ISDA Safe, Efficient Markets

July 13, 2015

Submitted Electronically

Mr. Brent J. Fields
Secretary,
Securities and Exchange Commission,
100 F Street NE., Washington, DC
20549–1090

Re: Application of Certain Title VII Requirements to 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; Proposed Rules (RIN 3235-AL73)

Dear Mr. Fields:

The International Swaps and Derivatives Association, Inc. ("**ISDA**")[1] appreciates the opportunity to submit these comments with respect to the notice of proposed rulemaking published by the Securities and Exchange Commission ("**SEC**", or the "**Commission**") (the "**Proposal**", or "**Cross-Border Proposal**")[2] regarding the cross-border application of certain security-based swaps ("**SBS**") provisions of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("**Dodd-Frank**", or the "**Dodd-Frank Act**").[3] We specifically appreciate and support the Commission's decision to seek public

---

1 Since 1985, ISDA has worked to make the global over-the-counter ("OTC") derivatives markets safer and more efficient. Today, ISDA has over 800 member institutions from 67 countries. These members include a broad range of OTC derivatives market participants including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure including exchanges, clearinghouses and repositories, as well as law firms, accounting firms and other service providers. Additional information on ISDA is available at www.isda.org.

2 *Application of Certain Title VII Requirements to 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*, 80 Fed. Reg. 27443 (May 13, 2015).

3 Pub. L. No. 111-203 (2010).

International Swaps and Derivatives Association, Inc.
1101 Pennsylvania Avenue, Suite 600
Washington, DC 20004
P 202 756 2980 F 202 756 0271
www.isda.org

NEW YORK WASHINGTON
LONDON BRUSSELS
HONG KONG SINGAPORE
TOKYO

comment, via the notice and comment rulemaking process, in connection with considering the appropriate rule-based framework to use when applying its Dodd-Frank rulemakings in the cross-border context. We also strongly support those aspects of the Proposal that (i) recognize an exemption from the SEC's clearing[4] and trade execution[5] requirements for SBS transactions between non-U.S. persons,[6] and (ii) subject to certain comments we set forth herein, provide that only a limited subset of Title VII requirements could apply to an SBS transaction between non-U.S. persons under any circumstance. We also agree that the reporting of both cleared and uncleared SBS transactions involving U.S. persons is vital to the implementation of Title VII and Dodd-Frank.

As discussed herein, while we are supportive of certain elements of the Proposal, we recommend that the SEC reconsider those aspects of the Proposal that would subject SBS activity between two non-U.S. persons, neither of which benefit from the guarantee of a U.S. person, to essentially the same level of SBS regulation that will apply to trades involving U.S. persons:

- We specifically urge the SEC to eliminate those aspects of the Proposal that would impose SBS dealer registration (via *de minimis* counting), external business conduct requirements,[7] and reporting requirements on SBS transactions between non-U.S. persons when the sole U.S. nexus is that some element of the sequence of events leading to the consummation of the transaction might have been arranged, negotiated or executed using personnel or agents located in the United States. We do not believe that such SBS transactions between non-U.S. persons should count toward a non-U.S. person's *de minimis* threshold. In the past, the SEC has noted that registration rules are designed to, among other things, apply regulatory oversight to entities engaging in activity that could impact or

---

4 Proposed rule §240.3a71-5(c).

5 Proposed rule §240.3a71-5(c).

6 As the Commission acknowledges: ". . . imposing the clearing and execution requirements may impose unnecessary costs on certain non-U.S. market participants in relation to the risks posed by their activity to the United States." And "In our view, a key objective of the clearing requirement is to mitigate systemic and operational risk in the United States, but the counterparty credit risk and operational risk of such transactions reside primarily outside the United States. [footnote 304 omitted] Accordingly, we preliminarily believe that subjecting such security-based swaps to the clearing requirement would not significantly advance what we view as a key policy objective of the clearing requirement applicable to security-based swaps under the Dodd-Frank Act." 80 Fed. Reg. at 27481.

7 We separately recommend that, when the SEC does ultimately finalize its proposed external business conduct rules (*see* Proposed rules §§240.15Fh-1 through 240.15Fh-6, and §240.15Fk-1), it adopt a rule set that is consistent with the CFTC's final external business conduct rules (*see* §§23.400-23.451). An entity that registers as both a swap dealer and an SBS dealer should not be subject to two unique sets of external business conduct requirements.

threaten SBS market stability and the U.S. financial system more generally. Because the SEC has already determined that SBS transactions between two non-U.S. persons, where neither is guaranteed by a U.S. person, need not be cleared because the risk of such transactions resides outside the U.S., it follows that the direct regulatory oversight and rules associated with registration of such non-U.S. persons is not necessary because the risk resides outside the United States and does not threaten U.S. market stability or the U.S. financial system. This does not change solely because an SBS transaction is arranged, negotiated, or executed in the United States. In this context, we also believe that it is particularly important for the SEC to clarify that when such SBS activity is part of or supports a business that is primarily based outside of the United States, as we will discuss in greater detail below, the Title VII SBS requirements will not apply.

- We also recommend that the SEC address the deficiencies in its current data, which limit its ability to fully assess and analyze the costs, benefits and other impacts that the Proposal will have on market participants and markets. For example, we note that the SEC currently lacks the data necessary to precisely estimate:
    - the number of non-U.S. persons that, in connection with their dealing activity, arrange, negotiate, or execute SBSs using personnel located in the United States or execute SBSs on a platform with its principal place of business in the United States,
    - the number of registered broker-dealers that intermediate SBS transactions; and
    - the number of additional non-U.S. persons that might incur reporting obligations under the Proposal.

If the SEC decides to adopt the Proposal as a final rule, we ask that the SEC incorporate certain changes, as follows:

- Provide that SBS transactions between two non-U.S. persons, if cleared outside of the United States, will not be subject to the SEC's SBS regulations.

- Minimize the impact of the Proposal by instead leveraging the existing components of the SEC's regulatory program, including recordkeeping requirements and the robust regulatory requirements applicable to U.S. based broker-dealers, both of which already accomplish the policy goals that the Proposal seeks to address.

- Adopt a practical and outcomes-based approach to substituted compliance by confirming that non-U.S. persons will be permitted to comply with any applicable SEC Dodd-Frank SBS regulations in connection with trades opposite another non-U.S. person via substituted compliance and by adhering to the regulatory regimes applicable in their home jurisdiction.

Finally, with respect to the proposed amendments to Regulation SBSR, we recommend that the Commission:

- Clarify that the Regulation SBSR reporting requirements will not apply to SBS transactions between two-non U.S. persons that are not guaranteed by a U.S. person and are neither SBS dealers nor major SBS participants; or

- Alternatively, clarify that a reporting requirement under Regulation SBSR is not triggered if a non-registered non-U.S. person that is engaged in dealing activity utilizes U.S. personnel for arranging, negotiating or executing an SBS transaction.

- Clarify that reporting requirements, if any, under the Proposal once finalized (as amended, as applicable) will not apply until after the registration process for SBS dealers/major SBS participants has begun.

- Provide that public dissemination of reported data does not apply to SBS transactions, even if such transactions are arranged, negotiated or executed in the United States, if neither party is a U.S. person and neither party is guaranteed by a U.S. person.

- Provide that public dissemination of reported data does not apply to "covered cross border transactions" – i.e., SBS transactions that have a U.S. person guarantor, including transactions in which the other side does not include a counterparty that is a U.S. person, registered SBS dealer, or registered major SBS participant, and that will not be submitted for clearing to a registered clearing agency having its principal place of business in the United States.

I. The Commission Should Not Adopt the Proposal to Apply Dodd-Frank SBS Requirements to Transactions Between Non-U.S. Persons.

The Proposal would require a non-U.S. person to include in its *de minimis* calculation, for SBS dealer registration purposes, any dealing transaction entered into with another non-U.S. person when the transaction is arranged, negotiated or executed by personnel or an agent (or personnel of an agent) located in a U.S. branch or office.[8] ISDA submits that the location of personnel or agents within the United States should not form the sole basis for requiring SBS dealer registration and compliance with the SEC's other Dodd-Frank Title VII rules, including external business conduct standards and reporting requirements.

If adopted in its current form, the Proposal would result in the regulation of SBS transactions and SBS participants that have no material connection with the United States.

[8] 80 Fed. Reg. at 27464.

The SBS markets are international and the arrangement, negotiation and execution of SBS transactions will often occur in multiple jurisdictions, including the United States. For example, a number of SBS transactions take place through single or multi-dealer electronic trading platforms or other electronic means. Thus, elements of a single SBS transaction may take place in different parts of the world, which may often make it difficult, or even impossible to determine what, if any, activity has taken place in the United States. We acknowledge the Commission's concern that electronic execution does not eliminate the possibility of abusive or manipulative conduct. However, absent further clarification regarding the circumstances under which electronic trading among non-U.S. persons will trigger the application of Dodd-Frank Title VII rules, market participants will be forced to operate under considerable regulatory uncertainty.

The Proposal would also likely result in a number of SBS market-participants relocating their market-facing employees to locations outside the United States. Global market participants seek to trade in global products and to be advised by experts in such products. The prudent risk management of global market participants therefore requires sales and trading experts in SBS transactions to typically be located in the region of the underlying asset. Accordingly, experts in SBS products that are linked to U.S.-based underliers will usually tend to be located in the United States. Non-U.S. market participants may not wish to subject themselves to the increased burden and complexity of U.S. regulation when dealing with non-U.S. counterparties, particularly as they may be subject to comparable regulation in their home jurisdictions. Accordingly, in order to continue to transact in such U.S. linked SBS products without being subject to burdensome and duplicative regulation, dealers will have strong incentives to move market facing employees to locations outside the United States. Such restructuring of business practices by non-U.S. persons to reduce their regulatory burdens are entirely reasonable from a business perspective but will potentially result in market fragmentation and decreased liquidity available to U.S. persons.

In the absence of risks to the U.S. financial system and U.S. counterparties, the Commission has not identified any benefit associated with regulating SBS transactions between non-U.S. persons.

Where the counterparties to an SBS transaction are non-U.S. persons and neither person is guaranteed by a U.S. person, the fact that U.S. personnel or agents are involved in a transaction does not transmit risk into the U.S. financial system. The Commission has expressly acknowledged that SBS transactions entered into between non-U.S. persons do not give rise to counterparty credit risk within the United States.[9] We submit that the Commission's principal concern in regulating entities involved in SBS transactions should be the mitigation of risks posed to the U.S. financial system and the protection of U.S. counterparties and consumers from fraudulent or manipulative conduct. The registration of certain SBS market participants, and the far reaching rules applicable to them as a result of such registration are primarily driven by the policy objective of mitigating risk in the SBS markets. In this regard, the Commission has specifically

[9] 80 Fed. Reg. at 27466.

recognized that rules that depend upon the definition of security-based swap dealer, such as margin and capital rules, "will reduce the financial risks of these institutions and contribute to the stability of the security-based swap market in particular and the U.S. financial system more generally."[10] To regulate such SBS transactions and the entities involved solely on the basis of some *de minimis* level of U.S. nexus during the initial stage of the transaction,[11] in the absence of any other substantive regulatory concern regarding risk to the U.S. financial system, does not advance the Commission's mandate to protect U.S. investors and the U.S. financial system. Instead, such regulatory oversight will result in the unnecessary application of onerous and costly U.S. regulatory requirements to non-U.S. entities, which will cause greater uncertainty and complication as non-U.S. entities would then be subject to comprehensive regulatory requirements in the United States, even as their home jurisdictions are establishing their own comprehensive regulatory regimes. In the absence of risk residing in the United States, to the extent the Commission's concern is fraudulent or manipulative conduct by market participants, the Commission may use or extend existing regulatory tools to police such conduct, as we discuss further below.

Moreover, the costs of the Proposal – both the direct costs of building compliance systems as well as the hidden costs relating to the market impact of the proposed rules – are significant and any corresponding benefits of the Proposal must be commensurate, while also taking into account whether there are alternative approaches that could achieve the same goals. The Proposal provides no detailed account of the quantifiable benefits that would accrue from the adoption of the Proposal and the application of regulatory oversight to SBS transactions and entities involved where risk resides outside the United States. Accordingly, before any final rule is adopted, we respectfully request that the Commission complete its cost-benefit analysis by considering how the benefits of the Proposal compare to its costs, including those costs as they will apply to non-U.S. persons. And, as we will discuss in greater detail below, this analysis must also recognize that the Commission already possesses a range of regulatory tools (such as books and records requirements and the direct regulation of U.S. based intermediaries) that it can use to satisfy its important regulatory interests in protecting against issues such as fraud and manipulation. The Commission should focus on enhancing these tools while avoiding the costly outcome of subjecting non-U.S. persons to the full range of Dodd-Frank Title VII requirements in connection with SBS transactions with other non-U.S. persons. We therefore request that the Commission assess and compare the costs of less burdensome forms of regulation before formulating any final rule.

---

[10] Application of "Security-Based Swap Dealer" and "Major Security-Based Swap Participant" Definitions to Cross-Border Security-Based Swap Activities; Final Rule; Republication, 79 Fed. Reg. 47,278, 47,286 (Aug. 12, 2014).

[11] Consider also the Supreme Court's ruling in *Morrison v. National Australia Bank*, 561 U.S. 247 (2010), which although addressing specific issues under Section 10(b) of the Exchange Act, certainly also stands for the general proposition that that the mere existence of some domestic conduct is not sufficient to justify the SEC's exercise of extraterritorial jurisdiction (*Morrison*, 561 U.S. at 266.).

The Commission should complete its collection and evaluation of essential data before beginning any final rulemaking.

We note that the Commission currently lacks a complete data set that is necessary to estimate with meaningful precision (i) the number of non-U.S. persons that, in connection with their dealing activity, arrange, negotiate or execute SBS transactions using personnel located in the United States or execute SBS transactions on a platform with its principal place of business in the United States, or (ii) the number of registered broker-dealers that intermediate SBS transactions. We also note with concern the SEC's statement that it "cannot precisely estimate the number of additional non-U.S. persons that might incur reporting obligations under this Proposal."[12]

The absence of data makes it difficult or impossible for the Commission to formulate a useful estimate of the market impact, costs and benefits of the Proposal, which we believe is a necessary prerequisite to the adoption of final rules. Accordingly, we respectfully recommend that the SEC consider further how the deficiencies in its current data, which limit its ability to fully assess and analyze the impact that the Proposal will have on market participants and markets, could be mitigated by taking a measured approach that involves gathering more robust and complete data prior to finalizing a rulemaking that will have a meaningful impact on a global market.

II. If the Commission Adopts the Proposal, the Proposal should be Modified

If the SEC decides to adopt the Proposal as a final rule, we ask that the SEC incorporate certain changes designed to clarify the scope of the final rule and to mitigate the unwarranted adverse impact that certain of the provisions, as proposed, will have on markets and market participants.

Title VII requirements should not apply to SBS transactions where parties do not have a reasonable expectation that the transaction may be subject to U.S. law.

We respectfully ask that the Commission confirm that its SBS dealer registration, external business conduct, and reporting rules do not apply in situations where parties execute an SBS transaction without any reasonable basis to expect that Title VII regulations will apply. For example, we note that parties to an SBS transaction may transact through an anonymous electronic platform. Parties may also transact in an SBS product with a counterparty whose personnel are located in the United States even though the SBS transaction in question involves no human contact within the United States – as is the case, for example, with algorithmic/program driven trading. Usually, in such cases, a non-U.S. person counterparty will not know who is responding on behalf of the other non-U.S. counterparty, let alone the individual responder's location. In such situations,

---

[12] 80 Fed. Reg. at 27496. Elsewhere in the Proposal, we note that the Commission states that "Our understanding of the market is informed by available data on SBS transactions, though we acknowledge the data limit the extent to which we can quantitatively characterize the market. Because these data do not cover the entire market, we have developed an understanding of market activity using a sample that includes only certain portions of the market." 80 Fed. Reg. at 27449.

the non-U.S. counterparty will not have a reasonable expectation that the transaction may be subject to U.S. law. Accordingly, in these contexts, the imposition of Title VII requirements may result in an unfair regulatory surprise to the transaction counterparties.

SBS transactions between two non-U.S. persons and cleared outside of the United States should not be subject to the SEC's SBS regulations.

As the Proposal acknowledges, several jurisdictions other than the United States have now adopted legislation that will compel clearing for certain SBS transactions.[13] Moreover, as markets continue to develop and evolve, more clearinghouses are providing clearing services for non-mandated products in response to demand from market participants who seek the benefits of clearing on a voluntary basis. An SBS transaction between non-U.S. persons that is cleared outside the United States should not count toward a non-U.S. person's *de minimis* threshold even if it is arranged, negotiated or executed by personnel located in the United States. Cleared transactions are subject to regulatory oversight in the clearing jurisdiction and are subject to reporting and recordkeeping requirements in that jurisdiction. The Commission does not have a supervisory interest in imposing an entity level regulatory program (such as SBS dealer registration and the associated external business conduct requirements) in connection with a transaction that is entered into between two non-U.S. persons and cleared via a central counterparty that is located outside the United States.

The Commission should enhance existing regulatory protections as an alternative to requiring SBS dealer registration.

We respectfully recommend that the Commission take steps to minimize the impact of the Proposal by instead leveraging the existing components of the SEC's regulatory program, including recordkeeping requirements and the robust regulatory requirements applicable to U.S. based broker-dealers, both of which already accomplish the primary policy goals that the Proposal seeks to address. Relying on books and records access is entirely consistent with the SEC's historical approach to cross-border regulation. Consider, for example, SEC Rule 15a-6,[14] which provides an exemption from SEC broker-dealer registration for certain foreign brokers or dealers to access U.S. market participants, provided that, among other things, such entity maintains the books and records associated with transactions with U.S. persons and makes those books and records available to the SEC upon request. Therefore, we recommend that the SEC consider whether certain of its policy goals with respect to the Proposal may be more appropriately achieved by other existing and proposed rules or by enhancing its existing books and records rules.

---

[13] As the Proposal notes, "Japan has rules in force mandating central clearing of certain OTC derivatives transactions. The EU has its legislation in place but has not yet made any determinations of specific OTC derivatives transactions subject to mandatory central clearing." 80 Fed. Reg. at 27458.

[14] 17 CFR 240.15a-6.

For example, the Proposal identifies investor protection and market integrity as key concerns related to a non-U.S. person's trading in U.S. markets that will be addressed by SBS dealer registration. However, if the Proposal's aim is to detect fraud, market abuse or manipulation by SBS market participants generally, the Commission's focus on registering SBS dealers is misplaced. Existing rules already apply more broadly to prohibit fraud and market manipulation by all market participants, not just dealers. The offer and sale of an SBS is subject to the anti-fraud provisions of Section 17(a) of the Securities Act of 1933 (the "Securities Act").[15] The Commission has also proposed rules that would prohibit, with respect to SBSs, misconduct prohibited by Rule 10b-5 under the Exchange Act and Section 17(a) of the Securities Act, which prohibit fraud, deception and material misstatements and omissions in connection with the purchase or sale of a security.[16] The proposed rules would apply to "any person," including issuers, broker-dealers, SBS dealers or major SBS participants or persons associated with SBS dealers or major SBS participants, SBS counterparties, and any other individuals or entities, including SBS end-users. The Proposal's limited focus on fraud by SBS dealers is therefore less likely to deter fraud than the Commission's other existing and proposed rules.

Uniformly applicable books and recordkeeping requirements would also provide the Commission with a tool to reach all SBS market participants engaging in dealing activity that utilize U.S. personnel in connection with arranging, negotiating or executing SBS transactions. This would then permit the Commission to more effectively police fraud, manipulation and market abuse by SBS market participants, even those whose activities are not significant enough to require SBS dealer registration.

Separately, the Proposal inexplicably and pre-emptively rejects the suggestion that the Commission's regulatory concerns could be met, at least in part, by existing regulations that apply to many U.S.-based intermediaries or agents of non-U.S. persons, such as SEC regulated broker-dealers. We encourage the SEC to re-consider whether there is in fact any additional value in imposing registration and external business conduct requirements in connection with activity that, when intermediated by an SEC regulated broker-dealer, is already subject to the SEC's robust regulatory program for such entities. We suggest that such an approach only adds complexity and cost without offering any corresponding benefit. That is, the Proposal does not consider the possibility of leveraging existing broker-dealer record keeping requirements to include access to the books and records relating to SBS transactions between non-U.S. persons, in their dealing capacity, who may be using a broker-dealer to arrange, negotiate or execute a trade, in the United States—a solution that may be simpler than subjecting the non-U.S. person to a completely new regulatory regime. In light of the Commission's generally favorable view of substituted compliance with comparable foreign regimes, we request that the Commission take a similarly comprehensive view of the extent to which applicable U.S.

---

15 *Exemptions for Security-Based Swaps Issued by Certain Clearing Agencies*, 77 Fed. Reg. 20,536 (June 9, 2011).

16 *Prohibition Against Fraud, Manipulation and Deception in Connection with Security-Based Swaps*, 75 Fed. Reg. 68,560 (Nov. 8, 2010).

regulations already secure the regulatory aims sought to be provided by the SBS dealer regime.

The Commission should adopt and implement an outcomes based approach to substituted compliance.

In its current form, the Proposal would apply to SBS transactions between non-U.S. persons even if such transactions only have an incidental connection to the United States and even if such transactions are already subject to comparable regulation in a non-U.S. jurisdiction. The Proposal permits substituted compliance only with respect to certain of a non-U.S. person's reporting obligations under Regulation SBSR. We believe that the SEC, and each other regulator charged with implementing derivatives market reforms, must adopt a practical and outcomes based approach to substituted compliance. We also believe that, in order to foster reciprocity and mutual recognition by non-U.S. regulators, U.S. regulators need to recognize foreign regimes as comparable and permit compliance with such regimes in lieu of compliance with applicable U.S. rules.

With respect to the SEC, this will be accomplished by confirming that non-U.S. persons will be permitted to comply with any applicable SEC Dodd-Frank Title VII SBS regulations in connection with trades opposite other non-U.S. persons (to the extent arranged, negotiated or executed via U.S. based personnel or agents) via substituted compliance and by adhering to the regulatory regimes applicable in their home jurisdictions. In the absence of a broad practical substituted compliance regime, SBS market participants run the risk of being subject to conflicting or duplicative regulations – and global markets run the risk of continued bifurcation and isolated liquidity pools. Accordingly, the Proposal should either permit comprehensive substituted compliance in any situation where non-U.S. persons are subject to comparable regulation in a non-U.S. jurisdiction or should specify that Dodd-Frank Title VII regulations do not apply in such circumstances.

By not adequately recognizing the compelling interests of non-U.S. regulators, the Proposal's current approach would represent a meaningful departure from and rejection of the example set forth in the Path Forward Agreement of July 2013 between the CFTC and the European Union. That Agreement states that "EU registered dealers who are neither affiliated with, nor guaranteed by, U.S. persons, would be generally subject only to U.S. transactional rules for their transactions with U.S. persons or U.S. guaranteed affiliates…" The Path Forward document also states, as a general principle, that "We will not seek to apply our rules (unreasonably) in the other jurisdiction, but will rely on the application and enforcement of the rules by the other jurisdiction." [17]

We also note that the CFTC, like the Commission, has deviated from the principles underlying the Path Forward Agreement in its guidance concerning SBS transactions between non-U.S. persons that are arranged negotiated or executed by U.S. personnel.

---

[17] See *The European Commission and the CFTC reach a Common Path Forward on Derivatives* (July 11, 2013), available at *http://www.cftc.gov/PressRoom/PressReleases/pr6640-13*.

Accordingly, we respectfully ask that the Commission work closely with the CFTC to ensure that any final rulemakings or guidance by the Commission and/or the CFTC be consistent with the principles of mutual respect and comity between regulators, including those underlying the Path Forward Agreement.

III. The Commission should modify the proposed reporting requirements under Regulation SBSR for non-U.S. persons.

Unregistered non-U.S. persons should be exempt from the reporting obligation.

Under the Proposal, even if two non-U.S. persons who are well below the SBS dealer threshold enter into an SBS transaction that has been arranged, negotiated or executed via U.S.-based personnel or a U.S. agent, that transaction is subject to Regulation SBSR and must be reported. This aspect of the proposal will impose an unnecessary burden and expense on unregistered entities. These entities do not have reporting infrastructure in place and will almost uniformly be compelled to engage third party providers. We suggest the Commission exempt unregistered non-U.S. persons from the reporting obligation.

Expanding reporting requirements to non-U.S. trades is burdensome and costly.

A requirement to report under the Proposal impacts both sides to an SBS transaction since each party's reporting obligations may depend upon the status of its counterparty. Unlike the *de minimis* calculation, each party would need to know whether its counterparty has a reporting obligation under the Proposal in order to determine its own reporting obligations. Significant cost and effort would be expended to systematically communicate, capture and apply this data to determine the identity of the reporting side on a transaction by transaction basis. Significantly more SBS transactions will be subject to the challenge of determining the reporting side if the Commission follows through on its stated intention to establish the initial compliance date for reporting under Regulation SBSR ahead of the registration requirement for SBS dealers and major SBS participants.

The Commission should not require SBS data reporting prior to the commencement of SBS dealer/major SBS participant registration.

In its comment letter dated May 4, 2015 with respect to the Commission's proposed reporting rule entitled "Reporting and Dissemination of Security-Based Swaps,"[18] ISDA alerted the Commission of the challenges that would arise if SBS data was required to be reported prior to the commencement of SBS dealer / major SBS participant registration. We would respectfully draw the Commission's attention to the similar, indeed greater, challenges that would arise if the reporting obligations proposed in the Proposal become

---

[18] *Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information*, 80 Fed. Reg. 14739 (March 19, 2015).

effective prior to the commencement of SBS dealer / major SBS participant registration.[19] These challenges include:

- *Complex Information Exchange*: To determine whether a trade is subject to SBS data reporting and which side has the reporting obligation, SBS market participants will require extensive transaction level party information (mainly relating to whether a non-U.S. person with dealing activity engages U.S. personnel for arranging, negotiating or executing a particular trade). The operational infrastructure for this information exchange will require SBS market participants to expend significant resources and time. For entities that do not expect to be registered, this will be particularly burdensome. Further, for some market participants (such as U.S. SBS dealers and U.S. major SBS participants), this costly infrastructure will become redundant once reporting involving SBS dealers/major SBS participants registrants commences.

- *Burden on U.S. persons and U.S. end-users*: If SBS data reporting were required prior to the commencement of SBS dealer/major SBS participant registration, a significantly larger portion of reporting obligations would be borne by U.S. persons and U.S. end-users than if SBS data were required to be reported after the commencement of SBS dealer/major SBS participant registration. Before registration for SBS dealers / major SBS participants commences, in most trades involving U.S. persons, the side involving a U.S. person will usually bear the sole reporting obligation or may share the reporting obligation with the other side to the trade. In either case, in the absence of a registered entity on the other side, the expectation is that (i) a U.S. end-user will request that the other side to the trade (assuming it is a dealer/sell side market participant) perform the actual reporting; and (ii) relevant legal documentation will need to be developed to establish that the other side has taken on the reporting obligation (either (a) as part of the process to select the reporting side in case of a shared reporting obligation under the rule or (b) as part of a delegation arrangement where the other side solely reports as an agent for, and on behalf of, the U.S. end-user while the regulatory reporting obligation remains with the U.S. end-user). This process of developing documentation and implementing reporting processes is extremely time-consuming and costly. Therefore, in the period prior to the registration of SBS dealers / major SBS participants, even where the U.S. person delegates or contracts away its reporting obligation, it will do so only by incurring significant costs.

- *Differing Processes for Reporting Side Determination:* The reporting side determination which applies once SBS dealer / major SBS participant registration has commenced may differ from the reporting side determination which would

[19] As a follow-up to a discussion with Commission staff on June 8, 2015, ISDA is currently preparing a separate submission to the Commission describing, in greater detail, the challenges which would exist if reporting of SBS data were to occur prior to the commencement of SBSD/MSBSP registration. This letter summarizes some of the points raised in that separate submission.

apply if SBS data reporting were required prior to the commencement of SBS dealer / major SBS participant registration. For example, after SBS dealer / major SBS participant registration commences, reporting obligations will mostly lie with the registered entities. However, if SBS data reporting is required before SBS dealer / major SBS participant registration commences, reporting side determinations will have to be made for SBS transactions executed in that time period (as well as for pre-enactment and transitional SBS transactions). Such reporting side determinations may be allocated to entities which are not ultimately required to register as SBS dealers / major SBS participants. Because such reporting side determinations will continue to dictate reporting obligations for the remainder of the life of the relevant SBS transaction, unregistered entities may be required to continue to comply with reporting obligations they incurred before the commencement of SBS dealer / major SBS participant registration. Unregistered entities may thus be compelled to fulfill such reporting obligations for periods running into years (depending on the terms of the relevant SBS transaction). The Proposal would thus inadvertently impose reporting obligations, and reporting costs, on the parties least suited to bear such obligations and costs. Further, implementing the Proposal would force unregistered parties to incur significant costs to develop reporting infrastructure that they would no longer be required to use once SBS dealer / major SBS participant registration has commenced.

- *Cost Benefit Analysis*: While the Proposal has undertaken an assessment of the costs involved in implementing the proposed amendments to Regulation SBSR, this assessment does not account for the additional work by SBS market participants required to start reporting prior to SBS dealer / major SBS participant registration. This assessment also fails to account for the possibility that some of the documentation and processes developed for reporting may become obsolete after SBS data reporting by SBS dealers/major SBS participants registrants commences.

ISDA is currently preparing a separate submission to the Commission which will discuss, in greater detail, the challenges which would exist if reporting of SBS data were required prior to the commencement of registration for SBS dealers/major SBS participants.

Public dissemination of reported SBS data should not apply to transactions which have no U.S. persons or registered entities on either side.

The Commission should provide that public dissemination of reported SBS data does not apply to SBS transactions arranged, negotiated or executed in the United States where such transactions have no U.S. person guarantor and where neither party is a U.S. person. Such transactions do not involve U.S. persons, and accordingly have minimal, if any, impact on or relevance for the U.S. SBS markets even if they are arranged, negotiated or executed in the United States.

Public dissemination of reported SBS data should not apply to "covered cross border transactions".

The Commission should provide that public dissemination of reported SBS data does not apply to "covered cross border transactions" – i.e., SBS transactions that have a U.S. person guarantor on either or both sides, including transactions in which the other side includes no counterparty that is a U.S. person, registered SBS dealer, or registered major SBS participant, and that will not be submitted for clearing to a registered clearing agency having its principal place of business in the United States. As the Commission has already noted, the financial risks of such transactions lie outside the United States. Further, the presence of a U.S. person guarantor on either or both sides of such transactions does not make the pricing information relating to such transactions relevant to U.S. SBS markets. Accordingly, public dissemination of SBS data for such transactions should not be required.

The Proposal creates significant ambiguities for reporting by broker dealers and platforms.

Under the Proposal, a platform with its principal place of business in the United States or a broker-dealer registered with the Commission would be required to report even if neither side of the transaction is otherwise required to report. This creates additional issues for the platform or broker-dealer and for the Commission. First, platforms and broker-dealers will be required to implement costly and robust data capturing mechanisms and requirements regarding the status of the direct and indirect counterparties or the use of U.S. personnel, with respect to each SBS transaction in order determine whether one side of the SBS transaction already has the obligation to report the SBS data as the reporting side or whether the reporting obligation rests with the platform or broker-dealer. Second, the platform or registered broker-dealer which reports may only be involved in the original execution of the SBS transaction and therefore cannot comply with the SBSR's requirement to report life cycle events.[20] As a result, the Commission may not be able to rely on the data reported as current and accurate. We suggest that the Commission not adopt the proposed reporting requirements pertaining to platforms and registered broker-dealers.

The Commission should allow reporting requirements to be met via substituted compliance.

Reporting under Regulation SBSR will become operational after reporting requirements have been adopted in many other major jurisdictions. Accordingly, and consistent with our general comments on substituted compliance above, we ask that the Commission apply greater flexibility to accommodate substituted compliance determinations for SBS transactions and mixed swaps even if another jurisdiction's rules are not identical (on a line-by-line comparative basis) to those under Regulation SBSR. We continue to believe that an "outcomes" based approach is the only realistic path to substituted compliance. The Commission and its counterparts in other jurisdictions should defer to the jurisdiction most directly subject to the risk of the relevant transaction, trust its oversight and work to share data as required.

---

[20] *See* 17 CFR § 242.901(e).

The Commission should harmonize its reporting rules with the reporting rules of the CFTC.

Cross-border differences between the CFTC rules and Regulation SBSR should be minimized to reduce complexity and increase efficiencies. For example, the CFTC has currently provided time-limited no-action relief from the reporting requirements for non-U.S. swap dealers to report their swap transactions with non-U.S. persons. Similarly, SBS transactions of non-U.S. registered persons with other non-U.S. persons should not be required until a proper cross border analysis has been undertaken and substituted compliance determinations have been made.

We also note that a number of entities, including several non-U.S. entities, will be dually registered as swap dealers and SBS dealers and will therefore be subject to both SEC and CFTC jurisdiction. We ask that the Commission work with the CFTC to ensure that these entities not be subject to conflicting, duplicative or otherwise burdensome regulatory regimes.

The Commission should revise the reporting rules to expressly accommodate privacy and confidentiality concerns.

We request that the Commission permit the redaction of identifying information, the provision of which could violate applicable U.S. and non-U.S. data privacy laws. In her letter to the Financial Stability Board of August 12, 2014, SEC Chair White acknowledged the existence of significant "barriers," including data protection laws, blocking statutes, and state secrecy laws as well as bank secrecy laws, that could serve to hamper reporting of counterparty identifying information to trade repositories. While we await any initiative to resolve such barriers, we request that the Commission permit the "masking" or redaction of data to ensure that SBS market participants can also comply with the applicable laws of non-U.S. jurisdictions. Such a step would also be consistent with regulatory initiatives in a number of other jurisdictions that form part of the OTC Derivatives Regulators Group.

* * * *

ISDA appreciates the opportunity to provide these comments. If we may provide require further information, please do not hesitate to contact the undersigned or ISDA staff.

Sincerely,

David Geen
General Counsel

ISDA

cc: Securities and Exchange Commission
Mary Jo White, Chairman
Luis A. Aguilar, Commissioner
Daniel M. Gallagher, Commissioner
Kara M. Stein, Commissioner
Michael S. Piwowar, Commissioner

Commodity Futures Trading Commission
Timothy G. Massad, Chairman
Mark P. Wetjen, Commissioner
Sharon Y. Bowen, Commissioner
J. Christopher Giancarlo, Commissioner