

Regulation (EU) 648/2012, as amended from time to time.

(7) “EMIR RTS” means Commission Delegated Regulation (EU) 149/2013, as amended from time to time.

(8) “EMIR Margin RTS” means Commission Delegated Regulation (EU) 2016/2251, as amended from time to time.

(9) “CRD” means Directive 2013/36/EU, as amended from time to time.

(10) “CRR” means Regulation (EU) 575/2013, as amended from time to time.

(11) “CRR Reporting ITS” means Commission Implementing Regulation (EU) 680/2014, as amended from time to time.

(12) “MAR” means the “Market Abuse Regulation,” Regulation (EU) 596/2014, as amended from time to time.

(13) “MAR Investment Recommendations Regulation” means Commission Delegated Regulation (EU) 2016/958, as amended from time to time.

(14) “CNMV” means the Spanish Comisión Nacional del Mercado de Valores.

(15) “BoS” means the Spanish Banco de España.

(16) “ECB” means the European Central Bank.

(17) “Accounting Directive” means Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013, as amended from time to time.

(18) “BRRD” means Bank Recovery and Resolution Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014, as amended from time to time.

(19) “SSMA” means the Spanish Securities Market Act, Royal Legislative Decree 4/2015, of October 23, as amended from time to time.

(20) “RD 217/2008” means Royal Decree 217/2008, of February 15, as amended from time to time.

(21) “LOSSEC” means the Act on Regulation, Supervision, and Solvency of Credit Institutions, Law 10/2014, of June 26, as amended from time to time.

(22) “RD 84/2015” means Royal Decree 84/2015, of February 13, as amended from time to time.

(23) “BoS Circular 2/2016” means Circular 2/2016, of February 2, of the Bank of Spain, as amended from time to time.

(24) “Prudentially regulated” means a Covered Entity that has a “prudential regulator” as that term is defined in Exchange Act section 3(a)(74).

By the Commission.

**Eduardo A. Aleman,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93411; File No. S7–08–21]

### Amended and Restated Order Granting Conditional Substituted Compliance in Connection With Certain Requirements Applicable to Non-U.S. Security-Based Swap Dealers and Major Security-Based Swap Participants Subject to Regulation in the Federal Republic of Germany; Amended Orders Addressing Non-U.S. Security-Based Swap Entities Subject to Regulation in the French Republic or the United Kingdom; and Order Extending the Time To Meet Certain Conditions Relating to Capital and Margin

October 22, 2021.

#### I. Overview

##### A. Amended and Restated Order

Pursuant to Securities Exchange Act of 1934 (“Exchange Act”) rule 3a71–6, in December 2020, the Securities and Exchange Commission (“Commission”) issued a substituted compliance order<sup>1</sup> providing that security-based swap dealers and major security-based swap participants (“SBS Entities”) subject to regulation in the Federal Republic of Germany (“Germany”) conditionally may satisfy certain requirements under the Exchange Act related to risk control, internal supervision and compliance, counterparty protection, and books and records by complying with comparable German and European Union (“EU”) requirements.<sup>2</sup> The German Order did not address substituted compliance for Exchange Act capital and margin

<sup>1</sup> See Exchange Act Release No. 90765 (Dec. 22, 2020), 85 FR 85686 (Dec. 29, 2020) (“German Order”).

<sup>2</sup> “Risk control” includes requirements related to internal risk management, trade acknowledgment and verification, portfolio reconciliation and dispute resolution, portfolio compression and trading relationship documentation; “internal supervision and compliance” includes requirements related to diligent supervision, conflicts of interest, information gathering under Exchange Act section 15F(j), 15 U.S.C. 78o–10(j), and chief compliance officers; “counterparty protection” includes requirements related to disclosure of material risks and characteristics and material incentives or conflicts of interest, “know your counterparty,” suitability of recommendations, fair and balanced communications, disclosure of daily marks and disclosure of clearing rights; and “books and records” includes requirements related to making and keeping current certain prescribed records, preservation of records, reporting, notification and securities counts.

requirements applicable to SBS Entities without a prudential regulator.

In August 2021, the Bundesanstalt für Finanzdienstleistungsaufsicht (“BaFin”) submitted an amended “substituted compliance” application (“Amended Application”) requesting that the Commission amend the existing German Order<sup>3</sup> to address nonbank capital and margin requirements.<sup>4</sup> The Amended Application incorporated comparability analyses between the relevant requirements in Exchange Act section 15F and the rules and regulations thereunder for which BaFin is seeking substituted compliance determinations and applicable German and EU law, as well as information regarding German supervisory and enforcement frameworks.

On August 12, 2021, the Commission issued a notice of the Amended Application, accompanied by a proposed amended and restated substituted compliance order (the “proposed Amended Order”).<sup>5</sup> In addition to addressing margin and capital requirements, the proposed Amended Order proposed changes the Commission preliminarily viewed as necessary to align the German Order with substituted compliance orders for SBS Entities subject to regulation in the French Republic (“France”)<sup>6</sup> and the United Kingdom (“UK”)<sup>7</sup> which the

<sup>3</sup> See Letter from Thorsten Pötzsch, Chief Executive Director of BaFin’s Resolution Sector, BaFin, to Vanessa Countryman, Secretary, Commission, dated August 12, 2021. The Amended Application is available on the Commission’s website at: <https://www.sec.gov/page/exchange-act-substituted-compliance-and-listed-jurisdiction-applications-security-based-swap>.

<sup>4</sup> “Capital and margin” includes requirements related to capital applicable to non-prudentially regulated security-based swap dealers and to margin applicable to non-prudentially regulated SBS Entities. More specifically, the Amended Application requested that the Commission extend the German Order to also provide for substituted compliance for the capital requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1 through 18a–1d (collectively, “Exchange Act Rule 18a–1”), the margin requirements of Exchange Act section 15F(e) and Exchange Act rule 18a–3, and related recordkeeping, reporting, notification, and securities count requirements.

<sup>5</sup> See Exchange Act Release No. 92647 (Aug. 12, 2021), 86 FR 46500 (Aug. 18, 2021) (“German Substituted Compliance Notice and Proposed Amended Order”).

<sup>6</sup> See Exchange Act Release No. 92484 (July 23, 2021), 86 FR 41612 (Aug. 2, 2021) (“French Order”). See also Exchange Act Release No. 90766 (Dec. 22, 2020), 85 FR 85720 (Dec. 29, 2020) (“French Substituted Compliance Notice and Proposed Order”); Exchange Act Release No. 91477 (Apr. 5, 2021), 86 FR 18341 (Apr. 8, 2021) (“French Reopening Release”).

<sup>7</sup> See Exchange Act Release No. 92529 (July 30, 2021), 86 FR 43318 (Aug. 6, 2021) (“UK Order”). See also Exchange Act Release No. 91476 (Apr. 5, 2021), 86 FR 18378 (Apr. 8, 2021) (“UK Substituted Compliance Notice and Proposed Order”).

Commission finalized after issuing the German Order.<sup>8</sup>

As discussed below, the Commission is adopting an Amended Order that has been modified from the proposal in certain respects to address commenter concerns and to make clarifying changes.

### *B. Amendments to French and UK Orders*

The French and UK Orders include an additional capital condition that is designed to ensure comparable regulatory outcomes between Exchange Act capital requirements and French and UK capital requirements, respectively.<sup>9</sup> The Commission proposed an identical additional capital condition with respect to non-U.S. security-based swap dealers subject to regulation in Germany applying substituted compliance with respect to Exchange Act capital requirements.<sup>10</sup> As discussed in part V, the Commission is modifying this additional capital condition in the Amended Order. These modifications respond to comments that were also directed to the capital conditions in the French and UK Orders.<sup>11</sup> The Commission is now issuing an order to amend the French and UK Orders to make the additional capital conditions in those orders consistent with the additional capital condition in the Amended Order.

In addition, in response to one commenter's concern regarding general condition (a)(5) as discussed in parts II.B and IV below,<sup>12</sup> which is relevant to French and UK Orders as well, the Commission is amending the French and UK Orders.

### *C. Order Extending Time To Meet Certain Capital Conditions*

In addition, as discussed in part V, the Commission is extending until January 1, 2022 the time to meet certain additional conditions to applying substituted compliance to Exchange Act capital and margin requirements in the

Amended Order, the French Order, and the UK Order. The Commission also is extending the compliance date for Exchange Act capital requirements for a certain type of security-based swap dealer located in Germany.

## **II. Substituted Compliance Framework, Scope of Substituted Compliance, and Prerequisites**

### *A. Substituted Compliance Framework and Purpose*

As the Commission discussed when it finalized the German Order,<sup>13</sup> Exchange Act rule 3a71-6 provides a framework whereby non-U.S. SBS Entities may satisfy certain requirements under Exchange Act section 15F by complying with comparable regulatory requirements of a foreign jurisdiction.<sup>14</sup> Because substituted compliance does not constitute exemptive relief, but instead provides an alternative method by which non-U.S. SBS Entities may comply with applicable Exchange Act requirements, the non-U.S. SBS Entities would remain subject to the relevant requirements under section 15F. The Commission accordingly will retain the authority to inspect, examine and supervise those SBS Entities' compliance and take enforcement action as appropriate. Under the substituted compliance framework, failure to comply with the applicable foreign requirements and other conditions to a substituted compliance order would lead to a violation of the applicable requirements under the Exchange Act and potential enforcement action by the Commission (as opposed to automatic revocation of the substituted compliance order).

Under rule 3a71-6, substituted compliance potentially is available in connection with certain section 15F requirements,<sup>15</sup> but is not available in connection with antifraud prohibitions and certain other requirements under the Federal securities laws.<sup>16</sup> As stated in the German Order, SBS Entities in Germany accordingly must comply

directly with those requirements notwithstanding the availability of substituted compliance for other requirements.<sup>17</sup>

The substituted compliance framework reflects the cross-border nature of the security-based swap market, and is intended to promote efficiency and competition by helping to address potential duplication and inconsistency between relevant U.S. and foreign requirements.<sup>18</sup> In practice, substituted compliance may be expected to help SBS Entities leverage their existing systems and practices to comply with relevant Exchange Act requirements in conjunction with their compliance with relevant foreign requirements. Market participants began to count security-based swap transactions toward the thresholds for registration with the Commission as an SBS Entity on August 6, 2021, and the first security-based swap dealers and major security-based swap participants are required to be registered with the Commission by November 1, 2021 and December 1, 2021, respectively.<sup>19</sup> Substituted compliance should assist relevant non-U.S. security-based swap market participants in preparing for registration.

### *B. Scope of Substituted Compliance*

BaFin, in both its initial application and its Amended Application, sought substituted compliance for SBS Entities subject to regulation in Germany for entity-level and transaction-level Exchange Act requirements. For entity-level Exchange Act requirements,<sup>20</sup> a

<sup>17</sup> See German Order, 85 FR 85687.

<sup>18</sup> See generally Business Conduct Adopting Release, 81 FR 30073 (noting that the cross-border nature of the security-based swap market poses special regulatory challenges, in that relevant U.S. requirements "have the potential to lead to requirements that are duplicative of or in conflict with applicable foreign business conduct requirements, even when the two sets of requirements implement similar goals and lead to similar results").

<sup>19</sup> 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>.

<sup>20</sup> The entity-level requirements relate to capital and margin, books and records (other than those linked to the counterparty protection rules), internal risk management systems, trade acknowledgement and verification, portfolio reconciliation, compression, trading relationship documentation, and internal supervision and chief compliance officer requirements. See Exchange Act Release No. 86175 (June 21, 2019) 84 FR 43872, 43879 (Aug 22, 2019) ("Capital and Margin Adopting Release"); Exchange Act Release No. 87005 (June 19, 2019) 84 FR 68550, 68596 (Dec. 16, 2019) ("Books and Records Adopting Release"); Exchange Act Release No. 78011 (June 8, 2016) 81 FR 39808, 39827 (June 17, 2016) ("TAV Adopting Release"); Exchange Act Adopting Release No.

<sup>8</sup> In addition, the Commission had the benefit of the public comment on the French Substituted Compliance Notice and Proposed Order, the French Reopening Release and the UK Substituted Compliance Notice and Proposed Order, some of which also referenced the German Order. See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46500 n.6.

<sup>9</sup> See French Order, 86 FR 41630-36, 41659; UK Order, 86 FR 43338-44, 43372.

<sup>10</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46505-09, 46528-29.

<sup>11</sup> See Letter from Kyle Brandon, Managing Director, Head of Derivatives Policy, SIFMA (Sept. 13, 2021) ("SIFMA II Letter") at 2. Comments may be found on the Commission's website at: <http://www.sec.gov/comments/s7-08-21/s70821.htm>.

<sup>12</sup> See SIFMA II Letter at 3.

<sup>13</sup> See German Order, 85 FR 85687. See also, e.g., French Substituted Compliance Notice and Proposed Order, 85 FR 85721.

<sup>14</sup> See Exchange Act Release No. 77617 (Apr. 14, 2016), 81 FR 29960, 30079 (May 13, 2016) ("Business Conduct Adopting Release").

<sup>15</sup> 17 CFR 240.3a71-6(d).

<sup>16</sup> Exchange Act Release No. 90378 (Nov. 9, 2020), 85 FR 72726, 72727 nn.11 & 12 (Nov. 13, 2020) ("German Substituted Compliance Notice and Proposed Order") (addressing unavailability of substituted compliance in connection with antifraud provisions, as well as provisions related to transactions with counterparties that are not eligible contract participants ("ECPs"), segregation of customer assets, required clearing upon counterparty election, regulatory reporting and public dissemination, and registration of offerings).

Covered Entity (as such term in defined in the Amended Order)<sup>21</sup> must choose either to apply substituted compliance pursuant to the proposed Amended Order with respect to all security-based swap business subject to the relevant German and EU requirements or to comply directly with the Exchange Act with respect to all such business; a Covered Entity may not choose to apply substituted compliance for some of the business subject to the relevant German or EU requirements and comply directly with the Exchange Act for another part of the business that is subject to the relevant German and EU requirements. Additionally, for entity-level Exchange Act requirements, if the Covered Entity also has security-based swap business that is not subject to the relevant German requirements, the Covered Entity must either comply directly with the Exchange Act for that business or comply with the terms of another applicable substituted compliance order.<sup>22</sup> For transaction-level Exchange Act requirements,<sup>23</sup> a Covered Entity may decide to apply substituted compliance for some of its security-based swap business and to comply directly with the Exchange Act (or comply with another applicable substituted compliance order) for other parts of its security-based swap business.

One commenter requested that the Commission make an exception to its approach to substituted compliance for entity-level requirements when a Covered Entity enters into a security-based swap with a counterparty that is not subject to EMIR.<sup>24</sup> The commenter asked that the Commission permit the Covered Entity, in those circumstances, to choose either to apply the relevant EMIR-related requirements to that counterparty as though it were covered by EMIR or to comply directly with the relevant Exchange Act requirement. In effect, the commenter asked that

Covered Entities be permitted to treat entity-level requirements as transaction-level requirements when the Covered Entity enters into a security-based swap with a counterparty that is not subject to EMIR. The commenter made a related request with respect to counterparties not subject to EMIR, which the Commission addresses in part IV.B below.

The Amended Order requires a Covered Entity to be subject to and comply with EMIR-related requirements if it applies substituted compliance for Exchange Act entity-level requirements related to internal risk management, trade acknowledgment and verification, portfolio reconciliation and dispute resolution, portfolio compression, trading relationship documentation, internal supervision, chief compliance officers, recordkeeping, and securities count requirements. When the Commission adopted these requirements, it determined that SBS Entities should apply them at an entity level.<sup>25</sup> The Commission believes that allowing non-U.S. SBS Entities to follow a different approach to these entity-level requirements for purposes of the Amended Order would undermine its decision to require all SBS Entities to apply these requirements at an entity level and create unwarranted disparities in the requirements applicable to SBS Entities. In choosing to use substituted compliance for an Exchange Act entity-level requirement, the Covered Entity is choosing to comply with the relevant conditions of the Amended Order. Any Covered Entity that wishes to avoid complying with the relevant conditions of the Amended Order, such as applying EMIR-related requirements to all of its business that satisfies all conditions of the Amended Order, may do so by choosing not to use substituted compliance for the relevant entity-level requirements.

For these reasons, and for the reasons discussed in part IV.B below, the Commission is not making an exception to its approach to substituted compliance for entity-level requirements when a Covered Entity enters into a security-based swap with a counterparty that is not subject to EMIR. Commenters did not address the proposed approach to substituted compliance for transaction-level requirements. The Commission accordingly is issuing the Amended Order with the proposed approach to entity-level and transaction-level requirements.

### C. Specific Prerequisites

#### 1. Covered Entity

Under the German Order, the definition of “Covered Entity” specified which entities could make use of substituted compliance.<sup>26</sup> In connection with its Amended Application related to capital and margin requirements, BaFin requested substituted compliance with respect to investment firms and credit institutions that are authorized by BaFin to provide investment services or perform investment activities in Germany and are supervised by the European Central Bank (“ECB”) as significant institutions (or had a licensing application pending as of August 12, 2021).<sup>27</sup> In order to ensure that the firms that would rely on the proposed Amended Order are subject to the relevant German and EU requirements and oversight, the proposed definition was revised in accordance with BaFin’s request.<sup>28</sup>

Commenters did not address the amended “Covered Entity” definition, and the Commission is issuing the definition as proposed.<sup>29</sup> Substituted compliance accordingly is available only to Covered Entities that are subject to the relevant German and EU regulatory requirements and oversight.

#### 2. Comparability of Regulatory Outcomes

As discussed in the German Order and earlier in the German Substituted Compliance Notice and Proposed Order,<sup>30</sup> Rule 3a71–6 describes the requirements for the Commission to make a substituted compliance determination. Under the rule, the Commission must determine that the analogous foreign requirements are comparable to otherwise applicable requirements under the Exchange Act (*i.e.*, the relevant requirements in the Exchange Act and the rules and regulations thereunder), after accounting for factors such as “the

87782 (Dec. 18, 2019) 85 FR 6359, 6378 (Feb. 4, 2020) (“Risk Mitigation Adopting Release”); Business Conduct Adopting Release, 81 FR 30064.

<sup>21</sup> See para. (g)(1)(iii) of the Amended Order.

<sup>22</sup> In the context of the EMIR counterparties condition in paragraph (a)(5) of the proposed Amended Order, a Covered Entity would have to choose: (1) To apply substituted compliance pursuant to the proposed Amended Order—including compliance with paragraph (a)(5) as applicable—for a particular set of entity-level requirements with respect to all of its business that would be subject to the relevant EMIR-based requirement if the counterparty were the relevant type of counterparty; or (2) to comply directly with the Exchange Act with respect to such business.

<sup>23</sup> Transaction-level requirements encompass business conduct requirements for the protection of counterparties, and additional provisions for the protection of special entities. See Business Conduct Adopting Release, 81 FR 30065.

<sup>24</sup> See SIFMA II Letter at 3.

<sup>25</sup> See note 20, *supra*.

<sup>26</sup> The German Order defined a “Covered Entity” as an entity that (i) is an SBS Entity registered with the Commission; (ii) is not a “U.S. person,” as that term is defined in Exchange Act rule 3a71–3(a)(4); and (iii) is an investment firm or credit institution authorized by BaFin to provide investment services or perform investment activities in Germany. See para. (f)(1) of the German Order, 85 FR 85700.

<sup>27</sup> See Amended Application at 1. The Amended Application requested that firms that had a licensing application pending with the ECB as of the date of the Amended Application be included within the definition of Covered Entity.

<sup>28</sup> See para. (g)(1)(iii) of the proposed Amended Order; see also German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46533.

<sup>29</sup> See para. (g)(1)(iii) of the Amended Order.

<sup>30</sup> See German Order, 85 FR 85687; German Substituted Compliance Notice and Proposed Order, 85 FR 72727.

scope and objectives of the relevant foreign regulatory requirements” and “the effectiveness of the supervisory compliance program administered, and the enforcement authority exercised” by the foreign authority.<sup>31</sup> As noted upon adoption of the German Order and subsequent substituted compliance orders, the comparability assessments are to be based on a “holistic approach” that “will focus on the comparability of regulatory outcomes rather than predicating substituted compliance on requirement-by-requirement similarity.”<sup>32</sup> The Commission has concluded that this comparability prerequisite is met in connection with a number of requirements under the Exchange Act, in some cases with the addition of conditions to help ensure the comparability of regulatory outcomes.<sup>33</sup>

### 3. Memoranda of Understanding

Exchange Act rule 3a71–6(a)(2)(ii) further predicates the availability of substituted compliance on the Commission and the foreign financial regulatory authority or authorities entering into a supervisory and enforcement memorandum of understanding and/or other arrangement with the relevant foreign financial regulatory authorities “addressing supervisory and enforcement cooperation and other matters arising under the substituted compliance determination.”<sup>34</sup> With the proposed expansion of substituted compliance to nonbank capital and margin requirements, BaFin and the ECB share responsibility for supervising compliance with the provisions of EU and German law applicable to the Amended Order. Accordingly, the

<sup>31</sup> Exchange Act rule 3a71–6(a)(2)(ii).

<sup>32</sup> See German Order; 85 FR 85687; French Order, 86 FR 41613; UK Order, 86 FR 43319. See also Business Conduct Adopting Release, 81 FR 30078–79 (further recognizing that “different regulatory systems may be able to achieve some or all of those regulatory outcomes by using more or fewer specific requirements than the Commission, and that in assessing comparability the Commission may need to take into account the manner in which other regulatory systems are informed by business and market practices in those jurisdictions”). The Commission’s assessment of a foreign authority’s supervisory and enforcement effectiveness—as part of the broader comparability analysis—would be expected to consider not only overall oversight activities, but also oversight specifically directed at conduct and activity relevant to the substituted compliance determination. “For example, it would be difficult for the Commission to make a comparability determination in support of substituted compliance if oversight is directed solely at the local activities of foreign security-based swap dealers, as opposed to the cross-border activities of such dealers.” Business Conduct Adopting Release, 81 FR 30079 (footnote omitted).

<sup>33</sup> See German Order, 85 FR 85687.

<sup>34</sup> Exchange Act rule 3a71–6(a)(2)(ii).

Commission entered into relevant memoranda of understanding with BaFin on December 20, 2020<sup>35</sup> and with the ECB on August 16, 2021.<sup>36</sup> Both memoranda of understanding must be in place before Covered Entities may use substituted compliance to satisfy obligations under the Exchange Act.<sup>37</sup>

### 4. “Adequate assurances”

A foreign financial regulatory authority may submit a substituted compliance application only if the authority provides “adequate assurances” that no law or policy would impede the ability of any entity that is directly supervised by the authority and that may register with the Commission “to provide prompt access to the Commission to such entity’s books and records or to submit to onsite inspection or examination by the Commission.”<sup>38</sup> The Commission found that BaFin had satisfied this requirement in connection with the German Order when noticing the application.<sup>39</sup> In addition, in proposing the Amended Order, the Commission stated that BaFin had again satisfied this prerequisite in the Commission’s preliminary view, taking into account information and representations that BaFin provided regarding certain German and EU requirements that are relevant to the Commission’s ability to inspect, and access the books and records of, firms using substituted compliance pursuant to the Order.<sup>40</sup> The Commission

<sup>35</sup> On December 18, 2020, the Commission and BaFin entered into a memorandum of understanding to address substituted compliance cooperation, a copy of which is on the Commission’s website at [www.sec.gov](http://www.sec.gov) under the “Substituted Compliance” tab, which is located on the “Security-Based Swap Markets” page in the Division of Trading and Markets section of the site.

<sup>36</sup> On August 16, 2021, the Commission and the ECB entered into a memorandum of understanding setting forth the conditions under which supervisory and enforcement information for certain subject matters, including but not limited to margin and capital, that is owned by the ECB, can be requested, shared, used and protected from unauthorized disclosure by the SEC and ECB. The memorandum of understanding serves as a framework for consultation, cooperation and the exchange of information between the SEC and the ECB in the supervision, enforcement and oversight of the covered firms. A copy of the memorandum of understanding is available on the Commission’s website at [www.sec.gov](http://www.sec.gov) under the “Substituted Compliance” tab, which is located on the “Security-Based Swap Markets” page in the Division of Trading and Markets section of the site.

<sup>37</sup> See paras. (a)(7) and (8) of the Amended Order.

<sup>38</sup> See Exchange Act rule 3a71–6(c)(3).

<sup>39</sup> See German Substituted Compliance Notice and Proposed Order, 85 FR 72728. In adopting the German Order, the Commission reiterated its view with regard to adequate assurances. See German Order, 85 FR 85696.

<sup>40</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46522. See also Amended Application at 2 (providing

received no comments on this preliminary view and has not changed its view.

## III. Amended and Additional General Conditions

The original German Order incorporated a number of general conditions and other prerequisites to help ensure that the relevant German and EU requirements that form the basis for substituted compliance in practice will apply to the Covered Entity’s security-based swap business and activities, and to promote the Commission’s oversight over entities that avail themselves of substituted compliance.<sup>41</sup> In the German Substituted Compliance Notice and Proposed Amended Order, the Commission proposed to amend certain of the general conditions and prerequisites and to include additional new conditions. The proposed Amended Order would address BaFin’s request to extend the German Order to provide substituted compliance for nonbank capital and margin requirements and also provide clarity and consistency with the French Order and the UK Order as described more fully in this part III below.

### A. Revision of General Condition Regarding Notice

#### 1. Proposed Approach

The German Order included a general condition that Covered Entities must provide the Commission with written notice of their intent to rely on substituted compliance.<sup>42</sup> To promote clarity in the notice regarding the Covered Entity’s intended use of substituted compliance and for consistency with the Commission’s other substituted compliance orders,<sup>43</sup> the Commission proposed to amend the general condition to require that the notice identify each specific substituted compliance determination for which the Covered Entity intends to apply substituted compliance. The proposed Amended Order also would require the Covered Entity to amend the notice if it modifies the scope of its reliance on substituted compliance and to send the notice to the Commission in the manner

“adequate assurances” regarding access to books and records and on-site inspections and examinations).

<sup>41</sup> See paras. (a)(1) through (7) of the German Order, 85 FR 85698.

<sup>42</sup> See para. (a)(6) of the German Order.

<sup>43</sup> See French Order, 86 FR 41685; UK Order, 86 FR 43371. See also German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46501 n.13.

specified on the Commission's website.<sup>44</sup>

## 2. Commenter Views and Final Provisions

Commenters did not address the revision to the notice requirement in paragraph (a)(9) of the proposed Amended Order for the Covered Entity to notify the Commission in writing of its intent to rely on substituted compliance and the Commission is issuing this requirement as proposed.<sup>45</sup>

### B. Additional Condition Regarding Notification of Requirements Related to Changes in Capital

#### 1. Proposed Approach

The Commission proposed to add a general condition that Covered Entities with a prudential regulator relying on substituted compliance pursuant to the proposed Amended Order must apply substituted compliance with respect to the requirements of Exchange Act rule 18a-8(c) and the requirements of Exchange Act rule 18a-8(h) as applied to Exchange Act rule 18a-8(c).<sup>46</sup> Exchange Act rule 18a-8(c) generally requires every security-based swap dealer with a prudential regulator that files a notice of adjustment of its reported capital category with the Federal Reserve Board, the Office of the Comptroller of the Currency, or the Federal Deposit Insurance Corporation to give notice of this fact on same day by transmitting a copy to the Commission of the notice of adjustment of reported capital category in accordance with Exchange Act rule 18a-8(h).<sup>47</sup> Exchange Act rule 18a-8(h) sets forth the manner in which every notice or report required to be given or transmitted pursuant to Exchange Act rule 18a-8 must be made.<sup>48</sup> While Exchange Act rule 18a-8(c) is not linked to an Exchange Act capital requirement, it is linked to capital requirements in the U.S. promulgated by the prudential regulators. In its application, BaFin cited several German and EU provisions as providing similar outcomes to the notifications requirements of Exchange Act Rule 18a-8.<sup>49</sup> This proposed general condition was designed to clarify that a prudentially regulated Covered Entity must provide the Commission with copies of any notifications regarding

changes in the Covered Entity's capital situation required by German or EU law. The intent was to align the notification requirement with the German and EU capital requirements applicable to the Covered Entity.

## 2. Commenter Views and Final Provisions

The Commission did not receive any comments on this proposed amendment to the German Order and the Amended Order includes this provision.<sup>50</sup>

### C. Amendment to General Condition Regarding EU Cross-Border Matters

#### 1. Proposed Approach

The Commission proposed to modify the German Order's general condition related to EU cross-border matters. Substituted compliance under the German Order in part is predicated on BaFin being responsible for the supervision and enforcement of Covered Entities in connection with certain MiFID provisions that constitute conditions to individual substituted compliance provisions.<sup>51</sup> That general condition is intended to help ensure that the prerequisites to substituted compliance with respect to supervision and enforcement are satisfied in practice when MiFID allocates responsibility for ensuring compliance to another EU Member State. Because MiFIR is subject to similar allocation provisions,<sup>52</sup> the Commission proposed to incorporate references to MiFIR requirements into the general condition.<sup>53</sup> This change would be consistent with the French Order.<sup>54</sup>

## 2. Commenter Views and Final Provisions

The Commission did not receive any comments on this proposed revision to the German Order's general condition related to EU cross-border matters and is issuing the revision as proposed.<sup>55</sup>

### D. Additional MOU-Related General Condition

#### 1. Proposed Approach

In light of the Amended Application addressing capital and margin requirements for nonbanks, the Commission also proposed to add a new general condition that would predicate

substituted compliance on the presence of a supervisory and enforcement memorandum of understanding between the Commission and the ECB, pertaining to information owned by the ECB.<sup>56</sup> The Commission stated its preliminary view that access to this ECB information will assist the Commission's effective oversight of Covered Entities that use substituted compliance in connection with capital and margin requirements. The Commission and the ECB entered into a MOU addressing supervisory and enforcement cooperation related to substituted compliance on August 16, 2021.<sup>57</sup>

## 2. Commenter Views and Final Provisions

The Commission did not receive any comments on this new proposed general condition to the German Order requiring a supervisory and enforcement memorandum of understanding between the Commission and the ECB and is issuing the condition as proposed.<sup>58</sup>

## IV. Changes to Risk Control and Internal Supervision Requirements

### A. Changes to Trade Acknowledgement and Verification and Trading Relationship Documentation

#### 1. Proposed Approach

Under the original German Order, substituted compliance for trade acknowledgement and verification and for trading relationship documentation in part requires that a Covered Entity comply with certain requirements under MiFID (plus the German implementation of MiFID) and with certain requirements under EMIR.<sup>59</sup> Commenters to the French Order expressed concern that the interplay between those particular MiFID conditions and a separate EU cross-border condition to the Order in practice would preclude the availability of substituted compliance for entities that have branches in other EU Member States.<sup>60</sup> After careful consideration and

<sup>56</sup> See para. (a)(8) of the proposed Amended Order.

<sup>57</sup> See note 36, *supra*.

<sup>58</sup> See para. (a)(8) of the Amended Order.

<sup>59</sup> See paras. (b)(2) and (5) of the German Order.

<sup>60</sup> See Letter from Kyle Brandon, Managing Director, Head of Derivatives Policy, SIFMA (Jan. 25, 2021) ("SIFMA Letter I") (commenting on the French Substituted Compliance Notice and Proposed Order but stating that the concerns applied equally to the German Order). SIFMA Letter I can be found on the Commission's website at: <http://www.sec.gov/comments/s7-22-20/s72220.htm>. In relevant part, the cross-border condition of paragraph (a)(10) of the proposed Amended Order stated that if responsibility for ensuring compliance with any provision of MiFID or MiFIR (or the EU or German implementing

<sup>44</sup> See para. (a)(9) of the proposed Amended Order.

<sup>45</sup> See para. (a)(9) of the Amended Order.

<sup>46</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46502; para. (a)(11) of the proposed Amended Order.

<sup>47</sup> 17 CFR 240.18a-8(c).

<sup>48</sup> See 240.18a-8(h).

<sup>49</sup> See KWG section 25a(1) sentence 6 no. 3, and FinDAG section 4d.

<sup>50</sup> See para. (a)(11) of the Amended Order.

<sup>51</sup> See part IX, *infra*.

<sup>52</sup> See MiFID art. 35(8) (in part allocating responsibility over MiFIR articles 14 to 26 to competent authorities in member states in which branches are located).

<sup>53</sup> See para. (a)(10) of the proposed Amended Order.

<sup>54</sup> See para. (a)(10) of the French Order.

<sup>55</sup> See para. (a)(10) of the Amended Order.

finalization of the French Order, the Commission proposed to amend the German Order to address those concerns and for consistency with the French Order. The proposed Amended Order revised the conditions related to trade acknowledgment and verification requirements, and to trading relationship documentation, by removing the MiFID-related conditions and instead relying solely on EMIR conditions to establish comparability for those requirements.<sup>61</sup> The Commission believes that the Amended Order's EU cross-border condition provides an important safeguard to help ensure that firms that avail themselves of substituted compliance are subject to appropriate regulatory supervision and enforcement.

Consistent with French Order,<sup>62</sup> the proposed Amended Order removed the MiFID conditions to substituted compliance for trade acknowledgment and verification and trade relationship documentation.<sup>63</sup> In addition, the Commission proposed to add the confirmation provisions of EMIR article 11(1)(a) and EMIR RTS article 12 as conditions to substituted compliance for trade relationship documentation.<sup>64</sup> The Commission preliminarily believed that the EMIR provisions related condition

requirement) that is a condition for substituted compliance is allocated to an authority in a Member State of the EU in whose territory a Covered Entity provides a service, BaFin must be the authority responsible for supervision and enforcement of that provision. In practice (pursuant to MiFID article 35), this allocation of oversight applies to requirements pursuant to MiFID article 25 ("assessment of suitability and appropriateness and reporting to clients") as well as certain other MiFID provisions not relevant here. In the commenter's view, application of those MiFID article 25 conditions in connection with trade acknowledgment and verification requirements and trading relationship documentation requirements would "in practice lead to an untenable patchwork of substituted compliance." See SIFMA Letter I at 3. The commenter further states that SBS Entities "operating branches throughout the EU" would not be able to avail themselves of substituted compliance in connection with these requirements "unless authorities or regulated SBS Entities in every or nearly every one of the 27 EU Member States submit their own substituted compliance applications covering local branches of SBS Entities, and the Commission reviews and responds to those applications and enters into memoranda of understanding . . . with authorities in each of these Member States." That problem does not arise in connection with requirements under EMIR, which does not allocate oversight of a German entity's compliance to authorities in other EU Member States. That problem also does not arise in connection with other requirements under MiFID (e.g., MiFID art. 16 organizational provisions) that are not subject to the same allocation of oversight.

<sup>61</sup> See paras. (b)(2) and (5) of the proposed Amended Order.

<sup>62</sup> See para. (b)(2) of the French Order.

<sup>63</sup> See paras. (b)(2) and (5) of the proposed Amended Order.

<sup>64</sup> See para. (b)(5) of the proposed Amended Order.

described below, were sufficient for regulatory comparability and recognized that in practice the interplay between the EU cross-border conditions and MiFID documentation provisions may limit the use of substituted compliance and its associated regulatory benefits.<sup>65</sup> To ensure that there would be no opportunity for gaps that may prevent the EMIR provisions in practice from producing outcomes consistent with those of the Exchange Act rules, that preliminary view, however, required the addition of the EMIR-related conditions in paragraphs (a)(5) and (a)(6) of the proposed Amended Order and described below.

## 2. Commenter's Views and Final Provisions

The Commission did not receive any comments on the proposed revisions to the German Order's conditions related to trade acknowledgment and verification requirements, and trading relationship documentation, to remove the MiFID-related conditions and rely solely on EMIR conditions to establish comparability for those requirements, and issues those revisions as proposed and consistent with the French Order.<sup>66</sup> This decision takes into account the discussion below related to the EMIR-related general conditions and the comment the Commission received on the EMIR-related general condition regarding counterparty status.

### B. Addition of EMIR-Related General Conditions

#### 1. Proposed Approach

The heightened reliance on the EMIR conditions to establish comparability in connection with trade acknowledgment and verification and trading relationship documentation requires additional safeguards to help ensure that there will be no opportunity for gaps that may prevent the EMIR provisions in practice from producing outcomes consistent with those of the Exchange Act rules. In response, the proposed Amended Order included two additional EMIR-related general conditions. The first such condition provides that the Covered Entity must comply with the applicable EMIR-related condition of the proposed Amended Order as if the counterparty were the type of counterparty that would trigger the application of the relevant EMIR-based requirements. If the Covered Entity reasonably determines that its counterparty would

<sup>65</sup> In addition, these proposed changes are consistent with the French Order. See paras. (a)(5) and (a)(6) of the French Order.

<sup>66</sup> See paras. (b)(2) and (b)(5) of the Amended Order.

be a financial counterparty<sup>67</sup> if not for the counterparty's location and/or lack of regulatory authorization in the EU, the condition further requires the Covered Entity to treat the counterparty as if the counterparty were a financial counterparty, rather than as another type of counterparty to which the relevant EMIR-based requirements may apply.<sup>68</sup>

The second such condition would require that, for each part of the Order that requires compliance with EMIR-related requirements, either: (i) The relevant security-based swap is an "OTC derivative" or "OTC derivative contract," as defined in EMIR article 2(7), that has not been cleared by a central counterparty and otherwise is subject to the provisions of EMIR article 11, EMIR RTS articles 11 through 15, and EMIR Margin RTS article 2; or (ii) the relevant security-based swap has been cleared by a central counterparty that has been authorized or recognized to clear derivatives contracts by a relevant authority in the EU.<sup>69</sup> This second condition would help ensure that substituted compliance is available in connection with an instrument that has been cleared at an EU-authorized or EU-recognized central counterparty (and hence is not within the Exchange Act rule's exclusion but also is not subject to relevant EMIR requirements).

## 2. Commenter's Views and Final Provisions

One commenter stated that the proposed additional EMIR-related condition related to counterparty status effectively would override exemptions and exclusions from EMIR for certain public sector counterparties, such as multilateral development banks, and would expand the application of EMIR to counterparties who are not "undertakings," such as natural persons.<sup>70</sup> The commenter noted that

<sup>67</sup> EMIR article 2(8) defines "financial counterparty" to encompass investment firms, credit institutions, insurers and certain other types of businesses that have been authorized in accordance with EU law. Under EMIR, the distinction between financial counterparties and other types of counterparties such as non-financial counterparties is manifested, *inter alia*, in connection with confirmation timing standards. See EMIR RTS article 12.

<sup>68</sup> See para. (a)(5) of the proposed Amended Order.

<sup>69</sup> See para. (a)(6) of the proposed Amended Order. Prong (i) to this proposed condition would be satisfied by uncleared instruments that fall within the ambit of the EMIR requirements at issue. The alternative prong (ii) would be satisfied when instruments fall outside the ambit of those EMIR requirements by virtue of being cleared in the EU, akin to the Exchange Act rules' exclusion for security-based swaps cleared by clearing agencies registered with the Commission.

<sup>70</sup> See SIFMA II Letter at 2.

compliance with the condition would require the Covered Entity to “assess whether these counterparties who are not subject to EMIR would be so subject as if it were the type of counterparty specified by EMIR as well as, in many cases, enter into documentation with those counterparties compliant with EMIR.”<sup>71</sup> The commenter noted that these counterparties would be confused why an order of the Commission “now deprives them of an exception or exemption under EU law that has for some time applied to them” and would be reluctant to enter into new documentation to enable a Covered Entity to satisfy the Commission’s substituted compliance order.<sup>72</sup> To address this reluctance, the commenter requested a six-month transition period until May 1, 2022, before a Covered Entity will be required to comply with the EMIR counterparty general condition in paragraph (a)(5) of the Amended Order.

The Commission proposed revisions to the conditions to trade acknowledgement and verification and trading relationship documentation substituted compliance to remove the MiFID conditions and rely entirely on EMIR requirements in response to commenters’ concerns that the relevant MiFID conditions in the German Order would preclude the availability of substituted compliance for entities that have branches in EU Member States.<sup>73</sup> The Commission proposed to amend the German Order to address those concerns and for consistency with French Order, but only with the addition of the EMIR-related counterparty condition. By requiring a Covered Entity to treat its counterparty as a type of counterparty that would trigger the application of the relevant EMIR-based requirements, the condition will require the Covered Entity to perform the relevant obligations pursuant to those EMIR-based requirements and thus act in a way that is comparable to Exchange Act requirements. Absent the condition, the Commission would not find comparability with regard to the categories of counterparties, such as U.S. persons and natural persons, to which EMIR is not applicable for the entity-level requirements and, accordingly, would not have been able to make a positive substituted compliance determination for those entity-level requirements. The EMIR-related conditions were intended to help ensure that there will be no

opportunity for gaps that may prevent the EMIR provisions in practice from producing outcomes consistent with those of the Exchange Act rules.<sup>74</sup>

The Commission, however, did not intend for the condition to require compliance with EMIR under circumstances where neither EMIR nor the Exchange Act would apply. As such, the Commission is modifying the EMIR counterparties general condition to clarify that this condition applies only to the extent that an Exchange Act section or rule cited in the relevant part of the Amended Order applies to the security-based swap activities with that counterparty.<sup>75</sup> To promote consistency in the use of substituted compliance across other jurisdictions in which EMIR applies, the Commission also is modifying the same condition in the French Order and the UK Order.

Although the Commission is not modifying the condition to the extent requested by the commenter, the Commission is not providing an additional transition period at this time. The registration compliance date for U.S. and non-U.S. SBS Entities is October 6, 2021, and that is also the compliance date for the entity-level requirements at issue. This date has been known to potential SBS Entities since February 4, 2020.<sup>76</sup> In areas where the Commission makes a positive substituted compliance determination under the Amended Order, Covered Entities will have additional flexibility with respect to how to comply with the relevant Exchange Act requirements, but they, like all registered SBS Entities, must comply with the Exchange Act as of the later of the registration compliance date or the date when they register with the Commission. Commission staff are available to discuss implementation issues with Covered Entities during the implementation period.

The same commenter asked that the Commission confirm that, when a Covered Entity enters into a security-based swap with a counterparty that is not subject to EMIR, the Covered Entity may choose either to apply the relevant EMIR-related requirements to that counterparty as though it were covered by EMIR or to comply directly with the relevant Exchange Act requirement.<sup>77</sup> As discussed in part II.B above, the Commission is not providing the requested relief.

The Commission did not receive any comments on the proposed addition of the general condition in paragraph (a)(6) of the Amended Order related to the security-based swap’s status as an “OTC derivative” or “OTC derivative contract” under EMIR. The Commission is issuing this additional general condition with a clarification that the condition applies only if the relevant EMIR-based requirement applies to OTC derivatives that have not been cleared by a central counterparty.<sup>78</sup> The Commission is making this clarification because some provisions of EMIR cited in the Amended Order, such as EMIR articles 39(4) and (5), are not limited in their application to non-centrally cleared OTC derivatives. The Commission also is clarifying that the condition applies whenever the Amended Order requires the application of, and the Covered Entity’s compliance with EMIR, EMIR RTS EMIR Margin RTS and/or other EU requirements adopted pursuant to those provisions. These clarifications already appear in a similar condition in the UK Order, and, to promote consistency in the use of substituted compliance across other jurisdictions in which EMIR applies, the Commission also is modifying the same condition in the French Order.

### *C. Revisions to Internal Risk Management and Internal Supervision*

#### 1. Proposed Approach

The Commission also proposed to incorporate—as part of the relevant conditions in paragraph (b)(1) of the proposed Amended Order relating to internal risk management—MiFID articles 16 and 23 and the related implementing provisions, MiFID Org Reg articles 25 through 37, 72 through 76 and Annex IV, as well as CRD articles 88(1), 91(1)–(2) and (7)–(9) and the related implementing provisions.<sup>79</sup> These provisions address additional aspects of a Covered Entity’s management of the risks posed by internal governance and organization, business operations, conflicts of interest with and between clients, and senior staff remuneration policies and were part of the Commission’s comparability determination for entities subject to regulation in France. The Commission also proposed to incorporate CRR articles 286–88 and 293 and EMIR Margin RTS article 2 to the conditions of paragraph (d)(3) of the proposed Amended Order relating to internal

<sup>78</sup> See para. (a)(6) of the Amended Order.

<sup>79</sup> See para. (b)(1) of the proposed Amended Order.

<sup>74</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46503.

<sup>75</sup> See para. (a)(5)(iii) of the Amended Order.

<sup>76</sup> See Exchange Act Release No. 87780 (Dec. 18, 2019), 85 FR 6270, 6345–46 (Feb. 4, 2020).

<sup>77</sup> See SIFMA II Letter at 3.

<sup>71</sup> See SIFMA II Letter at 3.

<sup>72</sup> See SIFMA II Letter at 3.

<sup>73</sup> See German Substituted Compliance Order and Proposed Amended Order, 86 FR 46503.



supervision.<sup>80</sup> These provisions relate to counterparty credit risk and risk management generally and collateral-related risk management procedures and were also part of the Commission's comparability analysis in the French Order.<sup>81</sup> Also consistent with the French Order, the Commission proposed to delete CRD article 93 and the related implementing provisions from both paragraph (d)(1) and (d)(3), as those provisions relate to remuneration policies for institutions that benefit from exceptional (German and EU) government intervention.<sup>82</sup>

## 2. Commenter Views and Final Provisions

The Commission did not receive any comments on the proposed revisions to paragraphs (b)(1) and (d)(3) of the German Order related to the inclusion of additional conditions and to paragraphs (d)(1) and (d)(3) of the German Order related to the deletion of CRD article 93 and implementing provisions. The Commission issues these revisions to the German Order as proposed.<sup>83</sup>

## V. Substituted Compliance for Capital and Margin Requirements

### A. Proposed Approach

The Amended Application in part requested substituted compliance in connection with requirements under the Exchange Act relating to:

- **Capital**—Capital requirements pursuant to Exchange Act section 15F(e) and Exchange Act rule 18a–1 and 18a–1a through 18a–1d applicable to certain SBS Entities.<sup>84</sup> Exchange Act rule 18a–1 helps to ensure the SBS Entity maintains at all times sufficient liquid assets to promptly satisfy its liabilities, and to provide a cushion of liquid assets in excess of liabilities to cover potential market, credit, and other risks.<sup>85</sup> The

<sup>80</sup> See para. (d)(3) of the proposed Amended Order.

<sup>81</sup> See paras. (b)(1) and (d)(3) of the French Order.

<sup>82</sup> See paras. (b)(1) and (d)(3) of the proposed Amended Order.

<sup>83</sup> See paras. (b)(1), (d)(1) and (d)(3) of the Amended Order.

<sup>84</sup> Exchange Act rule 18a–1 applies to security-based swap dealers that: (1) Do not have a prudential regulator; and (2) are either (a) not dually registered with the Commission as a broker-dealer or (b) are dually registered with the Commission as a special purpose broker-dealer known as an OTC derivatives dealer. Security-based swap dealers that are dually-registered with the Commission as a full-service broker-dealer are subject to the capital requirements of Exchange Act rule 15c3–1 (17 CFR 240.15c3–1) for which substituted compliance is not available. See 17 CFR 240.3a71–6(d)(4)(i) (making substituted compliance available only with respect to the capital requirements of Exchange Act section 15F(e) and Exchange Act rule 18a–1).

<sup>85</sup> See Capital and Margin Adopting Release, 84 FR 43947. The Amended Application discusses EU

rule's net liquid assets test standard protects customers and counterparties and mitigates the consequences of an SBS Entity's failure by promoting the ability of the firm to absorb financial shocks and, if necessary, to self-liquidate in an orderly manner.<sup>86</sup> As part of the capital requirements, security-based swap dealers without a prudential regulator also must comply with the internal risk management control requirements of Exchange Act Rule 15c3–4 with respect to certain activities.<sup>87</sup>

- **Margin**—Margin requirements pursuant to Exchange Act section 15F(e) and Exchange Act rule 18a–3 for non-prudentially regulated SBS Entities.<sup>88</sup> The margin requirements are designed to protect SBS Entities from the consequences of a counterparty's default.<sup>89</sup>

Taken as a whole, these capital and margin requirements help to promote market stability by mandating that SBS Entities follow practices to manage the market, credit, liquidity, solvency, counterparty, and operational risks associated with their security-based swap businesses.

In proposing to provide conditional substituted compliance in connection with this part of the Amended Application, the Commission preliminarily concluded that substituted compliance with respect to the

and German requirements that address firms' capital requirements. See Amended Application Annex A category 3 (Side Letter Addressing Capital Requirements). See also Amended Application Annex A category 4 (Internal Risk Management Requirements) (generally discussing internal risk management requirements).

<sup>86</sup> See Capital and Margin Adopting Release, 84 FR 43879–83. The capital standard of Exchange Act rule 18a–1 is based on the net liquid assets test of Exchange Act rule 15c3–1 applicable to broker-dealers. *Id.* The net liquid assets test seeks to promote liquidity by requiring that a firm maintain sufficient liquid assets to meet all liabilities, including obligations to customers, counterparties, and other creditors, and, in the event a firm fails financially, to have adequate additional resources to wind-down its business in an orderly manner without the need for a formal proceeding. See *id.* at 43879. See Amended Application Annex A category 3 (Side Letter Addressing Capital Requirements).

<sup>87</sup> See 17 CFR 240.15c3–4 and 18a–1(f).

<sup>88</sup> 17 CFR 240.18a–3.

<sup>89</sup> See Capital and Margin Adopting Release, 84 FR 43947, 43949 (“Obtaining collateral is one of the ways OTC derivatives dealers manage their credit risk exposure to OTC derivatives counterparties. Prior to the financial crisis, in certain circumstances, counterparties were able to enter into OTC derivatives transactions without having to deliver collateral. When ‘trigger events’ occurred during the financial crisis, those counterparties faced significant liquidity strains when they were required to deliver collateral”). The Amended Application discusses EU and German requirements that address firms' margin requirements. See Amended Application Annex A category 4 (Margin Requirements for Nonbank Firms).

Exchange Act capital and margin requirements would be subject to certain additional conditions.<sup>90</sup>

## B. Commenter Views and Final Provisions

### 1. Capital

Substituted compliance with respect to the capital requirements of Exchange Act rule 18a–1 would be conditioned on Covered Entities being subject to and complying with relevant EU and German capital requirements.<sup>91</sup> The Commission did not receive comment on this proposed capital condition and the Amended Order includes the condition.<sup>92</sup>

The first additional capital condition required that the Covered Entity apply substituted compliance with respect to Exchange Act rules 18a–5(a)(9) (a record making requirement), 18a–6(b)(1)(x) (a record preservation requirement), and 18a–8(a)(1)(i), (a)(1)(ii), (b)(1), (b)(2), and (b)(4) (notification requirements relating to capital).<sup>93</sup> These recordkeeping and notification requirements are directly linked to the capital requirements of Exchange Act rule 18a–1. The proposed Amended Order conditioned substituted compliance with respect to these recordkeeping and notification requirements on the Covered Entity applying substituted compliance with respect to Exchange Act rule 18a–1.<sup>94</sup> This additional capital condition in the proposed Amended Order did the reverse: It conditioned substituted compliance with respect to Exchange Act rule 18a–1 on the Covered Entity applying substituted compliance for these linked recordkeeping and notification requirements. This proposed additional capital condition was designed to provide clarity as to the Covered Entity's obligations under these recordkeeping and notification requirements when applying substituted compliance with respect to Exchange Act rule 18a–1. The Commission did not receive comment on this proposed additional capital condition and the Amended Order includes the condition.<sup>95</sup>

The second additional capital condition imposed a simplified net liquid assets test and related

<sup>90</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46505–11.

<sup>91</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46505.

<sup>92</sup> See para. (c)(1)(i) of the Amended Order.

<sup>93</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46505.

<sup>94</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46512–18, 46520–22.

<sup>95</sup> See para. (c)(1)(ii) of the Amended Order.



requirements on the Covered Entity.<sup>96</sup> This condition was designed to help ensure the comparability of regulatory outcomes between Exchange Act rule 18a-1 (which imposes a net liquid assets test) and the capital requirements applicable to nonbank security-based swap dealers in Germany that are expected to register with the Commission. Those capital requirements are based on the international capital standard for banks (“Basel capital standard”).<sup>97</sup>

The second additional capital condition had four prongs. In particular, it conditioned substituted compliance with respect to Exchange Act rule 18a-1 on the Covered Entity: (1) Maintaining liquid assets (as defined in the proposed condition) that have an aggregate market value that exceeds the amount of the Covered Entity’s total liabilities by at least \$100 million before applying the deduction specified in the proposed condition, and by at least \$20 million after applying the deduction specified in the proposed condition; (2) making and preserving for three years a quarterly record with respect to the first prong;<sup>98</sup> (3) notifying the Commission in writing within 24 hours in the manner specified on the Commission’s website if the Covered Entity fails to meet the requirements of the proposed condition and including in the notice the contact information of an individual who could provide further information about the failure to meet the requirements; and (4) including its most recent statement of financial condition filed with its local supervisor (whether audited or unaudited) with its initial written notice to the Commission of its intent to rely on substituted compliance.<sup>99</sup>

For the purposes of the capital condition, “liquid assets” would be defined as: (1) Cash and cash equivalents; (2) collateralized agreements; (3) customer and other

trading related receivables; (4) trading and financial assets; and (5) initial margin posted by the Covered Entity to a counterparty or third-party that meets certain conditions.<sup>100</sup> These categories of liquid assets were designed to align with assets that are considered allowable assets for purposes of calculating net capital under Exchange Act rule 18a-1. If an asset did not fall within one of the five categories of “liquid assets” as defined in the proposed Amended Order, it would be considered non-liquid, and could not be treated as a liquid asset for purposes of this capital condition.<sup>101</sup> For example, the following categories of assets generally would not have been able to be treated as liquid assets: (1) Investments; (2) loans; and (3) other assets.<sup>102</sup> The non-liquid “investment” category would have included the Covered Entity’s ownership interests in subsidiaries or other affiliates. The non-liquid “loans” category would have included unsecured loans and advances. The non-liquid “other” assets category would have referred to assets that do not fall into any of the other categories of liquid or non-liquid assets. These non-liquid “other” assets would have included furniture, fixtures, equipment, real estate, property, leasehold improvements, deferred tax assets, prepayments, and intangible assets.

The deduction (haircut) required for purposes of this capital condition would be determined by dividing the amount of the Covered Entity’s total risk-weighted assets by 12.5 (*i.e.*, the reciprocal of 8%).<sup>103</sup> Under the Basel standard, Covered Entities must risk-weight their assets.<sup>104</sup> This involves adjusting the nominal value of each

asset based on the inherent market or credit risk of the asset. Less risky assets are adjusted to lower values (*i.e.*, have less weight) than more risky assets. As a result, Covered Entities must hold lower levels of regulatory capital for less risky assets and higher levels of capital for riskier assets. The Commission’s proposal to use risk-weighted assets to calculate the deduction was designed to be similar to how haircuts are calculated under Exchange Act rule 18a-1 inasmuch as less risky assets incur lower haircuts than riskier assets and, therefore, require less net capital to be held in relation to them.<sup>105</sup> Consequently, the Commission stated that the process of risk-weighting assets under the Basel capital standard provides a method to account for the inherent risk in an asset held by a Covered Entity similar to how the haircuts under the Exchange Act rule 18a-1 account for the risk of assets held by SBS Entities.<sup>106</sup>

The proposed approach to calculating the deduction for the capital condition would have required a Covered Entity to divide the *total* amount of its risk-weighted assets by 12.5. In proposing to use the total amount of risk-weighted assets, the Commission acknowledged that a Covered Entity’s total risk-weighted assets include components in addition to credit and market risk charges (*e.g.*, operational risk charges).<sup>107</sup>

Commenters addressed two aspects of the additional four pronged capital condition and made recommendations as to how they believed it should be clarified or modified.<sup>108</sup> One of the commenters stated that the recommendations with respect to the Amended Order “apply equally to the UK and French Orders.”<sup>109</sup>

First, commenters made recommendations about how to calculate total liabilities.<sup>110</sup> In particular, commenters requested that the calculation of total liabilities exclude instruments that qualify as Tier 2 capital under the Basel capital standard, including subordinated debt instruments that qualify as Tier 2

<sup>96</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46505–09.

<sup>97</sup> See, *e.g.*, Basel Committee on Banking Supervision (“BCBS”), The Basel Framework, available at: [https://www.bis.org/basel\\_framework/](https://www.bis.org/basel_framework/).

<sup>98</sup> In particular, quarterly record would need to: (1) Identify and value the liquid assets (as defined in the proposed condition) maintained pursuant to the proposed condition; (2) compare the amount of the aggregate value the liquid assets maintained pursuant to the proposed condition to the amount of the Covered Entity’s total liabilities and show the amount of the difference between the two amounts (“the excess liquid assets amount”), and (3) show the amount of the deduction specified in the proposed condition and the amount that deduction reduces the excess liquid assets amount. See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46509.

<sup>99</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46507–09.

<sup>100</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46508. The fifth category of liquid assets would be initial margin posted by the Covered Entity to a counterparty or a third-party custodian, provided: (1) The initial margin requirement is funded by a fully executed written loan agreement with an affiliate of the Covered Entity; (2) the loan agreement provides that the lender waives repayment of the loan until the initial margin is returned to the Covered Entity; and (3) the liability of the Covered Entity to the lender can be fully satisfied by delivering the collateral serving as initial margin to the lender. *Id.*

<sup>101</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46508.

<sup>102</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46508.

<sup>103</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46508–09. Under the Basel capital standard, Covered Entities must hold regulatory capital equal to at least 8% of the amount of their risk-weighted assets. See BCBS, *Risk-based capital requirements (RBC20)*, available at: [https://www.bis.org/basel\\_framework/chapter/RBC/](https://www.bis.org/basel_framework/chapter/RBC/) 20.htm?inforce=20191215&published=20191215.

<sup>104</sup> See BCBS, *Risk-based capital requirements (RBC20)*.

<sup>105</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46508–09.

<sup>106</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46509.

<sup>107</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46509, n.87.

<sup>108</sup> See Letter from Andrew Nash, Managing Director, Morgan Stanley (July 20, 2021) (“Morgan Stanley Letter”) at 1–3; SIFMA II Letter at 4–7. The Morgan Stanley Letter may be found on the Commission’s website at: <https://www.sec.gov/comments/s7-16-20/s71620.htm>.

<sup>109</sup> See SIFMA II Letter at 2.

<sup>110</sup> See Morgan Stanley Letter; SIFMA II Letter.

capital.<sup>111</sup> Commenters pointed out that Exchange Act rule 18a–1 recognizes subordinated debt that meets certain requirements as a form of regulatory capital.<sup>112</sup> In addition, commenters stated that Covered Entities are generally subject to a minimum requirement for own funds and eligible liabilities (referred to as “MREL”) in connection with supporting “bail-in” tools of resolution regimes.<sup>113</sup> Commenters requested that eligible liabilities under MREL also be excluded from the total liabilities calculation because the MREL liabilities share key characteristics with Tier 2 capital, including the condition that the liabilities satisfy certain requirements related to maturity, subordination, repayment, ownership, reduction, and/or conversion.<sup>114</sup> Further, a commenter provided a table comparing the requirements for debt to qualify as capital under Exchange Act rule 18a–1, as Tier 2 capital under the Basel capital standard, and as an eligible liability under MREL.<sup>115</sup> The commenter stated that debt to qualifying as Tier 2 capital under the Basel capital standard or an eligible liability under MREL has “characteristics comparable to subordinated loans that qualify” as capital under Exchange Act rule 18a–1.<sup>116</sup>

In response to these comments, the Commission believes it would be appropriate to exclude *subordinated debt* issued by the Covered Entity that qualifies as Tier 2 capital under the Basel Capital standard from the calculation of total liabilities for purposes of the capital condition.<sup>117</sup> Exchange Act rule 18a–1 permits subordinated debt that meets certain requirements to count as regulatory capital by excluding the liability from the calculation of net worth for purposes of computing net capital.<sup>118</sup> Subordinated debt that qualifies for this treatment under Exchange Act rule 18a–1 and subordinated debt that qualifies as Tier 2 capital under the Basel capital standard have comparable characteristics in terms of requirements relating to minimum terms, effective subordination, permissive prepayments,

and accelerating maturity.<sup>119</sup> The Commission, however, does not believe other types of instruments that might qualify as Tier 2 capital under the Basel standard should be excluded from liabilities for the purposes of the capital condition. Exchange rule 18a–1 makes a specific allowance for *subordinated debt*. Similarly, the Commission does not believe eligible liabilities under MREL should be excluded from liabilities for the purposes of the capital condition. While these liabilities may share characteristics with subordinated debt that qualifies as Tier 2 capital, they do not qualify as Common Equity Tier 1, Additional Tier 1, or Tier 2 capital under the Basel capital standard.<sup>120</sup>

To implement this modification, the term “total liabilities” in the capital condition has been replaced with the term “adjusted liabilities.”<sup>121</sup> Further, the term “adjusted liabilities” has been defined to mean the Covered Entity’s total liabilities, excluding subordinated debt issued by the Covered Entity that qualifies as Tier 2 capital pursuant to the Basel capital standard.<sup>122</sup>

Second, commenters made recommendations about how to calculate the deduction (haircut) derived from risk-weighted assets.<sup>123</sup> In particular, commenters recommended that assets that are not treated as liquid assets for purposes of the proposed capital condition be excluded from the calculation of total risk-weighted assets.<sup>124</sup> A commenter stated that these assets are excluded from the calculation of “liquid assets” and, therefore, they are subject to a 100 percent deduction for purposes of the capital condition.<sup>125</sup> Therefore, including them in the risk-weighted assets deduction would result in their being deducted twice for purposes of the capital condition. A commenter also requested that components of risk-weighted assets other than CRR Part Three, Title III (credit risk) and CRR Part Three, Title IV (market risk) be excluded from the calculation of total risk-weighted assets.<sup>126</sup> In particular, the commenter requested that the following components be excluded: (1) CRR Part Three, Title III (operational risk); (2) CRR Part Three, Title IV (settlement risk); and CRR Part Three, Title VI

(credit valuation adjustment risk). The commenter stated that the standardized or model-based haircuts required by Exchange Act rule 18a–1 address credit and market risk and that the parallel requirements under the Basel capital standard are the calculations under CRR Part Three, Title III (credit risk) and CRR Part Three, Title IV (market risk). A commenter stated that calculations under CRR Part Three, Title III (operational risk), (2) CRR Part Three, Title IV (settlement risk), and CRR Part Three, Title VI (credit valuation adjustment risk) are not directly analogous to the Commission’s net capital requirements and may not be suitable for inclusion in the risk-weighted assets used to calculate the deduction (haircut) for purposes of the proposed capital condition.<sup>127</sup> Finally, a commenter stated that excluding these assets from risk-weighted assets would be straightforward and transparent process since a Covered Entity must track illiquid assets and must separately compute the different categories of risk-weighted assets under the Basel capital standard.<sup>128</sup>

In response to these comments, the Commission believes it would be appropriate to exclude assets that are not treated as liquid assets for purposes of the capital condition from the amount of the risk-weighted assets used to calculate the deduction.<sup>129</sup> These illiquid assets will be deducted entirely from the Covered Entity’s assets prior to applying the deduction derived from the Covered Entity’s risk-weighted assets. Consequently, their illiquidity will be addressed in that first step of the calculation. The Commission also believes it would be appropriate to exclude risk-weighted assets that are calculated under CRR Part Three, Title III (Own Funds Requirements for Operational Risk) from the amount of the risk-weighted assets used to calculate the deduction.<sup>130</sup> Under Exchange Act rule 18a–1, SBS Entities that are approved to use models must take market and credit risk deductions.<sup>131</sup> The proposed capital condition is modeled, in part, on the provisions of Exchange Act rule 18a–1 applicable to SBS Entities approved to use models.<sup>132</sup> The provisions of Exchange Act rule 18a–1 governing the use of models by SBS Entities do not

<sup>111</sup> See Morgan Stanley Letter at 2–3; SIFMA II Letter at 5.

<sup>112</sup> See Morgan Stanley Letter at 3; SIFMA II Letter at 5.

<sup>113</sup> See SIFMA II Letter at 5.

<sup>114</sup> See SIFMA II Letter at 6.

<sup>115</sup> See SIFMA II Letter, Appendix.

<sup>116</sup> See SIFMA II Letter at 5.

<sup>117</sup> See paras. (c)(1)(iii)(A)(1) and (c)(1)(iii)(C) of the Amended Order.

<sup>118</sup> See 17 CFR 240.18a–1(c)(1)(ii).

<sup>119</sup> Compare 17 CFR 240.18a–1d, with CRR Article 63.

<sup>120</sup> See BRRD.

<sup>121</sup> See paras. (c)(1)(iii)(A)(1) and (c)(1)(iii)(A)(2)(b) of the Amended Order.

<sup>122</sup> See para. (c)(1)(iii)(C) of the Amended Order.

<sup>123</sup> See Morgan Stanley Letter; SIFMA II Letter.

<sup>124</sup> See Morgan Stanley Letter at 2; SIFMA II Letter at 6–7.

<sup>125</sup> See SIFMA II Letter at 6.

<sup>126</sup> See SIFMA II Letter at 7.

<sup>127</sup> See Morgan Stanley Letter at 2, n.4.

<sup>128</sup> See SIFMA II Letter at 7.

<sup>129</sup> See paras. (c)(1)(iii)(D)(1) and (2) of the Amended Order.

<sup>130</sup> See paras. (c)(1)(iii)(D)(1) and (2) of the Amended Order.

<sup>131</sup> See 17 CFR 240.18a–1(e).

<sup>132</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46507–08.

require operational risk charges. The Commission, however, does not agree that risk-weighted assets calculated under CRR Part Three, Title IV (settlement risk) and CRR Part Three, Title VI (credit valuation adjustment risk) should be excluded from the amount of the risk-weighted assets used to calculate the deduction. These components do relate to credit risk.

To implement these modifications, the Amended Order provides that a Covered Entity may exclude assets that are not treated as liquid assets for the purposes of the capital condition and risk-weighted assets that are calculated under CRR Part Three, Title III (Own Funds Requirements for Operational Risk) from the amount of the risk-weighted assets used to calculate the deduction.<sup>133</sup>

The French and UK Orders also include the four pronged additional capital condition.<sup>134</sup> In light of the modifications to the four pronged capital condition in the Amended Order, the Commission is issuing an order that makes conforming amendments to the French and UK Orders.

In addition to these comments on the four pronged capital condition, commenters responded to questions the Commission asked about a Covered Entity operating under waivers from capital and liquidity requirements that can be granted by German and EU authorities under Articles 7 and 8 of the CRR.<sup>135</sup> Under Articles 7 and 8 of the CRR, supervisory authorities can grant a Covered Entity a waiver from EU and German capital and liquidity requirements, respectively, if its parent is subject to them. The Bafin's Amended Application requested substituted compliance for Covered Entities operating pursuant to these waivers.<sup>136</sup> The Bafin stated that this type of waiver is only granted under strict conditions.

The proposed Amended Order required the Covered Entity (*i.e.*, the registrant itself) to be subject to the specified EU and German capital and liquidity requirements. Accordingly, it would not have provided substituted compliance for Exchange Act rule 18a-1 to a Covered Entity operating pursuant to these waivers. However, the

Commission requested comment on whether a positive substituted compliance determination (subject to conditions and limitations) could be made with respect to a Covered Entity operating pursuant to a waiver from compliance with the Basel capital and liquidity requirements.<sup>137</sup> Specifically, the Commission requested comment on whether additional conditions could be imposed on a Covered Entity operating pursuant to these waivers that could produce a comparable regulatory outcome to Exchange Act rule 18a-1.

Commenters supported permitting a firm operating under the Article 7 waiver from the German and EU capital requirements to apply substituted compliance to Exchange Act rule 18a-1.<sup>138</sup> A commenter stated that relevant competent authorities will only approve a request for a waiver if the Covered Entity and holding company satisfy a number of requirements that are designed to ensure that resources would be available to the Covered Entity to substantially the same extent absent a waiver.<sup>139</sup> This commenter stated that competent authorities will not approve a waiver unless Covered Entity and its holding company can demonstrate that there are not structural or corporate impediments to the free transfer of funds between the entities, the parent is sufficiently involved in setting the risk appetite and risk management of the Covered Entity; and the Covered Entity complies with the group's risk management policy. Commenters also stated that the level of oversight by European and German supervisors over a Covered Entity operating pursuant to the waiver is no different than the level of oversight exercised with respect to a Covered Entity that is not operating pursuant to the waiver.<sup>140</sup>

The Commission is not prepared at the this time to permit a Covered Entity that is operating under an Article 7 and/or 8 waiver to apply substituted compliance to Exchange Act rule 18a-1. The Commission's preliminary substituted compliance determination with respect to Exchange Act rule 18a-1 was based, in part, on the Covered Entity being subject to and complying with the Basel capital standard.<sup>141</sup> In fact, all of the Commission's substituted compliance determinations are conditioned on the Covered Entity being subject to and complying with

comparable requirements of the home jurisdiction. Further, Exchange Act rule 3a71-6 provides that the Commission will consider (in addition to any conditions imposed) whether the capital requirements of the foreign financial regulatory system are designed to help ensure the safety and soundness of registrants in a manner that is *comparable* to the applicable provisions arising under the Exchange Act and its rules and regulations (emphasis added). Exchange Act rule 18a-1 does not have a comparable provision under which an SBS Entity can obtain a waiver from the requirements of that rule if its immediate holding company is subject to the rule.

However, the Commission also believes it would be appropriate to provide additional time for a Covered Entity located in Germany and operating under the Article 7 waiver to take steps necessary to comply with the terms and conditions of the Amended Order or otherwise address the fact that it does not meet the those terms and conditions. Otherwise, the Covered Entity may have to drastically reduce its operations on November 1, 2021 (the SBS Entity registration date), which could cause severe disruptions to the services the Covered Entity provides its security-based swap customers. Therefore, the Commission, by order, is extending the compliance date for Exchange Act rule 18a-1 until January 1, 2022 for a Covered Entity located in Germany that is operating under an Article 7 waiver.

Finally, commenters requested that the application of the additional capital conditions be delayed until September 1, 2022.<sup>142</sup> A commenter stated that Covered Entities did not have effective notice of the additional capital conditions until the issuance of the French Order on July 23, 2021, and that there is not sufficient time between that date and the November 1, 2021 registration date to come into compliance with the capital conditions.<sup>143</sup> The commenter stated that Covered Entities must put in place systems for performing the calculations required by the additional four pronged capital condition. Further, this commenter stated that complying with the capital conditions by November 1, 2021 may create significant challenges with the senior officer certification required in connection with registration, which requires a certification that a Covered Entity has developed and implemented policies and procedures

<sup>133</sup> See para. (c)(1)(iii)(D)(2) of the Amended Order.

<sup>134</sup> See French Order, 86 FR 41630-36, 41659; UK Order, 86 FR 43338-44, 43372.

<sup>135</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46524 (requesting comment on this topic). See also Morgan Stanley Letter; SIFMA II Letter (responding to the request for comment).

<sup>136</sup> Amended Application Annex A category 3 (Side Letter Addressing Capital Requirements).

<sup>137</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46524.

<sup>138</sup> See Morgan Stanley Letter at 1-2; SIFMA II Letter at 7.

<sup>139</sup> See SIFMA II Letter at 7.

<sup>140</sup> See SIFMA II Letter at 7.

<sup>141</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46505-07.

<sup>142</sup> See Morgan Stanley Letter at 4; SIFMA II Letter at 10.

<sup>143</sup> See SIFMA II Letter at 9.

reasonably designed to prevent violations of Federal securities laws and regulations.<sup>144</sup>

In response to the comments requesting a delay in compliance with the capital conditions until September 1, 2022, the Commission acknowledges that Covered Entities will have a limited period of time to comply with the conditions before the November 1, 2021 registration compliance date. Substituted compliance, however, is conditioned upon the capital conditions in the Amended Order and it is important for Covered Entities to comply with these conditions in order for German and European capital requirements to have comparable outcomes to Exchange Act rule 18a-1. Consequently, in order to balance the limited timeframe to achieve compliance with the capital conditions with the policy goals of comparability, the Commission is, by order, extending the time when a Covered Entity needs to meet the additional capital condition in paragraph (c)(1)(iii) of the Amended Order until January 1, 2022. The Commission similarly is, by order, extending the time to meet the capital condition in paragraph (c)(1)(iii) of the French Order and (c)(1)(iii) of the UK Order until January 1, 2022.

## 2. Margin

Substituted compliance with respect to the margin requirements of Exchange Act rule 18a-3 was subject to two additional conditions. The first additional condition required a Covered Entity to collect variation margin, as defined in the EMIR Margin RTS, from a counterparty with respect to a transaction in non-cleared security-based swaps, unless the counterparty would qualify for an exception under Exchange Act rule 18a-3 from the requirement to deliver variation margin to the Covered Entity. This additional condition was designed to close the gap between the counterparty exceptions of Exchange Act rule 18a-3 and the EU and German margin rules with respect to variation margin. The second additional condition required a Covered Entity to collect initial margin, as defined in the EMIR Margin RTS, from a counterparty with respect to transactions in non-cleared security-based swaps, unless the counterparty would qualify for an exception under Exchange Act rule 18a-3 from the requirement to deliver initial margin to a Covered Entity. This additional condition was designed to close the gap between the counterparty exceptions of Exchange Act rule 18a-3 and the EU

and German margin rules with respect to initial margin.

The Commission did not receive any comments on the margin conditions in the proposed Amended Order. A commenter, however, recommended that the application of the additional margin conditions be delayed until September 1, 2022.<sup>145</sup> A commenter stated that Covered Entities did not have effective notice of the additional margin conditions until the issuance of the French Order on July 23, 2021, and that there is not sufficient time between that date and the November 1, 2021 registration date to come into compliance with the capital conditions.<sup>146</sup> The commenter stated that in connection with the margin requirements, a Covered Entity will need to work with counterparties to determine which counterparties may be subject to exemptions for initial and/or variation margin under the Exchange Act rule 18a-3. In addition, if counterparties are subject to Exchange Act rule 18a-3, a commenter stated that a Covered Entity will need to enter into written agreements and put in place systems necessary to collect margin.<sup>147</sup>

The Commission is adopting the margin conditions as proposed.<sup>148</sup> In response to comments regarding a delay in compliance with the margin conditions until September 1, 2022, the Commission is, by order, extending the time when a Covered Entity needs to meet the additional margin conditions in paragraphs (c)(2)(ii) and (iii) of the Amended Order until January 1, 2022. The Commission similarly is, by order, extending the time to meet the margin conditions in paragraphs (c)(2)(ii) and (iii) of the French Order and paragraphs (c)(2)(ii) and (iii) of the UK Order until January 1, 2022.

## VI. Amendments Related to Chief Compliance Officer Reports

### A. Proposed Approach

Exchange Act rule 15Fk-1 states that the required compliance reports must include “a certification by the chief compliance officer or senior officer that, to the best of his or her knowledge and reasonable belief and under penalty of law, the information contained in the compliance report is accurate and complete in all material respects.”<sup>149</sup> The standard applied in the German

Order required certification that “under penalty of law, the report is accurate and complete.”<sup>150</sup> The Commission preliminarily believed that, consistent with the French Order,<sup>151</sup> further alignment of the proposed Amended Order’s certification requirement with that of the applicable Exchange Act rule was appropriate. Therefore, the proposed Amended Order clarified that the required reports should be certified by “the chief compliance officer or senior officer” of the Covered Entity and that the same certification standard contained in Exchange Act rule 15Fk-1 applies.<sup>152</sup>

In further seeking consistency with the Commission’s other substituted compliance orders,<sup>153</sup> the Commission proposed to amend the German Order to clarify the timing for Covered Entities to submit compliance reports to the Commission. To promote timely notice comparable to what the Exchange Act rule provides, the Commission proposed to incorporate a timing standard that accounts for MiFID-required timing as well as the possibility that the relevant reports may be submitted to the management body early. Under the proposed Amended Order, the applicable compliance reports would be provided to the Commission no later than 15 days following the earlier of: (i) The submission of the report to the Covered Entity’s management body; or (ii) the time the report is required to be submitted to the management body.<sup>154</sup> The proposed Amended Order also clarified that together the reports must cover the entire period that the Covered Entity’s annual compliance report referenced in Exchange Act section 15F(k)(3) and Exchange Act rule 15Fk-1(c) would be required to cover.<sup>155</sup>

### B. Commenters Views and Final Provisions

No commenters addressed the proposed changes to the compliance report requirements and the Commission is issuing the changes described in part VI.A above as proposed.

<sup>150</sup> See para. (d)(2) of the German Order.

<sup>151</sup> See French Order, 86 FR 41659; UK Order, 86 FR 43372.

<sup>152</sup> See para. (d)(2)(ii)(B) of the proposed Amended Order. In addition, for consistency with the French Order, the Commission is proposing to incorporate CRR articles 286–88 and 293 and EMIR Margin RTS article 2 as part of para. (d)(3) of the proposed Amended Order.

<sup>153</sup> See, e.g., French Order, 86 FR 41659.

<sup>154</sup> See para. (d)(2)(D) of the proposed Amended Order.

<sup>155</sup> See para. (d)(2)(E) of the proposed Amended Order.

<sup>144</sup> See SIFMA II Letter at 10.

<sup>145</sup> See SIFMA II Letter at 9–10.

<sup>146</sup> See SIFMA II Letter at 9.

<sup>147</sup> See SIFMA II Letter at 9–10.

<sup>148</sup> See para. (c)(2) of the Amended Order.

<sup>149</sup> Exchange Act rule 15Fk-1(c)(2)(ii)(D), 17 CFR 240.15Fk-1(c)(2)(ii)(D). See also Exchange Act rule 15Fk-1(e)(2) (defining “senior officer” as “the chief executive officer or other equivalent officer”).

## VII. Amendments Related to Counterparty Protection Requirements

### A. Proposed Approach

#### 1. Disclosure of Information Regarding Material Risks and Characteristics

With the Amended Order, the Commission proposed to add two requirements to the list of German and EU disclosure of information regarding material incentives or conflicts of interest requirements that the Covered Entity must be subject to and comply with. The MAR Investment Recommendations Regulation articles 5 and 6 enumerate specific obligations in relation to disclosure of interests or of conflicts of interest. Article 5 requires that persons who produce recommendations disclose in their recommendations all relationships and circumstances that may reasonably be expected to impair the objectivity of the recommendation, including interests or conflicts of interest. Article 6 imposes additional obligations on certain entities, including the disclosure of information on their interests and conflicts of interest concerning the issuer to which a recommendation relates. The Commission preliminarily believed that requiring Covered Entities to be subject to and comply with MAR Investment Recommendations Regulation articles 5 and 6 contributes to a determination that relevant German and EU requirements produce regulatory outcomes that are comparable to relevant requirements of Exchange Act rule 15Fh-3(b).

#### 2. Fair and Balanced Communications

The Commission also proposed to modify the fair and balanced communications section of the proposed Amended Order.<sup>156</sup> First, the Commission believes that German and EU fair and balanced communications requirements are more comparable to Exchange Act requirements when considering three additional EU requirements: MAR article 20(1) would require the Covered Entity to present recommendations in a manner that ensures the information is objectively presented and to disclose interests and conflicts of interest concerning the financial instruments to which the information relates. MAR Investment Recommendations Regulation article 3 would require a Covered Entity to communicate only recommendations that present facts in a way that they are clearly distinguished from interpretations, estimates, opinions and other types of non-factual information;

label clearly and prominently projections, forecasts and price targets; indicate the relevant material assumptions and substantial material sources of information; and include only reliable information or a clear indication when there is doubt about reliability. MAR Investment Recommendations Regulation article 4 would require the Covered Entity to provide in its recommendation additional information about the factual basis of its recommendation. Accordingly, the Commission proposed to add these three requirements to the Amended Order's list of German and EU fair and balanced communications requirements that the Covered Entity must be subject to and comply with.<sup>157</sup> Second, the German Order required the Covered Entity to be subject to and comply with MAR Investment Recommendations Regulation article 5,<sup>158</sup> which relates to obligations to disclose conflicts of interest. As discussed above, the Commission is requiring Covered Entities to comply with this requirement and with MAR Investment Recommendations Regulation article 6 when using substituted compliance for disclosure of material incentives and conflicts of interest requirements. Accordingly, the Commission believes that MAR Investment Recommendations Regulation article 5 is less relevant to comparability of fair and balanced communications requirements and proposed to delete the reference to it in relation to substituted compliance for fair and balanced communications.

### B. Commenters Views and Final Provisions

Commenters did not address the proposed revisions to the counterparty protection requirements described in part VII.A above and the Commission is amending and restating this part of the Amended Order as proposed.

## VIII. Amendments Related to Recordkeeping, Reporting, Notification, and Securities Count Requirements

### A. Proposed Approach

In its initial application (the "BaFin Application"), the BaFin requested, in part, substituted compliance for requirements applicable to SBS Entities with and without a prudential regulator under the Exchange Act relating to:

- *Recordmaking*—Exchange Act rule 18a-5 requires prescribed records to be made and kept current.<sup>159</sup>

<sup>157</sup> See para. (e)(5) of the Amended Order.

<sup>158</sup> See para. (d)(2) of the German Order.

<sup>159</sup> See 17 CFR 240.18a-5. The BaFin Application discusses German requirements that address firms'

- *Record Preservation*—Exchange Act rule 18a-6 requires preservation of records.<sup>160</sup>

- *Reporting*—Exchange Act rule 18a-7 requires certain reports.<sup>161</sup>

- *Notification*—Exchange Act rule 18a-8 requires notification to the Commission when certain financial or operational problems occur.<sup>162</sup>

- *Securities Count*—Exchange Act rule 18a-9 requires non-prudentially regulated security-based swap dealers to perform a quarterly securities count.<sup>163</sup>

- *Daily Trading Records*—Exchange Act section 15F(g) requires SBS Entities to maintain daily trading records.<sup>164</sup>

Taken as a whole, the recordkeeping, reporting, notification, and securities count requirements that apply to SBS Entities are designed to promote the prudent operation of the firm's security-based swap activities, assist the Commission in conducting compliance examinations of those activities, and alert the Commission to potential financial or operational problems that could impact the firm and its customers.

In issuing the German Order, the Commission found that relevant EU and German requirements, subject to conditions and limitations, would produce regulatory outcomes that are comparable to the outcomes associated with the recordkeeping, reporting, and notification requirements of Exchange Act rules 18a-5, 18a-6, 18a-7, and 18a-8 applicable to SBS Entities with a prudential regulator.<sup>165</sup> However, the BaFin Application did not seek substituted compliance for the Exchange Act capital and margin requirements

record creation obligations related to matters such as financial condition, operations, transactions, counterparties and their property, personnel and business conduct. See BaFin Application Annex A category 2 at 4-34.

<sup>160</sup> See 17 CFR 240.18a-6. The BaFin Application discusses German requirements that address firms' record preservation obligations related to records that firms are required to create, as well as additional records such as records of communications. See BaFin Application Annex A category 2 at 35-79.

<sup>161</sup> See 17 CFR 240.18a-7. The BaFin Application discusses German requirements that address firms' obligations to make certain reports. See BaFin Application Annex A category 2 at 80-91, 96-102.

<sup>162</sup> See 17 CFR 240.18a-8. The BaFin Application discusses German requirements that address firms' obligations to make certain notifications. See BaFin Application Annex A category 2 at 92-96, 102.

<sup>163</sup> See 17 CFR 240.18a-9. The BaFin Application discusses German requirements that address firms' obligations to perform securities counts. See BaFin Application Annex A category 2 at 27-30.

<sup>164</sup> See 15 U.S.C. 78o-10(g). The BaFin Application discusses German requirements that address firms' record preservation obligations related to records that firms are required to create, as well as additional records such as records of communications. See BaFin Application Annex A category 2 at 35-79.

<sup>165</sup> See German Order, 85 FR 85695-97.

<sup>156</sup> See para. (e)(2)(iii) of the proposed Amended Order.

applicable to SBS Entities without a prudential regulator. Because of the close relationship between many of the Exchange Act recordkeeping, reporting, and notification requirements and the administration and oversight of Exchange Act capital and margin requirements, the German Order did not address substituted compliance for recordkeeping, reporting, notification, and securities count requirements applicable to SBS Entities without a prudential regulator.

The BaFin's Amended Application requested substituted compliance for the Exchange Act capital and margin requirements applicable to SBS Entities without a prudential regulator. Consequently, the Commission considered substituted compliance for the recordkeeping, reporting, notification, and securities count requirements applicable to SBS Entities without a prudential regulator.<sup>166</sup> The Commission also considered substituted compliance with respect to the trading record preservation requirements of Exchange Act section 15F(g), which are applicable to SBS Entities with and without a prudential regulator.<sup>167</sup>

The Commission preliminarily concluded that the relevant EU and German requirements, subject to conditions and limitations, would produce regulatory outcomes that are comparable to the outcomes associated with the requirements of Exchange Act rules 18a-5, 18a-6, 18a-7, 18a-8, and 18a-9 applicable to SBS Entities without a prudential regulator and to the outcomes associated with Exchange Act section 15F(g) applicable to all SBS Entities (collectively, the "Exchange Act Recordkeeping and Reporting Requirements").<sup>168</sup> Moreover, the proposed structure of the substituted compliance determinations with respect to Exchange Act rules 18a-5, 18a-6, 18a-7, and 18a-8 (collectively, the "recordkeeping, reporting, and notification rules") would have provided Covered Entities with greater flexibility to select distinct requirements within the broader rules for which they want to apply substituted compliance.<sup>169</sup>

### B. Commenter Views and Final Provisions

As was the case with German Order, the Commission's preliminary

substituted compliance determinations for the additional Exchange Act Recordkeeping and Reporting Requirements were subject to the condition that the Covered Entity is subject to and complies with the relevant German or EU laws.<sup>170</sup> Substituted compliance for all of the Exchange Act Recordkeeping and Reporting Requirements accordingly is conditioned on Covered Entities being subject to and complying with the EU and German provisions that in the aggregate establish a framework that produces outcomes comparable to those associated with the analogous Exchange Act Recordkeeping and Reporting Requirements.<sup>171</sup>

In addition to making preliminary substituted compliance determinations with respect to requirements of Exchange Act rules 18a-5, 18a-6, 18a-7, 18a-8, and 18a-9 applicable to SBS Entities without a prudential regulator and to the requirements of Exchange Act section 15F(g) applicable to all SBS Entities, the Commission proposed to amend the German Order in a number of ways.<sup>172</sup> The proposed amendments are discussed below.

#### 1. General Considerations

The Commission proposed to amend the German Order in ways that would implicate two or more of Exchange Act rules 18a-5, 18a-6, 18a-7, and 18a-8.

First, the German Order made substituted compliance available with respect to the entirety of Exchange Act rules 18a-5, 18a-6, 18a-7, and 18a-8 as applicable to Covered Entities with a prudential regulator.<sup>173</sup> Consequently, under the German Order, the Covered Entity could elect to apply substituted compliance with respect to the entire rule (subject to conditions and limitations) or, alternatively, comply with the Exchange Act rule. The Commission proposed modifying this approach to provide all Covered Entities with greater flexibility to select which

distinct requirements within the broader rule for which they would apply substituted compliance.<sup>174</sup> This would not preclude a Covered Entity from applying substituted compliance for the entire rule (subject to conditions and limitations). However, it would permit the Covered Entity to apply substituted compliance with respect to certain requirements of a given rule and to comply directly with the remaining requirements. This more granular approach to the recordkeeping, reporting, and notification rules was intended to permit Covered Entities to leverage existing recordkeeping and reporting systems that are designed to comply with the *broker-dealer* recordkeeping, reporting, and notification requirements on which the recordkeeping, reporting, and notification requirements applicable to SBS Entities are based. For example, it may be more efficient for a Covered Entity to comply with certain Exchange Act requirements within a given recordkeeping, reporting, or notification rule (rather than apply substituted compliance) because it can utilize systems that its affiliated broker-dealer has implemented to comply with them. This proposed approach was consistent with the approach taken by the Commission in the French and UK Orders.<sup>175</sup>

As applied to Exchange Act rules 18a-5 and 18a-6, this approach of providing greater flexibility resulted in preliminary substituted compliance determinations with respect to the different categories of records these rules require SBS Entities to make, keep current, and/or preserve.<sup>176</sup> The objective of these rules—taken as a whole—is to assist the Commission in monitoring and examining for compliance with substantive Exchange Act requirements applicable to SBS Entities (e.g., capital and margin requirements) as well as to promote the prudent operation of these firms.<sup>177</sup> The Commission stated a preliminary belief that the comparable EU and German recordkeeping rules achieve these outcomes with respect to compliance with substantive EU and German requirements for which preliminary positive substituted compliance

<sup>170</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46530-33.

<sup>171</sup> See paras. (f)(1)(i)(A)(1), (f)(1)(i)(B)(1), (f)(1)(i)(C)(1), (f)(1)(i)(D)(1), (f)(1)(i)(E), (f)(1)(i)(F)(1), (f)(1)(i)(G)(1), (f)(1)(i)(H)(1), (f)(1)(i)(I)(1), (f)(1)(i)(J)(1), (f)(1)(i)(K), (f)(1)(i)(L)(1), (f)(1)(i)(M)(1), (f)(1)(i)(N)(1), (f)(1)(i)(O)(1), (f)(2)(i)(A), (f)(2)(i)(B), (f)(2)(i)(C)(1), (f)(2)(i)(D), (f)(2)(i)(E)(1), (f)(2)(i)(F)(1), (f)(2)(i)(G)(1), (f)(2)(i)(H)(1), (f)(2)(i)(I)(1), (f)(2)(i)(J)(1), (f)(2)(i)(K)(1), (f)(2)(i)(L)(1), (f)(2)(i)(M), (f)(2)(i)(N)(1), (f)(2)(i)(P)(1), (f)(2)(i)(Q), (f)(2)(i)(R), (f)(3)(i)(A), (f)(3)(ii)(B), (f)(e)(iii)(A), (f)(3)(iv)(A), (f)(4)(i)(A)(1), (f)(4)(ii)(B), (f)(4)(iii)(A)(1), (f)(4)(iv)(D)(1), (f)(5)(i), and (f)(6) of the Amended Order.

<sup>172</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46512-22, 46530-33.

<sup>173</sup> See German Order, 85 FR 85699-700.

<sup>174</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46512-13, 46530-33.

<sup>175</sup> See French Order, 86 FR 41649; UK Order, 86 FR 43360.

<sup>176</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46513, 46530-32.

<sup>177</sup> See, e.g., Exchange Act Release No. 71958 (Apr. 17, 2014), 79 FR 25194, 25199-200 (May 2, 2014).

<sup>166</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46512-522.

<sup>167</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46522.

<sup>168</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46512-22.

<sup>169</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46512-22.

determinations were being made (*e.g.*, the preliminary positive substituted compliance determinations with respect to the Exchange Act capital and margin requirements).<sup>178</sup> At the same time, the recordkeeping rules address different categories of records through distinct requirements within the rules. Each requirement with respect to a specific category of records (*e.g.*, paragraph (a)(2) of Exchange Act rule 18a-5 addressing ledgers (or other records) reflecting all assets and liabilities, income and expense and capital accounts) can be viewed in isolation as a distinct recordkeeping rule. Therefore, the Commission made preliminary substituted compliance determinations at this level of Exchange Act rules 18a-5 and 18a-6.<sup>179</sup>

The Commission did not receive any comments on this proposed approach and the Amended Order structures the substituted compliance determinations in this manner.<sup>180</sup>

Second, the Commission did not make a preliminary positive substituted compliance determination with respect to a discrete provision of the Exchange Act Recordkeeping and Reporting Requirements if it was fully or partially linked to a substantive Exchange Act requirement for which substituted compliance was not available or for which a preliminary positive substituted compliance determination was not being made.<sup>181</sup> In particular, a preliminary positive substituted compliance determination was not made, in full or in part, for recordkeeping, reporting, or notification requirements linked to the following Exchange Act rules for which substituted compliance is not available or a positive substituted compliance determination was not made: (1) Exchange Act rule 15Fh-4; (2) Exchange Act rule 15Fh-5; (3) Exchange Act rule 15Fh-6; (4) Exchange Act rule 18a-2; (5) Exchange Act rule 18a-4; (6) Regulation SBSR; and (7) Form SBSE and its variations. This proposed approach was consistent with the approach taken by the Commission in the French and UK Orders.<sup>182</sup>

The Commission did not receive comment on these limitations and the

<sup>178</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46513.

<sup>179</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46513, 46530-32.

<sup>180</sup> See paras. (f)(1), (f)(2), (f)(3), and (f)(4) of the Amended Order.

<sup>181</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46513.

<sup>182</sup> See French Order, 86 FR 41650; UK Order, 86 FR 43361.

Amended Order includes the limitations.<sup>183</sup>

Third, the Commission conditioned substituted compliance with discrete provisions of the Exchange Act Recordkeeping and Reporting Requirements that were fully or partially linked to a substantive Exchange Act requirement for which substituted compliance was available on the Covered Entity applying substituted compliance with respect to the linked Exchange Act requirement.<sup>184</sup> In particular, substituted compliance for a provision of the Exchange Act Recordkeeping and Reporting Requirements that is linked to the following Exchange Act rules was conditioned on the SBS Entity applying substituted compliance to the linked substantive Exchange Act rule: (1) Exchange Act rule 15Fh-3; (2) Exchange Act rule 15Fi-2; (3) Exchange Act rule 15Fi-3; (4) Exchange Act rule 15Fi-4; (5) Exchange Act rule 15Fi-5; (6) Exchange Act rule 15Fk-1; (7) Exchange Act rule 18a-1; (8) Exchange Act rule 18a-3; (9) Exchange Act rule 18a-5; (10) Exchange Act rule 18a-6(b)(1)(viii); and (11) Exchange Act rule 18a-7. This proposed approach was consistent with the approach taken by the Commission in the French and UK Orders.<sup>185</sup>

The Commission did not receive comment on these proposed conditions and the Amended Order includes the conditions.<sup>186</sup>

Fourth, the Commission conditioned substituted compliance with discrete provisions of the Exchange Act Recordkeeping and Reporting Requirements that would be important for monitoring or examining compliance with the capital rule for nonbank security-based swap dealers on the Covered Entity applying substituted compliance with respect to the capital rule (*i.e.*, the Rule 18a-1 Condition).<sup>187</sup> This approach was designed to ensure that, if the Covered Entity does not

<sup>183</sup> See paras. (f)(1)(i)(J)(3), (f)(1)(ii)(C), (f)(2)(i)(E)(3), (f)(2)(i)(H)(4), (f)(2)(i)(H)(5), (f)(2)(i)(L)(2), (f)(2)(ii)(B), (f)(4)(i)(C)(2), (f)(4)(i)(D)(3), (f)(4)(i)(D)(4), (f)(4)(ii)(B), and (f)(4)(ii)(C) of the Amended Order.

<sup>184</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46513-22, 46530-33.

<sup>185</sup> See French Order, 86 FR 41650; UK Order, 86 FR 43361.

<sup>186</sup> See paras. (f)(1)(i)(G)(2), (f)(1)(i)(L)(2), (f)(1)(i)(M)(2), (f)(1)(i)(M)(3), (f)(1)(i)(N)(2), (f)(1)(i)(O)(2), (f)(2)(i)(E)(2), (f)(2)(i)(H)(2), (f)(2)(i)(H)(3), (f)(2)(i)(I)(2), (f)(2)(i)(J)(2), (f)(2)(i)(K)(2), (f)(2)(i)(K)(3), (f)(2)(i)(P)(2), (f)(3)(i)(C), (f)(3)(i)(D), (f)(3)(ii)(B), (f)(3)(iii)(C), (f)(3)(iv)(C), (f)(3)(iv)(D), (f)(4)(i)(A)(2), and (f)(4)(i)(D)(2) of the Amended Order.

<sup>187</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46514-15, 46530-33.

apply substituted compliance with respect to Exchange Act rule 18a-1, it makes and preserves records and files reports that the Commission uses to monitor and examine for compliance with the Exchange Act rule 18a-1, and that the firm makes and preserves records to assist it in complying with these rules. This proposed approach was consistent with the approach taken by the Commission in the French and UK Orders.<sup>188</sup>

The Commission did not receive comment on these proposed conditions and the Amended Order includes the conditions.<sup>189</sup>

Fifth, the proposed Amended Order would allow a Covered Entity to apply substituted compliance on a transaction-by-transaction basis to the Commission's recordkeeping requirements that are linked with the counterparty protection requirements of Exchange Act rule 15Fh-3.<sup>190</sup> This approach was designed to align with the proposed Amended Order allowing Covered Entities to apply substituted compliance on a transaction-by-transaction basis for the Commission's counterparty protection requirements. This proposed approach was consistent with the approach taken by the Commission in the French and UK Orders.<sup>191</sup>

The Commission did not receive comment on this proposed approach and the Amended Order permits substituted compliance to be applied in this manner.<sup>192</sup>

Sixth, the proposed Amended Order included a condition that Covered Entities must promptly furnish to a representative of the Commission upon request an English translation of any record, report, or notification of the Covered Entity that is required to be made, preserved, filed, or subject to examination pursuant to Exchange Act section 15F of this Order.<sup>193</sup> This proposed approach was consistent with

<sup>188</sup> See French Order, 86 FR 41650-51; UK Order, 86 FR 43361.

<sup>189</sup> See paras. (f)(1)(i)(A)(2), (f)(1)(i)(B)(2), (f)(1)(i)(C)(2), (f)(1)(i)(D)(2), (f)(1)(i)(F)(2), (f)(1)(i)(H)(2), (f)(1)(i)(I)(2), (f)(1)(i)(J)(2), (f)(2)(i)(C)(2), (f)(2)(i)(F)(2), (f)(2)(i)(G)(2), (f)(2)(i)(N)(2), (f)(2)(i)(O)(2), and (f)(5)(ii) of the Amended Order.

<sup>190</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46514-21, 46530-32.

<sup>191</sup> See French Order, 86 FR 41613; UK Order, 86 FR 43324-25.

<sup>192</sup> See paras. (f)(1)(ii)(B) and (f)(2)(ii)(A) of the Amended Order.

<sup>193</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46522, 46533.



the approach taken by the Commission in the French and UK Orders.<sup>194</sup>

The Commission did not receive comment on this proposed condition and the Amended Order includes the condition.<sup>195</sup>

## 2. Exchange Act Rule 18a–5

The proposed Amended Order conditioned substituted compliance in connection with the record making requirements of Exchange Act rule 18a–5 applicable to Covered Entities without a prudential regulator on the firm: (1) Preserving all of the data elements necessary to create the records required by Exchange Act rules 18a–5(a)(1), (2), (3), (4), and (7); and (2) upon request furnishing promptly to representatives of the Commission the records required by those rules (“SEC Format Condition”).<sup>196</sup> This proposed condition is modeled on the alternative compliance mechanism in paragraph (c) of Exchange Act rule 18a–5. In effect, a Covered Entity applying substituted compliance with respect to these requirements of Exchange Act rule 18a–5 would need to comply with the comparable EU and German requirements. However, under the SEC Format Condition, the Covered Entity would need to produce a record that is formatted in accordance with the requirements of Exchange Act rule 18a–5 at the request of Commission staff. The objective would be to require—on a very limited basis—the production of a record that consolidates the information required by Exchange Act rules 18a–5(a)(1), (2), (3), (4), and (7) in a single record and, as applicable, in a blotter or ledger format. This would assist the Commission staff in reviewing the information on the record.

The Commission did not receive any comment on this proposed condition and the Amended Order includes the condition.<sup>197</sup> However, for consistency with the UK Order, the Commission is modifying paragraph (f)(1)(i)(M)(2) of the Amended Order to clarify that substituted compliance for the portions of Exchange Act rules 18a–5(a)(17) and (b)(13) relating to Exchange Act rule 15Fh–3 is conditioned on the Covered Entity applying substituted compliance for the relevant paragraphs of Exchange Act rule 15Fh–3, rather than the entirety

of Exchange Act rule 15Fh–3. To promote consistency with the other EU jurisdictions, the Commission also is modifying the same condition in paragraph (f)(1)(i)(M)(2) of the French Order.

## 3. Exchange Act Rule 18a–6

The Amended Order did not extend substituted compliance to the requirements of Exchange Act section 15F(f) to keep books and records open to inspection by any representative of the Commission and the requirement of Exchange Act rule 18a–6(g) to furnish promptly to a representative of the Commission legible, true, complete, and current copies of those records of the Covered Entity without a prudential regulator that are required to be preserved under Exchange Act rule 18a–6, or any other records of the Covered Entity that are subject to examination or required to be made or maintained pursuant to Exchange Act section 15F that are requested by a representative of the Commission.<sup>198</sup>

The Commission did not receive any comments on this proposed limitation and the Amended Order includes the limitation, which now applies to Covered Entities with and without a prudential regulator.<sup>199</sup> In addition, for consistency with the UK Order, the Commission is modifying paragraph (f)(2)(i)(K)(2) of the Amended Order to clarify that substituted compliance for the portions of Exchange Act rules 18a–6(a)(17) and (b)(13) relating to Exchange Act rule 15Fh–3 is conditioned on the Covered Entity applying substituted compliance for the relevant paragraphs of Exchange Act rule 15Fh–3, rather than the entirety of Exchange Act rule 15Fh–3. To promote consistency with the other EU jurisdictions, the Commission also is modifying the same condition in paragraph (f)(2)(i)(K)(2) of the French Order.

## 4. Exchange Act Rule 18a–7

Paragraph (a)(2) of Exchange Act rule 18a–7 requires SBS Entities with a prudential regulator to file the FOCUS Report Part IIC on a quarterly basis. The German Order provided substituted compliance for this requirement subject to the condition that the Covered Entity file with the Commission periodic unaudited financial and operational information in the manner and format specified by the Commission by order or

rule (“Manner and Format Condition”) and present the financial information in accordance with GAAP that the firm uses to prepare general purpose publicly available or available to be issued financial statements in Germany (“German GAAP Condition”).<sup>200</sup> The Amended Order continues to provide Covered Entities with a prudential regulator substituted compliance for paragraph (a)(2) of Exchange Act rule 18a–7, subject to the Manner and Format and German GAAP Conditions.<sup>201</sup>

Paragraph (a)(1) of Exchange Act rule 18a–7 requires SBS Entities without a prudential regulator to file the FOCUS Report Part II on a monthly basis. The proposed Amended Order would provide Covered Entities without a prudential regulator substituted compliance for paragraph (a)(1) of Exchange Act rule 18a–7 subject to the Manner and Format and German GAAP conditions.<sup>202</sup> However, there were two additional conditions. First, the Covered Entity would need to apply substituted compliance for Exchange Act Rule 18a–1 (*i.e.*, substituted compliance would be subject to the Rule 18a–1 Condition). Second, the Covered Entity would need to apply substituted compliance with respect to Exchange Act rule 18a–6(b)(1)(viii) (a record preservation requirement). This record preservation requirement is directly linked to the financial and operational reporting requirements of Exchange Act rule 18a–7(a)(1).

The Commission did not receive comment on these proposed conditions and the Amended Order includes the conditions.<sup>203</sup>

Paragraphs (c), (d), (e), (f), (g), and (h) of Exchange Act rule 18a–7 set forth requirements for SBS Entities that are not prudentially regulated to annually file financial statements and certain reports, as well as reports covering those statements and reports prepared by an independent public accountant.<sup>204</sup> The Commission proposed amending the German Order to make substituted compliance available with respect to these requirements, subject to six

<sup>194</sup> See French Order, 86 FR 41651; UK Order, 86 FR 43361.

<sup>195</sup> See para. (f)(8) of the Amended Order.

<sup>196</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46515, 46531. The German Order included this condition for a Covered Entity with a prudential regulator to apply substituted compliance for Exchange Act rule 18a–5. See German Order, 85 FR 85699.

<sup>197</sup> See para. (f)(1)(ii)(A) of the Amended Order.

<sup>198</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46517, 46533. The German Order did not extend substituted compliance to these requirements as applicable to a Covered Entity with a prudential regulator. See German Order, 85 FR 85700.

<sup>199</sup> See para. (f)(7) of the Amended Order.

<sup>200</sup> See German Order, 85 FR 85700. See also Exchange Act Release No. 93335 (Oct. 14, 2021) (order specifying the manner and format of filing unaudited financial and operational information by Covered Entities relying on substituted compliance determinations with respect to Exchange Act rule 18a–7).

<sup>201</sup> See para. (f)(3)(i) of the Amended Order.

<sup>202</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46518, 46532.

<sup>203</sup> See para. (f)(3)(i) of the Amended Order.

<sup>204</sup> See 17 CFR 240.18a–7(c) through (h).

additional conditions.<sup>205</sup> The first condition would be that the Covered Entity simultaneously sends a copy of the financial statements the Covered Entity is required to file with EU or German authorities, including a report of an independent public accountant covering the financial statements, to the Commission in the manner specified on the Commission's website ("SEC Filing Condition"). Because EU and German laws would not otherwise require the financial statements and report of the independent public accountant covering the financial statements to be filed with the Commission, the purpose of this condition would be to provide the Commission with the financial statements and report to more effectively supervise and monitor Covered Entities.

The second condition would be that the Covered Entity include with the transmission of the annual financial statements and report the contact information of an individual who can provide further information about the financial statements and reports ("Contact Information Condition"). This would assist the Commission staff in promptly contacting an individual at the Covered Entity who can respond to questions that information on the financial statements or report may raise about the Covered Entity's financial or operational condition.

The third condition would be that the Covered Entity includes with the transmission the report of an independent public accountant required by Exchange Act rule 18a-7(c)(1)(i)(C) covering the annual financial statements if EU and German laws do not require the Covered Entity to engage an independent public accountant to prepare a report covering the annual financial statements ("Accountant's Report Condition"). The third condition further would provide that the report of the independent public accountant may be prepared in accordance with generally accepted auditing standards ("GAAS") in Germany that are used to perform audit and attestation services and the accountant complies with German independence requirements. According to the BaFin Application, German laws only require certain investment firms (depending on their size) to have their financial statements audited, so this condition would be designed to ensure that all SBS Entities subject to the requirement in rule 18a-7 to file audited annual reports are

required to have their financial statements audited.

The fourth condition would be that a Covered Entity that is a security-based swap dealer would need to file the reports required by Exchange Act rule 18a-7(c)(1)(i)(B) and (C) addressing the statements identified in Exchange Act rule 18a-7(c)(3) or (c)(4), as applicable, that relate to Exchange Act rule 18a-4 ("Rule 18a-4 Limited Exclusion").<sup>206</sup> These reports are designed to provide the Commission with information about an SBS Entity's compliance with Rule 18a-4. Substituted compliance is not available for Exchange Act rule 18a-4 and, therefore, this condition is designed to provide the Commission with similar compliance information. Under this condition, Covered Entities would need to file a limited compliance report that includes the statements relating to Rule 18a-4<sup>207</sup> or an exemption report if the Covered Entity claims an exemption from Rule 18a-4. The Covered Entity also would need to file the report of an independent public accountant covering the limited compliance report or exemption report. The fourth condition further would provide that the report of the independent public accountant may be prepared in accordance with GAAS in Germany that are used to perform audit and attestation services and the accountant complies with German independence requirements.

The fifth condition would be that a Covered Entity that is a major security-based swap participant would need to file the supporting schedules required by Exchange Act rule 18a-7(c)(1)(i)(A) and (C) addressing the statements identified in Exchange Act rules 18a-7(c)(2)(ii) and (iii) that relate to Exchange Act rule 18a-2 for which the proposed Amended Order would not provide substituted compliance. These supporting schedules are the Computation of Tangible Net Worth.

<sup>206</sup> This was viewed as a limited exclusion from the availability of substituted compliance for these requirements because the proposed Amended Order would permit these reports relating Exchange Act rule 18a-4 to be included with the German regulatory reports the Covered Entities would file with the Commission and because the reports could be prepared in accordance with German GAAS (as discussed below).

<sup>207</sup> The limited compliance report would not need to address Exchange Act rule 18a-9 if the Covered Entity is applying substituted compliance to this requirement. Further, as discussed above, substituted compliance with paras. (c) through (h) of Exchange Act rule 18a-7 is conditioned on the Covered Entity applying substituted compliance to Exchange Act rule 18a-1. Therefore, the Covered Entity would not need to address that rule in the compliance report. Finally, the Covered Entity would not need to address an account statement rule of a self-regulatory organization.

The sixth condition would be that a Covered Entity that is a security-based swap dealer would need to file the supporting schedules required by Exchange Act rule 18a-7(c)(1)(i)(A) and (C) addressing the statements identified in Exchange Act rules 18a-7(c)(2)(ii) and (iii) that relate to Exchange Act rule 18a-4 and 18a-4a if the Covered Entity is not exempt from Exchange Act rule 18a-4 (*i.e.*, the Rule 18a-4 Limited Exclusion). These supporting schedules are the Computation for Determination of Security-Based Swap Customer Reserve Requirements and the Information Relating to the Possession or Control Requirements for Security-Based Swap Customers, which are designed to provide the Commission with information about an SBS Entity's compliance with Rule 18a-4. Substituted compliance for Exchange Act rule 18a-4 is not available.

The Commission did not receive any comment on these proposed conditions and the Amended Order includes the conditions.<sup>208</sup>

#### 5. Exchange Act Rule 18a-8

Exchange Act rule 18a-8 requires SBS Entities to send notifications to the Commission if certain adverse events occur.<sup>209</sup> The German Order provided substituted compliance for the requirements of Exchange Act rule 18a-8 applicable to SBS Entities with a prudential regulator (subject to conditions and limitations).<sup>210</sup> In particular, the requirements of: (1) Paragraph (c) of Exchange Act rule 18a-8 that an SBS Entity that is a security-based swap dealer and that files a notice of adjustment to its reported capital category with a U.S. prudential regulator must transmit a copy of the notice to the Commission; (2) paragraph (d) of the rule that an SBS Entity provide notification to the Commission if it fails to make and keep current books and records under Exchange Act rule 18a-5 and to transmit a subsequent report on steps being taken to correct the situation; (3) and paragraph (h) of the rule setting forth how to make the notifications required by Exchange Act 18a-8.

Under the German Order, substituted compliance in connection with the notification requirements of Exchange Act rule 18a-8 were subject to the conditions that the Covered Entity: (1) Simultaneously sends a copy of any notice required to be sent by EU or German notification laws to the Commission in the manner specified on

<sup>208</sup> See para. (f)(3)(iv)(B) of the Amended Order.

<sup>209</sup> See 17 CFR 240.18a-8.

<sup>210</sup> See German Order, 85 FR 85700.

<sup>205</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46519-20, 46532-33.

the Commission's website (*i.e.*, the "SEC Filing Condition"); and (2) includes with the transmission the contact information of an individual who can provide further information about the matter that is the subject of the notice (*i.e.*, the "Contact Information Condition").<sup>211</sup> The purpose of these conditions was to alert the Commission to financial or operational problems that could adversely affect the firm—the objective of Exchange Act rule 18a–8. In addition, the German Order did not provide substituted compliance for paragraph (g) of Exchange Act rule 18a–8 requiring an SBS Entity that is a security-based swap dealer provide to notification if it fails to make a required deposit into its special reserve account for the exclusive benefit of security-based swap customers under Exchange Act rule 18a–4.<sup>212</sup> Substituted compliance is not available for Exchange Act rule 18a–4. The proposed Amended Order would continue to provide Covered Entities with a prudential regulator substituted compliance for the notification requirements of Exchange Act rule 18a–8 discussed above subject to the conditions and limitations.<sup>213</sup>

The proposed Amended Order would provide Covered Entities without a prudential regulator substituted compliance for paragraph (d) of Exchange Act rule 18a–8, subject to the SEC Filing and Contact Information Conditions.<sup>214</sup> Exchange Act rule 18a–8 has notification requirements that apply exclusively to Covered Entities without a prudential regulator. In particular, paragraphs (a)(1)(i), (a)(1)(ii), (b)(1), (b)(2), and (b)(4) of Exchange Act rule 18a–8 require an SBS Entity that is a security-based swap dealer and that does not have a prudential regulator to provide notifications related to the capital requirements of Exchange Act rule 18a–1. Paragraph (e) of Exchange Act rule 18a–8, in pertinent part, requires an SBS Entity that is a security-based swap dealer and that does not have a prudential regulator to provide notification if it has a material weakness under Exchange Act rule 18a–7 and to transmit a subsequent report on the steps being taken to correct the situation. The Commission conditioned substituted compliance for these notification requirements on the SEC

Filing and Contact Information Conditions.<sup>215</sup>

The Commission did not receive any comment on these proposed conditions and the Amended Order includes the conditions.<sup>216</sup>

### IX. Additional Considerations Regarding Supervisory and Enforcement Effectiveness Related to Capital and Margin

#### A. Proposed Approach

Exchange Act rule 3a71–6(a)(2)(i) provides that the Commission's assessments regarding the comparability of foreign requirements in part should take into account "the effectiveness of the supervisory program administered, and the enforcement authority exercised" by the foreign financial regulatory authority. This provision is intended to help ensure that substituted compliance is not predicated on rules that appear high-quality on paper if market participants in practice are allowed to fall short of their obligations, while also recognizing that differences among supervisory and enforcement regimes should not be assumed to reflect flaws in one regime or another.<sup>217</sup> In the German Order, the Commission concluded that the "relevant supervisory and enforcement considerations in German are consistent with substituted compliance."<sup>218</sup> BaFin's Amended Application provided the Commission with additional information on the supervision and enforcement framework for compliance with capital and margin applicable to significant credit institutions.

In proposing to grant substituted compliance in connection with BaFin's Amended Application, the Commission preliminarily concluded that the relevant supervisory and enforcement considerations were consistent with substituted compliance. That preliminary conclusion took into account information regarding BaFin's and the ECB's roles and practices in supervising investment firms and credit institutions located in Germany, as well as their enforcement-related authority and practices.<sup>219</sup>

#### B. Commenter Views and Final Provisions

Commenters did not address the Commission's preliminary conclusions

<sup>215</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46520–21.

<sup>216</sup> See para. (f)(4)(ii)(A) of the Amended Order.

<sup>217</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46522–23.

<sup>218</sup> See German Order, 85 FR 84697.

<sup>219</sup> German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46522–23.

regarding supervisory and enforcement considerations, and the Commission continues to conclude that the relevant supervisory and enforcement considerations in Germany are consistent with substituted compliance.

### X. Conclusion

*It is hereby determined and ordered,* pursuant to rule 3a71–6 under the Exchange Act, that the Commission's Order dated December 22, 2020, granting conditional substituted compliance in connection with certain requirements applicable to non-U.S. security-based swap dealers and major security-based swap participants subject to regulation in the Federal Republic of Germany is amended and restated to provide that a Covered Entity (as defined in paragraph (g)(1) of this Order) may satisfy the requirements under the Exchange Act that are addressed in paragraphs (b) through (f) of this Order so long as the Covered Entity is subject to and complies with relevant requirements of the Federal Republic of Germany and the European Union and with the conditions of this Order, as amended or superseded from time to time.

(a) General conditions.

This Order is subject to the following general conditions, in addition to the conditions specified in paragraphs (b) through (f):

(1) *Activities as MiFID "investment services or activities."* For each condition in paragraphs (b) through (f) of this Order that requires the application of, and the Covered Entity's compliance with, provisions of MiFID, provisions of WpHG that implement MiFID, and/or other EU and German requirements adopted pursuant to those provisions, the Covered Entity's relevant security-based swap activities constitute "investment services" or "investment activities," as defined in MiFID article 4(1)(2) and in WpHG section 2(8), and fall within the scope of the Covered Entity's authorization from BaFin to provide investment services and/or perform investment activities in the Federal Republic of Germany.

(2) *Counterparties as MiFID "clients."* For each condition in paragraphs (b) through (f) of this Order that requires the application of, and the Covered Entity's compliance with, provisions of MiFID, provisions of WpHG that implement MiFID and/or other EU and German requirements adopted pursuant to those provisions, the relevant counterparty (or potential counterparty) to the Covered Entity is a "client" (or potential "client"), as defined in MiFID article 4(1)(9) and in WpHG section 67(1).

<sup>211</sup> See German Order, 85 FR 85700.

<sup>212</sup> See German Order, 85 FR 85700.

<sup>213</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46520.

<sup>214</sup> See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46520.

(3) *Security-based swaps as MiFID “financial instruments.”* For each condition in paragraphs (b) through (f) of this Order that requires the application of, and the Covered Entity’s compliance with, provisions of MiFID, provisions of WpHG that implement MiFID and/or other EU and German requirements adopted pursuant to those provisions, the relevant security-based swap is a “financial instrument,” as defined in MiFID article 4(1)(15) and in WpHG section 2(4).

(4) *Covered Entity as CRD/CRR “institution.”* For each condition in paragraphs (b) through (f) of this Order that requires the application of, and the Covered Entity’s compliance with, the provisions of CRD, provisions of KWG that implement CRD, CRR and/or other EU and German requirements adopted pursuant to those provisions, the Covered Entity is an “institution,” as defined in CRD article 3(1)(3), in CRR article 4(1)(3) and in KWG section 1(1b).

(5) *Counterparties as EMIR “counterparties.”* For each condition in paragraphs (b) through (f) of this Order that requires the application of, and the Covered Entity’s compliance with, provisions of EMIR, EMIR RTS, EMIR Margin RTS and/or other EU requirements adopted pursuant to those provisions, if the relevant provision applies only to the Covered Entity’s activities with specified types of counterparties, and if the counterparty to the Covered Entity is not any of the specified types of counterparty, the Covered Entity complies with the applicable condition of this Order:

(i) As if the counterparty were the specified type of counterparty; in this regard, if the Covered Entity reasonably determines that the counterparty would be a financial counterparty if it were established in the EU and authorized by an appropriate EU authority, it must treat the counterparty as if the counterparty were a financial counterparty;

(ii) Without regard to the application of EMIR article 13; and

(iii) Only to the extent that an Exchange Act section or rule cited in paragraphs (b) through (f) of this Order applies to the security-based swap activities with that counterparty.

(6) *Security-based swap status under EMIR.* For each condition in paragraphs (b) through (f) of this Order that requires the application of, and the Covered Entity’s compliance with, provisions of EMIR, EMIR RTS, EMIR Margin RTS, and/or other EU requirements adopted pursuant to those provisions, if the relevant provision applies to the Covered Entity’s OTC derivatives or OTC derivative contracts that have not

been cleared by a central counterparty, then either:

(i) The relevant security-based swap is an “OTC derivative” or “OTC derivative contract,” as defined in EMIR article 2(7), that has not been cleared by a central counterparty and otherwise is subject to the provisions of EMIR article 11, EMIR RTS articles 11–15, and EMIR Margin RTS article 2; or

(ii) The relevant security-based swap has been cleared by a central counterparty that is authorized or recognized to clear derivatives contracts by a relevant authority in the EU.

(7) *Memorandum of Understanding with BaFin.* The Commission and BaFin have a supervisory and enforcement memorandum of understanding and/or other arrangement addressing cooperation with respect to this Order at the time the Covered Entity complies with the relevant requirements under the Exchange Act via compliance with one or more provisions of this Order.

(8) *Memorandum of Understanding Regarding ECB-Owned Information.* The Commission and the ECB have a supervisory and enforcement memorandum of understanding and/or other arrangement addressing cooperation with respect to this Order as it pertains to information owned by the ECB at the time the Covered Entity complies with the relevant requirements under the Exchange Act via compliance with one or more provisions of this Order.

(9) *Notice to Commission.* A Covered Entity relying on this Order must provide notice of its intent to rely on this Order by notifying the Commission in writing. Such notice must be sent to the Commission in the manner specified on the Commission’s website. The notice must include the contact information of an individual who can provide further information about the matter that is the subject of the notice. The notice must also identify each specific substituted compliance determination within paragraphs (b) through (f) of the Order for which the Covered Entity intends to apply substituted compliance. A Covered Entity must promptly provide an amended notice if it modifies its reliance on the substituted compliance determinations in this Order.

(10) *European Union Cross-Border Matters.*

(i) If, in relation to a particular service provided by a Covered Entity, responsibility for ensuring compliance with any provision of MiFID or MiFIR or any other EU or German requirement adopted pursuant to MiFID or MiFIR listed in paragraphs (b) through (f) of this Order is allocated to an authority of

the Member State of the European Union in whose territory a Covered Entity provides the service, BaFin must be the authority responsible for supervision and enforcement of that provision or requirement in relation to the particular service.

(ii) If responsibility for ensuring compliance with any provision of MAR or any other EU requirement adopted pursuant to MAR listed in paragraphs (b) through (f) of this Order is allocated to one or more authorities of a Member State of the European Union, one of such authorities must be BaFin.

(11) *Notification Requirements Related to Changes in Capital.* A Covered Entity that is prudentially regulated relying on this Order must apply substituted compliance with respect to the requirements of Exchange Act rule 18a–8(c) and the requirements of Exchange Act rule 18a–8(h) as applied to Exchange Act rule 18a–8(c).

(b) Substituted compliance in connection with risk control requirements.

This Order extends to the following provisions related to risk control:

(1) *Internal risk management.* The requirements of Exchange Act section 15F(j)(2) and related aspects of Exchange Act rule 15Fh–3(h)(2)(iii)(I), provided that the Covered Entity is subject to and complies with the requirements of: MiFID articles 16 and 23; WpHG sections 63, 80, 83 and 84; MiFID Org Reg articles 21–37, 72–76 and Annex IV; CRD articles 74, 76 and 79–87, 88(1), 91(1)–(2), 91(7)–(9) and 92, 94 and 95; and KWG sections 25a, 25b, 25c (other than 25c(2)), 25d (other than 25d(3) and 25d(11)), 25e and 25f; CRR articles 286–88 and 293; and EMIR Margin RTS article 2.

(2) *Trade acknowledgement and verification.* The requirements of Exchange Act rule 15Fi–2, provided that the Covered Entity is subject to and complies with the requirements of EMIR article 11(1)(a) and EMIR RTS article 12.

(3) *Portfolio reconciliation and dispute reporting.* The requirements of Exchange Act rule 15Fi–3, provided that:

(i) The Covered Entity is subject to and complies with the requirements of EMIR article 11(1)(b) and EMIR RTS articles 13 and 15; and

(ii) The Covered Entity provides the Commission with reports regarding disputes between counterparties on the same basis as it provides those reports to competent authorities pursuant to EMIR RTS article 15(2).

(4) *Portfolio compression.* The requirements of Exchange Act rule 15Fi–4, provided that the Covered Entity is subject to and complies with

the requirements of EMIR RTS article 14.

(5) *Trading relationship documentation.* The requirements of Exchange Act rule 15Fi-5, other than paragraph (b)(5) to that rule when the counterparty is a U.S. person, provided that the Covered Entity is subject to and complies with the requirements of EMIR article 11(1)(a), EMIR RTS article 12, and EMIR Margin RTS article 2.

(c) Substituted compliance in connection with capital and margin.

(1) *Capital.* The requirements of Exchange Act section 15F(e) and Exchange Act rules 18a-1, and 18a-1a through d, provided that:

(i) The Covered Entity is subject to and complies with: CRR, Part One (General Provisions) Article 6(1), Part Two (Own Funds), Part Three (Capital Requirements), Part Four (Large Exposures), Part Five (Exposures to Transferred Credit Risk), Part Six (Liquidity), and Part Seven (Leverage); MiFID Org Reg article 23; BRRD, articles 45(6) and 81(1); CRD, articles 73, 79, 86, 129, 129(1), 130, 130(1), 130(5), 131, 133, 133(1), 133(4), 141, 142(1) and (2); EMIR Margin RTS, articles 2, 3(b), 7, and 19(1)(d) and (e), (3) and (8); KWG, sections 10b-10h, 10i(2)-(9), 25a(1) sentence 3 no. 2 and no. 3 b), 33(1) sentence 1c); SAG, section 49(2), 49d, 62(1), 138(1); and SolvV, section 37;

(ii) The Covered Entity applies substituted compliance for the requirements of Exchange Act rules 18a-5(a)(9), 18a-6(b)(1)(x), and 18a-8(a)(1)(i), (a)(1)(ii), (b)(1), (b)(2), and (b)(4) pursuant to this Order;

(iii)(A) The Covered Entity:

(1) Maintains liquid assets as defined in paragraph (c)(1)(iii)(B) that have an aggregate market value that exceeds the amount of the Covered Entity's adjusted liabilities as defined in paragraph (c)(1)(iii)(C) by at least \$100 million before applying the deduction specified in paragraph (c)(1)(iii)(D) and by at least \$20 million after applying the deduction specified in paragraph (c)(1)(iii)(D);

(2) Makes and preserves for three years a quarterly record that:

(a) Identifies and values the liquid assets maintained pursuant to paragraph (c)(1)(iii)(A)(1);

(b) Compares the amount of the aggregate value the liquid assets maintained pursuant to paragraph (c)(1)(iii)(A)(1) to the amount of the Covered Entity's total liabilities and shows the amount of the difference between the two amounts ("the excess liquid assets amount"); and

(c) Shows the amount of the deduction specified in paragraph (c)(1)(iii)(D) and the amount that

deduction reduces the excess liquid assets amount;

(3) The Covered Entity notifies the Commission in writing within 24 hours in the manner specified on the Commission's website if the Covered Entity fails to meet the requirements of paragraph (c)(iii)(A)(1) and includes in the notice the contact information of an individual who can provide further information about the failure to meet the requirements; and

(4) Includes its most recent statement of financial condition filed with its local supervisor (whether audited or unaudited) with its initial written notice to the Commission of its intent to rely on substituted compliance under condition (a)(9) above.

(B) For the purposes of paragraph (c)(1)(iii)(A)(1), liquid assets are:

(1) Cash and cash equivalents;

(2) Collateralized agreements;

(3) Customer and other trading related receivables;

(4) Trading and financial assets; and

(5) Initial margin posted by the Covered Entity to a counterparty or a third-party custodian, provided:

(a) The initial margin requirement is funded by a fully executed written loan agreement with an affiliate of the Covered Entity;

(b) The loan agreement provides that the lender waives re-payment of the loan until the initial margin is returned to the Covered Entity; and

(c) The liability of the Covered Entity to the lender can be fully satisfied by delivering the collateral serving as initial margin to the lender.

(C) For the purposes of paragraph (c)(1)(iii)(A)(1), adjusted liabilities are the Covered Entity's total liabilities, excluding subordinated debt issued by the Covered Entity that qualifies as Tier 2 capital pursuant to the capital requirements identified in paragraph (c)(1)(i).

(D) The deduction required by paragraph (c)(1)(iii)(A) is the amount of the Covered Entity's risk-weighted assets, excluding risk-weighted assets that are included in CRR Part Three, Title III (Own Funds Requirements for Operational Risk) and risk-weighted assets that are not treated as liquid assets for the purposes of paragraph (c)(1)(iii)(A)(1), calculated for the purposes of the capital requirements identified in paragraph (c)(1)(i) divided by 12.5.

(2) *Margin.* The requirements of Exchange Act section 15F(e) and Exchange Act rule 18a-3, provided that:

(i) The Covered Entity is subject to and complies with the requirements of: EMIR article 11; EMIR Margin RTS; CRR articles 103, 105(3); 105(10); 111(2), 224,

285, 286, 286(7), 290, 295, 296(2)(b), 297(1), 297(3), and 298(1); MiFID Org Reg article 23(1); CRD articles 74 and 79(b); and KWG section 25a(1);

(ii) The Covered Entity collects variation margin, as defined in EMIR Margin RTS, from a counterparty with respect to transactions in non-cleared security-based swaps, unless the counterparty would qualify for an exception from the collateral collection requirements under paragraph (c)(1)(iii) or (c)(2)(iii) of Exchange Act 18a-3;

(iii) The Covered Entity collects initial margin, as defined in the EMIR Margin RTS, from a counterparty with respect to transactions in non-cleared security-based swaps, unless the counterparty would qualify for an exception from the collateral collection requirements under paragraph (c)(1)(iii) of Exchange Act rule 18a-3; and

(iv) The Covered Entity applies substituted compliance for the requirements of Exchange Act rule 18a-5(a)(12) pursuant to this Order.

(d) Substituted compliance in connection with internal supervision and compliance requirements and certain Exchange Act section 15F(j) requirements.

This Order extends to the following provisions related to internal supervision and compliance and Exchange Act section 15F(j) requirements:

(1) *Internal supervision.* The requirements of Exchange Act rule 15Fh-3(h) and Exchange Act sections 15F(j)(4)(A) and (j)(5), provided that:

(i) The Covered Entity is subject to and complies with the requirements identified in paragraph (d)(3) of this Order;

(ii) The Covered Entity complies with paragraph (d)(4) of this Order; and

(iii) This paragraph (d) does not extend to the requirements of paragraph (h)(2)(iii)(I) to rule 15Fh-3 to the extent those requirements pertain to compliance with Exchange Act sections 15F(j)(2), (j)(3), (j)(4)(B) and (j)(6), or to the general and supporting provisions of paragraph (h) to rule 15Fh-3 in connection with those Exchange Act sections.

(2) *Chief compliance officers.* The requirements of Exchange Act section 15F(k) and Exchange Act rule 15Fk-1, provided that:

(i) The Covered Entity is subject to and complies with the requirements identified in paragraph (d)(3) of this Order;

(ii) All reports required pursuant to MiFID Org Reg article 22(2)(c) must also:

(A) Be provided to the Commission at least annually, and in the English language;

(B) Include a certification signed by the chief compliance officer or senior officer (as defined in Exchange Act rule 15Fk-1(e)(2)) of the Covered Entity that, to the best of the certifier's knowledge and reasonable belief and under penalty of law, the report is accurate and complete in all material respects;

(C) Address the Covered Entity's compliance with:

(i) Applicable requirements under the Exchange Act; and

(ii) The other applicable conditions of this Order in connection with requirements for which the Covered Entity is relying on this Order;

(D) Be provided to the Commission no later than 15 days following the earlier of:

(i) The submission of the report to the Covered Entity's management body; or

(ii) The time the report is required to be submitted to the management body; and

(E) Together cover the entire period that the Covered Entity's annual compliance report referenced in Exchange Act section 15F(k)(3) and Exchange Act rule 15Fk-1(c) would be required to cover.

(3) *Applicable supervisory and compliance requirements.* Paragraphs (d)(1) and (d)(2) are conditioned on the Covered Entity being subject to and complying with the following requirements: MiFID articles 16 and 23; WpHG sections 63, 80, 83 and 84; MiFID Org Reg articles 21–37, 72–76 and Annex IV; CRD articles 74, 76, 79–87, 88(1), 91(1)–(2), 91(7)–(9) and 92, 94 and 95; and KWG sections 25a, 25b, 25c (other than 25c(2)), 25d (other than 25d(3) and 25d(11)), 25e and 25f, and CRR articles 286–88 and 293; and EMIR Margin RTS article 2.

(4) *Additional condition to paragraph (d)(1).* Paragraph (d)(1) further is conditioned on the requirement that the Covered Entity complies with the provisions specified in paragraph (d)(3) as if those provisions also require compliance with:

(i) Applicable requirements under the Exchange Act; and

(ii) The other applicable conditions of this Order in connection with requirements for which the Covered Entity is relying on this Order.

(e) Substituted compliance in connection with counterparty protection requirements.

This Order extends to the following provisions related to counterparty protection:

(1) *Disclosure of information regarding material risks and*

*characteristics.* The requirements of Exchange Act rule 15Fh-3(b) relating to disclosure of material risks and characteristics of one or more security-based swaps subject thereto, provided that the Covered Entity, in relation to that security-based swap, is subject to and complies with the requirements of MiFID article 24(4), WpHG sections 63(7) and 64(1) and MiFID Org Reg articles 48–50.

(2) *Disclosure of information regarding material incentives or conflicts of interest.* The requirements of Exchange Act rule 15Fh-3(b) relating to disclosure of material incentives or conflicts of interest that a Covered Entity may have in connection with one or more security-based swaps subject thereto, provided that the Covered Entity, in relation to that security-based swap, is subject to and complies with the requirements of either:

(i) MiFID article 23(2)–(3); WpHG section 63(2); and MiFID Org Reg articles 33–35;

(ii) MiFID article 24(9); WpHG section 70; and MiFID Delegated Directive article 11(5); or

(iii) MAR article 20(1) and MAR Investment Recommendations Regulation articles 5 and 6.

(3) *“Know your counterparty.”* The requirements of Exchange Act rule 15Fh-3(e), as applied to one or more security-based swap counterparties subject thereto, provided that the Covered Entity, in relation to the relevant security-based swap counterparty, is subject to and complies with the requirements of MiFID article 16(2); WpHG section 80(1); MiFID Org Reg articles 21–22, 25–26 and applicable parts of Annex I; CRD articles 74(1) and 85(1); KWG section 25a; MLD articles 11 and 13; GwG sections 10–11; MLD articles 8(3) and 8(4)(a) as applied to internal policies, controls and procedures regarding recordkeeping of customer due diligence activities; and GwG section 6(1)–(2) as applied to vigilance measures regarding recordkeeping of customer due diligence activities.

(4) *Suitability.* The requirements of Exchange Act rule 15Fh-3(f), as applied to one or more recommendations of a security-based swap or trading strategy involving a security-based swap subject thereto, provided that:

(i) The Covered Entity, in relation to the relevant recommendation, is subject to and complies with the requirements of MiFID articles 24(2)–(3) and 25(1)–(2); WpHG sections 63(5)–(6), 80(9)–(13) and 87(1)–(2); and MiFID Org Reg articles 21(1)(b) and (d), 54 and 55; and

(ii) The counterparty to which the Covered Entity makes the

recommendation is a “professional client” mentioned in MiFID Annex II section I and WpHG section 67(2) and is not a “special entity” as defined in Exchange Act section 15F(h)(2)(C) and Exchange Act rule 15Fh-2(d).

(5) *Fair and balanced communications.* The requirements of Exchange Act rule 15Fh-3(g), as applied to one or more communications subject thereto, provided that the Covered Entity, in relation to the relevant communication, is subject to and complies with the requirements of:

(i) Either MiFID articles 24(1), (3) and WpHG sections 63(1), (6) or MiFID article 30(1) and WpHG section 68(1); and

(ii) MiFID articles 24(4)–(5); WpHG sections 63(7) and 64(1); MiFID Org Reg articles 46–48; MAR articles 12(1)(c), 15 and 20(1); and MAR Investment Recommendations Regulation articles 3 and 4.

(6) *Daily mark disclosure.* The requirements of Exchange Act rule 15Fh-3(c), as applied to one or more security-based swaps subject thereto, provided that the Covered Entity is required to reconcile, and does reconcile, the portfolio containing the relevant security-based swap on each business day pursuant to EMIR articles 11(1)(b) and 11(2) and EMIR RTS article 13.

(f) Substituted compliance in connection with recordkeeping, reporting, notification, and securities count requirements.

This Order extends to the following provisions that apply to a Covered Entity related to recordkeeping, reporting, notification and securities counts:

(1)(i) *Make and keep current certain records.* The requirements of the following provisions of Exchange Act rule 18a-5, provided that the Covered Entity complies with the relevant conditions in this paragraph (f)(1)(i) and with the applicable conditions in paragraph (f)(1)(ii):

(A) The requirements of Exchange Act rule 18a-5(a)(1) or (b)(1), as applicable, provided that:

(1) The Covered Entity is subject to and complies with the requirements of MiFID Org Reg articles 74, 75, and Annex IV; and MiFIR article 25(1); and

(2) With respect to the requirements of Exchange Act rule 18a-5(a)(1), the Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a-1 through 18a-1d pursuant to this Order.

(B) The requirements of Exchange Act rule 18a-5(a)(2), provided that:

(1) The Covered Entity is subject to and complies with the requirements of CRD article 73; MiFID Delegated Directive article 2; MiFID Org Reg articles 72, 74 and 75; EMIR article 39(4); KWG section 10a; and WpHG section 84; and

(2) The Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1 through 18a–1d pursuant to this Order;

(C) The requirements of Exchange Act rule 18a–5(a)(3) or (b)(2), as applicable, provided that:

(1) The Covered Entity is subject to and complies with the requirements of MiFID Delegated Directive article 2; MiFID Org Reg articles 72, 74 and 75; EMIR article 39(4); and WpHG section 84; and

(2) With respect to the requirements of Exchange Act rule 18a–5(a)(3), the Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1 through 18a–1d pursuant to this Order;

(D) The requirements of Exchange Act rule 18a–5(a)(4) or (b)(3), as applicable, provided that:

(1) The Covered Entity is subject to and complies with the requirements of CRR article 103; MiFID articles 16(6), 25(5), and 25(6); MiFID Org Reg articles 59, 74, 75 and Annex IV; MiFIR article 25(1); EMIR articles 9(2) and 11(1)(a); WpHG sections 63 and 64; and

(2) With respect to the requirements of Exchange Act rule 18a–5(a)(4), the Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1 through 18a–1d pursuant to this Order;

(E) The requirements of Exchange Act rule 18a–5(b)(4) provided that the Covered Entity is subject to and complies with the requirements of MiFID Org Reg article 59; EMIR articles 9(2) and 11(1)(a); MiFID articles 16(6), 25(5), and 25(6); and WpHG sections 63, 64, and 83 paragraphs 1 and 2;

(F) The requirements of Exchange Act rule 18a–5(a)(5) or (b)(5), as applicable, provided that:

(1) The Covered Entity is subject to and complies with the requirements of MiFID Org Reg articles 74, 75 and Annex IV; and MiFIR article 25(1); and

(2) With respect to the requirements of Exchange Act rule 18a–5(a)(5), the Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1 through 18a–1d pursuant to this Order;

(G) The requirements of Exchange Act rules 18a–5(a)(6) and (a)(15) or (b)(6) and (b)(11), as applicable, provided that:

(1) The Covered Entity is subject to and complies with the requirements of CRR articles 103, 105(3), and 105(10); CRD article 73; MiFID articles 16(6), 25(5), 25(6); MiFID Delegated Directive article 2; MiFID Org Reg articles 59, 74, 75, and Annex IV; MiFIR article 25(1); EMIR articles 9(2), 11(1)(a), and 39(4); KWG section 10a; and WpHG sections 63, 64, 83 paragraphs 1 through 2, and 84; and

(2) The Covered Entity applies substituted compliance for the requirements of Exchange Act rule 15Fi–2 pursuant to this Order;

(H) The requirements of Exchange Act rule 18a–5(a)(7) or (b)(7), as applicable, provided that:

(1) The Covered Entity is subject to and complies with the requirements of MiFIR article 25(1); MLD4 articles 11 and 13; MiFID article 25(2); WpHG section 64 paragraph 3; and GWG sections 10 and 11; and

(2) With respect to the requirements of Exchange Act rule 18a–5(a)(7), the Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1 through 18a–1d pursuant to this Order;

(I) The requirements of Exchange Act rule 18a–5(a)(8), provided that:

(1) The Covered Entity is subject to and complies with the requirements of CRR articles 103, 105(3), and 105(10); MiFID Org Reg articles 59, 74, 75 and Annex IV; MiFIR article 25(1); EMIR articles 9(2), 11(1)(a), and 39(4); MiFID articles 16(6), 25(5), and 25(6); CRD article 73; MiFID Delegated Directive article 2; WpHG sections 63, 64, 83 paragraphs 1 through 2, and 84; and KWG section 10a; and

(2) The Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1 through 18a–1d pursuant to this Order.;

(J) The requirements of Exchange Act rule 18a–5(a)(9), provided that:

(1) The Covered Entity is subject to and complies with the requirements of CRD article 73; MiFID Delegated Directive article 2; EMIR article 39(4); MiFID Org Reg articles 72, 74, and 75; KWG section 10a; and WpHG Section 84;

(2) The Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1 through 18a–1d pursuant to this Order; and

(3) This Order does not extend to the requirements of Exchange Act rule

18a–5(a)(9) relating to Exchange Act rule 18a–2;

(K) The requirements of Exchange Act rule 18a–5(a)(10) and (b)(8), provided that the Covered Entity is subject to and complies with the requirements of MiFID Org Reg articles 21(1)(d), 35; CRD articles 88, 91(1), 91(8); MiFID article 9(1) and 16(3); KWG sections 15, 25a(1), 25c(1) through (3), 25c(4a), 25d(1) through (3), 25d(7), 25d(11), and 36; and WpHG sections 81(1) and 84;

(L) The requirements of Exchange Act rule 18a–5(a)(12), provided that:

(1) The Covered Entity is subject to and complies with the requirements of CRR articles 103, 105(3) and 105(10); MiFID Org Reg. articles 72, 74 and 75; CRD article 73; MiFID Delegated Directive article 2; KWG section 10a; and WpHG section 84; and

(2) The Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rule 18a–3 pursuant to this Order;

(M) The requirements of Exchange Act rule 18a–5(a)(17) and (b)(13), as applicable, regarding one or more provisions of Exchange Act rules 15Fh–3 or 15Fk–1 for which substituted compliance is available under this Order, provided that:

(1) The Covered Entity is subject to and complies with the requirements of MiFID Org Reg articles 72, 73, and Annex I; MiFID articles 16(6) and 25(2); MLD articles 11 and 13; EMIR article 39(5); WpHG sections 64 paragraph 3 and 83 paragraph 1; and GWG sections 10 and 11, in each case with respect to the relevant security-based swap or activity;

(2) With respect to the portion of Exchange Act rule 18a–5(a)(17) and (b)(13) that relates to one or more provisions of Exchange Act rule 15Fh–3 for which substituted compliance is available under this Order, the Covered Entity applies substituted compliance for such business conduct standard(s) of Exchange Act rule 15Fh–3 pursuant to this Order, as applicable, with respect to the relevant security-based swap or activity; and

(3) With respect to the portion of Exchange Act rule 18a–5(a)(17) and (b)(13) that relates to Exchange Act rule 15Fk–1, the Covered Entity applies substituted compliance for Exchange Act section 15F(k) and Exchange Act rule 15Fk–1 pursuant to this Order;

(N) The requirements of Exchange Act rule 18a–5(a)(18)(i) and (ii) or (b)(14)(i) and (ii), as applicable, provided that:

(1) The Covered Entity is subject to and complies with the requirements of



EMIR article 11(1)(b); and EMIR RTS article 15(1)(a); and

(2) The Covered Entity applies substituted compliance for Exchange Act rule 15Fi–3 pursuant to this Order; and

(O) The requirements of Exchange Act rule 18a–5(a)(18)(iii) or (b)(14)(iii), as applicable, provided that:

(1) The Covered Entity is subject to and complies with the requirements of EMIR article 11(1)(b); and EMIR RTS article 15(1)(a), in each case with respect to such security-based swap portfolio(s); and

(2) The Covered Entity applies substituted compliance for Exchange Act rule 15Fi–4 pursuant to this Order.

(ii) Paragraph (f)(1)(i) is subject to the following further conditions:

(A) Paragraphs (f)(1)(i)(A) through (D) and (H) are subject to the condition that the Covered Entity preserves all of the data elements necessary to create the records required by the applicable Exchange Act rules cited in such paragraphs and upon request furnishes promptly to representatives of the Commission the records required by those rules;

(B) A Covered Entity may apply the substituted compliance determination in paragraph (f)(1)(i)(M) to records of compliance with Exchange Act rule 15Fh–3(b), (c), (e), (f) and (g) in respect of one or more security-based swaps or activities related to security-based swaps; and

(C) This Order does not extend to the requirements of Exchange Act rule 18a–5(a)(13), (a)(14), (a)(16), (b)(9), (b)(10) or (b)(12).

(2)(i) *Preserve certain records.* The requirements of the following provisions of Exchange Act rule 18a–6, provided that the Covered Entity complies with the relevant conditions in this paragraph (f)(2)(i) and with the applicable conditions in paragraph (f)(2)(ii):

(A) The requirements of Exchange Act rule 18a–6(a)(1) or (a)(2), as applicable, provided that the Covered Entity is subject to and complies with the requirements of MiFID Org Reg articles 72, 74, 75, and Annex IV; CRR article 103; MiFIR article 25(1); EMIR article 9(2); MiFID articles 16(6) and 69(2); CRD article 73; MiFID Delegated Directive article 2; WpHG sections 6, 7, 83 paragraph 1, and 84; and KWG section 10a;

(B) The requirements of Exchange Act rule 18a–6(b)(1)(i) or (b)(2)(i), as applicable, provided that the Covered Entity is subject to and complies with the requirements of MiFID Org Reg articles 72, 74, 75, and Annex IV; CRR article 103; MiFIR article 25(1); EMIR

article 9(2); MiFID articles 16(6) and 69(2); CRD article 73; MiFID Delegated Directive article 2; WpHG sections 6, 7, 83 paragraph 1, and 84; and KWG section 10a;

(C) The requirements of Exchange Act rule 18a–6(b)(1)(ii) and (iii), provided that:

(1) The Covered Entity is subject to and complies with the requirements of MiFID Org Reg articles 72, 74 and 75; EMIR article 9(2); CRD article 73; MiFID Delegated Directive article 2; MiFID 16(6); KWG section 10a; and WpHG sections 83 paragraph 1, and 84; and

(2) The Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1 through 18a–1d pursuant to this Order;

(D) The requirements of Exchange Act rule 18a–6(b)(1)(iv) or (b)(2)(ii), as applicable, provided that the Covered Entity is subject to and complies with the requirements of CRR article 103; MiFID Org Reg articles 72, 73, 74, 75, 76, Annex I and Annex IV; MiFIR article 25(1); EMIR article 9(2); CRD article 73; MiFID articles 16(6), 16(7); MiFID Delegated Directive article 2; KWG section 10a; and WpHG sections 83 paragraphs 1 and 3 through 8, and 84;

(E) The requirements of Exchange Act rule 18a–6(b)(1)(v), provided that:

(1) The Covered Entity is subject to and complies with the requirements of EMIR article 9(2); CRR articles 99, 294, 394, 415, 430 and Part Six: Title II and Title III; CRR Reporting ITS article 14 and annexes I–V and VIII–XIII; and MiFID Org Reg article 72(1);

(2) With respect to the requirements of Exchange Act rule 18a–6(b)(1)(v), the Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1 through 18a–1d pursuant this Order; and

(3) This Order does not extend to the requirements of Exchange Act rule 18a–6(b)(1)(v) relating to Exchange Act rule 18a–2;

(F) The requirements of Exchange Act rule 18a–6(b)(1)(vi) or (b)(2)(iii), as applicable, provided that:

(1) The Covered Entity is subject to and complies with the requirements of EMIR article 9(2); MiFID Org Reg articles 72(1) and 73; MiFID article 16(6); and WpHG section 83 paragraph 1; and

(2) With respect to the requirements of Exchange Act rule 18a–6(b)(1)(vi), the Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1 through 18a–1d pursuant to this Order;

(G) The requirements of Exchange Act rule 18a–6(b)(1)(vii) or (b)(2)(iv), as applicable, provided that:

(1) The Covered Entity is subject to and complies with the requirements of MiFID Org Reg articles 72(1) and 73; MiFIR article 25(1); EMIR article 9(2); MiFID article 16(6); and WpHG section 83 paragraph 1; and

(2) With respect to the requirements of Exchange Act rule 18a–6(b)(1)(vii), the Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1 through 18a–1d pursuant to this Order;

(H) The requirements of Exchange Act rule 18a–6(b)(1)(viii), provided that:

(1) The Covered Entity is subject to and complies with the requirements of CRR articles 99, 294, 394, 415, 430 and Part Six: Title II and Title III; CRR Reporting ITS article 14 and annexes I–V and VIII–XIII, as applicable; and MiFID Org Reg article 72(1);

(2) The Covered Entity applies substituted compliance for the requirements of Exchange Act rule 18a–7(a)(1), (b), (c) through (h), and Exchange Act rule 18a–7(j) as applied to these requirements pursuant to this Order;

(3) With respect to the requirements of Exchange Act rule 18a–6(b)(1)(viii), the Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1 through 18a–1d pursuant to this Order;

(4) This Order does not extend to the requirements of Exchange Act rule 18a–6(b)(1)(viii)(L); and

(5) This Order does not extend to the requirements of Exchange Act rule 18a–6(b)(1)(viii)(M) relating to Exchange Act rule 18a–2.

(I) The requirements of Exchange Act rule 18a–6(b)(1)(ix), provided that:

(1) The Covered Entity is subject to and complies with the requirements of MiFID Org Reg articles 22(3)(c), 23, 24, 25(2), 26, 29(2)(c), 35 and 72(1); CRR articles 176, 286 and 293(1)(d); EMIR RTS; EMIR article 9(2); MiFID articles 16(2), 16(3), 16(5), 24(9); MiFID Delegated Directive article 11; CRD article 73, 75–87; WpHG sections 64 paragraph 3, 70, 80 paragraph 6, and 84; WpDVerOV section 6; and KWG sections 10a, 25a, 25c(3)(3), 25c(3)(4), 25c(4a), 25d(6), 25(8); and

(2) The Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1 through 18a–1d pursuant to this Order;

(J) The requirements of Exchange Act rule 18a–6(b)(1)(x), provided that:

(1) The Covered Entity is subject to and complies with the requirements of EMIR article 9(2); MiFID Org Reg article 72(1); CRD article 73; MiFID article 16(6); KWG section 10a; and WpHG section 83 paragraph 1; and

(2) The Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a-1 through 18a-1d pursuant to this Order;

(K) The requirements of Exchange Act rule 18a-6(b)(1)(xii) or (b)(2)(vii), as applicable, regarding one or more provisions of Exchange Act rules 15Fh-3 or 15Fk-1 for which substituted compliance is available under this Order, provided that:

(1) The Covered Entity is subject to and complies with the requirements of EMIR article 9(2); MLD4 articles 11 and 13; MiFID Org Reg article 72(1); MiFID article 16(6); GWG sections 10 and 11; and WpHG section 83 paragraph 1, in each case with respect to the relevant security-based swap or activity;

(2) With respect to the portion of Exchange Act rule 18a-6(b)(1)(xii) or (b)(2)(vii) that relates to one or more provisions of Exchange Act rule 15Fh-3 for which substituted compliance is available under this Order, the Covered Entity applies substituted compliance for such business conduct standard(s) of Exchange Act rule 15Fh-3 pursuant to this Order, as applicable, with respect to the relevant security-based swap or activity; and

(3) With respect to the portion of Exchange Act rule 18a-6(b)(1)(xii) or (b)(2)(vii), as applicable, that relates to Exchange Act rule 15Fk-1, the Covered Entity applies substituted compliance for Exchange Act section 15F(k) and Exchange Act rule 15Fk-1 pursuant to this Order;

(L) The requirements of Exchange Act rule 18a-6(c), provided that:

(1) The Covered Entity is subject to and complies with the requirements of MiFID Org Reg articles 21(1)(f) and 72(1); MiFID article 16(6); and WpHG section 83 paragraph 1; and

(2) This Order does not extend to the requirements of Exchange Act rule 18a-6(c) relating to Forms SBSE, SBSE-A, SBSE-C, SBSE-W, all amendments to these forms, and all other licenses or other documentation showing the registration of the Covered Entity with any securities regulatory authority or the U.S. Commodity Futures Trading Commission;

(M) The requirements of Exchange Act rule 18a-6(d)(1), provided that the Covered Entity is subject to and complies with the requirements of MiFID Org Reg articles 35 and 72(1);

CRD articles 88, 91(1), 91(8); MiFID article 9(1), 16(3), 16(6); KWG sections 25c(1) through (3), 25d(1) through (3), and 36; and WpHG sections 81(1), 83 paragraph 1, and 84;

(N) The requirements of Exchange Act rule 18a-6(d)(2), provided that:

(1) The Covered Entity is subject to and complies with the requirements of EMIR article 9(2); MiFID Org Reg articles 72(1) and 72(3); MiFID article 16(6); and WpHG section 83 paragraph 1; and

(2) With respect to the requirements of Exchange Act rule 18a-6(d)(2)(i), the Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a-1 through 18a-1d pursuant to this Order;

(O) The requirements of Exchange Act rule 18a-6(d)(3), provided that:

(1) The Covered Entity is subject to and complies with the requirements of MiFID Org Reg articles 21(1)(f), 72, 73, and Annex I; MiFID article 16(6); and WpHG section 83 paragraph 1; and

(2) With respect to the requirements of Exchange Act rule 18a-6(d)(3)(i), the Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a-1 through 18a-1d pursuant to this Order;

(P) The requirements of Exchange Act rule 18a-6(d)(4) and (d)(5), provided that:

(1) The Covered Entity is subject to and complies with the requirements of EMIR article 9(2); MiFID Org Reg articles 24, 25(2), 72(1) and 73; MiFID articles 16(2), 16(6), and 25(5); and WpHG sections 64 paragraph 3 and 83 paragraphs 1 and 2; and

(2) The Covered Entity applies substituted compliance for Exchange Act rules 15Fi-3, 15Fi-4, and 15Fi-5 pursuant to this Order;

(Q) The requirements of Exchange Act rule 18a-6(e), provided that the Covered Entity is subject to and complies with the requirements of MiFID Org Reg articles 21(2), 58, 72(1) and 72(3); MiFID articles 16(5), 16(6); and WpHG sections 80 paragraph 6, and 83 paragraph 1; and

(R) The requirements of Exchange Act rule 18a-6(f), provided that the Covered Entity is subject to and complies with the requirements of MiFID Org Reg article 31(1); MiFID article 16(5); and WpHG section 80 paragraph 6.

(ii) Paragraph (f)(2)(i) is subject to the following further conditions:

(A) A Covered Entity may apply the substituted compliance determination in paragraph (f)(2)(i)(K) to records related to Exchange Act rule 15Fh-3(b), (c), (e), (f) and (g) in respect of one or

more security-based swaps or activities related to security-based swaps; and

(B) This Order does not extend to the requirements of Exchange Act rule 18a-6(b)(1)(xi), (b)(1)(xiii), (b)(2)(v), (b)(2)(vi), or (b)(2)(viii).

(3) *File Reports*. The requirements of the following provisions of Exchange Act rule 18a-7, provided that the Covered Entity complies with the relevant conditions in this paragraph (f)(3):

(i) The requirements of Exchange Act rule 18a-7(a)(1) or (a)(2), as applicable, and the requirements of Exchange Act rule 18a-7(j) as applied to the requirements of Exchange Act rule 18a-7(a)(1) or (a)(2), as applicable, provided that:

(A) The Covered Entity is subject to and complies with the requirements of CRR articles 99, 394, 430 and Part Six: Title II and Title III; CRR Reporting ITS annexes I, II, III, IV, V, VIII, IX, X, XI, XII and XIII, as applicable;

(B) The Covered Entity files periodic unaudited financial and operational information with the Commission or its designee in the manner and format required by Commission rule or order and presents the financial information in the filing in accordance with generally accepted accounting principles that the Covered Entity uses to prepare general purpose publicly available or available to be issued financial statements in Germany;

(C) With respect to the requirements of Exchange Act rule 18a-7(a)(1), the Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a-1 through 18a-1d pursuant to this Order; and

(D) With respect to the requirements of Exchange Act rule 18a-7(a)(1), the Covered Entity applies substituted compliance for the requirements of Exchange Act rule 18a-6(b)(1)(viii) pursuant to this Order;

(ii) The requirements of Exchange Act rule 18a-7(a)(3) and the requirements of Exchange Act rule 18a-7(j) as applied to the requirements of Exchange Act rule 18a-7(a)(3), provided that:

(A) The Covered Entity is subject to and complies with the requirements of CRR articles 99, 394, 431, 433, 452, 454, and 455; CRR Reporting ITS annexes I, II, VIII and IX, as applicable; and

(B) The Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a-1 through 18a-1d pursuant to this Order;

(iii) The requirements of Exchange Act rule 18a-7(b), provided that:

(A) The Covered Entity is subject to and complies with the requirements of

CRR articles 431 through 455; and HGB sections 316 and 325; and

(B) The Covered Entity applies substituted compliance for the requirements of Exchange Act rule 18a-6(b)(1)(viii) pursuant to this Order.

(iv) The requirements of Exchange Act rule 18a-7(c), (d), (e), (f), (g) and (h) and the requirements of Exchange Act rule 18a-7(j) as applied to the requirements of paragraphs (c), (d), (e), (f), (g) and (h) of Exchange Act rule 18a-7, provided that:

(A) The Covered Entity is subject to and complies with the requirements of CRR articles 26(2), 132(5), 154, 191, 321, 325bi, 350, 353, 368, 418; HGB sections 316 and 325; WpHG section 24 and 84, and 89 (1) sentence 1 no. 1; and KWG section 26a(1);

(B) With respect to financial statements the Covered Entity is required to file annually with the German BaFin, including a report of an independent public accountant covering the financial statements, the Covered Entity:

(1) Simultaneously sends a copy of such annual financial statements and the report of the independent public accountant covering the annual financial statements to the Commission in the manner specified on the Commission's website;

(2) Includes with the transmission the contact information of an individual who can provide further information about the financial statements and report;

(3) Includes with the transmission the report of an independent public accountant required by Exchange Act rule 18a-7(c)(1)(i)(C) covering the annual financial statements if German laws do not require the Covered Entity to engage an independent public accountant to prepare a report covering the annual financial statements; provided, however, that such report of the independent public accountant may be prepared in accordance with generally accepted auditing standards in Germany that the independent public accountant uses to perform audit and attestation services and the accountant complies with German independence requirements;

(4) Includes with the transmission the reports required by Exchange Act rule 18a-7(c)(1)(i)(B) and (C) addressing the statements identified in Exchange Act rule 18a-7(c)(3) or (c)(4), as applicable, that relate to Exchange Act rule 18a-4; provided, however, that the report of the independent public accountant required by Exchange Act rule 18a-7(c)(1)(i)(C) may be prepared in accordance with generally accepted auditing standards in Germany that the independent public

accountant uses to perform audit and attestation services and the accountant complies with German independence requirements; and

(5) Includes with the transmission the supporting schedules and reconciliations, as applicable, required by Exchange Act rules 18a-7(c)(2)(ii) and (iii), respectively, relating to Exchange Act rule 18a-2; and

(6) Includes with the transmission the supporting schedules and reconciliations, as applicable, required by Exchange Act rules 18a-7(c)(2)(ii) and (iii), respectively, relating to Exchange Act rules 18a-4 and 18a-4a;

(C) The Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a-1 through 18a-1d pursuant to this Order; and

(D) The Covered Entity applies substituted compliance for the requirements of Exchange Act rule 18a-6(b)(1)(viii) pursuant to this Order.

(4)(i) *Provide Notification.* The requirements of the following provisions of Exchange Act rule 18a-8, provided that the Covered Entity complies with the relevant conditions in this paragraph (f)(4)(i) and with the applicable conditions in paragraph (f)(4)(ii):

(A) The requirements of paragraphs (a)(1)(i), (a)(1)(ii), (b)(1), (b)(2), and (b)(4) of Exchange Act rule 18a-8 and the requirements of Exchange Act rule 18a-8(h) as applied to the requirements of paragraphs (a)(1)(i), (a)(1)(ii), (b)(1), (b)(2), and (b)(4) of Exchange Act rule 18a-8, provided that:

(1) The Covered Entity is subject to and complies with the requirements of CRR article 366(5); KWG section 25a (1) sentence 6 no. 3; and FinDAG section 4d; and

(2) The Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a-1 through 18a-1d pursuant to this Order;

(B) The requirements of Exchange Act rule 18a-8(c) and the requirements of Exchange Act rule 18a-8(h) as applied to the requirements of Exchange Act rule 18a-8(c), provided that the Covered Entity is subject to and complies with the requirements of KWG section 25a(1) sentence 6 no. 3; and FinDAG section 4d;

(C) The requirements of Exchange Act rule 18a-8(d) and the requirements of Exchange Act rule 18a-8(h) as applied to the requirements of Exchange Act rule 18a-8(d), provided that:

(1) The Covered Entity is subject to and complies with the requirements of

KWG section 25a(1) sentence 6 no. 3; and FinDAG section 4d; and

(2) This Order does not extend to the requirements of Exchange Act rule 18a-8(d) to give notice with respect to books and records required by Exchange Act rule 18a-5 for which the Covered Entity does not apply substituted compliance pursuant to this Order;

(D) The requirements of Exchange Act rule 18a-8(e) and the requirements of Exchange Act rule 18a-8(h) as applied to the requirements of Exchange Act rule 18a-8(e), provided that:

(1) The Covered Entity is subject to and complies with the requirements of KWG section 25a(1) sentence 6 no. 3; and FinDAG section 4d;

(2) The Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a-1 through 18a-1d pursuant to this Order;

(3) This Order does not extend to the requirements of Exchange Act rule 18a-8(e) relating to Exchange Act rule 18a-2 or to the requirements of Exchange Act rule 18a-8(h) as applied to the requirements of Exchange Act rule 18a-8(e) relating to Exchange Act rule 18a-2; and

(4) This Order does not extend to the requirements of Exchange Act rule 18a-8(e) relating to Exchange Act rule 18a-4 or to the requirements of Exchange Act rule 18a-8(h) as applied to the requirements of Exchange Act rule 18a-8(e) relating to Exchange Act rule 18a-4;

(ii) Paragraph (f)(4)(i) is subject to the following further conditions:

(A) The Covered Entity:

(1) Simultaneously sends a copy of any notice required to be sent by German law cited in this paragraph of the Order to the Commission in the manner specified on the Commission's website; and

(2) Includes with the transmission the contact information of an individual who can provide further information about the matter that is the subject of the notice;

(B) This Order does not extend to the requirements of paragraphs (a)(2) and (b)(3) of Exchange Act rule 18a-8 relating to Exchange Act rule 18a-2 or to the requirements of Exchange Act rule 18a-8(h) as applied to the requirements of paragraphs (a)(2) and (b)(3) of Exchange Act rule 18a-8 relating to Exchange Act rule 18a-2;

(C) This Order does not extend to the requirements of paragraph (g) of Exchange Act rule 18a-8 or to the requirements of Exchange Act rule 18a-8(h) as applied to the requirements of paragraph (g) of rule 18a-8.

(5) *Securities Counts*. The requirements of Exchange Act rule 18a–9, provided that:

(i) The Covered Entity is subject to and complies with the requirements of EMIR article 11(1)(b); EMIR RTS articles 12 and 13; WpHG section 84; HGB sections 316 and 325; and WpHG section 89 (1) sentence 1 no. 1; and

(ii) The Covered Entity applies substituted compliance for the requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1 through 18a–1d pursuant to this Order.

(6) *Daily Trading Records*. The requirements of Exchange Act section 15F(g), provided that the Covered Entity is subject to and complies with the requirements of WpHG section 83 paragraph 1; and MiFID Org Reg article 21(1)(f), 21(4), and 72(1).

(7) *Examination and Production of Records*. Notwithstanding the forgoing provisions of paragraph (f) of this Order, this Order does not extend to, and Covered Entities remain subject to, the requirement of Exchange Act section 15F(f) to keep books and records open to inspection by any representative of the Commission and the requirement of Exchange Act rule 18a–6(g) to furnish promptly to a representative of the Commission legible, true, complete, and current copies of those records of the Covered Entity that are required to be preserved under Exchange Act rule 18a–6, or any other records of the Covered Entity that are subject to examination or required to be made or maintained pursuant to Exchange Act section 15F that are requested by a representative of the Commission.

(8) *English Translations*. Notwithstanding the forgoing provisions of paragraph (f) of this Order, to the extent documents are not prepared in the English language, Covered Entities must promptly furnish to a representative of the Commission upon request an English translation of any record, report, or notification of the Covered Entity that is required to be made, preserved, filed, or subject to examination pursuant to Exchange Act section 15F of this Order.

(g) *Definitions*.

(1) “Covered Entity” means an entity that:

(i) Is a security-based swap dealer or major security-based swap participant registered with the Commission;

(ii) Is not a “U.S. person,” as that term is defined in rule 3a71–3(a)(4) under the Exchange Act; and

(iii) Is an investment firm and/or credit institution that is authorized by BaFin to provide investment services or perform investment activities in Germany and is supervised by the ECB

(or has a licensing application pending with the ECB as of August 12, 2021) as a significant institution.

(2) “MiFID” means the “Markets in Financial Instruments Directive,” Directive 2014/65/EU, as amended from time to time.

(3) “WpHG” means Germany’s “Wertpapierhandelsgesetz,” as amended or superseded from time to time.

(4) “MiFID Org Reg” means Commission Delegated Regulation (EU) 2017/565, as amended from time to time.

(5) “MiFID Delegated Directive” means Commission Delegated Directive (EU) 2017/593, as amended from time to time.

(6) “MLD” means Directive (EU) 2015/849, as amended from time to time.

(7) “GwG” means Germany’s “Geldwäschegesetz,” as amended from time to time.

(8) “MiFIR” means Regulation (EU) 600/2014, as amended from time to time.

(9) “EMIR” means the “European Market Infrastructure Regulation,” Regulation (EU) 648/2012, as amended from time to time.

(10) “EMIR RTS” means Commission Delegated Regulation (EU) 149/2013, as amended from time to time.

(11) “EMIR Margin RTS” means Commission Delegated Regulation (EU) 2016/2251, as amended from time to time.

(12) “CRR Reporting ITS” means Commission Implementing Regulation (EU) 680/2014, as amended from time to time.

(13) “CRD” means Directive 2013/36/EU, as amended from time to time.

(14) “KWG” means Germany’s “Kreditwesengesetz,” as amended from time to time.

(15) “CRR” means Regulation (EU) 575/2013, as amended from time to time.

(16) “MAR” means the “Market Abuse Regulation,” Regulation (EU) 596/2014, as amended from time to time.

(17) “MAR Investment Recommendations Regulation” means Commission Delegated Regulation (EU) 2016/958, as amended from time to time.

(18) “FinDAG” means Germany’s “Finanzdienstleistungsaufsichtsgesetz,” as amended from time to time.

(19) “BaFin” means the Bundesanstalt für Finanzdienstleistungsaufsicht.

(20) “ECB” means the European Central Bank.

(21) “WpDVerOV” means Germany’s “Wertpapierdienstleistungs-Verhaltens- und -Organisationsverordnung,” as amended from time to time.

(22) “SAG” means Germany’s “Sanierungs- und Abwicklungsgesetz,” as amended from time to time.

(23) “SolvV” means Germany’s “Solvabilitätsverordnung,” as amended from time to time.

(24) “BRRD” means Bank Recovery and Resolution Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014, as amended from time to time.

*It is hereby further determined and ordered pursuant to rule 3a71–6 under the Exchange Act, that the paragraph (c)(1)(iii) of the Order Granting Conditional Substituted Compliance in Connection With Certain Requirements Applicable to Non-U.S. Security-Based Swap Dealers and Major Security-Based Swap Participants Subject to Regulation in the French Republic issued by the Commission (Exchange Act Release No. 92484, 86 FR 41612) (“French Substituted Compliance Order”) is amended and replaced with the following:*

(iii)(A) The Covered Entity:

(1) Maintains liquid assets as defined in paragraph (c)(1)(iii)(B) that have an aggregate market value that exceeds the amount of the Covered Entity’s adjusted liabilities as defined in paragraph (c)(1)(iii)(C) by at least \$100 million before applying the deduction specified in paragraph (c)(1)(iii)(D) and by at least \$20 million after applying the deduction specified in paragraph (c)(1)(iii)(D);

(2) Makes and preserves for three years a quarterly record that:

(a) Identifies and values the liquid assets maintained pursuant to paragraph (c)(1)(iii)(A)(1);

(b) Compares the amount of the aggregate value the liquid assets maintained pursuant to paragraph (c)(1)(iii)(A)(1) to the amount of the Covered Entity’s total liabilities and shows the amount of the difference between the two amounts (“the excess liquid assets amount”); and

(c) Shows the amount of the deduction specified in paragraph (c)(1)(iii)(D) and the amount that deduction reduces the excess liquid assets amount;

(3) The Covered Entity notifies the Commission in writing within 24 hours in the manner specified on the Commission’s website if the Covered Entity fails to meet the requirements of paragraph (c)(iii)(A)(1) and includes in the notice the contact information of an individual who can provide further information about the failure to meet the requirements; and

(4) Includes its most recent statement of financial condition filed with its local supervisor (whether audited or unaudited) with its initial written notice

to the Commission of its intent to rely on substituted compliance under condition (a)(9) above.

(B) For the purposes of paragraph (c)(1)(iii)(A)(1), liquid assets are:

- (1) Cash and cash equivalents;
- (2) Collateralized agreements;
- (3) Customer and other trading related receivables;

- (4) Trading and financial assets; and
- (5) Initial margin posted by the Covered Entity to a counterparty or a third-party custodian, provided:

- (a) The initial margin requirement is funded by a fully executed written loan agreement with an affiliate of the Covered Entity;

- (b) The loan agreement provides that the lender waives re-payment of the loan until the initial margin is returned to the Covered Entity; and

- (c) The liability of the Covered Entity to the lender can be fully satisfied by delivering the collateral serving as initial margin to the lender.

(C) For the purposes of paragraph (c)(1)(iii)(A)(1), adjusted liabilities are the Covered Entity's total liabilities, excluding subordinated debt issued by the Covered Entity that qualifies as Tier 2 capital pursuant to the capital requirements identified in paragraph (c)(1)(i).

(D) The deduction required by paragraph (c)(1)(iii)(A) is the amount of the Covered Entity's risk-weighted assets, excluding risk-weighted assets that are included in CRR Part Three, Title III (Own Funds Requirements for Operational Risk) and risk-weighted assets that are not treated as liquid assets for the purposes of paragraph (c)(1)(iii)(A)(1), calculated for the purposes of the capital requirements identified in paragraph (c)(1)(i) divided by 12.5.

*It is hereby further determined and ordered* pursuant to rule 3a71-6 under the Exchange Act, that the paragraph (c)(1)(iii) of the *Order Granting Conditional Substituted Compliance in Connection With Certain Requirements Applicable to Non-U.S. Security-Based Swap Dealers and Major Security-Based Swap Participants Subject to Regulation in the United Kingdom* (Exchange Act Release No. 92529, 86 FR 43318) ("UK Substituted Compliance Order") is amended and replaced with the following:

(iii)(A) The Covered Entity:

- (1) Maintains liquid assets as defined in paragraph (c)(1)(iii)(B) that have an aggregate market value that exceeds the amount of the Covered Entity's adjusted liabilities as defined in paragraph (c)(1)(iii)(C) by at least \$100 million before applying the deduction specified in paragraph (c)(1)(iii)(D) and by at least

\$20 million after applying the deduction specified in paragraph (c)(1)(iii)(D);

- (2) Makes and preserves for three years a quarterly record that:

- (a) Identifies and values the liquid assets maintained pursuant to paragraph (c)(1)(iii)(A)(1);

- (b) Compares the amount of the aggregate value the liquid assets maintained pursuant to paragraph (c)(1)(iii)(A)(1) to the amount of the Covered Entity's total liabilities and shows the amount of the difference between the two amounts ("the excess liquid assets amount"); and

- (c) Shows the amount of the deduction specified in paragraph (c)(1)(iii)(D) and the amount that deduction reduces the excess liquid assets amount;

- (3) The Covered Entity notifies the Commission in writing within 24 hours in the manner specified on the Commission's website if the Covered Entity fails to meet the requirements of paragraph (c)(iii)(A)(1) and includes in the notice the contact information of an individual who can provide further information about the failure to meet the requirements; and

- (4) Includes its most recent statement of financial condition filed with its local supervisor (whether audited or unaudited) with its initial written notice to the Commission of its intent to rely on substituted compliance under condition (a)(9) above.

(B) For the purposes of paragraph (c)(1)(iii)(A)(1), liquid assets are:

- (1) Cash and cash equivalents;
- (2) Collateralized agreements;
- (3) Customer and other trading related receivables;

- (4) Trading and financial assets; and
- (5) Initial margin posted by the Covered Entity to a counterparty or a third-party custodian, provided:

- (a) The initial margin requirement is funded by a fully executed written loan agreement with an affiliate of the Covered Entity;

- (b) The loan agreement provides that the lender waives re-payment of the loan until the initial margin is returned to the Covered Entity; and

- (c) The liability of the Covered Entity to the lender can be fully satisfied by delivering the collateral serving as initial margin to the lender.

(C) For the purposes of paragraph (c)(1)(iii)(A)(1), adjusted liabilities are the Covered Entity's total liabilities, excluding subordinated debt issued by the Covered Entity that qualifies as Tier 2 capital pursuant to the capital requirements identified in paragraph (c)(1)(i).

(D) The deduction required by paragraph (c)(1)(iii)(A) is the amount of

the Covered Entity's risk-weighted assets, excluding risk-weighted assets that are included in CRR Part Three, Title III (Own Funds Requirements for Operational Risk) and risk-weighted assets that are not treated as liquid assets for the purposes of paragraph (c)(1)(iii)(A)(1), calculated for the purposes of the capital requirements identified in paragraph (c)(1)(i) divided by 12.5.

*It is hereby further determined and ordered* pursuant to rule 3a71-6 under the Exchange Act, that the paragraph (a)(5) of the French Substituted Compliance Order is amended and replaced with the following:

(5) *Counterparties as EMIR "counterparties."* For each condition in paragraphs (b) through (f) of this Order that requires the application of, and the Covered Entity's compliance with, provisions of EMIR, EMIR RTS, EMIR Margin RTS and/or other EU requirements adopted pursuant to those provisions, if the relevant provision applies only to the Covered Entity's activities with specified types of counterparties, and if the counterparty to the Covered Entity is not any of the specified types of counterparty, the Covered Entity complies with the applicable condition of this Order:

- (i) As if the counterparty were the specified type of counterparty; in this regard, if the Covered Entity reasonably determines that the counterparty would be a financial counterparty if it were established in the EU and authorized by an appropriate EU authority, it must treat the counterparty as if the counterparty were a financial counterparty;

- (ii) Without regard to the application of EMIR article 13; and

- (iii) Only to the extent that an Exchange Act section or rule cited in paragraphs (b) through (f) of this Order applies to the security-based swap activities with that counterparty.

*It is hereby further determined and ordered* pursuant to rule 3a71-6 under the Exchange Act, that the paragraph (a)(6) of the French Substituted Compliance Order is amended and replaced with the following:

(6) *Security-based swap status under EMIR.* For each condition in paragraphs (b) through (f) of this Order that requires the application of, and the Covered Entity's compliance with, provisions of EMIR, EMIR RTS, EMIR Margin RTS, and/or other EU requirements adopted pursuant to those provisions, if the relevant provision applies to the Covered Entity's OTC derivatives or OTC derivative contracts that have not been cleared by a central counterparty, then either:

(j) The relevant security-based swap is an “OTC derivative” or “OTC derivative contract,” as defined in EMIR article 2(7), that has not been cleared by a central counterparty and otherwise is subject to the provisions of EMIR article 11, EMIR RTS articles 11–15, and EMIR Margin RTS article 2; or

(ii) The relevant security-based swap has been cleared by a central counterparty that is authorized or recognized to clear derivatives contracts by a relevant authority in the EU.

*It is hereby further determined and ordered* pursuant to rule 3a71–6 under the Exchange Act, that the paragraph (f)(1)(i)(M)(2) of the French Substituted Compliance Order is amended and replaced with the following:

(2) With respect to the portion of Exchange Act rule 18a–5(a)(17) and (b)(13) that relates to one or more provisions of Exchange Act rule 15Fh–3 for which substituted compliance is available under this Order, the Covered Entity applies substituted compliance for such business conduct standard(s) of Exchange Act rule 15Fh–3 pursuant to this Order, as applicable, with respect to the relevant security-based swap or activity; and

*It is hereby further determined and ordered* pursuant to rule 3a71–6 under the Exchange Act, that the paragraph (f)(2)(i)(K)(2) of the French Substituted Compliance Order is amended and replaced with the following:

(2) With respect to the portion of Exchange Act rule 18a–6(b)(1)(xii) or (b)(2)(vii) that relates to one or more provisions of Exchange Act rule 15Fh–3 for which substituted compliance is available under this Order, the Covered Entity applies substituted compliance for such business conduct standard(s) of Exchange Act rule 15Fh–3 pursuant to this Order, as applicable, with respect to the relevant security-based swap or activity; and

*It is hereby further determined and ordered* pursuant to rule 3a71–6 under the Exchange Act, that the paragraph (a)(13) of the UK Substituted Compliance Order is amended and replaced with the following:

(13) Covered Entity’s counterparties as UK EMIR “counterparties.” For each condition in paragraphs (b) through (f) of this Order that requires the application of, and the Covered Entity’s compliance with, provisions of UK EMIR, UK EMIR RTS, UK EMIR Margin RTS, and/or other UK requirements adopted pursuant to those provisions, if the relevant provision applies only to the Covered Entity’s activities with specified types of counterparties, and if the counterparty to the Covered Entity is not any of the specified types of

counterparty, the Covered Entity complies with the applicable condition of this Order:

(i) As if the counterparty were the specified type of counterparty; in this regard, if the Covered Entity reasonably determines that the counterparty would be a financial counterparty if it were established in the UK and authorized by an appropriate UK authority, it must treat the counterparty as if the counterparty were a financial counterparty;

(ii) Without regard to the application of UK EMIR article 13; and

(iii) Only to the extent that an Exchange Act section or rule cited in paragraphs (b) through (f) of this Order applies to the security-based swap activities with that counterparty.

*It is hereby further determined and ordered* pursuant to rule 3a71–6 under the Exchange Act, that a security-based swap dealer applying substituted compliance with respect to the capital requirements of Exchange Act section 15F(e) and Exchange Act rules 18a–1, and 18a–1a through d has until January 1, 2022 to meet (as applicable):

a. The additional capital condition in paragraph (c)(1)(iii) of the *Amended and Restated Order Granting Conditional Substituted Compliance in Connection with Certain Requirements Applicable to Non-U.S. Security-Based Swap Dealers and Major Security-Based Swap Participants Subject to Regulation in the Federal Republic of Germany* (Exchange Act Release No. 35–93411) (“German Amended Order”);

b. The additional capital condition in paragraph (c)(1)(iii) of the French Substituted Compliance Order; or

c. The additional capital condition in paragraph (c)(1)(iii) of the UK Substituted Compliance Order.

*It is hereby further determined and ordered* pursuant to rule 3a71–6 under the Exchange Act, that a security-based swap dealer applying substituted compliance with respect to the margin requirements of Exchange Act section 15F(e) and Exchange Act rule 18a–3 has until January 1, 2022 to meet (as applicable):

a. The additional margin conditions in paragraphs (c)(1)(ii) and (iii) of the German Amended Order;

b. The additional margin conditions in paragraphs (c)(1)(ii) and (iii) of the French Substituted Compliance Order; or

c. The additional margin conditions in paragraphs (c)(1)(ii) and (iii) of the UK Substituted Compliance Order.

*It is further determined and ordered* that the compliance date for Exchange Act section 15F(e) and Exchange Act rules 18a–1, and 18a–1a through d is

January 1, 2022 for a security-based swap dealer with a principal place of business in Germany that is operating pursuant to a waiver under CRR, Article 7 (Derogation from the application of prudential requirements on an individual basis).

By the Commission.

**Eduardo A. Aleman,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93403; File No. SR–CBOE–2021–061]

### Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Length of Its Current Global Trading Hours Session

October 22, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),<sup>1</sup> and Rule 19b–4 thereunder,<sup>2</sup> notice is hereby given that on October 21, 2021, Cboe Exchange, Inc. (the “Exchange” or “Cboe Options”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a “non-controversial” proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>3</sup> and Rule 19b–4(f)(6) thereunder.<sup>4</sup> The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

Cboe Exchange, Inc. (the “Exchange” or “Cboe Options”) proposes to extend the length of its current global trading hours session (“Global Trading Hours” or “GTH”). The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange’s website (<http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx>), at the Exchange’s Office of the Secretary, and at the Commission’s Public Reference Room.

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b–4.

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>4</sup> 17 CFR 240.19b–4(f)(6).