the amendments to the Commission's delegations of authority to the Director of Trading and Markets pursuant to 17 CFR 200.30-3 and to the General Counsel pursuant to 17 CFR 200.30-14, 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. 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. Notwithstanding this finding, the Commission published certain proposed changes to the Commission's Rules of Practice for notice and comment in the Proposing Release but received no specific comments pertaining to them. *See supra* section XIV.

B. Proposed use of information

1. Registration Requirements and Form SBSEF

Regulation SE imposes various requirements relating to SBSEF registration, which are set forth in Rule 803.[1033]

The information collected pursuant to these adopted rules will 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 whether 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 will be publicly available, except to the extent that a request for confidential treatment is granted, 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 Regulation SE require SBSEFs to establish certain rules, policies, and procedures to comply with applicable requirements of the SEA and the Commission's rules thereunder.[1034] The rules also will help an SBSEF's members to understand and comply with the rules of the SBSEF.

3. Reporting Requirements for SBSEFs

Various provisions of Regulation SE require SBSEFs and certain other persons to submit reports or provide specified information.[1035] This information will generally 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.

1033 *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).

1034 *See, e.g.*, Proposed Rule 819(a)(2) (requiring an SBSEF to establish and enforce trading, trade processing, and participation rules).

1035 *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).

4. Recordkeeping Required under Regulation SE

Regulation SE requires an SBSEF to keep specified records.[1036] The audit trail information required to be maintained under Regulation SE will aid the SBSEF in detecting and deterring fraudulent and manipulative acts with respect to trading on its market, as well as help the SBSEF 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 will 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

Regulation SE imposes certain publication burdens on SBSEFs in Rule 825.[1037]

The requirement contained in 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 will 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, Rule 825 requires an SBSEF to publish a Daily Market Data Report that is designed to provide market observers with a daily snapshot of market activity on the SBSEF.

6. Rule Filing and Product Filing Processes for SBSEFs

Regulation SE establishes various filing requirements applicable to SBSEFs. Rules 804 and 805 provide mechanisms for an SBSEF to submit filings for new products that it seeks to list either through a self-certification process or by voluntarily requesting Commission approval, respectively. Rules 806 and 807 require an SBSEF to submit new rule or rule amendments either

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1036 *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).

1037 *See* Proposed Rule 825 (requiring an SBSEF to make publicly available a "Daily Market Data Report").

through a self-certification process or by voluntarily requesting Commission approval, respectively.

Rule 808 addresses 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. Rule 809 establishes procedures for addressing a situation where an SBSEF wishes to list a product and it is unclear whether that product is an SBS or swap (i.e., whether it properly falls under the jurisdiction of the SEC or the CFTC). Rule 810 provides 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 collected under Rules 804 and 805 will help the Commission assess whether an SBS listed by an SBSEF complies with relevant provisions of the SEA. In addition, this information will assist the Commission in overseeing the SBSEF's compliance with its regulatory obligations generally and to learn about developments in the SBS product market. Rules 804 and 805 also 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 collected under Rules 806 and 807 will 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. Rules 806 and 807 also 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 Rules 809 and 810 will 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 will 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

Regulation SE includes Rule 831 that would set out requirements relating to an SBSEF's CCO.

The information that will be collected under Rule 831 will 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 will provide the Commission with important information on the financial health of the SBSEF.

8. Surveillance Systems Requirements for SBSEFs

The rules that require an SBSEF to maintain surveillance systems and to monitor trading[1038] 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 Regulation SE are: (1) SBSEFs (and entities wishing to register with the Commission as

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[1038] *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).

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), as well as general industry information, the Commission preliminarily estimated that five entities will seek to register as SBSEFs and thus become subject to the collection of information requirements of these rules.[1039] The Commission did not receive comments about its estimate of the number of SBSEF registrants, and its initial estimate continues to be reasonable.

The Commission preliminarily estimated that three persons would request exemption orders under one or both paragraphs of Rule 833.[1040] The CFTC has granted three exemptions similar to those contemplated by Rule 833,[1041] 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 did not receive comments about its estimate of the number of persons requesting exemption orders under Rule 833, and its initial estimate continues to be reasonable.

The Commission preliminarily estimated that three entities will operate as SBS exchanges.[1042] These are likely to be existing national securities exchanges that, in the future, seek to list SBS and thereby become SBS exchanges. The Commission did not receive comments about its estimate of the number of SBS exchanges, and its initial estimate continues to be reasonable.

1039 *See* Proposing Release, *supra* note 1, 87 FR at 28963.

1040 *Id.* 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 Rule 832) who are members of such trading venues.

1041 *See also supra* note 626 (discussing a CFTC staff no-action letter addressing certain UK swap trading facilities).

1042 *See* Proposing Release, *supra* note 1, 87 FR at 28963.

The Commission considered whether any provision of proposed Regulation SE would impose any burdens (as defined in the PRA) on SBSEF members but received no comments on this point and continues to estimate that the provisions of Regulation SE would not impose PRA burdens on SBSEF members.

D. Total Annual Reporting and Recordkeeping Burden

1. Overview

The CFTC, based on its experience in developing rules for SEFs and regulating the SEF market, has over the years 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 Regulation SE are modeled.[1043] Those estimates are presented in the form of aggregate totals for compliance with:

- *Part 37 of the CFTC regulations* regarding initial registration requirements applicable to SEFs;

[1043] *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 (Nov. 27, 2020), 85 FR 82313, 82324 (Dec. 18, 2020) (Final Rule PRA for 17 CFR 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, 17 CFR 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 Feb. 4, 2021), *available at* https://omb.report/omb/3038-0093 (PRA Supporting Statements for CFTC part 40, 17 CFR 36.1); Notification of Pending Legal Proceedings: OMB Control Number 3038-0033 Supporting Statements (last updated Oct. 29, 2021), *available at* https://omb.report/omb/3038-0033 (PRA Supporting Statements for 17 CFR 1.60(a), (c), and (e)); Adaptation of Regulations To Incorporate Swaps (Oct. 16, 2012), 77 FR 66288, 66306–08 (Nov. 2, 2012) (Final Rule PRA for 17 CFR 1.59 and 1.37(c)); Recordkeeping (May 23, 2017), 82 FR 24479, 24485 (May 30, 2017) (Final Rule PRA for 17 CFR 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 17 CFR 1.31, 1.37(c), 1.59, and 1.67); Service on Self-Regulatory Organization Governing Boards or Committees by Persons with Disciplinary Histories (Feb. 27, 1990), 55 FR 7884, 7890 (Mar. 6, 1990) (Final Rule PRA for 17 CFR 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 (Dec. 23, 1998), 64 FR 16, 22 (Jan. 4, 1999) (Final Rule PRA for 17 CFR 1.69); Rules Pertaining to Contract Markets and Their Members: OMB Control Number 3038-0022 Supporting Statements (last updated Dec. 21, 2010), *available at* https://omb.report/omb/3038-0022 (PRA Supporting Statements for 17 CFR 1.63, 1.64, and 1.69); Swap Data Recordkeeping and Reporting Requirements (Dec. 20, 2011), 77 FR 2136, 2171–76 (Jan. 13, 2012) (Final Rule PRA for 17 CFR 45.2); Swap Data Recordkeeping and Reporting Requirements: OMB Control Number 3038-0096 Supporting Statements (last updated Mar. 16, 2021),

- *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
- *17 CFR 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 are, with limited exceptions discussed above, substantively similar to those applicable to SEFs. Therefore, the Commission is basing its estimates for the paperwork burdens for SBSEFs on the CFTC's paperwork burden calculations for analogous rules that apply to SEFs, which have been approved by OMB.[1044] 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 that 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 Commission rules being adopted, the Commission does not need to substantially deviate from the CFTC's estimates of aggregated burden hours for compliance (beyond scaling back the CFTC's estimates to account for the smaller number of SBSEFs, and the smaller size of the SBS market relative to the swaps market). These minor differences between the CFTC's existing rules for SEFs and the Commission's 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, and, in other cases, by differences between the swaps market and SBS market. In either case, however, the Commission anticipates that the burdens on SBSEFs would

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available at https://omb.report/omb/3038-0096 (PRA Supporting Statements for 17 CFR 45.2); Repeal of the Exempt Commercial Market and Exempt Board of Trade Exemptions (Sept. 28, 2015), 80 FR 59575, 59576 (Oct. 2, 2015) (Final Rule PRA for 17 CFR 15.05).

[1044] Rule 835, which requires 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.

be substantially similar to the burdens set out in the CFTC estimates, which serve as the basis for the Commission's estimates.[1045] Furthermore, 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 adopted by the Commission are adapted from existing rules of the CFTC. With these rules, the Commission intends to obtain comparable regulatory benefits as the CFTC rules while imposing only marginal additional burdens on 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.[1046]

The burden hours discussed below represent annual/ongoing burdens, with three exceptions that represent initial, one-time burdens: registration burdens for SBSEFs under Rule 803, exemption requests regarding foreign SBS trading venues under Rule 833, and certain rules under Rules 834(b) and (c).

The Commission requested comments on its entire proposed approach to estimating burden hours and received no comment.[1047] The Commission continues to estimate the burdens

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1045 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 that, 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.

1046 However, there may be instances in which a 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 SEC requirement, and in reality there would be few or de minimis burdens imposed on dually registered SEF/SBSEFs.

1047 *See* Proposing Release, *supra* note 1, 87 FR at 28969.

at the levels set forth in the Proposing Release. Therefore, for any provision that the Commission is adopting as proposed, it is not changing its preliminary estimate, except in one instance to account for an update in an estimate by the CFTC that the Commission is using to base its burden estimates.[1048] For any provision that the Commission is modifying from the proposal, as discussed in more detail below, the Commission estimates that the modification would result in no change in the burden estimate compared to the proposal.

2. Aggregate Burdens for Rules Modeled 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 Rule 803, on a one-time basis. The Commission estimates that five entities initially would seek to register with the Commission as SBSEFs. The Commission estimates the burdens of Rule 803 and Form SBSEF to be per respondent and aggregate of 295 and 1,475 hours, respectively. 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). Form SBSEF requests almost exactly the same information as required by Form SEF, and 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.[1049] For purposes of calculating burden hours, the CFTC considered the entire SEF application process to constitute a single information collection; the Commission is utilizing the same approach for SBSEFs. SBSEFs would likely prepare Form SBSEF internally.

[1048] As discussed below, the Commission has revised its burden estimate for Rule 811(d) due to a corresponding revision by the CFTC of its analogous rule.

[1049] *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.

(b) Ongoing Compliance with Other Requirements that Are Similar to the Remainder of Part 37

The Commission estimates the aggregate ongoing annual hour burden for compliance with all of the SBSEF rules that have analogs in part 37 to be 1,935 hours.[1050] 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.[1051] With the exception of § 37.600, which implements a CEA Core Principle for SEFs relating to position limits that is not present in the SEA, every other section of part 37 has an analog in proposed Regulation SE that is substantively similar.[1052] Therefore, 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 noted above, the Commission is adopting Rule 815 and 819 as proposed, except that it is: (1) removing the proposed definition of a "Block Trade", a term used in Rule 815, from Rule 802 and reserving that definition; (2) modifying Rule 815(d)(2) and (d)(3) to narrow the scope of the package-transaction exception to the method of execution requirements of Rule 815; (3) adding section (g) to Rule 815 to specify that a security-based swap that is intended to be cleared at the time of the transaction, but is not accepted for clearing at a registered clearing agency, shall be void *ab initio*; (4) amending Rule 819(e) to permit SBSEFs to contract with DCMs for the provision of services to assist in complying with the SEA and Commission rules thereunder, as approved by the Commission; (5) adding sections (c)(4) and (g)(14) to Rule 819 to address

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1050 1,935 hours = 387 hours (annual burden per respondent) x 5 (number of respondents).

1051 *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).

1052 As discussed previously, the Commission proposed to incorporate portions of the CFTC guidance into certain rules in Regulation SE. The Commission is now adopting those portions of the CFTC guidance as proposed into the rules of Regulation SE. The CFTC guidance clarifies portions of its rules by suggesting means for compliance and does not fundamentally alter those rules. When the CFTC adopted this guidance into its regulations, it did not alter its burden hours estimate. *See, e.g.*, 2021 SEF Amendments Adopting Release. Therefore, 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 rules.

Commission review of: (i) denial or limitation of access to any service or denial or conditioning of membership by an SBSEF and (ii) disciplinary sanctions imposed by an SB SEF; and (6) removing certain mentions of block trades in various places throughout Rule 819 because as mentioned above, a definition of that term has not been adopted. Although these changes may have a practical impact on respondents' SBS trading activity, the Commission estimates that they do not increase or decrease the burden hours for compliance with the Core Principles that are similar to the remainder of part 37. The changes simply: (1) make modifications to accommodate reserving the definition for a block trade; (2) narrow the scope of an exception relating to package-transactions; (3) automatically declare trades intended to be cleared but not accepted for clearing to be void *ab initio*; (4) permit SBSEFs to contract with DCMs for certain services; and (5) address Commission review of certain actions taken by SBSEFs. None of these changes requires additional record-keeping or reporting burdens (or results in a decrease in record-keeping and reporting obligations). Therefore, the Commission estimates that the per-respondent or aggregate totals of 387 hours and 1,935 hours, respectively.

In addition, the Commission is modifying Rule 825 to make changes to what type of information is required to be submitted in and timing of publication of the daily market data report and to remove certain mentions of block trades because that term will not be defined in Regulation SE at this time. Rule 825 will not require the disclosure of the number of block trades and will require publication of the report as soon as reasonably practicable on the next business day but no later than 7 a.m. (rather than before the beginning of trading) and several mentions of block trades in Rule 825(c) have been removed. Not requiring the disclosure of the number of block trades will have a negligible impact on the reporting burden of preparing the daily market data report. Rule 825 requires the report to contain numerous items. The Commission estimates that eliminating block trades from one of the required items (trade count) will reduce the hours burden for compiling the report by a negligible amount. Similarly, changing the timing of the publication of the report will have no impact on burden hours. The Commission estimates that it

will not require a greater or fewer number of hours to compile the report as a result of the change in timing for publication as it is the same report that is being compiled. Therefore, the Commission continues to estimate a per-respondent and aggregate totals of 387 hours and 1,935 hours, respectively.

As discussed in more detail below, certain SBSEF rules being adopted in Regulation SE are derived from other parts of the CFTC's rules (e.g., part 40) and the burdens for those rules 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 SBSEF rule. Please see above for more detailed descriptions of a particular 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 Rule 803 (registration) and certain other rules not modeled 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[a]
Appendix B	Guidance relating to Core Principles	guidance incorporated throughout rules 818 through 831

[a] The burdens of registering using Form SBSEF are discussed in the previous section.

3. Aggregate Burdens for Rules Modeled on CFTC Part 40 Rules

A number of rules contained in Regulation SE are modeled on 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 adopting Rules 804, 805, 806, and 807—which are closely modeled 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, Rule 808 is modeled after § 40.8 and provides that certain information in a Form SBSEF application or a rule or product filing would be made publicly available, unless confidential treatment is obtained pursuant to Rule 24b-2. Rule 809 is loosely modeled after § 40.12 and sets 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

Rules 804 and 805 require an SBSEF to submit filings for new products that it seeks to list. Under Rules 806 and 807, an SBSEF is 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 rule and product filing processes in Rules 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.[1053] The Commission is estimating a total of five SBSEF respondents. The Commission estimates that the aggregate ongoing annual hourly burden for all SBSEFs to prepare and submit rule and product filings under Rules 804, 805, 806, and 807 (including the cover sheet[1054]) 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,[1055] an estimate of 30 responses is appropriate given the more limited scope of the SBS market, as opposed to the swaps market. This would result in a total estimated ongoing annual burden of 60 hours per respondent[1056] and 300 hours for all the respondents annually.[1057]

As noted above, the Commission is stating in this release that, where a respondent is seeking to list a new category of product of which there would be multiple specific products based on different underlying securities, separate submissions under Rule 804 with respect to each underlying security would not be required, but the submission made would have to address

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1053 *See* 75 FR 67282 (Nov. 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).

1054 Each of the filings that is required by Rules 804 through 807 would have to include a submission cover sheet that is modeled 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 Rules 804 through 807, which are based upon the CFTC's estimates. *See supra* note 1053.

1055 *See supra* note 1053.

1056 60 hours = 30 (number of responses per year per respondent) x 2 hours (burden per response).

1057 300 hours = 60 hours (annual burden per respondent pursuant to Rules 804, 805, 806, and 807) x 5 (number of respondents).

why each of the included underlying securities meets the relevant standards required by Regulation SE. "Blanket" certifications—e.g., a single submission for all equity total return security-based swaps to be listed—would not meet the requirements of Rule 804. This flexibility does not result in any increase or decrease in estimated burden hours. Any time savings from the ability to combine submissions under Rule 804 is likely to be substantially, if not fully, offset by the burden of drafting the explanation of why each of the included underlying securities meets the relevant standards required by Regulation SE. Therefore, the changes do not increase or decrease the burden hours for compliance with the rules pertaining to new product filings under Rules 804 and 805. Indeed, as described above, the per-respondent estimate for the requirements related to the rule and product filing processes of 60 hours was an estimate informed by the CFTC's similar provisions and was meant to encompass the combined burdens that an SBSEF would incur to comply with the rule and product filing processes in Rules 804, 805, 806, and 807. Therefore, the Commission continues to estimate the per-respondent and aggregate totals to be 60 hours and 300 hours, respectively.

(b) Burdens related to rules modeled after other part 40 rules

(i) Rule 802

Certain definitions contained in Rule 802 are modeled after provisions of part 40. These definitions do not result in any paperwork burden.

(ii) Rule 809

Rule 809 is loosely modeled on § 40.12 of the CFTC's rules and would apply when 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. Rule 809 provides that a product certification made by an SBSEF pursuant to Rule 804 shall be stayed, or the review period for a product that has been submitted for Commission approval by an SBSEF pursuant to Rule 805 shall be tolled, upon a request, made pursuant to Rule 3a68-2

under the SEA[1058] by the SBSEF, the SEC, or the CFTC, for a joint interpretation of whether the product is a swap, SBS, or mixed swap.

Rule 809 itself does not include a process for determining whether the SEC or CFTC has jurisdiction over a product. 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.[1059] The only burden imposed on an SBSEF under Rule 809 would be checking a box on the submission cover sheet when the SBSEF intends to request a joint interpretation from the Commission and the CFTC pursuant to SEA Rule 3a68-2.[1060] The Commission estimates that each such request would impose a burden of 0.25 hours. Furthermore, the Commission estimates that each SBSEF would make one such request per year.[1061] Accordingly, the aggregate ongoing annual burden for all SBSEFs to comply with Rule 809 would be 1.25 hours.[1062] This work, should it be required, is likely to be conducted internally.

4. Aggregate Burdens for Rules Modeled After CFTC Rules Other than Parts 37 and 40

Adopted rules similar to rules of the CFTC other than part 37 and part 40 are Rules 811(d), 816(e), 819(h), 819(i), 819(j), 819(k), 826(f), and 834. These rules generate various categories of burdens for SBSEFs or market participants.

1058 17 CFR 240.3a68-2.

1059 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 (Dec. 23, 2021), *available at* https://omb.report/icr/202112-3235-018/doc/117438500.pdf.

1060 *See supra* section IV.E.

1061 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.

1062 1.25 hours = 1 (number of responses per year per respondent) x 0.25 hours (burden per response) x 5 (number of respondents).

(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 Rule 811 adapts paragraphs (a), (c), and (e) of § 1.60 to apply to SBSEFs. Paragraph (d)(1) requires 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 to which its property or assets are subject. Paragraph (d)(2) requires 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.

The Commission estimates that an SBSEF would provide the information required by Rule 811(d) once per year, and that each submission would take 0.25 hours. Thus, the Commission estimates that the aggregate ongoing annual burden for all SBSEFs to comply with requests for documents or information pursuant to Rule 811(d) would be 1.25 hours.[1063] 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 97 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 0.25 hour, totaling 24.25 hours (97 x 0.25) annually.[1064]

For PRA purposes, it is reasonable to apply the CFTC's approach to Rule 811(d).[1065] This work, should it be required, is likely to be conducted internally.

[1063] 1 (number of responses per year per respondent) x 0.25 hours (burden per response) x 5 (number of respondents) = 1.25 hour.

[1064] *See* OMB, Supporting Statement for New and Revised Information Collections: OMB Control Number 3038-0033 (Oct. 29, 2021), *available at* https://omb.report/icr/202110-3038-001/doc/115991000.pdf.

[1065] In its preliminary estimates, the Commission based its burden hour calculations upon CFTC 2018 submission to OMB. The Commission is now updating the numbers to reflect numbers from the 2021

(b) Rule 819(h)

Paragraph (h) of Rule 819 generally prohibits 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. Rule 819(h) is modeled on § 1.59 of the CFTC's rules. The Commission does not estimate that this rule would result in a paperwork burden.

(c) Rule 819(i)

Paragraph (i) of Rule 819 bars 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. Rule 819(i) is modeled on § 1.63 of the CFTC's rules.

The Commission estimates that an SBSEF would provide the information required by Rule 819(i) once per year, and that each submission would take 79.83 hours. Thus, the Commission estimates that the aggregate ongoing annual burden for all SBSEFs to comply with Rule 819(i) would be 399.15 hours.[1066] The Commission is basing this estimate on the estimate 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 such submission to the CFTC per year. The CFTC further estimated that the time required to prepare one submission is approximately 79.83 hours.[1067]

For PRA purposes, it is reasonable to apply the CFTC's approach to Rule 819(i), and this work is likely to be conducted internally.

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submission to OMB. The result is the per response burden has increased from .2 hours to .25 hours. *See* OMB, Supporting Statement for New and Revised Information Collections: OMB Control Number 3038-0033 (Oct. 29, 2021), *available at* https://omb.report/icr/202110-3038-001/doc/115991000.pdf.

1066 1 (number of responses per year per respondent) x 79.83 hours (burden per response) x 5 (number of respondents) = 399.15 hours.

1067 *See* CFTC, *Service on Self-Regulatory Organization Governing Boards or Committees by Persons with Disciplinary Histories* (Feb. 27, 1990), 55 FR 7884, 7890 (Mar. 6, 1990) (final rule PRA for § 1.63).

(d) Rule 819(j)

Paragraph (j) of Rule 819 is modeled on § 1.67 of the CFTC's rules. Rule 819(j)(1) provides 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 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 for the time that it would take to prepare and submit a simple notice.[1068] The Commission estimates that these notices would occur once per year at each SBSEF, resulting in an aggregate ongoing annual burden to comply with Rule 819(j) of 2.5 hours.[1069] This work, should it be required, is likely to be conducted internally.

(e) Rule 819(k)

Paragraph (k) of Rule 819 requires 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. Rule 819(k) is modeled on provisions of § 15.05 of the CFTC's rules that apply to SEFs. The Commission does not estimate that this rule would result in a paperwork burden.

(f) Rule 826(f)

Rule 826(f) is modeled on § 1.37(c) and requires 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,

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1068 Rule 819(j) does not address any of the requirements or process concerning taking final disciplinary actions; it merely requires 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 (Nov. 19, 2014), 79 FR 72251, 72381 (Dec. 5, 2014).

1069 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.

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 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 estimates that the aggregate ongoing annual burden for all SBSEFs to comply with requests for documents or information pursuant to Rule 826(f) would be 2 hours.[1070] 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, it is reasonable to apply the CFTC's approach to Rule 826(f). This work, should it be required, is likely to be conducted internally.

(g) Rule 834

Rule 834 of Regulation SE implements 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). Rule 834 provides 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. Rule 834 also requires 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.

[1070] 1 (number of responses per year per respondent) x 0.40 hours (burden per response) x 5 (number of respondents) = 2 hours.

The Commission estimates that Rules 834(b) and (c) together would have an initial, one-time paperwork burden of 15 hours per entity associated with drafting and implementing any such rules, for an aggregate one-time paperwork burden of 120 hours.[1071] Rules 834(b) and (c) are substantially similar to Proposed Rule 702(c) of Regulation MC.[1072] 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.[1073] While the Commission is modifying Rule 834(b) to provide an exception to the 20% restriction mentioned above to SBSEFs that have entered into an agreement with a registered futures association or a national securities association for the provision of certain specified regulatory services, the Commission does not estimate that this exception would result in a change in burden hours for compliance with Rule 834(b). The modification does not affect the information collection under this rule, as it does not involve any record keeping, reporting, or third-party disclosure obligations. Therefore, the Commission is not altering its estimate of 15 hours per entity for Rule 834(b).[1074]

Additionally, the Commission estimates that Rule 834(d), Rule 834(e), and Rule 834(f), combined, would result in an aggregate ongoing annual paperwork burden of 10 hours.[1075] Rules 834(d), (e), and (f) are substantially similar to Proposed Rule 702(h) in Regulation MC in 2010[1076] 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),[1077] 1.63, 1.64, and

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1071 1 (number of responses per respondent) x 15 hours (burden per response) x 8 (5 SBSEFs + 3 SBS exchanges) = 120 hours. Rule 834(a) contains defined terms and would not result in a paperwork burden.

1072 Regulation MC Proposal, *supra* note 21, 75 FR at 65916.

1073 *Id.*

1074 *See supra* section VIII.B for discussion of the 20% restriction.

1075 10 hours = 1 (number of responses per respondent) x 1.25 hours (burden per response) x 8 (number of SBSEF + SBS exchange respondents).

1076 Regulation MC Proposal, *supra* note 21, 75 FR at 65932.

1077 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 Rules 834(d), (e), and (f).

1.67 would result in an average annual paperwork burden of 1.25 hours per response that was included in its submission to OMB.[1078]

The Commission estimates that Rule 834(g) would have an aggregate ongoing annual burden of 16 hours.[1079] 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 for § 1.69 of 2 hours per response that was included in its submission to OMB.[1080]

The Commission does not estimate that Rule 834(h) would result in a paperwork burden not already included in the above estimates. Rule 834(h) incorporates into a single rule the requirements for an SBSEF to file rules to comply with Rule 834. As it has already described the paperwork burdens of Rules 834(b) through (g), the Commission does not estimate that 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.[1081]

5. Miscellaneous Burdens

(a) Rule 833

Rule 833 describes 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,[1082] the Commission 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 two requests in each subsequent year; and that each submission would require an initial, one-time burden of 80 hours. Once an exemption

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1078 *See* 58 FR 37644, 37653.

1079 16 hours = 1 (number of responses per respondent) x 2 hours (burden per response) x 8 (number of SBSEF + SBS exchange respondents).

1080 *See* 64 FR at 16, 22.

1081 26 hours = 10 hours (from the second sentence of Rules 834(d), 834(e), and 834(f)) + 16 hours (from Rule 834(g)) + 0 hours (from Rule 834(h).

1082 *See supra* text accompanying note 1041.

has been granted to an applicant, no further action would be required. The Commission estimates the burden to submit an exemption request under one or both paragraphs of Rule 833 would be 240 hours in the first year[1083] and 160 hours in each subsequent year.[1084]

(b) Rule 835

Rule 835 provides 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 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.[1085] The Commission estimates 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 Rule 835 of 45 hours.[1086] This work, should it be required, is likely to be conducted internally.

1083 240 hours (80 hours of in-house counsel time) x (3 respondents).

1084 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 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 estimates that burden for submitting documents and information in support of a request for an exemption order under Rule 833 would be the same.

1085 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 (Nov. 19, 2014), 79 FR 72251, 72381 (Dec. 5, 2014).

1086 45 hours (0.75 hours of in-house counsel time) x (12 responses per year) x (5 respondents).

6. Total Paperwork Burden Under Proposed Regulation SE

Based on the foregoing, the Commission estimates that the total one-time burden for all SBSEFs, persons that seek an exemption order under Rule 833, and SBS exchanges combined pursuant to the requirements under Regulation SE is equal to 1,995 hours. The Commission estimates that annual ongoing burden for all SBSEFs, persons that seek an exemption order under Rule 833, and SBS exchanges combined pursuant to the requirements under Regulation SE is equal to 2,712.15 hours.

Summary of Aggregate Burden Hours				
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 modeled 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)	0.25	Ongoing	5	1.25
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 and 2[a]	240 and 160
834(b) through (c)	15	One-Time	8	120
834(d) through (g)	3.25	Ongoing	8	26
835	9	Ongoing	5	45

[a] Three respondents in the first year and then two each subsequent year.

E. Collection of Information is Mandatory

The collections of information imposed on SBSEFs throughout Regulation SE is mandatory for registered SBSEFs. The collection of information with respect to Rule 833 is mandatory for persons that seek an exemption order under Rule 833. The collection of information with respect to Rule 834 is 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. Rule 826 under Regulation SE implements 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.

XIX. REGULATORY FLEXIBILITY CERTIFICATION

The Regulatory Flexibility Act ("RFA")[1087] requires Federal agencies, in promulgating rules, to consider the impact of those rules on small entities. Section 603(a) of the Administrative Procedure Act,[1088] as amended by the RFA, generally requires the Commission to undertake a final regulatory flexibility analysis of rules it is adopting, unless the Commission certifies that the rules would not have a significant impact on a substantial number of "small entities."[1089] 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.[1090] In the Proposing Release, the Commission certified, pursuant to section 605(b) of the RFA, that that the proposed rules, form, and cover sheet under Regulation SE and the related rules and rule amendments, if adopted, would not have a

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1087 5 U.S.C. 601 *et seq.*

1088 5 U.S.C. 603(a).

1089 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 rulemaking, are set forth in Rule 0-10 under the SEA, 17 CFR 240.0-10. *See* SEA Release No. 18452 (Jan. 28, 1982), 47 FR 5215 (Feb. 4, 1982) (File No. AS-305).

1090 *See* 5 U.S.C. 605(b).

significant economic impact on a substantial number of small entities for purposes of the RFA.[1091] The Commission solicited but did not receive any comments on the certification as it related to the entities impacted by Regulation SE. The Commission's analysis of the existing information relating to entities subject to Regulation SE, for purposes of the RFA, is discussed below.

A. SBSEFs

Most of Regulation SE, and the related rules and rule amendments, 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 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 FRFA, a small entity includes: (1) when used with reference to an "issuer" or a "person," other than an investment company, an "issuer" or "person" that, on the last day of its most recent fiscal year, had total assets of $5 million or less;[1092] 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,[1093] 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.[1094] Under the

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1091 *See* Proposing Release, *supra* note 1, 87 FR at 28969–70.

1092 *See* 17 CFR 240.0-10(a).

1093 17 CFR 240.17a-5(d).

1094 *See* 17 CFR 240.0-10(c).

standards adopted by the Small Business Administration ("SBA"), entities in financial investments and related activities[1095] are considered small entities if they have $41.5 million or less in annual receipts.

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 (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, for purposes of the RFA none of the potential SBSEFs would be considered small entities.

B. Persons Requesting an Exemption Order Pursuant to Rule 833

Rule 833 describes 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 exemptions with respect to three foreign jurisdictions,[1096] the Commission estimates that there would be three requests under one or both paragraphs of 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 Rule 832) who are members of such trading venues.

Based on the Commission's existing information about the SBS market, the Commission estimates that for purposes of the FRFA no person likely to request an exemption order pursuant to Rule 833 would be considered a small entity. The Commission estimates that most, if not all, of the persons requesting exemptions would be large business entities or subsidiaries of large

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[1095] 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.

[1096] *See supra* text accompanying note 1041.

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 estimates that for purposes of the RFA they would not be considered small entities.

C. SBS Exchanges

Certain rules under Regulation SE apply to SBS exchanges. Currently, there are no SBS exchanges. However, the Commission estimates that there could be up to three entities that would be considered SBS exchanges and would thus be subject to certain requirements of 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[1097] and is not affiliated with any person (other than a natural person) that is not a small business or small organization.[1098] Under the standards adopted by the SBA, entities involved in financial investments and related activities[1099] 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, for purposes of the RFA 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 Regulation SE is a "small entity" for the purposes of the RFA. In addition, the Commission estimates that any SBS exchange would have annual receipts in excess of $41,500,000. Therefore, for purposes of the RFA, no potential SBS exchange would be considered small entities.

1097 17 CFR 242.601.

1098 *See* 17 CFR 240.0-10(e).

1099 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.

D. Certification

For the foregoing reasons, the Commission certifies, pursuant to section 605(b) of Title 5 of the U.S. Code, that the rules, form, and cover sheet under Regulation SE and the related rules and rule amendments will not have a significant economic impact on a substantial number of small entities.

XX. OTHER MATTERS

If any of the provisions of these rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

Pursuant to the Congressional Review Act,[1100] the Office of Information and Regulatory Affairs has designated these rules as not a "major rule" as defined by 5 U.S.C. 804(2).

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 amending §§ 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 adopting new §§ 201.442, 201.443, 240.15a-12, and 242.800 through 242.835, as set forth below.

List of Subjects

17 CFR Part 200

Organization; Conduct and Ethics; and Information and Requests

17 CFR Part 201

Administrative practice and procedure.

[1100] 5 U.S.C. 801 *et seq*.

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 amending title 17, chapter II of the Code of the Federal Regulations as follows:

PART 200—ORGANIZATION; CONDUCT AND ETHICS; INFORMATION AND REQUESTS

1. The authority citation for part 200 continues to read as follows:

Authority: 5 U.S.C. 552, 552a, 552b, and 557; 11 U.S.C. 901 and 1109(a); 15 U.S.C. 77c, 77e, 77f, 77g, 77h, 77j, 77*o*, 77q, 77s, 77u, 77z-3, 77ggg(a), 77hhh, 77sss, 77uuu, 78b, 78c(b), 78d, 78d-1, 78d-2, 78e, 78f, 78g, 78h, 78i, 78k, 78k-1, 78*l*, 78m, 78n, 78*o*, 78*o*-4, 78q, 78q-1, 78w, 78t-1, 78u, 78w, 78*ll*(d), 78mm, 78eee, 80a-8, 80a-20, 80a-24, 80a-29, 80a-37, 80a-41, 80a-44(a), 80a-44(b), 80b-3, 80b-4, 80b-5, 80b-9, 80b-10(a), 80b-11, 7202, and 7211 *et seq.*; 29 U.S.C. 794; 44 U.S.C. 3506 and 3507; Reorganization Plan No. 10 of 1950 (15 U.S.C. 78d); sec. 8G, Pub. L. 95-452, 92 Stat. 1101 (5 U.S.C. App.); sec. 913, Pub. L. 111-203, 124 Stat. 1376, 1827; sec. 3(a), Pub. L. 114-185, 130 Stat. 538; E.O. 11222, 30 FR 6469, 3 CFR, 1964–1965 Comp., p. 36; E.O. 12356, 47 FR 14874, 3 CFR, 1982 Comp., p. 166; E.O. 12600, 52 FR 23781, 3 CFR, 1987 Comp., p. 235; Information Security Oversight Office Directive No. 1, 47 FR 27836; and 5 CFR 735.104 and 5 CFR parts 2634 and 2635, unless otherwise noted.

Subpart A—Organization and Program Management

2. Amend §200.30-3 by adding paragraphs (a)(95) through (102) to read as follows:

§ 200.30-3 Delegation of authority to Director of Division of Trading and Markets.

* * * * *

(a) * * *

(95) Pursuant to §§ 242.803 and 242.808(a) and (b) of this chapter (Rules 803 and 808(a) and (b)):

(i) To publish notice on the Commission's website of a completed application ("Form SBSEF"), to register as a security-based swap execution facility;

(ii) To make available on the Commission's website certain specified parts of a Form SBSEF;

(iii) To notify the applicant that its application is incomplete and will not be deemed to have been submitted for purposes of the Commission's review;

(iv) To request from the applicant any additional information and documentation necessary to review an application;

(v) To notify the applicant that its application is materially incomplete and to specify the deficiencies in the application, for purposes of staying the 180-day period for Commission review of the Form SBSEF; and

(vi) Upon receipt of a request submitted in good form by a security-based swap execution facility for vacation of its registration, to issue an order vacating the security-based swap execution facility's registration and to send a copy of the request and its order to all other security-based swap execution facilities, national securities exchanges that trade security-based swaps, and registered clearing agencies that clear security-based swaps.

(96) Pursuant to §§ 242.804(c)(1) and (2) and 242.808(b) of this chapter:

(i) To make publicly available on the Commission's website a security-based swap execution facility's filing of new products pursuant to the self-certification procedures of §242.804 of this chapter;

(ii) To stay for a period of up to 90 days the effectiveness of a security-based swap execution facility's self-certification of a new product;

(iii) To publish notice on the Commission's website of a 30-day period for public comment; and

(iv) To withdraw the stay or notify the security-based swap execution facility that the Commission objects to the proposed certification.

(97) Pursuant to §§ 242.805(b) through (e) and 242.808(b) of this chapter:

(i) To make publicly available on the Commission's website a security-based swap execution facility's filing of new products for Commission review and approval pursuant to §242.805 of this chapter (Rule 805);

(ii) To notify the submitting security-based swap execution facility that a submission for a new product does not comply with paragraph (a) of §242.805 of this chapter (Rule 805);

(iii) To extend by an additional 45 days the period for consideration of a new product voluntarily submitted by a security-based swap execution facility to the Commission for approval, if the product raises novel or complex issues that require additional time to analyze, and to notify the security-based swap execution facility of the extension 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;

(iv) To extend the period for consideration of a new product voluntarily submitted by a security-based swap execution facility to the Commission for approval by such longer period as to which the security-based swap execution facility agrees in writing;

(v) To approve a proposed new product and provide notice of the approval to the security-based swap execution facility;

(vi) To notify the security-based swap execution facility that the Commission will not, or is unable to, approve the product, and to 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 §242.805(a) of this chapter, that the product violates, appears to violate, or potentially violates but which cannot be ascertained from the submission.

(98) Pursuant to §§ 242.806(b) through (e) and 242.808(b) of this chapter:

(i) To make publicly available on the Commission's website a security-based swap execution facility's filing of new rules and rule amendments for Commission review and approval pursuant to §242.806(a) of this chapter;

(ii) To notify the submitting security-based swap execution facility that a submission for a new rule or rule amendment does not comply with §242.806(a) of this chapter;

(iii) To extend by an additional 45 days the period for consideration of a new rule or rule amendment voluntarily submitted by a security-based swap execution facility to the Commission, if the proposed rule or rule amendment raises novel or complex issues that require additional time to review or is of major economic significance, the submission is incomplete, or the requester does not respond completely to the Commission questions in a timely manner, and to notify the security-based swap execution facility of the extension 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;

(iv) To extend the period for consideration of a new rule amendment voluntarily submitted by a security-based swap execution facility to the Commission for approval by such longer period as to which the security-based swap execution facility agrees in writing;

(v) To approve a proposed rule or rule amendment and provide notice of the approval to the security-based swap execution facility;

(vi) To notify a security-based swap execution facility that the Commission will not, or is unable to, approve the new rule or rule amendment and to 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, including the

form or content requirements of Rule 806, with which the new rule or rule amendment is inconsistent or appears to be inconsistent; and

(vii) To approve a proposed rule or a rule amendment, including changes to terms and conditions of a product, on an expedited basis under such conditions as shall be specified in the written notification.

(99) Pursuant to §§ 242.807(c) and 242.808(b) of this chapter:

(i) To make publicly available on the Commission's website a security-based swap execution facility's filing of new rules and rule amendments pursuant to the self-certification procedures of §242.807 of this chapter;

(ii) To stay for a period of up to 90 days the effectiveness of a security-based swap execution facility's self-certification of a new rule or rule amendment;

(iii) To publish notice on the Commission's website of a 30-day period for public comment; and

(iv) To withdraw the stay or notify the security-based swap execution facility that the Commission objects to the proposed certification.

(100) Pursuant to §§242.809 of this chapter, to provide written notice to a security-based swap execution facility of a stay or tolling pending issuance of a joint interpretation upon request for a joint interpretation of whether a proposed 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.

(101) Pursuant to §242.811 of this chapter:

(i) To request pursuant §242.811(a) of this chapter that a security-based swap execution facility file with the Commission information related to its business as a security-based swap execution facility, and to specify the form, manner, and timeframe for the filing by the security-based swap execution facility;

(ii) To request pursuant to §242.811(b) of this chapter that a security-based swap execution facility 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, to specify the Core Principles and other obligations under the Act or the Commission's rules that the security-based swap execution facility's filing must address, and to specify the form, manner, and timeframe for the security-based swap execution facility's filing;

(iii) To specify, pursuant to §242.811(c)(2) of this chapter, the form and manner of the notification required pursuant to §242.811(c)(1) of this chapter by a security-based swap execution facility 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, and to request supporting documentation of the transaction;

(iv) To specify the form and manner of the certification required pursuant to §242.811(c)(4) of this chapter; and

(v) To specify the form and manner of the submission by a security-based swap execution facility of documents filed in any material legal proceeding to which the security-based swap execution facility is a party or its property or assets is subject, as specified in §242.811(d)(1) of this chapter, or 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, as specified in §242.811(d)(2) of this chapter, and to request further documents.

(102) Pursuant to §242.822 of this chapter (Rule 822), to require that a security-based swap execution provide information in its possession to the Commission and to specify the form and manner of that provision, and to require a security-based swap execution facility to share information with other regulation organizations, data repositories, and third-party data reporting

services as necessary and appropriate to fulfill the security-based swap execution facility's regulatory and reporting responsibilities.

* * * * *

3. Amend § 200.30-14 by revising paragraphs (h)(4), (h)(5), (h)(7), and (h)(8) to read as follows:

§ 200.30-14 Delegation of authority to the General Counsel.

* * * * *

(h) * * *

(4) With respect to proceedings conducted under sections 19(d), (e), and (f) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(d), (e), and (f), Title I of the Sarbanes–Oxley Act of 2002, 15 U.S.C. 7211–7219, and § 201.442 of this chapter (Rule 442 of the Commission's Rules of Practice) to determine that an application for review under any of those sections has been abandoned, under the provisions of'§ 201.420, § 201.440, or § 201.442 of this chapter (Rule 420, Rule 440, or Rule 442 of the Commission's Rules of Practice), or otherwise, and accordingly to issue an order dismissing the application.

(5) With respect to proceedings conducted pursuant to the Securities Exchange Act of 1934, 15 U.S.C. 78a et seq., the Investment Company Act of 1940, 15 U.S.C. 80a–1 et seq., the Investment Advisers Act of 1940, 15 U.S.C. 80b–1 et seq., the provisions of§ 201.102(e) or § 201.442 of this chapter (Rule 102(e) or Rule 442 of the Commission's Rules of Practice), and Title I of the Sarbanes–Oxley Act of 2002, 15 U.S.C. 7211–7219, to determine applications to stay Commission orders pending appeal of those orders to the federal courts and to determine application to vacate such stays.

* * * * *

(7) In connection with Commission review of actions taken by self-regulatory organizations pursuant to sections 19(d), (e), and (f) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(d), (e), and (f), by the Public Company Accounting Oversight Board pursuant to Title

I of the Sarbanes–Oxley Act of 2002, 15 U.S.C. 7211–7219, or by a security-based swap execution facility pursuant to§ 201.442 of this chapter (Rule 442 of the Commission's Rules of Practice) to grant or deny requests for oral argument in accordance with the provisions of§ 201.451 of this chapter (Rule 451 of the Commission's Rules of Practice).

(8) In connection with Commission review of actions taken by the Public Company Accounting Oversight Board pursuant to Title I of the Sarbanes–Oxley Act of 2002, 15 U.S.C. 7211–7219, or by a security-based swap execution facility pursuant to§ 201.442 of this chapter (Rule 442 of the Commission's Rules of Practice), to determine whether to lift the automatic stay of a disciplinary sanction.

* * * * *

PART 201—RULES OF PRACTICE

4. The general authority citation for part 201 continues to read as follows:

Authority: 15 U.S.C. 77s, 77sss, 78w, 78x, 80a-37, and 80b-11; 5 U.S.C. 504(c)(1).

* * * * *

Subpart D—Rules of Practice

5. The authority citation subpart D is revised to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77h-1, 77j, 77s, 77u, 77sss, 78c(b), 78d-1, 78d-2, 78*l*, 78m, 78n, 78*o*(d), 78*o*-3, 78*o*-10(b)(6), 78s, 78u-2, 78u-3, 78v, 78w, 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.

6. Amend § 201.101 by adding paragraph (a)(9)(ix) to read as follows:

§ 201.101 Definitions.

(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;

* * * * *

7. 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.

* * * * *

8. Amend § 201.210 by revising the paragraph (a) heading, (a)(1), paragraph (b) heading, (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.

* * * * *

(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.

* * * * *

(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:

* * * * *

9. Amend § 201.401 by adding paragraph (f) to read as follows:

§ 201.401 Consideration of stays.

* * * * *

(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.

10. 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) of this chapter;

(2) Final action with respect to a denial or conditioning of membership, as defined in § 240.835(b)(2) of this chapter; 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) of this chapter.

(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 of this chapter by the security-based swap execution facility of the determination is received by the aggrieved person. The Commission will not extend this 30-day period, absent a showing of extraordinary circumstances. This section is the exclusive remedy for seeking an extension of the 30-day period. 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) of this section.

(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.

11. 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.

12. Amend §201.450, by:

a. Redesignating paragraphs (a)(2)(iv) and (a)(2)(v) as paragraphs (a)(2)(v) and (a)(2)(vi); and

b. Adding new paragraph (a)(2)(iv).

The addition reads as follows:

§ 201.450 Briefs filed with the Commission.

(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).

* * * * *

13. Amend §201.460 by adding paragraph (a)(4) to read as follows:

§ 201.460 Record before the Commission.

* * * * *

(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.

* * * * *

PART 232—REGULATION S-T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

14. 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, 78*o*(d), 78w(a), 78*ll*, 80a-6(c), 80a-8, 80a-29, 80a-30, 80a-37, 80b-4, 80b-6a, 80b-10, 80b-11, 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

15. Amend §232.405 by:

a. Revising the introductory text, paragraphs (a)(2), (a)(3)(i) introductory text, (a)(3)(ii), (a)(4), and (b)(5) introductory text;

b. Adding paragraph (b)(5)(ii); 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), General Instruction F of § 249.311 (Form 11-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), § 240.13a-21 of this chapter (Rule 13a-21 under the Exchange Act), 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), § 240.17Ad-27(d) of this chapter (Rule 17Ad-27(d) under the Exchange Act), Note D.5 of § 240.14a-101 of this chapter (Rule 14a-101 under the Exchange Act), Item 1 of § 240.14c-101 of this chapter (Rule 14c-101 under the Exchange Act), General Instruction I of § 249.333 of this chapter (Form F-SR), 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 2.(*l*) of Form N-8B-2 (§ 274.12 of this chapter), General Instruction 5 of Form S-6 (§ 239.16 of this chapter), General Instruction C.4 of Form N-CSR (§§ 249.331 and 274.128 of this chapter), §§ 242.829 and 831 of this chapter (Rules 829 and 831 of Regulation SE), and the Registration Instructions to Form SBSEF (§ 249.1701 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), Instruction F of Form 11-K (§ 249.311 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), § 240.13a–21 of this chapter (Rule 13a–21 under the Exchange Act), 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), § 240.17Ad-27(d) of this chapter (Rule 17Ad–27(d) under the Exchange Act), Note D.5 of § 240.14a-101 of this chapter (Rule 14a–101 under the Exchange Act), Item 1 of § 240.14c-101 of this chapter (Rule 14c–101 under the Exchange Act), General Instruction I to Form F–SR (§ 249.333 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 2.(*l*) of Form N-8B-2 (§ 274.12 of this chapter), General

Instruction 5 of Form S-6 (§ 239.16 of this chapter), General Instruction C.4 of Form N-CSR (§§ 249.331 and 274.128 of this chapter), §§ 242.829 and 242.831 of this chapter (Rules 829 and 831 of Regulation SE), and the Registration Instructions to Form SBSEF (§ 249.1701 of this chapter), as applicable;

* * * * *

(3) * * *

(i) If the electronic filer is not a management investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a *et seq.*), a separate account as defined in section 2(a)(14) of the Securities Act (15 U.S.C. 77b(a)(14)) registered under the Investment Company Act of 1940, 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)), a unit investment trust as defined in Section 4(2) of the Investment Company Act of 1940 (15 U.S.C. 80a-4), or a clearing agency that provides a central matching service, or is subject to §§ 242.800 through 242.835 (Regulation SE), and is not within one of the categories specified in paragraph (f)(1)(i) of this section, as partly embedded into a filing with the remainder simultaneously submitted as an exhibit to:

* * * * *

(ii) If the electronic filer is a management investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a et seq.), a separate account (as defined in section 2(a)(14) of the Securities Act (15 U.S.C. 77b(a)(14)) registered under the Investment Company Act of 1940, 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)), a unit investment trust as defined in Section 4(2) of the Investment Company Act of 1940 (15 U.S.C. 80a-4), or a clearing agency that provides a central matching service, or is subject to §§ 242.800 through 242.835 (Regulation SE), and is not within one of the categories specified in paragraph (f)(1)(ii) of this section, as partly embedded into a filing with the remainder simultaneously submitted as an exhibit to a filing that contains the disclosure this section requires to be tagged; and

(4) Be submitted in accordance with the EDGAR Filer Manual and, as applicable, Item 601(b)(101) of § 229.601(b)(101) of this chapter (Regulation S-K), General Instruction F of Form 11–K (§ 249.311 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), § 240.13a-21 of this chapter (Rule 13a–21 under the Exchange Act), 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), § 240.17Ad-27(d) of this chapter (Rule 17Ad–27(d) under the Exchange Act), Note D.5 of § 240.14a-101 of this chapter (Rule 14a–101 under the Exchange Act), Item 1 of § 240.14c-101 of this chapter (Rule 14c–101 under the Exchange Act), General Instruction I to Form F–SR (§ 249.333 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), Instruction 2.(*l*) of Form N-8B-2 (§ 274.12 of this chapter); General Instruction 5 of Form S-6 (§ 239.16 of this chapter); General Instruction C.4 of Form N-CSR (§§ 249.331 and 274.128 of this chapter), §§ 242.829 and 831 of this chapter (Rules 829 and 831 of Regulation SE), and the Registration Instructions to Form SBSEF (§ 249.1701 of this chapter), as applicable.

(b) * * *

(5) If the electronic filer is a clearing agency that provides a central matching service, or is subject to §§ 242.800 through 242.835 (Regulation SE), an Interactive Data File must consist only of a complete set of information for all corresponding data in the Related Official Filing, no more and no less, as follows:

* * * * *

(ii) For electronic filers subject to Regulation SE, the content of documents required to be filed electronically under §§ 242.829 and 242.831 of this chapter (Rules 829 and 831 of Regulation SE); and the Registration Instructions to § 249.1701 of this chapter (Form SBSEF), as applicable.

* * * * *

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). General Instruction F of § 249.311 of this chapter (Form 11-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 Form 11-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). Section 240.17Ad-27(d) of this chapter (Rule 17Ad-27(d) under the

Exchange Act) specifies the circumstances under which an Interactive Data File must be submitted with respect the reports required under Rule 17Ad-27. Note D.5 of § 240.14a-101 of this chapter (Schedule 14A) and Item 1 of § 240.14c-101 of this chapter (Schedule 14C) specify the circumstances under which an Interactive Data File must be submitted with respect to Schedules 14A and 14C. Section 240.13a-21 of this chapter (Rule 13a-21 under the Exchange Act) and General Instruction I to § 249.333 of this chapter (Form F-SR) specify the circumstances under which an Interactive Data File must be submitted, with respect to Form F-SR. §§ 242.829 and 242.831 of this chapter (Rules 829 and 831 of Regulation SE) and the Registration Instructions to § 249.1701 of this chapter (Form SBSEF), as applicable, specify the circumstances under which an Interactive Data File must be submitted with respect to filings made under Regulation SE.

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

16. 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, 78j-4, 78k, 78k-1, 78*l*, 78m, 78n, 78n-1, 78*o*, 78*o*-4, 78*o*-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78dd, 78*ll*, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, 7201 *et seq.*, and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; and Pub. L. 111-203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112-106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

17. Amend §240.3a1-1 by:

a. Removing the word “or” from the end of paragraph (a)(2);

b. Removing the period from the end of paragraph (a)(3) and adding a semicolon in its place;

c. Adding paragraphs (a)(4) and (5); and

d. Revising paragraph (b) introductory text.

The additions and revisions read as follows:

§ 240.3a1-1 Exemption from the definition of "Exchange" under section 3(a)(1) of the Act.

* * * * *

(a) * * *

(4) Has registered with the Commission as a security-based swap execution facility pursuant § 242.803 of this chapter and provides a market place or facilities 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 of security-based swaps.

(b) Notwithstanding paragraphs (a)(1) through (3) of this section, an organization, association, or group of persons shall not be exempt under this section from the definition of "exchange," if:

* * * * *

18. 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 of this chapter shall be deemed also to have registered with the Commission pursuant to sections 15(a) and (b) of the Act (15 U.S.C. 78*o*(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. 78*o*(b)(4));

(2) Section 15(b)(6) of the Act (15 U.S.C. 78*o*(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, SE, AND SBSR, AND CUSTOMER MARGIN REQUIREMENTS FOR SECURITY FUTURES

19. The authority citation for part 242 is revised 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), 78*l*, 78m, 78n, 78*o*(b), 78*o*(c), 78*o*(g), 78q(a), 78q(b), 78q(h), 78w(a), 78dd-1, 78mm, 80a-23, 80a-29, 80a-37, and 8343.

20. The heading for part 242 is revised to read as set forth above.

21. Add §§242.800 through 242.835 to read as follows:

Regulation SE—Registration and Regulation of Security-Based Swap Execution Facilities

Sec.

* * * * *

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 §§ 242.800 through 242.835 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 ("Act").

§ 242.801 Applicable provisions.

A security-based swap execution facility shall comply with the requirements of §§ 242.800 through 242.835 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 §§ 242.800 through 242.835, are defined as follows solely for purposes of §§ 242.800 through 242.835:

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 saving 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 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.

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.

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 a security-based swap execution facility or security-based swap exchange ("SBS exchange") to recommend or establish policies or procedures with respect to the surveillance, compliance, rule enforcement, or disciplinary responsibilities of the security-based swap execution facility 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, bylaw, 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 (2)(i)(A) through (C) of this definition of trading facility is excluded from the meaning of the term "trading facility" 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) of this chapter.

Note 1 to § 242.802. The Commission has not yet adopted a definition of "block trade."

§ 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) 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) *Request to register.* An entity requesting registration as a security-based swap execution facility shall:

(i) File electronically a complete Form SBSEF (referenced in § 249.1701), or any successor forms, and all information and documentation described in such forms with the Commission using the EDGAR system and, for the information specified in the Registration Instructions to Form SBSEF, as an Interactive Data File in accordance with § 232.405 of this chapter; 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 of this chapter.

(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 and, for the information specified in the Registration Instructions to Form SBSEF, as an Interactive Data File in accordance with § 232.405 of this chapter.

(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. 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 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. 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 EFFS system;

(2) The Commission has received the submission by the open of business on the business day that is 10 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 therein;

(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 of this chapter; and

(vii) A request for confidential treatment, if appropriate, as permitted under § 240.24b-2 of this chapter.

(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 EFFS system;

(2) Include a copy of the submission cover sheet in accordance with the instructions therein;

(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 of this chapter;

(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 of this chapter; 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) *Forty-five-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 EFFS system;

(2) Include a copy of the submission cover sheet in accordance with the instructions therein;

(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 the 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 of this chapter;

(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 of this chapter.

(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) *Forty-five-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 EFFS system.

(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 10 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 therein (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 10 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 10-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 EFFS system; 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;

(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; and

(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 10 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 an equity interest transfer described in paragraph (c)(1) of this section, 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 under the Act;

(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 10 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 § 242.802 of this chapter 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.* With regard to Required Transactions, 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 and is not intended to be cleared, 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;

(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; and

(v) A Required Transaction that is executed as a component of a package transaction in which all other non-security-based swap components are swaps that are subject to a trade execution requirement under 17 CFR 37.9.

(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 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 paragraphs (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.

(g) *Transactions not accepted for clearing.* A security-based swap execution facility shall establish and enforce rules that provide that a security-based swap that is intended to be cleared at the time of the transaction, but is not accepted for clearing at a registered clearing agency, shall be void *ab initio*.

§ 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.

(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.

(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.

(4) *Commission review with respect to a denial or limitation of access to any service or a denial or conditioning of membership*. (i) *In general*. 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 final action with respect to a denial or limitation of access to any service offered by the security-based swap execution facility or any final action

with respect to a denial or conditioning of membership, as defined in § 242.835(b)(2) of this chapter (Rule 835(b)(2)), in accordance with § 201.442 of this chapter (Rule of Practice 442).

(ii) *Standard to govern Commission review.* In reviewing such a determination, if the Commission finds that the specific grounds on which such denial, limitation, or conditioning is based exist in fact, that such denial, limitation, or conditioning is in accordance with the rules of the security-based swap execution facility, and that such rules are, and were applied in a manner, consistent with the purposes of the Exchange Act, the Commission, by order, shall dismiss the proceeding. If the Commission does not make any such finding or if it finds that such denial, limitation, or conditioning imposes any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act, the Commission, by order, shall set aside the action of the security-based swap execution facility and require it to admit such person to membership or participation or grant such person access to services offered 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 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 board of trade designated as a contract market (under section 5 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 § 242.826 (Core Principle 9).

(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.

(14) *Commission review of a disciplinary sanction*. (i) *In general*. An application for review by the Commission may be filed by any person who is aggrieved by a determination of a security-based swap facility with respect to any final disciplinary action, as defined in § 242.835(b)(1) of this chapter (Rule 835(b)(1)), in accordance with § 201.442 of this chapter (Rule of Practice 442).

(ii) *Standard to govern Commission review.* (A) In reviewing such a determination, if the Commission finds that such person has engaged in such acts or practices, or has omitted such acts, as the security-based swap execution facility has found him to have engaged in or omitted, that such acts or practices, or omissions to act, are in violation of the Exchange Act, the rules or regulations thereunder, or the rules of the security-based swap execution facility, and that such provisions are, and were applied in a manner, consistent with the purposes of Exchange Act, the Commission, by order, shall so declare and, as appropriate, affirm the sanction imposed by the security-based swap execution facility, modify the sanction in accordance with paragraph (C) of

this subsection, or remand to the security-based swap execution facility for further proceedings; or

(B) if the Commission does not make any such finding it shall, by order, set aside the sanction imposed by the security-based swap execution facility and, if appropriate, remand to the security-based swap execution facility for further proceedings.

(C) If the Commission, having due regard for the public interest and the protection of investors, finds that a sanction imposed by a security-based swap execution facility upon such person imposes any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act or is excessive or oppressive, the Commission may cancel, reduce, or require the remission of such sanction.

(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):

(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 10 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 10 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 $5,000 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; and

(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 authority, 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 §§ 242.900 through 242.909 (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 (excluding error trades, correcting trades, and offsetting trades);

(ii) The total notional amount traded (excluding error trades, correcting trades, and offsetting trades);

(iii) The total notional amount of block trades, after such time as the Commission adopts a definition of "block trade" in § 242.802 of this chapter (Rule 802);

(iv) The opening and closing price;

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

(vi) 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 as soon as reasonably practicable on the next business day after the day to which the information pertains, but in no event later than 7 a.m. on the next business day.

(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 §§ 242.800 through 242.835 (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 (g) 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 paragraphs (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 of this chapter.

§ 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 § 242.826 (Core Principle 9), 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 § 242.826 (Core Principle 9).

(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;

(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 of this chapter 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 § 242.826 (Core Principle 9).

§ 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 in paragraph (b) of this section.

(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) *Definitions*. For purposes of this section:

Family relationship of a person means the person's spouse, former spouse, parent, stepparent, child, stepchild, sibling, stepbrother, stepsister, 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) *Ownership and voting limitations.* 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.

(3) The ownership and voting limitations in paragraphs (b)(1) and (2) of this section shall not apply to an SBSEF that has, pursuant to §242.819(e), entered into an agreement with a registered futures association or a national securities association for the provision of regulatory

services that encompass, at a minimum, real-time market monitoring under §242.819(d)(5) and investigations and investigation reports under §242.819(d)(6).

(c) *Enforcement of limitations.* 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 (b) 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) *Disciplinary committees and hearing panels.* 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) *Governing board composition.* Each security-based swap execution facility and SBS exchange shall ensure that:

(1) Twenty 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 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 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

22. 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.

* * * * *

23. Add subpart R to read as follows:

Subpart R—Forms for Registration of, and Filings by, Security-Based Swap Execution Facilities

Sec.

249.1701 Form SBSEF.
249.1702 Security-Based Swap Execution Facility Cover Sheet.

§ 249.1701 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.

§ 249.1702 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 §§ 242.804 through 242.807, 242.809, and 242.816).

24. Add Form SBSEF (referenced in § 249.1701).

Note: Form SBSEF is attached as Appendix A to this document. Form SBSEF will not appear in the Code of Federal Regulations.

25. Add Security-Based Swap Execution Facility Submission Cover Sheet (referenced in §249.1702).

Note: Security-Based Swap Execution Facility Submission Cover Sheet is attached as Appendix B to this document. The Security-Based Swap Execution Facility Submission Cover Sheet will not appear in the Code of Federal Regulations.

By the Commission.

Dated: November 2, 2023.

J. Matthew DeLesDernier,

Deputy Secretary.

Note: The following appendices will not appear in the Code of Federal Regulations.

APPENDIX A—Form SBSEF

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 required to be included in the following exhibits to Form SBSEF must be provided as an Interactive Data File in accordance with Rule 405 of Regulation S-T (17 CFR 232.405). This requirement does not extend to copies of existing documents:

(1) Exhibit C;
(2) Exhibit D;
(3) Exhibit E;
(4) Exhibit F;
(5) Exhibit H;
(6) Exhibit I (except for any copies of agreements included with the exhibit);
(7) Exhibit J;
(8) Exhibit K;
(9) Exhibit L;

(10) Exhibit P;
(11) Exhibit Q;
(12) Exhibit R; and
(13) Exhibit S.

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 with the name(s) of the clearing agency(ies) 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—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 EFFS system. 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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