American Bankers Association
Financial Services Roundtable
Futures Industry Association
Institute of International Bankers
International Swaps and Derivatives Association
Investment Company Institute
Securities Industry and Financial Markets Association
U.S. Chamber of Commerce

June 10, 2011

Chairman Mary L. Schapiro
Commissioner Kathleen L. Casey
Commissioner Elisse B. Walter
Commissioner Luis A. Aguilar
Commissioner Troy A. Paredes

Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Re: Request for Clarification and Relief Under Section 774 of the Dodd-Frank Wall Street Reform and Consumer Protection Act; Petition for Exemption Pursuant to Section 36(a)(1) of the Securities Exchange Act of 1934 and Section 28 of the Securities Act of 1933

Dear Chairman Schapiro and Commissioners Casey, Walter, Aguilar and Paredes:

The undersigned associations sincerely appreciate the significant efforts of the Securities and Exchange Commission ("**SEC**") over the last year to implement Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("**Dodd-Frank**"). We appreciate the SEC's recent announcement that it is taking a series of actions to clarify the requirements that will apply on July 16 and to provide appropriate temporary relief.[1] We believe that all of the provisions of Title VII, including those that do not require rulemaking, should follow an orderly implementation plan. We are therefore writing to request the deferral, during the rulemaking period, of all operative provisions of Title VII of Dodd-Frank, other than the amendments to the definitions of the term "security" and Section 767, that are scheduled to become effective on July 16, 2011. We also request a broad temporary deferral of application of the securities laws, except for the existing antifraud and anti-manipulation provisions, to security-

[1] Press Release, Securities and Exchange Commission, SEC Announces Steps to Address One-Year Effective Date of Title VII of Dodd-Frank Act (June 10, 2011), *available at* http://www.sec.gov/news/press/2011/2011-125.htm.

based swaps ("**SBS**") that would otherwise result from including SBS in the definition of "security." [2]

Section 774 of Dodd-Frank states that the provisions of Title VII take effect, unless otherwise specified, on the later of (i) 360 days after the date of enactment or (ii) to the extent a provision requires a rulemaking, not less than 60 days after publication of the final rule or regulation implementing such provision. While most of the provisions of Title VII require rulemaking to be effective, according to our reading, a number of provisions that relate to SBS are arguably scheduled to become effective on July 16 ("**self-operative provisions**").[3]

In general, intractable compliance, interpretive and operational challenges will arise if such provisions go into effect in July. Compliance with these provisions is complicated in part because certain key terms, such as SBS, SBS dealer and major SBS participant, are subject to further definition, and because the self-operative provisions are integrally related to other provisions that require rulemaking. There is no basis for assuming that Congress intended all of the self-operative provisions of Dodd-Frank to become effective before the mandatory rulemaking process is complete. To the contrary, § 712 of Dodd-Frank requires the SEC to issue most of the final rules under Title VII by July 2011.

We request that the SEC use its exemptive authority under Section 36(a)(1) of the Exchange Act[4] and Section 28 of the Securities Act,[5] and any other legal authorities available to the SEC, to exempt, interpret or otherwise provide relief to

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[2] Dodd-Frank §§ 761(a)(2) and 768(a)(1) (amending the definition of "security" in the Securities Act of 1933, as amended ("**Securities Act**") and the Securities Exchange Act of 1934, as amended ("**Exchange Act**").

[3] We believe that there are strong arguments why substantially all of the provisions of Title VII could be interpreted as at least indirectly requiring rulemakings to be effective. Without guidance from the SEC, market participants would need to prepare for the possibility that all provisions that do not explicitly require rulemaking will be viewed as effective on July 16. We therefore appreciate the SEC's plans to provide guidance regarding which provisions will become operable on July 16 and encourage the SEC to do so as soon as possible.

[4] Section 36(a)(1) states: "Except as provided in subsection (b) of this section, but notwithstanding any other provision of this title, the Commission, by rule, regulation, or order, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this title or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors."

[5] Section 28 states: "The Commission, by rule or regulation, may conditionally or unconditionally exempt any person, security, or transaction, or any class of persons, securities, or transactions, from any provision or provisions of this title or of any rule or regulation issued under this title, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors."

market participants from the requirements of all of the self-operative provisions, other than the amendment to the securities definition to include SBS and Section 767. This relief should remain in effect until key definitional and other rules are effective, and the SEC has specified an implementation plan for Title VII. The implementation of the self-operative provisions should align with the principles and phase-in schedule that the SEC adopts for its Title VII rulemakings.

In addition, we request that the SEC temporarily exempt market participants from all of the securities laws, except the existing antifraud protections, that would otherwise apply to SBS beginning on July 16 when SBS become securities. We recognize that the definitional change to include SBS in the term "security" must be effective on July 16 in order for the SEC to maintain its existing antifraud authority over SBS that were previously security-based swap agreements. This temporary exemption should last long enough to provide sufficient time for (i) the SEC to adopt rules defining SBS, SBS dealer, major SBS participant and eligible contract participant ("**ECP**"), as well as the rules on SBS capital, margin and business conduct requirements and clarification as to the extraterritorial reach of Title VII; (ii) market participants to submit requests for permanent exemptions and for the SEC to adopt exemptions where appropriate; (iii) the SEC to integrate the application of the securities requirements to SBS with the overall Title VII implementation schedule; and (iv) market participants to consider the appropriate legal entity registration framework to adopt in light of the SEC's final rules; and (v) market participants to implement that framework. Within three months of July 16, we will provide to the SEC a detailed targeted request for permanent exemptions from particular inapposite securities laws. We also respectfully request that the SEC encourage FINRA to file a rule that would defer application of its rules to SBS and to adopt an implementation plan that is aligned with the SEC's schedule.

These exemptions are critical to ensuring an orderly and logical implementation of Title VII. We appreciate and are supportive of the SEC's consideration of various approaches to a phased-in implementation schedule and believe that the implementation of the self-operative provisions should follow a similar logic.[6] It is necessary to align the implementation of the self-operative

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[6] We encourage the SEC to carefully consider the recommendations made in a recent comment letter submitted by SIFMA and other trade groups to the SEC regarding the phase-in schedule for Title VII requirements. *See* Letter from the International Swaps and Derivatives Association, the Futures Industry Association, the Financial Services Forum and SIFMA to the Commissions, dated May 4, 2011, *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=42353. We also recommend that the SEC adopt an iterative rulemaking process, along with an implementation timetable, and provide market participants an opportunity to review and comment on revised versions of the rules, and their interdependencies. *See* Letter from the FIA, The Financial Services Roundtable, the Institute of International Bankers (Institute), the Insured Retirement Institute, ISDA, SIFMA and the U.S. Chamber of Commerce to the CFTC, dated May 26, 2011; *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=44562 and Letter from the ABA and the ABA Securities Association to the
(…continued)

provisions with the provisions that are dependent on rulemaking to ensure a coherent realization of the new swaps regulatory regime.

This letter is divided into two parts. Part I discusses five rulemaking areas and why deferral of the effectiveness of the related self-operative provisions is particularly necessary until final rulemaking is effective. It also includes specific examples of the challenges that will result if the self-operative provisions are not deferred. Part II outlines the problems associated with SBS becoming securities and discusses why a broad temporary exemption from application of the securities laws (other than existing antifraud and anti-manipulation provisions) to SBS is necessary.

I. The Self-Operative Provisions Should Be Deferred Until Related SEC Rulemakings Are Effective

A. *Deferral Is Needed Until Key Rulemakings Are Effective*

This section identifies five critical rulemaking areas that require resolution before the self-operative provisions of Title VII should become effective.

1. SBS Definitional Rule Must Be Effective

The definition of SBS is of central importance for the self-operative provisions. The SEC and the Commodity Futures Trading Commission ("**CFTC**," and, together with the SEC, the "**Commissions**") have proposed, but have not yet finalized their joint proposal defining swap, mixed swap and SBS.[7] This Product Definition Proposal would prevent unintended consequences of imposing Title VII requirements on products that were not intended to be regulated as SBS. For example, the Commissions proposed that certain insurance products, such as surety bonds, true loan participations and forward sales of mortgage-backed securities in the TBA market would be outside the definition of SBS. As of July 16, however, these transactions could arguably fall within the definition of SBS. As a result, they could be treated as securities, and become subject to the new SBS collateral segregation and business conduct self-operative provisions, among others.

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CFTC, dated June 3, 2011, *available at* http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=44614.

[7] CFTC and SEC Proposed Rule on Product Definitions Contained in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 76 Fed. Reg. 29,818 (May 23, 2011) (hereinafter "**Product Definition Proposal**") (adding 17 C.F.R. pt. 240).

2. SBS Dealer and Major SBS Participant Definitional and Registration Rules Must Be Effective

The SBS dealer and major SBS participant registration requirement should be interpreted as implicitly requiring a rulemaking: specifically, these provisions depend on the rules that further define SBS dealer and major SBS participant and the registration rule. Section 764(a) of Title VII forbids SBS dealers and major SBS participants from operating unless they are registered as such with the SEC. That section also requires the SEC to adopt rules within one year of the enactment of Dodd-Frank that provide for the registration of SBS dealers and major SBS participants. Clearly, Congress did not intend to halt the activities of the SBS market's primary participants on July 16, 2011 as a result of there being no registration regime set up by the SEC at that time. The SEC should interpret these provisions as implicitly requiring a rulemaking to prevent this paradoxical result.

The statutory definitions of SBS dealer and major SBS participant do not provide sufficient guidance for market participants to determine which of their entities would be captured by these definitions and therefore subject to registration. The Commissions have proposed, but have not yet adopted, a rule further defining these terms.[8] The interdependence of such definitional rule and the registration requirement is exemplified by the CFTC's proposed registration rule 2121, which states that swap dealers "would be required to apply for registration not later than the effective date of the applicable Definitional Rulemaking" (*i.e.*, the effective date of the swap dealer and major swap participant definitions).[9] Even if market participants could rely on the statutory definitions, and the joint proposal defining SBS dealer and major SBS participant, ambiguities remain. In particular, key interpretive issues such as the treatment of inter-affiliate swaps, legacy swaps and affiliate guarantees, and the extraterritorial application of the registration requirement, are unaddressed in the statutory definitions and were not resolved by the proposal.

3. Rulemaking on Capital, Margin and Business Conduct Must Be Effective

Market participants have not yet been able to determine which entities they will register as SBS dealers and major SBS participants and the regulatory requirements that will apply to them because the SEC has yet to propose rules on capital, margin, and business conduct, among other areas, for SBS dealers and

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[8] CFTC-SEC Proposed Rule on Further Definition of '"Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," 75 Fed. Reg. 80,174 (Dec. 21, 2010) (hereinafter "**Definitional Proposal**") (adding 17 C.F.R. pt. 240).

[9] CFTC Proposed Rule on Registration of Swap Dealers and Major Swap Participants, 75 FR 71,379, 71,381 (Nov. 23, 2010) (adding C.F.R. pts. 3, 23 and 170).

major SBS participants. Dodd-Frank does not contemplate that market participants would have to make these decisions in the absence of final rules. Section 712 requires the rules governing SBS dealers and major SBS participants to be final within one year of the enactment of Dodd-Frank. We request that the SEC provide relief to avoid this unintended consequence.

4. New Antifraud Liability Must Be Clarified

We have significant concerns that the new antifraud liability for SBS under Section 9 of the Exchange Act will be interpreted broadly on July 16 in light of the expanded scope of antifraud liability proposed by the SEC under Rule 9j-1.[10] The Antifraud Proposal is overly broad and would expose SBS market participants to inappropriate enforcement liability because it creates uncertainty as to what is required to comply with the new antifraud provisions.[11] For example, the Antifraud Proposal does not provide safe harbors analogous to Exchange Act Rule 10b5-1. SBS market participants need clarity that the Antifraud Proposal will not be applied on July 16 before a final rule is effective. Otherwise, market participants may be discouraged from entering into SBS transactions on July 16 in order to avoid the potentially significant liability that could arise under the new antifraud liability, if it is interpreted broadly.

5. Extraterritorial Guidance Is Needed

In the absence of clear guidance regarding the extraterritorial application of Title VII, it is virtually impossible for global swaps entities to plan for the implementation of Title VII. Section 772(b) states, "No provision . . . shall apply to any person insofar as such person transacts a business in security-based swaps without the jurisdiction of the United States, unless such person transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of any provision . . . ." The SEC has not provided any formal guidance on what this section means in practice and scope. As a result, market participants do not know what types of U.S. activities engaged in by their non-U.S. entities will trigger U.S. registration requirements and regulations, nor do they know the scope of capital or margin requirements that will apply. For those non-U.S. entities that expect to register as SBS dealers or major SBS participants, there remain major ambiguities

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[10] SEC's Proposed Rule on Prohibition Against Fraud, Manipulation, and Deception in Connection With Security-Based Swaps, 75 FR 68,560 (Nov. 8, 2010) (hereinafter "**Antifraud Proposal**") (adding 17 C.F.R. pt. 240).

[11] For example, please refer to SIFMA's comment letter to the SEC, dated December 23, 2010, *available at* http://www.sifma.org/WorkArea/DownloadAsset.aspx?id=22834.

as to how their SBS with non-U.S. persons will be treated and how U.S. requirements will be reconciled with foreign regulatory requirements.[12]

A number of important provisions that are scheduled to or could arguably go into effect on July 16 pose substantial problems for market participants absent further rulemaking by the Commissions. Faced with the unaddressed interpretive and compliance issues, market participants have little confidence that they will be able to assure compliance with the self-operative provisions. This is particularly problematic because of Section 29(b) of the Exchange Act, which may render void any contract made in violation of the Exchange Act. We request that the SEC explicitly provide that no SBS agreement can be void under Section 29(b) as a result of the self-operative provisions, except by reason of the existing securities antifraud and anti-manipulation laws.

B. *Specific Examples Showing Why Security-Based Swap Self-Operative Provisions Should Be Deferred*

The challenges associated with provisions that are specific to SBS dealers and major SBS participants, and to market participants more generally, are discussed below.

1. Problematic SBS Dealer and Major SBS Participant Requirements

As a preliminary matter, we believe that the SEC should interpret all of the provisions in § 764(a) that regulate SBS dealers and major SBS participants as provisions that require rulemaking, and therefore not effective on July 16. First, the intent of Dodd-Frank appears to only apply SBS dealer and major SBS participant requirements to persons that are registered with the SEC as such. Section 764(a) of Title VII forbids SBS dealers and major SBS participants from operating unless they are registered as such with the SEC. Second, Section 15F contains a general requirement in subsection (d) for the SEC to adopt rules for persons that register as SBS dealers and major SBS participants. There are also mandatory rulemaking provisions within Section 15F on business conduct, chief

[12] We and our members have submitted comment letters and other materials to the SEC that discuss the extraterritorial application of Title VII. Please refer to the comment letters submitted by: the Institute on January 10, 2011, *available at* http://sec.gov/comments/s7-39-10/s73910-8.pdf, by SIFMA on February 3, 2011, *available at* http://www.sec.gov/comments/s7-39-10/s73910-81.pdf; 7 foreign financial institutions on January 11, 2011, *available at* http://www.sec.gov/comments/s7-39-10/s73910-9.pdf; 12 foreign financial institutions on February 17, 2011, *available at* http://www.sec.gov/comments/s7-39-10/s73910-25.pdf; and Sullivan & Cromwell LLP on behalf of Bank of America Corporation, Citigroup Inc. and JPMorgan Chase & Co. on February 22, 2011, *available at* http://www.sec.gov/comments/s7-39-10/s73910-60.pdf; and the presentation submitted to the SEC by the Institute on April 13, 2011, *available at* http://www.sec.gov/comments/other/other-initiatives/otherinitiatives-50.pdf.

compliance officer duties and other requirements. We appreciate that the SEC is taking steps in the coming weeks to clarify the requirements that will apply to SBS transactions as of July 16 and encourage the SEC to interpret these provisions as requiring rulemaking.

If the SEC does not take action to provide relief soon, market participants that are captured by the statutory definitions of SBS dealer and major SBS participant could be subject to provisions regulating SBS dealers and major SBS participants on July 16, even though they are not registered with the SEC.

For one, market participants that are captured by the statutory definition of SBS dealer may be required to comply with fiduciary-like business conduct rules when advising pension funds, municipalities and other "special entities."[13] These duties include acting in the best interests of the special entity, using reasonable efforts to obtain information, and disclosing the firm's capacity when acting as a counterparty to a special entity. Some dealers may cease or limit their SBS business with "special entities" as the legal and financial risks resulting from these provisions is too substantial absent clarity on the application of the "special entity" rules on July 16. There is also substantial uncertainty around what constitutes acting "as an advisor to," and in the "best interests" of, a special entity.[14] The statutory requirement is also silent as to what constitutes "reasonable efforts": would an SBS dealer be able to rely on the special entity's representations to satisfy its obligations to use "reasonable efforts" to obtain information necessary to determine that a recommended SBS is in the special entity's best interests? The SEC should provide relief to market participants from complying with the special entity requirements until the SEC has provided guidance for how to comply with these requirements in an effective business conduct rule.

Application of the statutory special entity requirements, in the absence of an effective SEC business conduct rule, will result in substantial compliance risk due to possible SEC enforcement actions, as well as litigation risk: failure to comply with the special entity rules could subject persons that meet the statutory definition of SBS dealer to private litigation actions under Section 10(b) of the

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[13] We note that new subsection 15F(h)(4) of the Exchange Act is ambiguous as to whether it requires further rulemaking. However, we believe that this subsection is dependent on rulemaking because new subsection 15F(h)(6) requires the SEC to prescribe rules under subsection (h) governing business conduct standards.

[14] While the SEC has not yet proposed or finalized a rule on business conduct, the CFTC's proposed rule recognizes that Dodd-Frank does not define the key terms "advisor," "best interests" and "reasonable efforts" and, as a result, proposes to define these terms and specify how to comply with the special entity rules. CFTC Proposed Rule on Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties, 75 Fed. Reg. 80,638 (Dec. 22, 2010) (adding 17 C.F.R. pts. 23 and 155).

Exchange Act and could also subject broker-dealers advising special entities to private litigation actions under Section 9 of the Exchange Act.

Furthermore, market participants that fall within the statutory definition of SBS dealer or major SBS participant could be required to:

- cease all SBS dealing activities and divest SBS, or be in violation of the law for failing to be registered with the SEC, notwithstanding that the SEC has not yet provided a process for registration;[15]

- designate a chief compliance officer who must review and ensure compliance with Title VII, administer policies and procedures, and establish procedures for remediation of noncompliance;[16] and

- create new, and amend existing, customer documentation, educate customers and notify all bilateral uncleared swap counterparties of their right to have initial margin segregated at an independent third-party custodian.[17]

2. Substantial Challenges in the Application of Provisions that Affect Market Participants Generally

Market participants may also be subject to new requirements on July 16 that will be difficult to implement in the absence of final and effective SEC rules. For instance, in the absence of an effective Rule 9j-1, market participants will need to closely analyze their businesses to ensure operation of information walls (to the extent such barriers are recognized by the SEC for this purpose) to comply with the gloss imposed on these new antifraud provisions by the SEC's Antifraud Proposal.[18] Until the SEC's final rules are effective, implementation or modification of information barriers as they relate to SBS activity is unworkable.

There are also new requirements related to margin collection that could be disruptive to the markets. Broker-dealer registration or SBS dealer registration would be required for any person that accepts margin for cleared SBS. This may require persons that are not registered as broker-dealers to cease clearing customer SBS until the SBS registration rules are finalized and effective. In addition, asset managers that invest collateral on behalf of broker-dealers may

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[15] Dodd-Frank § 764(a).

[16] *Id.*

[17] *Id.*

[18] *Id.* §§ 762, 763.

need to reallocate these segregated funds into a narrow category of eligible investments that includes obligations of the United States, any state or political subdivision of a state, and obligations fully guaranteed by the United States.[19]

II. Problems with Treating Security-Based Swaps as "Securities" Necessitate Relief

The most problematic self-operative Title VII provisions are those that will expand the definition of "security" in the Securities Act and the Exchange Act to include SBS. We appreciate that the SEC recognized the need for such temporary relief in the press release it issued earlier today. These definitional changes will result in substantial new compliance requirements and implementation challenges that the SBS market is just beginning to comprehend. At the same time, we recognize that delaying the effectiveness of the definitional change is unworkable because of the collateral effect on the SEC's existing antifraud provisions for SBS that were previously security-based swap agreements. Therefore, rather than delay the effectiveness of the definitional change, we request that the SEC provide a broad temporary exemption from compliance with the requirements that will result from SBS being defined as securities, other than existing antifraud and anti-manipulation rules that apply to securities.

This temporary exemption should last long enough to provide sufficient time for (i) the SEC to adopt rules defining SBS, SBS dealer, major SBS participant and ECP, as well as the rules on SBS capital, margin and business conduct requirements and clarification with respect to the extraterritorial reach of Title VII; (ii) market participants to submit requests for permanent exemptions and for the SEC to adopt exemptions where appropriate; (iii) the SEC to integrate the application of the securities requirements to SBS with the overall Title VII implementation schedule; (iv) market participants to consider the appropriate legal entity registration framework to adopt in light of the SEC's final rules; and (v) market participants to implement that framework. Within three months of July 16, we will provide to the SEC a detailed targeted request for permanent exemptions from particular inapposite securities laws.

The SEC should also encourage FINRA to file a rule that (i) defines the term "security" by reference to the Exchange Act and temporarily excludes SBS from such definition, and specifically excludes SBS from the definition of security in NYSE Rule 3, or (ii) temporarily exempts market participants' SBS activities from FINRA requirements. Without such action from FINRA, broker-dealer SBS transactions would be subject to FINRA Rule 4210 margin requirements; markup rules for dealer trades with non-ECPs; best execution rules; anti-money laundering requirements; Know Your Customer and other account

[19] *Id.* § 763.

opening requirements; and suitability requirements, among others. We further believe that FINRA should adopt an implementation plan that is aligned with the SEC's schedule.

The inclusion of SBS in the definition of security beginning on July 16 raises the following three key problems:

- Application of regulatory requirements under the securities laws may be virtually impossible to ascertain with any precision because they raise questions concerning, or are related to, issues that will be addressed in rules that are not yet final. Furthermore, until these rules are effective, application of securities requirements to SBS is premature.

- Application of some of these regulatory requirements will make little sense in the context of SBS and should be permanently exempted. Other provisions will involve significant interpretive issues for which SEC guidance is needed.

- A number of requirements raise technical or operational hurdles that require more time to surmount. Significant time will be necessary to catalogue the full implications of the inclusion of SBS in the definition of security and to determine appropriate next steps.

The discussion below identifies examples where the inclusion of SBS in the definition of security is particularly problematic.

A. *Securities Requirements Are Impossible to Implement with Precision Prior to Final Rulemakings*

A foremost concern with the treatment of SBS as securities is that the definition of SBS is not settled. Nonetheless, if the application of the securities laws and regulations to SBS is not deferred, market participants will need to start reacting to this change now. As a legal, risk management and compliance matter, market participants will need to view as an SBS every transaction that could be an SBS under the statutory definition, and implement compliance and operations controls and procedures, even if the Product Definitions Proposal would exclude such transactions. Until the definition of SBS is final, market participants will not know which of their agreements will be regulated as securities subject to SEC registration, and which will be swaps regulated by the CFTC, nor will they know whether their transactions trigger broker-dealer, SBS dealer or major SBS participant registration. Subjecting SBS to securities requirements prior to the effectiveness of the SBS definition rule would be premature because it would mean that certain transactions captured by the statutory definition of SBS would be treated as securities solely for the interim period until the SBS definition is effective.

This confusion is further exacerbated by the uncertainty in the interrelated definitions of ECP and securities dealer. While there is an exclusion from the definition of dealer for dealing in SBS, this exclusion is limited to dealing in SBS with or for ECPs. The definition of ECP was amended by Dodd-Frank, and the Commissions have sought comments in their Definitional Proposal on how to further define such term, including how to interpret the phrase "discretionary basis." Until the term ECP is further defined in a final rulemaking, market participants will not know whether they are dealing with an ECP, and where the line is between their institutional and retail businesses. As a result, they will not know whether they are captured by the definition of "dealer" in the Securities Act and whether certain transactions are subject to the new requirement for non-ECP transactions to be executed on an exchange, or, if executed on a private placement basis, are subject to the requirement to be executed pursuant to an effective registration statement. As a result, market participants may cease or severely limit their business with counterparties that could potentially be considered non-ECPs under the Dodd-Frank statutory definition of ECP.

Finally, applying the securities laws and regulations to SBS prior to the finalization of key Title VII definitions and rules, such as the rules on capital, margin and business conduct, and guidance on extraterritorial application of Title VII, would require market participants to make premature decisions about how to structure their SBS activities. For example, it is difficult for market participants to decide whether to use a dually registered broker-dealer, SBS dealer for their SBS activities, or instead conduct all SBS activities out of an SBS dealer, until they know how much capital is required for SBS dealers.

B. *Particular Securities Requirements May Require Permanent Exemptive Relief or SEC Guidance as Applied to Security-Based Swaps*

As a preliminary matter, we believe that a number of securities requirements are inappropriate for SBS and inconsistent with the purposes of Dodd-Frank. Market participants are analyzing the implications of the SBS definition as a security to determine the need for specific relief where the application of the securities laws to SBS would be unworkable and inappropriate. This process of identifying the need for permanent relief is likely to extend well beyond the effective date of the self-operative provisions.

C. *Practical Implementation Issues Support Deferral of Applying the Securities Laws to Security-Based Swaps*

Because none of the critical SEC rulemakings identified earlier in this letter are final, market participants have not been able to fully analyze the changes to systems, policies, procedures and technology that are needed to comply with the requirements applicable to SBS as securities. It will take a number of months to catalogue requirements, analyze their impact on businesses, make decisions

about how to structure SBS activities in light of these impacts and implement such structural changes once rulemaking has been finalized.

In particular, the application of broker-dealer requirements to SBS poses a number of challenging implementation issues. First, nonbank firms involved in SBS activities may be required to register as broker-dealers. For example, a firm that intermediates SBS transactions as agent for offshore affiliates or executes SBS as agent on a trading facility would be a "broker" under the Securities Act, thereby subjecting it to broker-dealer registration. In addition, nonbank firms that act as dealers with respect to non-ECPs in SBS transactions will be required to register as broker-dealers. At the same time, the interaction of broker-dealer and SBS dealer regulatory requirements is as yet unknown because rules are not yet final, thus complicating key business structuring decisions. In several circumstances, banks that act as brokers or dealers in equity swaps with persons that are non-ECPs would also be required to register as broker-dealers.

SBS activities by a broker-dealer would be subject to extensive regulatory and compliance requirements currently only applicable to the securities activities by a broker-dealer, including registration of certain associated persons, supervision of the activities of those persons in compliance with securities laws and compliance with broker-dealer books and records requirements. Broker-dealers also could be subject in SBS transactions to Regulation T of the Board of Governors of the Federal Reserve System; Rule 10b-10 confirmation disclosure and periodic customer statements; Section 11(d) restrictions on extensions of credit; and Rule 15c2-8 prospectus delivery requirements, among others. The implications of Rules 15c3-1 and 15c3-3 also would need to be analyzed. For example, the haircut and margin requirements under Rule 15c3-3 as applied to SBS are difficult to discern; this is particularly true given that the SEC has not yet proposed margin requirements for SBS dealers and major SBS participants.

Firms have not yet been able to fully assess the impact of Title VII and design their compliance strategies because the definitions of SBS dealer, major SBS participant, ECP and SBS are not yet final. If the SEC does not act to defer application of the securities laws and regulations to SBS, some firms may decide to move their SBS brokering business with ECPs to offshore entities that would later register as SBS dealers when the SEC has established a registration process, or severely limit their U.S. SBS brokering business.

Finally, we understand that SBS must be subject to provisions addressing fraud and manipulation on July 16. Application of the existing securities antifraud and anti-manipulation provisions to SBS provides important investor protections. We support the SEC's view that all SBS should be subject to the antifraud and anti-manipulation provisions that currently apply to securities and security-based swap agreements, including under established guidance, until revised by further rulemaking.

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Title VII will fundamentally transform the SBS markets. We appreciate the SEC's efforts to design an orderly implementation schedule for Title VII and the steps it is taking to clarify and provide appropriate temporary relief from the requirements that will apply to SBS on July 16.

We respectfully request that the SEC use its exemptive authority under Section 36(a)(1) of the Exchange Act and Section 28 of the Securities Act, or any other legal authorities it deems appropriate, to exempt, interpret or otherwise provide relief to market participants from the self-operative provisions that are scheduled to take effect on July 16 (other than the amendments to the definitions of "security" and Section 767), and the securities laws (other than the existing antifraud and anti-manipulation provisions) that would apply to SBS as securities until key rulemakings are effective and an orderly process for implementation of Title VII is in effect. In the absence of SEC action on this issue, the market must begin to make difficult business and compliance decisions without knowing what regulatory requirements will be applicable. This could result in overbroad and inefficient implementation, and almost certainly would also result in significant duplication of implementation and compliance efforts once the rules are final. It is therefore critical that the SEC take action as soon as possible to allow for a logical implementation of Title VII and to avoid unintended consequences.

We are grateful for the efforts of the SEC to implement Dodd-Frank and for the opportunity the SEC has provided for us to express our views. We stand ready to provide whatever technical assistance the SEC would find useful as it continues its significant efforts. We would welcome the opportunity to meet with the SEC and FINRA to discuss areas where significant interpretive guidance or specific exemptive relief may be required.

Sincerely,

American Bankers Association
Financial Services Roundtable
Futures Industry Association
Institute of International Bankers
International Swaps and Derivatives Association
Investment Company Institute
Securities Industry and Financial Markets Association
U.S. Chamber of Commerce

cc: Mark D. Cahn, General Counsel
Securities and Exchange Commission
Richard G. Ketchum, Chairman
FINRA

Trade Association Signatories

The **American Bankers Association** represents banks of all sizes and charters and is the voice for the nation's $13 trillion banking industry and its 2 million employees. ABA's extensive resources enhance the success of the nation's banks and strengthen America's economy and communities. Learn more at www.aba.com.

The **Financial Services Roundtable** (the "Roundtable") represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies account directly for $92.7 trillion in managed assets, $1.1 trillion in revenue, and 2.3 million jobs.

The **Futures Industry Association** is the leading trade organization for the futures, options and OTC cleared derivatives markets. It is the only association representative of all organizations that have an interest in the listed derivatives markets. Its membership includes the world's largest derivatives clearing firms as well as leading derivatives exchanges from more than 20 countries. As the principal members of the derivatives clearinghouses, our member firms play a critical role in the reduction of systemic risk in the financial markets. They provide the majority of the funds that support these clearinghouses and commit a substantial amount of their own capital to guarantee customer transactions. FIA's core constituency consists of futures commission merchants, and the primary focus of the association is the global use of exchanges, trading systems and clearinghouses for derivatives transactions. FIA's regular members, who act as the majority clearing members of the U.S. exchanges, handle more than 90% of the customer funds held for trading on U.S. futures exchanges.

The **Institute of International Bankers** represents internationally headquartered financial institutions from 39 countries around the world; its members include international banks that operate branches and agencies, bank subsidiaries, and broker-dealer subsidiaries in the United States.

Since 1985, the **International Swaps and Derivatives Association** ("ISDA") has worked to make the global over-the-counter (OTC) derivatives markets safer and more efficient. Today, ISDA is one of the world's largest global financial trade associations, with over 800 member institutions from 56 countries on six continents. These members include a broad range of OTC derivatives market participants: global, international and regional banks, asset managers, energy and commodities firms, government and supranational entities, insurers and diversified financial institutions, corporations, law firms, exchanges, clearinghouses and other service providers. Information about ISDA and its activities is available on the Association's web site: www.isda.org.

The **Investment Company Institute** is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of $13.41 trillion and serve over 90 million shareholders.

The **Securities Industry and Financial Markets Association** ("SIFMA") brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association. For more information, visit www.sifma.org.

The **U.S. Chamber of Commerce** is the world's largest business federation, representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations.