

Mere curiosity is not a sufficient justification to contravene principles of international comity and respect for other sovereign nations that is the foundation of the global financial system. Not only did the IBAJ identify the specific extraneous information that is outside the scope of the CFTC's regulations, but also, I do not understand why the CFTC would set ourselves up to have to amend the Japan Final Order to address this overreach in the future.

Regrettably, this is not the only time that the CFTC appears to take a less deferential approach to Japanese law and, therefore, a more punitive approach to Japanese entities in contrast to other jurisdictions. I question the inequity that is inherent in the CFTC's view of Japan, which has certain banking and financial services laws that are stricter than the United States. Japan is a member of the G7, and its regulators are members of the Financial Stability Board (FSB), BCBS, International Organization of Securities Commissions (IOSCO), and many other international fora dedicated to safeguarding the global financial system. The CFTC has entered into multiple Memorandum of Understanding (MOU) with the JFSA. It goes without saying that Japan protects Japanese citizens and their assets. The Commission must show the same respect for Japanese laws that it provides to other jurisdictions, particularly because Japan is a key international partner and ally to the United States.

On May 25, 2024, the G7 Finance Ministers and Central Bank Governors' Communiqué stated: "We also reiterate our strong commitment to a free, fair, and rules-based multilateral system. Building on the legacy of the Japanese G7 Presidency, we will advance our cooperation to enhance global economic resilience and economic security and protect our economies from systemic shocks and vulnerabilities."<sup>4</sup> I urge the Commission to honor this commitment by the United States. [FR Doc. 2024-15092 Filed 7-17-24; 8:45 am]

BILLING CODE 6351-01-P

## COMMODITY FUTURES TRADING COMMISSION

### 17 CFR Chapter I

#### Order Granting Conditional Substituted Compliance in Connection With Certain Capital and Financial Reporting Requirements Applicable to Nonbank Swap Dealer Subject to Regulation by the Mexican Comision Nacional Bancaria y de Valores and Banco de Mexico

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Order.

**SUMMARY:** On December 13, 2022, the Commodity Futures Trading

Commission ("Commission" or "CFTC") published in the **Federal Register** a notice and request for comment on an application submitted by Morgan Stanley Mexico, Casa de Bolsa, S.A. de C.V., Goldman Sachs Mexico, Casa de Bolsa, S.A. de C.V., and Casa de Bolsa Finamex, S.A. de C.V. requesting that the Commission determine that CFTC-registered nonbank swap dealers organized and domiciled in Mexico may comply with certain capital and financial reporting requirements under the Commodity Exchange Act and Commission regulations by being subject to, and complying with, corresponding capital and financial reporting requirements of Mexico. The Commission also solicited public comment on a proposed order providing for the conditional availability of substituted compliance in connection with the application. The Commission is adopting the proposed order with certain modifications and clarifications to address comments received. The final order provides that a nonbank swap dealer organized and domiciled in Mexico may satisfy the capital requirements and financial reporting rules under the applicable provisions of the Commodity Exchange Act and Commission regulations by complying with certain specified Mexican laws and regulations and conditions set forth in the order.

**DATES:** This determination was made by the Commission on June 24, 2024.

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**SUPPLEMENTARY INFORMATION:** The Commodity Futures Trading Commission is issuing an order finding that registered nonbank swap dealers organized and domiciled in Mexico ("Mexican nonbank SDs") may satisfy certain capital and financial reporting requirements under the Commodity Exchange Act ("CEA")<sup>1</sup> and

Commission regulations<sup>2</sup> by being subject to, and complying with, comparable capital and financial reporting requirements under relevant Mexican laws and regulations, subject to certain conditions set forth in the order below. The order is based on the proposed comparability determination and related proposed order published by the Commission on December 13, 2022 in the **Federal Register**, as modified in certain aspects to address comments and to clarify its terms.<sup>3</sup>

## I. Introduction

### A. Regulatory Background—CFTC Capital, Margin, and Financial Reporting Requirements for Swap Dealers and Major Swap Participants

Section 4s(e) of the CEA<sup>4</sup> directs the Commission and "prudential regulators"<sup>5</sup> to impose capital requirements on swap dealers ("SDs") and major swap participants ("MSPs") registered with the Commission.<sup>6</sup> Section 4s(e) also directs the Commission and prudential regulators to adopt regulations imposing initial and variation margin requirements on swaps entered into by SDs and MSPs that are not cleared by a registered

<sup>2</sup> 17 CFR chapter I. Commission regulations may be accessed through the Commission's website, [www.cftc.gov](http://www.cftc.gov).

<sup>3</sup> Notice of Proposed Order and Request for Comment on an Application for a Capital Comparability Determination Submitted on Behalf of Nonbank Swap Dealers Subject to Regulation by the Mexican Comision Nacional Bancaria y de Valores, 87 FR 76374 (Dec. 13, 2022) ("2022 Proposal").

<sup>4</sup> 7 U.S.C. 6s(e).

<sup>5</sup> The term "prudential regulators" is defined in the CEA to mean the Board of Governors of the Federal Reserve System ("Federal Reserve Board"); the Office of the Comptroller of the Currency; the Federal Deposit Insurance Corporation; the Farm Credit Administration; and the Federal Housing Finance Agency. 7 U.S.C. 1a(39).

<sup>6</sup> Subject to certain exceptions, the term "swap dealer" is generally defined as any person that: (i) holds itself out as a dealer in swaps; (ii) makes a market in swaps; (iii) regularly enters into swaps with counterparties as an ordinary course of business for its own account; or (iv) engages in any activity causing the person to be commonly known in the trade as a dealer or market maker in swaps. 7 U.S.C. 1a(49).

The term "major swap participant" is generally defined as any person who is not an SD, and: (i) subject to certain exclusions, maintains a substantial position in swaps for any of the major swap categories as determined by the Commission; (ii) whose outstanding swaps create substantial counterparty exposure that could have serious adverse effects on the financial stability of the U.S. banking system or financial markets; or (iii) is a financial entity that: (a) is highly leveraged relative to the amount of capital it holds and that is not subject to capital requirements established by an appropriate Federal banking agency; and (b) maintains a substantial position in outstanding swaps in any major swap category as determined by the Commission. 7 U.S.C. 1a(33).

<sup>4</sup> G7 Finance Ministers and Central Bank Governors' Communiqué, Stresa, 23-25 May 2024, <https://www.consilium.europa.eu/media/muhnmsh1/stresa-communication-25-may-2024.pdf>.

<sup>1</sup> 7 U.S.C. 1 et seq. The CEA may be accessed through the Commission's website, [www.cftc.gov](http://www.cftc.gov).

derivatives clearing organization (“uncleared swaps”).

Section 4s(e) applies a bifurcated approach with respect to the above Congressional directives, requiring each SD and MSP that is subject to the regulation of a prudential regulator (“bank SD” and “bank MSP,” respectively) to meet the minimum capital requirements and uncleared swaps margin requirements adopted by the applicable prudential regulator, and requiring each SD and MSP that is not subject to the regulation of a prudential regulator (“nonbank SD” and “nonbank MSP,” respectively) to meet the minimum capital requirements and uncleared swaps margin requirements adopted by the Commission.<sup>7</sup> Therefore, the Commission’s authority to impose capital requirements and margin requirements for uncleared swap transactions extends to nonbank SDs and nonbank MSPs, including nonbank subsidiaries of bank holding companies regulated by the Federal Reserve Board.<sup>8</sup>

The prudential regulators implemented section 4s(e) in 2015 by amending existing capital requirements applicable to bank SDs and bank MSPs to incorporate swap transactions into their respective bank capital frameworks, and by adopting rules imposing initial and variation margin requirements on bank SDs and bank MSPs that engage in uncleared swap transactions.<sup>9</sup> The Commission adopted final rules imposing initial and variation margin obligations on nonbank SDs and nonbank MSPs for uncleared swap transactions on January 6, 2016.<sup>10</sup> The Commission also approved final capital requirements for nonbank SDs and nonbank MSPs on July 24, 2020, which were published in the **Federal Register** on September 15, 2020 with a compliance date of October 6, 2021 (“CFTC Capital Rules”).<sup>11</sup>

Section 4s(f) of the CEA addresses SD and MSP financial reporting requirements.<sup>12</sup> Section 4s(f) authorizes the Commission to adopt rules imposing financial condition reporting obligations

on all SDs and MSPs (*i.e.*, nonbank SDs, nonbank MSPs, bank SDs, and bank MSPs). Specifically, section 4s(f)(1)(A) provides, in relevant part, that each registered SD and MSP must make financial condition reports as required by regulations adopted by the Commission.<sup>13</sup> The Commission’s financial reporting obligations were adopted with the Commission’s nonbank SD and nonbank MSP capital requirements, and also had a compliance date of October 6, 2021 (“CFTC Financial Reporting Rules”).<sup>14</sup>

#### *B. Commission Capital Comparability Determinations for Non-U.S. Nonbank Swap Dealers and Non-U.S. Nonbank Major Swap Participants*

Commission Regulation 23.106 establishes a substituted compliance framework whereby the Commission may determine that compliance by a non-U.S. domiciled nonbank SD or non-U.S. domiciled nonbank MSP with its home country’s capital and financial reporting requirements will satisfy all or parts of the CFTC Capital Rules and all or parts of the CFTC Financial Reporting Rules (such a determination referred to as a “Comparability Determination”).<sup>15</sup> The Commission’s capital adequacy and financial reporting requirements are designed to address and manage risks that arise from a firm’s operation as a SD or MSP. Given their functions, both sets of requirements and rules must be applied on an entity-level basis (meaning that the rules apply on a firm-wide basis, irrespective of the type of

transactions involved) to effectively address risk to the firm as a whole. The availability of such substituted compliance is conditioned upon the Commission issuing a Comparability Determination finding that the relevant foreign jurisdiction’s capital adequacy and financial reporting requirements for non-U.S. nonbank SDs and/or non-U.S. nonbank MSPs are comparable to the corresponding CFTC Capital Rules and CFTC Financial Reporting Rules. The Commission would issue a Comparability Determination in the form of an order (“Comparability Order”).<sup>16</sup>

The Commission’s approach for conducting a Comparability Determination with respect to the CFTC Capital Rules and the CFTC Financial Reporting Rules is a principles-based, holistic approach that focuses on assessing whether the applicable foreign jurisdiction’s capital and financial reporting requirements have comparable objectives with, and achieve comparable outcomes to, corresponding CFTC requirements.<sup>17</sup> The Commission’s assessment is not a line-by-line evaluation or comparison of a foreign jurisdiction’s regulatory requirements with the Commission’s requirements.<sup>18</sup> In performing the analysis, the Commission recognizes that jurisdictions may adopt differing approaches to achieving regulatory objectives and outcomes, and the Commission will focus on whether the foreign jurisdiction’s capital and financial reporting requirements are based on regulatory objectives, and produce regulatory outcomes, that are comparable to the Commission’s in purpose and effect, and not whether they are comparable in every aspect or contain identical elements.

A person requesting a Comparability Determination is required to submit an application to the Commission containing: (i) a description of the objectives of the relevant foreign jurisdiction’s capital adequacy and financial reporting requirements applicable to entities that are subject to the CFTC Capital Rules and the CFTC Financial Reporting Rules; (ii) a description (including specific legal and regulatory provisions) of how the relevant foreign jurisdiction’s capital adequacy and financial reporting requirements address the elements of the CFTC Capital Rules and CFTC Financial Reporting Rules, including, at a minimum, the methodologies for

<sup>13</sup> 7 U.S.C. 6s(f)(1)(A).

<sup>14</sup> 85 FR 57462.

<sup>15</sup> 17 CFR 23.106. Commission Regulation 23.106(a)(1) provides that a request for a Comparability Determination may be submitted by a non-U.S. nonbank SD or a non-U.S. nonbank MSP, a trade association or other similar group on behalf of its SD or MSP members, or a foreign regulatory authority that has direct supervisory authority over one or more non-U.S. nonbank SDs or non-U.S. nonbank MSPs. However, Commission regulations also provide that any non-U.S. nonbank SD or non-U.S. nonbank MSP that is dually-registered with the Commission as a futures commission merchant (“FCM”) is subject to the capital requirements of Commission Regulation 1.17 and may not petition the Commission for a Comparability Determination. 17 CFR 23.101(a)(5) and (b)(4), respectively. Furthermore, substituted compliance is not available to non-U.S. bank SDs and non-U.S. bank MSPs with respect to their respective financial reporting requirements under Commission Regulation 23.105(p). Commission Regulation 23.105(p), however, permits non-U.S. bank SDs and non-U.S. bank MSPs that do not submit financial reports to a U.S. prudential regulator to file with the Commission a statement of financial condition, certain regulatory capital information, and Schedule 1 of appendix C to subpart E of part 23 of the Commission’s regulations prepared and presented in accordance with the accounting standards permitted by the non-U.S. bank SD’s or non-U.S. bank MSP’s home country regulatory authorities. 17 CFR 23.105(p)(2).

<sup>7</sup> 7 U.S.C. 6s(e)(2).

<sup>8</sup> 7 U.S.C. 6s(e)(1) and (2).

<sup>9</sup> *Margin and Capital Requirements for Covered Swap Entities*, 80 FR 74840 (Nov. 30, 2015).

<sup>10</sup> *Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants*, 81 FR 636 (Jan. 6, 2016).

<sup>11</sup> *Capital Requirements of Swap Dealers and Major Swap Participants*, 85 FR 57462 (Sept. 15, 2020). On April 30, 2024, the Commission amended the capital and financial reporting requirements to revise certain financial reporting obligations, among other changes. See *Capital and Financial Reporting Requirements for Swap Dealers and Major Swap Participants*, 89 FR 45569 (May 23, 2024). The amendments have limited impact on nonbank SDs covered by this order.

<sup>12</sup> 7 U.S.C. 6s(f).

<sup>16</sup> 17 CFR 23.106(a)(3).

<sup>17</sup> 17 CFR 23.106(a)(3)(ii). See also 85 FR 57462 at 57521.

<sup>18</sup> See 85 FR 57462 at 57521.

establishing and calculating capital adequacy requirements and whether such methodologies comport with international standards; and (iii) a description of the ability of the relevant foreign regulatory authority to supervise and enforce compliance with the relevant foreign jurisdiction's capital adequacy and financial reporting requirements. The applicant must also submit, upon request, such other information and documentation as the Commission deems necessary to evaluate the comparability of the capital adequacy and financial reporting requirements of the foreign jurisdiction.<sup>19</sup>

The Commission will consider an application for a Comparability Determination to be a representation by the applicant that the laws and regulations of the foreign jurisdiction that are submitted in support of the application are finalized and in force, that the description of such laws and regulations is accurate and complete, and that, unless otherwise noted, the scope of such laws and regulations encompasses the relevant non-U.S. nonbank SDs and/or non-U.S. nonbank MSPs domiciled in the foreign jurisdiction.<sup>20</sup> Each non-U.S. nonbank SD or non-U.S. nonbank MSP that seeks to rely on a Comparability Order is responsible for determining whether it is subject to the foreign laws and regulations found comparable in the Comparability Order. A non-U.S. nonbank SD or non-U.S. nonbank MSP that is not legally required to comply with a foreign jurisdiction's laws and/or regulations determined to be comparable in a Comparability Order may not voluntarily comply with such laws and/or regulations in lieu of compliance with the CFTC Capital Rules or the CFTC Financial Reporting Rules.

The Commission may consider all relevant factors in making a Comparability Determination, including: (i) the scope and objectives of the relevant foreign jurisdiction's capital and financial reporting requirements; (ii) whether the relevant foreign jurisdiction's capital and financial reporting requirements achieve

comparable outcomes to the Commission's corresponding capital requirements and financial reporting requirements; (iii) the ability of the relevant foreign regulatory authority or authorities to supervise and enforce compliance with the relevant foreign jurisdiction's capital adequacy and financial reporting requirements; and (iv) any other facts or circumstances the Commission deems relevant, including whether the Commission and foreign regulatory authority or authorities have a memorandum of understanding ("MOU") or similar arrangement that would facilitate supervisory cooperation.<sup>21</sup>

In performing the comparability assessment for foreign nonbank SDs, the Commission's review will include the extent to which the foreign jurisdiction's requirements address: (i) the process of establishing minimum capital requirements for nonbank SDs and how such process addresses risk, including market risk and credit risk of the nonbank SD's on-balance sheet and off-balance sheet exposures; (ii) the types of equity and debt instruments that qualify as regulatory capital in meeting minimum requirements; (iii) the financial reports and other financial information submitted by a nonbank SD to its relevant regulatory authority and whether such information provides the regulatory authority with the means necessary to effectively monitor the financial condition of the nonbank SD; and (iv) the regulatory notices and other communications between a nonbank SD and its foreign regulatory authority that address potential adverse financial or operational issues that may impact the firm. With respect to the ability of the relevant foreign regulatory authority to supervise and enforce compliance with the foreign jurisdiction's capital adequacy and financial reporting requirements, the Commission's review will include an assessment of the foreign jurisdiction's surveillance program for monitoring nonbank SDs' compliance with such capital adequacy and financial reporting requirements, and the disciplinary process imposed on firms that fail to comply with such requirements.<sup>22</sup>

Commission Regulation 23.106 further provides that the Commission

may impose any terms or conditions that it deems appropriate in issuing a Comparability Determination.<sup>23</sup> Any specific terms or conditions with respect to capital adequacy or financial reporting requirements will be set forth in the Commission's Comparability Order. As a general condition to all Comparability Orders, the Commission will require notification from the applicants of any material changes to information submitted by the applicants in support of a comparability finding, including, but not limited to, changes in the foreign jurisdiction's relevant laws and regulations, as well as changes to the relevant supervisory or regulatory regime.

To rely on a Comparability Order, a nonbank SD or nonbank MSP domiciled in the foreign jurisdiction and subject to supervision by the relevant regulatory authority (or authorities) in the foreign jurisdiction must file a notice with the Commission of its intent to comply with the applicable capital adequacy and financial reporting requirements of the foreign jurisdiction set forth in the Comparability Order in lieu of all or parts of the CFTC Capital Rules and/or CFTC Financial Reporting Rules.<sup>24</sup> Notices must be filed electronically with the Commission's Market Participants Division ("MPD").<sup>25</sup> The filing of a notice by a non-U.S. nonbank SD or non-U.S. nonbank MSP provides MPD staff with the opportunity to engage with the firm and to obtain representations that it is subject to, and complies with, the laws and regulations cited in the Comparability Order and that it will comply with any listed conditions. MPD will issue a letter under delegated authority from the Commission confirming that the non-U.S. nonbank SD or non-U.S. nonbank MSP may comply with foreign laws and regulations cited in the Comparability Order in lieu of complying with the CFTC Capital Rules and CFTC Financial Reporting Rules upon MPD's confirmation through discussions with the non-U.S. nonbank SD or non-U.S. nonbank MSP that the firm is subject to and complies with the applicable foreign laws and regulations, is subject to the jurisdiction of the applicable foreign regulatory authority (or authorities), and can meet the conditions in the Comparability Order.<sup>26</sup>

<sup>19</sup> 17 CFR 23.106(a)(2).

<sup>20</sup> The Commission provides the applicant with an opportunity to review for accuracy and completeness the Commission's description of relevant home country laws and regulations on which a proposed Comparability Determination and a proposed Comparability Order are based. The Commission relies on this review, and any corrections or feedback received, as part of the comparability assessment. A Comparability Determination and Comparability Order based on an inaccurate description of foreign laws and regulations may not be valid.

<sup>21</sup> 17 CFR 23.106(a)(3) and 85 FR 57462 at 57520-57522.

<sup>22</sup> The Commission would conduct a similar analysis, adjusted as appropriate to account for regulatory distinctions, in performing a comparability assessment for foreign nonbank MSPs. Commission Regulation 23.101(b) requires a nonbank MSP to maintain positive tangible net worth. There are no MSPs currently registered with the Commission.

<sup>23</sup> 17 CFR 23.106(a)(5).

<sup>24</sup> 17 CFR 23.106(a)(4).

<sup>25</sup> Notices must be filed in electronic form to the following email address: [MPDFinancialRequirements@cftc.gov](mailto:MPDFinancialRequirements@cftc.gov).

<sup>26</sup> 17 CFR 23.106(a)(4)(ii) and 17 CFR 140.91(a)(11).

Each non-U.S. nonbank SD and each non-U.S. nonbank MSP that receives confirmation from the Commission that it may comply with a foreign jurisdiction's capital adequacy and financial reporting requirements will be deemed by the Commission to be in compliance with the corresponding CFTC Capital Rules and/or CFTC Financial Reporting Rules.<sup>27</sup> A non-U.S. nonbank SD or non-U.S. nonbank MSP that receives confirmation of substituted compliance remains subject, however, to the Commission's examination and enforcement authority.<sup>28</sup> Accordingly, if a nonbank SD or nonbank MSP fails to comply with the foreign jurisdiction's capital adequacy and/or financial reporting requirements, the Commission may initiate an action for a violation of the corresponding CFTC Capital Rules and/or CFTC Financial Reporting Rules.<sup>29</sup> In addition, a finding of a violation by a foreign jurisdiction's regulatory authority is not a prerequisite for the exercise of such examination and enforcement authority by the Commission.

### C. Mexico Application for a Comparability Determination for Mexico-Domiciled Nonbank Swap Dealers

On September 29, 2021, Morgan Stanley Mexico, Casa de Bolsa, S.A. de C.V., Goldman Sachs Mexico, Casa de Bolsa, S.A. de C.V., and Casa de Bolsa Finamex, S.A. de C.V. (the "Applicants") submitted an application (the "Mexico Application") requesting that the Commission conduct a Comparability Determination and issue a Comparability Order finding that compliance with certain designated capital requirements of Mexico (the "Mexican Capital Rules") and certain designated financial reporting requirements of Mexico (the "Mexican Financial Reporting Rules") by a Mexican nonbank SD registered with the Mexican Comisión Nacional Bancaria y de Valores (Mexican Banking and Securities Commission) ("Mexican Commission")<sup>30</sup> as a broker-dealer

<sup>27</sup> 17 CFR 23.106(a)(4)(ii). As noted above, confirmation will be issued by MPD under authority delegated by the Commission. Commission Regulation 140.91(a)(11). 17 CFR 140.91(a)(11).

<sup>28</sup> 17 CFR 23.106(a)(4)(ii).

<sup>29</sup> *Id.*

<sup>30</sup> The Applicants represented that the Mexican Commission is a governmental agency that is part of the Ministry of Finance, and has independent technical and executive powers. The Applicants further represented that the Mexican Commission is in charge of the supervision and regulation of financial entities, such as Mexican nonbank SDs, with the purpose of ensuring their stability and sound performance, as well as maintaining a safe and sound financial system. The Mexico

satisfies corresponding CFTC Capital Rules and the CFTC Financial Reporting Rules applicable to a nonbank SD under sections 4s(e) and (f) of the CEA and Commission Regulations 23.101 and 23.105.<sup>31</sup>

The Applicants represented that the Securities Market Law (Ley del Mercado de Valores, the "Law")<sup>32</sup> and the General Provisions Applicable to Broker-Dealers (Disposiciones de Caracter General Aplicables a las Casa de Bolsa, the "General Provisions")<sup>33</sup> issued by the Mexican Commission contain the Mexican Capital Rules and the Mexican Financial Reporting Rules that apply to broker-dealers,<sup>34</sup> including Mexican nonbank SDs.<sup>35</sup> The Law and General Provisions impose mandatory capital and liquidity requirements that address quantifiable discretionary risks (credit risk, liquidity risk, and market risk), quantifiable non-discretionary risks (legal risk, operational risk, and technological risk), and non-quantifiable risks.<sup>36</sup> The Applicants currently are the only Mexican nonbank SDs registered with the Commission as SDs, and they represent that they are licensed with the

Application provides that: (i) the scope of the Mexican Commission's authority includes inspection, supervision, prevention, and correction powers; (ii) the primary financial entities regulated by the Mexican Commission are commercial banks, national development banks, regulated multiple purpose financial institutions, and broker-dealers, such as Mexican nonbank SDs; and (iii) the Mexican Commission is also in charge of granting and revoking broker-dealer licenses in Mexico. Mexico Application, p. 4 (fn. 10).

<sup>31</sup> The Mexico Application was submitted by Colin D. Lloyd, Cleary Gottlieb Steen & Hamilton LLP, on behalf of the Applicants. Mexico Application at p. 1. The Mexico Application is available on the Commission's website at: <https://www.cftc.gov/LawRegulation/DoddFrankAct/CDS/CP/index.htm>.

<sup>32</sup> Published in the Federal Official Gazette (Diario Oficial de la Federación) on December 30, 2005, as amended.

<sup>33</sup> Published in the Federal Official Gazette on September 6, 2004, as amended.

<sup>34</sup> The Applicants represented that pursuant to the provisions set forth in Article 113 of the Law, broker-dealers, such as Mexican nonbank SDs, among other entities, are the only financial institutions that may conduct securities intermediation transactions. Under Article 2 of the Law, securities intermediation is defined as the customary and professional performance of any of the following activities in Mexico: (i) actions for the purpose of facilitating the contact between the supply and demand of securities; (ii) the execution of transactions with securities for the account of third parties as commission agent, attorney-in-fact, or in any other capacity, participating in the relevant legal transactions either personally or on behalf of third parties; and (iii) the negotiation of securities on an intermediary's own account with the general public or with other intermediaries acting on their own account or on behalf of third parties. The organization and operation of broker-dealers, such as Mexican nonbank SDs, is governed by the Law and General Provisions. Mexico Application at p. 4 (fn. 11).

<sup>35</sup> Mexico Application at p. 4.

<sup>36</sup> *Id.*

Mexican Commission as broker-dealers subject to the Mexican Capital Rules and Mexican Financial Reporting Rules.

### D. Proposed Comparability Determination and Proposed Comparability Order for Mexico-Domiciled Nonbank Swap Dealers

On December 13, 2022, the Commission published the 2022 Proposal, seeking comment on the Mexico Application and the Commission's proposed Comparability Determination and related Comparability Order.<sup>37</sup> The 2022 Proposal set forth the Commission's preliminary Comparability Determination and proposed Comparability Order providing that, based on its review of the Mexico Application and applicable Mexican laws and regulations, the Commission preliminarily found that the Mexican Capital Rules and the Mexican Financial Reporting Rules, subject to the conditions set forth in the proposed Comparability Order, achieve comparable outcomes and are comparable in purpose and effect to the CFTC Capital Rules and CFTC Financial Reporting Rules.<sup>38</sup> The Commission, however, noted that there were certain differences between the Mexican Capital Rules and CFTC Capital Rules and certain differences between the Mexican Financial Reporting Rules and the CFTC Financial Reporting Rules. As such, the Commission included conditions in the proposed Comparability Order.<sup>39</sup> The proposed conditions were designed to promote consistency in regulatory outcomes and to reflect the scope of substituted compliance that would be available notwithstanding the differences, and to ensure that the Commission and National Futures Association ("NFA") receive information to monitor Mexican nonbank SDs for ongoing compliance with the Comparability Order.<sup>40</sup> The

<sup>37</sup> 2022 Proposal, 87 FR 76374 (Dec. 13, 2022).

<sup>38</sup> *Id.* at 76398. Consistent with the process specified in Section I.B. above for conducting Comparability Determinations, the Commission provided the Applicants with an opportunity to review for factual accuracy and completeness the Commission's description of relevant Mexican laws and regulations on which the proposed Comparability Determination and proposed Comparability Order were based. The Commission has relied on Applicants' review, and has incorporated feedback and corrections received from the Applicants. As previously noted, a Comparability Determination and Comparability Order based on an inaccurate description of foreign laws and regulations may not be valid.

<sup>39</sup> See 2022 Proposal at 76398.

<sup>40</sup> NFA is a registered futures association ("RFA") under section 17 of the CEA (7 U.S.C. 21). Each SD registered with the Commission is required to be an NFA member. 17 CFR 170.16. NFA, as an RFA, is also required by the CEA to adopt rules imposing

Commission further stated that the identified differences would not be inconsistent with providing a substituted compliance framework for Mexican nonbank SDs subject to the conditions specified in the proposed Comparability Order.<sup>41</sup>

The proposed Comparability Order was limited to the comparison of the Mexican Capital Rules to the Bank-Based Approach under the CFTC Capital Rules (“Bank-Based Approach”) for computing regulatory capital for nonbank SDs, which is based on certain capital requirements imposed by the Federal Reserve Board for bank holding companies.<sup>42</sup> As noted by the Commission in the 2022 Proposal, the Applicants had not requested, nor has the Commission performed, a comparison of the Mexican Capital Rules to the Commission’s TNW Approach or NLA Approach.<sup>43</sup>

*E. General Comments on the Mexico Application and the Commission’s Proposed Finding of Comparability Between the CFTC Capital Rules and CFTC Financial Reporting Rules and the Mexican Capital Rules and Mexican Financial Reporting Rules*

The public comment period on the Mexico Application and the proposed Comparability Determination and Comparability Order ended on February 13, 2023. The Commission received three substantive comments letters

minimum capital, segregation, and other financial requirements, as applicable, to its members, including SDs, that are at least as stringent as the Commission’s minimum capital, segregation, and other financial requirements for such registrants, and to implement a program to audit and enforce such requirements. 7 U.S.C. 21(p). Therefore, the Commission’s proposed Comparability Order required Mexican nonbank SDs to file certain financial reports and notices with NFA so that it may perform oversight of such firms as required under Section 17 of the CEA. The Commission will refer to NFA in this Comparability Determination when referring to the requirements or obligations of an RFA.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* As described in the 2022 Proposal, the CFTC Capital Rules provide nonbank SDs with three alternative capital approaches: (i) the Tangible Net Worth Capital Approach (“TNW Approach”); (ii) the Net Liquid Assets Capital Approach (“NLA Approach”); and (iii) the Bank-Based Approach. See 2022 Proposal at 76377 and 17 CFR 23.101. The Bank-Based Approach is consistent with the Basel Committee on Banking Supervision’s (“BCBS”) international framework for bank capital requirements (“BCBS framework” or “Basel standards”). The BCBS is the primary global standard-setter for the prudential regulation of banks and provides a forum for cooperation on banking supervisory matters. Institutions represented on the BCBS include the Federal Reserve Board, the European Central Bank, Deutsche Bundesbank, Bank of England, Bank of France, Bank of Japan, Banco de Mexico, and Bank of Canada. The BCBS framework is available at: [https://www.bis.org/basel\\_framework/index.htm](https://www.bis.org/basel_framework/index.htm).

<sup>43</sup> *Id.*

addressing the proposal from the following interested parties: Better Markets, Inc. (“Better Markets”); William J. Harrington (“Harrington”); and a joint letter from the International Swaps and Derivatives Association (“ISDA”) and the Securities Industry and Financial Markets Association (“SIFMA”).<sup>44</sup>

The Associations expressed support for the proposed Comparability Determination and proposed Comparability Order, agreeing with the Commission’s overall analysis and determination of comparability of the Commission’s Capital and Financial Reporting Rules and the Mexican Capital and Financial Reporting Rules.<sup>45</sup> Conversely, two commenters disagreed with the CFTC’s proposed Comparability Determination and proposed Comparability Order.<sup>46</sup> Better Markets asserted that the principles-based, holistic approach applied by the Commission, which assesses whether the applicable foreign jurisdiction’s capital and financial requirements achieve a comparable outcome to the corresponding CFTC’s requirements, is “insufficiently rigorous, leaving far too much room for inaccurate and unwarranted comparability determinations.”<sup>47</sup>

The Commission does not believe that the principles-based, holistic assessment that it conducted on the comparability of the Mexican Capital Rules and Mexican Financial Reporting Rules with the CFTC Capital Rules and CFTC Financial Reporting Rules was “insufficiently rigorous,” nor does the Commission believe that it left “room for inaccurate and unwarranted comparability determinations.” The principles-based, holistic approach employed in the Comparability Determination was performed in accordance with the substituted compliance assessment framework adopted by the Commission for capital and financial reporting requirements for

<sup>44</sup> Letter from Dennis M. Kelleher, President and CEO, and Cantrell Dumas, Director of Derivatives Policy, Better Markets (Feb. 13, 2023) (“Better Markets Letter”); Letter from William J. Harrington, Croatan Institute (Feb. 13, 2023) (“Harrington Letter”); and Letter from Steven Kennedy, Global Head of Public Policy, ISDA, and Kyle L. Brandon, Managing Director, Head of Derivatives Policy, SIFMA (together, the “Associations”) (Feb. 13, 2023) (“Associations Letter”). The Commission received an additional comment submission that did not provide any substantive comment on the 2022 Proposal. All comment letters for the 2022 Proposal are available at: <https://comments.cftc.gov/PublicComments/CommentList.aspx?id=7341> (the public comment file).

<sup>45</sup> Associations Letter at p. 2.

<sup>46</sup> Better Markets Letter at p. 2; Harrington Letter at p. 11.

<sup>47</sup> Better Markets Letter at p. 2.

foreign nonbank SDs and set out in Commission Regulation 23.106. Consistent with this assessment framework, the Commission focused on whether the Mexican Capital Rules and Mexican Financial Reporting Rules are designed with the objective of ensuring overall safety and soundness of the Mexican nonbank SDs in a manner that is comparable with the Commission’s overall objective of ensuring the safety and soundness of nonbank SDs.

As stated in the 2022 Proposal, due to the detailed and complex nature of the capital frameworks, differences in how jurisdictions approach and implement the requirements are expected, even among jurisdictions that base their requirements on the principles and standards set forth in the BCBS framework.<sup>48</sup> Furthermore, as discussed in section I.B. above, when adopting Commission Regulation 23.106, the Commission stated that its approach to substituted compliance is a principles-based, holistic approach that focuses on whether the foreign regulations are designed with the objectives of ensuring the overall safety and soundness of the non-US nonbank SD in a manner that is comparable with the Commission’s overall capital and financial reporting requirements, and is not based on a line-by-line assessment or comparison of a foreign jurisdiction’s regulatory requirements with the Commission’s requirements.<sup>49</sup>

The approach and standards contained in Commission Regulation 23.106, with the focus on “comparable outcomes,” are also consistent with the Commission’s precedents of undertaking a principles-based, holistic assessment of the comparability of foreign regulatory regimes for purposes of substituted compliance for cross-border swap transactions. The Commission first outlined its approach to substituted compliance with respect to swaps requirements in 2013, when it issued an Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations.<sup>50</sup> In the Guidance, the Commission stated that in evaluating whether a particular category of foreign regulatory requirement(s) is comparable and comprehensive to the applicable requirement(s) under the CEA and Commission regulations, the Commission will take into consideration all relevant factors, including but not limited to, the comprehensiveness of those requirement(s), the scope and

<sup>48</sup> See 2022 Proposal at 76381.

<sup>49</sup> 85 FR 57462 at 57521.

<sup>50</sup> *Interpretative Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations*, 78 FR 45292 (July 26, 2013) (“Guidance”).

objectives of the relevant regulatory requirement(s), the comprehensiveness of the foreign regulator's supervisory compliance program, as well as the home jurisdiction's authority to support and enforce its oversight of the registrant.<sup>51</sup> The Commission emphasized that in this context, "comparable does not necessarily mean identical."<sup>52</sup> Rather, the Commission stated that it would evaluate whether the home jurisdiction's regulatory requirement is comparable to, and as comprehensive as, the corresponding U.S. regulatory requirement(s).<sup>53</sup> In conducting comparability determinations based on the policy set forth in the Guidance, the Commission noted that the "outcome-based" approach recognizes that foreign regulatory systems differ and their approaches vary and may differ from how the Commission chose to address an issue, but that the foreign jurisdiction's regulatory requirements nonetheless achieve the regulatory outcome sought to be achieved by a certain provision of the CEA or Commission regulation.<sup>54</sup>

The Commission further elaborated on the required elements of comparability in 2016, when it issued final rules to address the cross-border application of the Commission's margin requirements for uncleared swap transactions. Specifically, the Commission stated that its substituted compliance approach reflects an outcome-based assessment of the comparability of a foreign jurisdiction's margin requirements with the Commission's corresponding requirements.<sup>55</sup> The Commission further stated that it would evaluate the objectives and outcomes of the foreign margin requirements in light of foreign regulator(s)' supervisory and enforcement authority.<sup>56</sup> Consistent with its previously stated position, the Commission recognized that jurisdictions may adopt different approaches to achieving the same outcome and, therefore, the assessment would focus on whether the foreign jurisdiction's margin requirements are comparable to the Commission's in purpose and effect, not whether they are

comparable in every aspect or contain identical elements.<sup>57</sup> The Commission's policy thus reflects an understanding that a line-by-line evaluation of a foreign jurisdiction's regulatory regime is not the optimum approach to assessing the comparability of complex structures whose individual components may differ based on jurisdiction-specific considerations, but which achieve the objective and outcomes set forth in the Commission's framework.

With respect to the Mexico Application, the process leading to the Commission's Comparability Determination involved Commission staff obtaining English language translations of relevant Mexican laws, rules, and regulations cited in the Mexico Application. Staff verified the assertions and citations contained in the Mexico Application regarding the specific Mexican Capital Rules and Mexican Financial Reporting Rules to the relevant English language versions of the Mexican laws, rules, and regulations.<sup>58</sup> Commission staff also evaluated the comparability of the Mexican Capital Rules and Mexican Financial Reporting Rules with the CFTC Capital Rules and CFTC Financial Reporting Rules with respect to the following areas: (i) the process of establishing minimum capital requirements for Mexican nonbank SDs and how such process addresses risk, including market risk and credit risk of the Mexican nonbank SD's on-balance sheet and off-balance sheet exposures; (ii) the types of equity and debt instruments that qualify as regulatory capital in meeting a Mexican nonbank SD's minimum capital requirements; (iii) the financial reports and other financial information submitted by a Mexican nonbank SD to the Mexican Commission, and whether such information provides the Mexican Commission with the means necessary to effectively monitor the financial condition of the Mexican nonbank SD; and (iv) the regulatory notices and other communications between a Mexican nonbank SD and the Mexican Commission that address potential adverse financial or operational issues that may impact the firm.<sup>59</sup> With respect to the ability of the Mexican Commission to supervise and enforce compliance with the Mexican Capital Rules and Mexican Financial Reporting

Rules, the Commission's assessment included a review of the Mexican Commission's surveillance program for monitoring compliance by Mexican nonbank SDs with the Mexican Capital Rules and Mexican Financial Reporting Rules, and the disciplinary process imposed on firms that fail to comply with such requirements.<sup>60</sup>

Contrary to the position articulated by Better Markets regarding the nature of the comparability assessment, the Commission believes that the principles-based, holistic assessment of the Mexican Capital Rules and Mexican Financial Reporting Rules against the CFTC Capital Rules and CFTC Financial Reporting Rules, as outlined above and discussed in detail in section II below, was sufficiently rigorous for purposes of determining if the Mexican laws and regulations are comparable in purpose and effect to the CEA and Commission regulations.

Better Markets further asserted that even under a principles-based, holistic approach, the Mexican capital and financial reporting requirements for Mexican nonbank SDs do not satisfy the test for an order granting substituted compliance as the Mexican Commission's regulatory framework governing capital and financial reporting is not comparable to the corresponding CFTC requirements.<sup>61</sup> Better Markets cited the Commission's inclusion of conditions in the proposed Comparability Order as demonstrating the Commission's need "to compensate for the acknowledged gaps in the Mexican Commission's framework."<sup>62</sup> Better Markets claimed that the Commission proposed 12 filing requirements that must be met as a condition for the comparability determination, and stated that the Commission was not conducting a comparability assessment, but was engaging in a "de facto rewriting" of Mexico's laws and rules in the form of conditions.<sup>63</sup>

The Commission disagrees that the inclusion of conditions in the Comparability Order precludes a finding of comparability with respect to the Mexican Capital Rules and Mexican Financial Reporting Rules. The Commission's comparability assessment process, consistent with the holistic approach, contemplates the potential need for a Comparability Order to contain conditions. Specifically, Commission Regulation 23.106(a)(5) states that the Commission may impose

<sup>51</sup> Guidance at 45343.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> See e.g., *Comparability Determination for the European Union: Certain Entity-Level Requirements*, 78 FR 78923 (December 27, 2013) at 78926.

<sup>55</sup> *Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants—Cross-Border Application of the Margin Requirements*, 81 FR 34817, 34836–34837 (May 31, 2016).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Staff also reviewed the Mexican Commission's website to confirm various provisions of Mexican laws and regulations that were relevant to the proposed Comparability Determination and proposed Comparability Order.

<sup>59</sup> 2022 Proposal at 76381.

<sup>60</sup> *Id.*

<sup>61</sup> Better Markets Letter at p. 3.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at p. 2.

any terms and conditions it deems appropriate in issuing a Comparability Order, including conditions with respect to capital adequacy and financial reporting requirements of non-U.S. nonbank SDs.<sup>64</sup>

The process employed in this Comparability Determination is consistent with the Commission's established approach to conducting comparability assessments. Upon a finding of comparability, the Commission's policy generally is that eligible entities may comply with a substituted compliance regime subject to the conditions the Commission places on its finding, and subject to the Commission's retention of its examination authority and its enforcement authority.<sup>65</sup> In this regard, the Commission has stated that certain conditions included in a Comparability Order may be designed to ensure the Commission's direct access to books and records required to be maintained by an SD registered with the Commission.<sup>66</sup> Other conditions may address areas where the foreign jurisdiction lacks analogous requirements.<sup>67</sup> The inclusion of conditions in a Comparability Order was contemplated as an integral part of the Commission's holistic, principles-based approach to conducting comparability assessments and is not inconsistent with a grant of substituted compliance.

In particular, Commission Regulation 23.106(a)(5) states the Commission's authority to impose conditions in issuing a Comparability Determination in connection with the CFTC Capital Rules and the CFTC Financial Reporting Rules. As further discussed below, the conditions proposed in the 2022 Proposal are clearly of the nature contemplated by Commission Regulation 23.106(a)(5).

The Commission also does not believe that the inclusion of conditions in the proposed Comparability Order reflects a "rewriting" of the Mexican laws and

regulations as asserted by Better Markets. Consistent with the Commission's policy described above, a majority of the conditions contained in the proposed Comparability Order are designed to ensure that: (i) the Mexican nonbank SD is eligible for substituted compliance based on the Mexican laws and regulations that were reviewed by the Commission in performing the comparability assessment, and (ii) the Commission and the NFA receive timely financial information and notices to effectively monitor a Mexican nonbank SD's compliance with the Comparability Order and to assess the ongoing safety and soundness of the Mexican nonbank SD. Specifically, there are 23 conditions in the final Comparability Order. Four conditions set forth criteria that a Mexican nonbank SD must meet to be eligible for substituted compliance pursuant to the Comparability Order.<sup>68</sup> The four conditions ensure that only Mexican nonbank SDs that are within the scope of, and comply with, the Mexican Capital Rules and Mexican Financial Reporting Rules that were part of the Commission's comparability assessment may apply for substituted compliance.

Eight additional conditions require Mexican nonbank SDs within the scope of the Comparability Order to provide notice to the Commission and NFA of certain defined events,<sup>69</sup> and a further two conditions require Mexican nonbank SDs to file with the Commission and NFA copies of certain unaudited and audited financial reports

<sup>64</sup> The four criteria provide that the Mexican nonbank SD: (i) is not subject to capital rules of a U.S. prudential regulator (Condition 1); (ii) is organized and domiciled in Mexico (Condition 2); (iii) is licensed by the Mexican Commission as a broker-dealer (*i.e.*, *casa de bolsa*) (Condition 3); and (iv) is subject to the Mexican Capital Rules and the Mexican Financial Reporting Rules that are part of the Commission's comparability assessment (Condition 4).

<sup>65</sup> The eight conditions require a Mexican nonbank SD to provide notice to the Commission in the event that the firm: (i) is informed by the Mexican Commission that it failed to comply with any component of the Mexican Capital Rules or Mexican Financial Reporting Rules (Condition 15); (ii) it breaches its capital conservation buffer requirement (Condition 16); (iii) fails to maintain regulatory capital in the form of fundamental capital of at least the equivalent of \$20 million (Condition 17); (iv) experiences a 30 percent or more decrease in its excess regulatory capital as compared to that the excess regulatory capital last reported (Condition 18); (v) fails to make or keep current financial books and records (Condition 19); (vi) fails to post or collect margin for uncleared swaps and non-cleared security-based swaps with one or more counterparties in amounts that exceed defined limits (Condition 20); (vii) changes its fiscal year end date (Condition 21); and (viii) is subject to material changes to the Mexican Capital Rules, Mexican Financial Reporting Rules, or the supervisory authority of the Mexican Commission (Condition 22).

that the firms provide to their applicable authorities.<sup>70</sup> In addition, two additional conditions reflect administrative matters necessary to implement the substituted compliance framework.<sup>71</sup> Lastly, six conditions impose obligations on Mexican nonbank SDs that align with certain of the Commission's requirements for nonbank SDs. The six conditions require a Mexican nonbank SD to: (i) maintain a minimum amount of fundamental capital equal to or in excess the equivalent of \$20 million (Condition 5); (ii) provide notice if it seeks the approval of the Mexican Commission to use internal models to compute market risk and/or credit risk and refrain from using internal models to compute regulatory capital without the authorization of the Commission (Condition 7); (iii) prepare and keep current financial books and records (Condition 8); (iv) file a monthly schedule of the firm's financial positions on Schedule 1 of appendix B to Subpart E of part 23 of the Commission's regulations (Condition 11); (v) file a monthly report listing the custodians holding margin posted by, and collected by, the Mexican nonbank SD, the amount of margin held by each custodian, and the aggregate amount of margin required to be posted and collected by the Mexican nonbank SD

<sup>70</sup> The two conditions provide that a Mexican nonbank SD must file with the Commission and NFA: (i) English language copies of certain financial reporting templates that the Mexican nonbank SD is required to submit to the relevant Mexican authorities pursuant to Article 203 of the General Provisions and Article 202 and Exhibit 9 of the General Provisions, as applicable (Condition 9), and (ii) English language copies of its annual audited financial statements and management report that are required to be prepared and published pursuant to Article 203 of the General Provisions (Condition 10).

<sup>71</sup> One of the administrative conditions provides that a Mexican nonbank SD must provide a notice to the Commission of its intent to comply with the Comparability Order and the Mexican Capital Rules and Mexican Financial Reporting Rules in lieu of the CFTC Capital Rules and CFTC Financial Reporting Rules. The notice must include the Mexican nonbank SD's representation that the firm is organized and domiciled in Mexico, is licensed by the Mexican Commission as a *casa de bolsa*, and is subject to, and complies with, the Mexican Capital Rules and the Mexican Financial Reporting Rules (Condition 6). A second administrative condition provides that a Mexican nonbank SD must file any documents with the Commission and NFA via electronic transmission (Condition 23). With respect to Condition 6, the Commission also notes that the language of the proposed condition required that a Mexican nonbank SD provide a notice of its intent to comply with "applicable" Mexican Capital Rules and Mexican Financial Reporting Rules. Given that "Mexican Capital Rules" and "Mexican Financial Reporting Rules" are terms defined in the Comparability Order to include laws and regulations that apply to Mexican nonbank SDs, the word "applicable" is superfluous and is, therefore, not included in the final Comparability Order.

<sup>64</sup> 17 CFR 23.106(a)(5). Commission Regulation 23.106(a)(3) establishes the Commission's standard of review for performing a Comparability Determination and provides that the Commission may consider all relevant factors, including whether the relevant foreign jurisdiction's capital adequacy and financial reporting requirements achieve comparable outcomes to the Commission's corresponding capital adequacy and financial reporting requirements for SDs. 17 CFR 23.106(a)(3)(ii).

<sup>65</sup> 85 FR 57462 at 57520. See also Guidance at 45342–45344 and *Comparability Determination for the European Union: Certain Transaction Level Requirements*, 78 FR 78878 (December 27, 2013) at 78880.

<sup>66</sup> *Comparability Determination for the European Union: Certain Transaction Level Requirements*, 78 FR 78878 (December 27, 2013) at 78880.

<sup>67</sup> Guidance at 45343.

(Condition 13); and (vi) submit, with each filing of financial information, a statement by an authorized representative that, to the best knowledge and belief of the person making the representation, the information is true and correct (Condition 14).<sup>72</sup>

As the substance of these conditions demonstrates, the primary objective of a majority of the conditions is not to compensate for regulatory gaps in the Mexican capital and financial reporting framework, but rather to ensure that the Commission and NFA receive information to conduct ongoing monitoring of Mexican nonbank SDs for compliance with relevant capital and financial reporting requirements. As discussed above, in issuing a Comparability Order, the Commission is not ceding its supervisory and enforcement authorities. The Comparability Order permits Mexican nonbank SDs to satisfy the Commission's capital and financial reporting requirements by complying with certain laws and/or regulations of Mexico that have been found to be comparable to the Commission's laws and/or regulations in purpose and effect. The Commission and NFA, however, have a continuing obligation to conduct ongoing oversight, including potential examination, of Mexican nonbank SDs to ensure compliance with the Comparability Order, including its conditions. To that effect, the notice and financial reporting conditions set forth in the Comparability Order provide the Commission and NFA with information necessary to monitor for such compliance and to evaluate the operational condition and ongoing financial condition of Mexican nonbank SDs. The Commission may also initiate an enforcement action against a Mexican nonbank SD that fails to comply with the conditions of the Comparability Order.<sup>73</sup>

<sup>72</sup> Another condition specifies that Mexican nonbank SDs that are registered with the U.S. Securities and Exchange Commission ("SEC") as security-based swap dealers ("SBSDs") and required to file with the SEC, or its designee, Form X-17A-5 ("FOCUS Report"), must file a copy of such FOCUS Report with the Commission and NFA within 35 calendar days after the end of each month (Condition 12). A Mexican nonbank SD that files a FOCUS Report pursuant to Condition 12 will not be required to file the reports and schedules specified in Conditions 9 and 11. Currently, no Mexican nonbank SD is registered as a SBS.

<sup>73</sup> As the Commission stated in the 2022 Proposal, a non-U.S. nonbank SD that operates under a Comparability Order issued by the Commission remains subject to the Commission's examination and enforcement authority. Specifically, the Commission may initiate an enforcement action against a non-U.S. nonbank SD that fails to comply with its home-country capital adequacy and/or financial reporting requirements cited in a

Furthermore, to the extent that a condition imposes a new obligation on Mexican nonbank SDs, the imposition of such condition is also consistent with Commission Regulation 23.106 and the Commission's established policy with regard to comparability determinations. As discussed above, the Commission contemplated that even in circumstances where the Commission finds two regulatory regimes comparable, the Commission may impose requirements on entities relying on substituted compliance where the Commission determines that the home jurisdiction's regime lacks comparable and comprehensive regulation on a specific issue.<sup>74</sup> The Commission's authority to impose such conditions is set out in Commission Regulation 23.106(a)(5), which states that the Commission may impose "any terms and conditions it deems appropriate, including certain capital adequacy and financial reporting requirements [on SDs]."<sup>75</sup>

Better Markets further stated that, if the Commission grants substituted compliance with regard to materially different regulatory requirements, it must make a well-supported comparability determination by, at a minimum, clearly and specifically setting forth the desired regulatory outcome and providing a detailed, evidence-based explanation as to how the jurisdiction's different legal requirements nonetheless lead to a comparable regulatory outcome.<sup>76</sup> Better Markets further asserted that "[a] determination that a foreign jurisdiction's nonbank SDs rules would produce comparable regulatory outcomes is the beginning, not the end, of the CFTC's obligation to ensure that the activities of the foreign nonbank SD entities do not pose risks to the U.S. financial system. As time goes on, regulatory requirements that, in theory, are expected to produce one regulatory outcome may, in practice, produce a different one. And, of course, the regulatory requirements may themselves be changed in a variety of ways. Finally, the effectiveness of an authority's supervision and enforcement program

Comparability Order. See 2022 Proposal at 76376–76377. See also 17 CFR 23.106(a)(4)(ii), which provides that the Commission may examine all nonbank SDs, regardless of whether the nonbank SDs rely on substituted compliance, and that the Commission may initiate an enforcement action under the Commission's capital and financial reporting regulations against a non-U.S. nonbank SD that fails to comply with a foreign jurisdiction's capital adequacy and financial reporting requirements.

<sup>74</sup> Guidance at 45343.

<sup>75</sup> 17 CFR 23.106(5).

<sup>76</sup> Better Markets Letter at pp. 7–8.

can become weakened for any number of reasons—the CFTC cannot assume that an enforcement program that is presently effective will continue to be effective."<sup>77</sup> Better Markets further asserted that to fulfill its obligation to protect the U.S. financial system, the Commission must ensure, on an ongoing basis, that each grant of substituted compliance remains appropriate over time by, at a minimum, requiring each Comparability Order, and each MOU with a foreign regulatory authority, to impose an obligation on the applicant, as appropriate, to: (i) periodically apprise the Commission of the activities and results of its supervision and enforcement programs, to ensure that they remain sufficiently robust to deter and address violations of the law; and (ii) immediately apprise the Commission of any material changes to the regulatory regime, including changes to rules or interpretations of rules.<sup>78</sup>

Although the Commission disagrees that the Mexican Capital Rules and the Mexican Financial Reporting Rules, as a whole, are materially different or do not achieve comparable regulatory outcomes when compared to the CFTC Capital Rules and CFTC Financial Reporting Rules, the Commission concurs that granting substituted compliance should be the result of a well-supported comparability assessment. Consistent with that view, the Commission believes that this final Comparability Determination articulates the Commission's analysis in sufficient detail and provides an appropriate explanation of how the foreign jurisdiction's requirements are comparable in purpose and effect with the Commission's requirements, and lead to comparable regulatory outcomes with the Commission's requirements. Specifically, section III of the 2022 Proposal and section II of the final Comparability Determination reflect, among other observations, the Commission's detailed analysis with respect to each of the elements for consideration listed in Commission Regulation 23.106(a)(3).

The Commission also concurs that the availability of substituted compliance is conditioned upon a non-US nonbank SD's ongoing compliance with the terms and conditions of the final Comparability Order, and the Commission's ongoing assessment that the Mexican Capital Rules and Mexican Financial Reporting Rules remain comparable in purpose and effect with the CFTC Capital Rules and CFTC

<sup>77</sup> *Id.* at p. 8.

<sup>78</sup> *Id.*



Financial Reporting Rules. As noted above, and discussed in more detail in sections II.D. and E. below, Mexican nonbank SDs are subject to notice and financial reporting requirements under the final Comparability Order that provide Commission and NFA staff with the ability to monitor the Mexican nonbank SDs' ongoing compliance with the conditions set forth in the final Comparability Order. In addition, the final Comparability Order requires the Applicants to inform the Commission of changes to the relevant Mexican Capital Rules and Mexican Financial Reporting Rules so that the Commission may assess the continued effectiveness of the Comparability Order in ensuring that the Mexican laws and regulations have the comparable regulatory objectives of the CEA and Commission regulations of ensuring the safety and soundness of nonbank SDs.<sup>79</sup> Commission staff will also monitor the Mexican nonbank SDs directly as part of its supervisory program and will discuss with the firms any proposed or pending revisions to specific laws and rules cited in the final Comparability Order. Lastly, in addition to assessing the effectiveness of the Comparability Order as a result of revisions or proposed revisions to the Mexican laws, regulations, or supervisory regime, the Commission further notes that future material changes to the CFTC Capital Rules or CFTC Financial Reporting Rules, or the Commission's or NFA's supervisory programs, may necessitate an amendment to the Comparability Determination and Comparability Order to reflect those changes.<sup>80</sup>

Another commenter, Harrington, stated that the Commission "must prevent every regulated [SD] globally from providing a non-margined swap contract with a flip clause [ . . . ]."<sup>81</sup> Harrington has elsewhere referred to a description of a "flip clause" as a provision in swap contracts with structured debt issuers that reverses or "flips" the priority of payment obligations owed to the swap counterparty on the one hand, and the noteholders on the other, following a

specified event of default.<sup>82</sup> Based on Harrington's description, flip clauses present a risk to the SD in synthetic transactions where payments under a swap contract are secured with the same collateral that would serve to cover payments under the notes issued by a structured debt issuer. In such circumstances, an "event of default" by the SD would cause the SD's priority of payment from the collateral under a swap to "flip" to a more junior priority position, including for mark-to-market gains on "in the money" swaps.<sup>83</sup> Harrington argued that "[each] flip clause exposes a derivative contract provider to the maximum loss of 100% of contract value of each swap-contract-with-flip-clause."<sup>84</sup> Harrington recognized, however, that the CFTC margin requirements for uncleared swap transactions address his concerns associated with the inclusion of a flip clause.<sup>85</sup> Nonetheless, according to the Harrington, risks arise in circumstances when non-U.S. margin rules exempt SDs from margin obligations in connection with swaps with a structured debt issuer.<sup>86</sup>

The Commission recognizes that given regulatory differences, some transactions that are subject to the CFTC margin requirements for uncleared swaps may not be subject to regulatory margin requirements in another jurisdiction. In connection with this Comparability Determination, however, the Commission notes that both under the CFTC Capital Rules and the Mexican Capital Rules, uncollateralized exposures from uncleared swap transactions would generate a higher counterparty credit risk exposure amount than the exposures resulting from transactions under which the counterparties have posted collateral.<sup>87</sup>

<sup>82</sup> William J. Harrington, Submission to the U.S. Securities and Exchange Commission Re: File No. S7-08-12 (Nov. 19, 2018) at p.8.

<sup>83</sup> For additional information on the legal mechanics of a flip clause, see *Lehman Brothers Special Financing Inc v. Bank of America N.A.*, No. 18-1079 (2nd Cir. 2020).

<sup>84</sup> Harrington Letter at p. 11.

<sup>85</sup> Harrington Letter at p. 4 (noting that the requirement for SDs to post and collect variation margin for swap contracts with a securitization or structured debt issuer "generates the immense benefit of inducing U.S. securitization and structured debt issuers to forswear all swap contracts").

<sup>86</sup> *Id.* (arguing that "non-U.S. swap margin rules de facto exempt a swap provider from collecting or posting variation margin under a new contract with most securitization and structured debt issuers").

<sup>87</sup> 12 CFR 217.34 and 12 CFR 217.132 (indicating that nonbank SDs may recognize the risk-mitigating effects of financial collateral for collateralized derivatives contracts) and Article 160 of the General Provisions (similarly indicating that Mexican nonbank SDs are allowed to recognize the risk-mitigating effect of collateral by deducting the amount of collateral from the exposure amount).

Accordingly, the Commission does not believe that the respective sets of rules adopt a conflicting approach or lead to a disparate outcome with respect to the capital treatment of uncollateralized uncleared swap exposures that would warrant a finding of non-comparability of the CFTC Capital Rules and the Mexican Capital Rules.

## II. Final Capital and Financial Reporting Comparability Determination and Comparability Order

The following section provides the Commission's comparative analysis of the Mexican Capital Rules and the Mexican Financial Reporting Rules with the corresponding CFTC Capital Rules and CFTC Financial Reporting Rules, as described in the 2022 Proposal, further modified to address comments received. As emphasized in the 2022 Proposal, the capital and financial reporting regimes are complex structures comprised of a number of interrelated regulatory components.<sup>88</sup> Differences in how jurisdictions approach and implement these regimes are expected, even among jurisdictions that base their requirements on the principles and standards set forth in the BCBS framework.

The Commission performed the analysis by assessing the comparability of the Mexican Capital Rules for Mexican nonbank SDs, as set forth in the Mexico Application and in the English language translation of certain applicable Mexican laws and regulations, with the Commission's Bank-Based Approach for nonbank SDs. The Commission understands that, as of the date of the final Comparability Determination, the Applicants are subject to a bank-based capital approach under the Mexican Capital Rules. Accordingly, when the Commission makes its final determination herein about the comparability of the Mexican Capital Rules with the CFTC Capital Rules, the determination pertains to the comparability of the Mexican Capital Rules with the Bank-Based Approach under the CFTC Capital Rules. The Commission notes that any material changes to the information submitted in the Mexico Application, including, but not limited to, proposed and final material changes to the Mexican Capital Rules or Mexican Financial Reporting Rules, as well as any proposed and final material changes to the Mexican Commission's supervisory authority or supervisory regime will require notification to the Commission and NFA pursuant to Condition 22 of the final

<sup>79</sup> Condition 22 of the final Comparability Order requires the Applicants to notify the Commission of any material changes to the information submitted in their application, including, but not limited to, proposed and final material changes to the Mexican Capital Rules or Mexican Financial Reporting Rules and proposed and final material changes to the Mexican Commission's supervisory authority or supervisory regime over Mexican nonbank SDs. The Commission notes that it made certain non-substantive, clarifying changes to the language of final Condition 22 as compared to the proposed condition.

<sup>80</sup> 2022 Proposal at 76381 (n. 91).

<sup>81</sup> Harrington Letter at p. 4.

<sup>88</sup> 2022 Proposal at 76381.

Comparability Order.<sup>89</sup> Therefore, if there are subsequent material changes to the Mexican Capital Rules, Mexican Financial Reporting Rules, or the supervisory authority or supervisory regime, the Commission will review and assess the impact of such changes on the final Comparability Determination and Comparability Order as they are then in effect, and may amend or supplement the Comparability Order as appropriate.<sup>90</sup>

#### A. Regulatory Objectives of CFTC Capital Rules and CFTC Financial Reporting Rules and Mexican Capital Rules and Mexican Financial Reporting Rules

##### 1. Preliminary Determination

As reflected in the 2022 Proposal and discussed above, the Commission preliminarily determined that the overall objectives of the Mexican Capital Rules and CFTC Capital Rules are comparable in that both sets of rules are intended to ensure the safety and soundness of nonbank SDs by establishing regulatory regimes that require nonbank SDs to maintain a sufficient amount of qualifying regulatory capital to absorb losses, including losses from swaps and other trading activities, and to absorb decreases in the value of firm assets and increases in the value of firm liabilities without the nonbank SDs becoming insolvent.<sup>91</sup> The Commission further noted that the Mexican Capital Rules and CFTC Capital Rules are also based on, and consistent with, the BCBS framework, which was designed to ensure that banking entities hold sufficient levels of capital to absorb losses, decreases in the value of firm assets, and increases in the value of firm liabilities without the banks becoming insolvent.<sup>92</sup>

The Commission observed that Mexican Capital Rules and CFTC

Capital Rules provide for a comparable approach to the calculation of on-balance sheet and off-balance sheet risk exposures using non-model, standardized approaches.<sup>93</sup> In addition, as discussed in the 2022 Proposal, the Mexican Capital Rules' and CFTC Capital Rules' requirements for identifying and measuring on-balance sheet and off-balance sheet exposures under the standardized approaches are also consistent with the requirements set forth under the BCBS framework for identifying and measuring on-balance sheet and off-balance sheet exposures.<sup>94</sup>

Finally, the Commission preliminarily found that the Mexican Capital Rules and CFTC Capital Rules achieve comparable outcomes and are comparable in purpose and effect in that both limit the types of capital instruments that qualify as regulatory capital to cover the on-balance sheet and off-balance sheet risk exposures to high quality equity capital and qualifying subordinated debt instruments that meet conditions designed to ensure that the holders of the debt have effectively subordinated their claims to other creditors of the nonbank SD.<sup>95</sup> As discussed in the 2022 Proposal and in section II.B. below, both the Mexican Capital Rules and the CFTC Capital Rules define high quality capital by the degree to which the capital represents permanent capital that is contributed, or readily available to a nonbank SD, on an unrestricted basis to absorb unexpected losses, including losses from swaps trading and other activities, decreases in the value of firm assets, and increases in the value of firm liabilities without the nonbank SD becoming insolvent.<sup>96</sup>

The Commission further stated that it preliminarily found the Mexican Financial Reporting Rules to be comparable in purpose and effect to the CFTC Financial Reporting Rules as both sets of rules require nonbank SDs to provide the Mexican Commission and the Banco de Mexico ("Mexican Central Bank"), as applicable, and the CFTC, respectively, with periodic financial reports, including unaudited financial reports and an annual audited financial report, detailing their financial operations and demonstrating their compliance with minimum capital requirements.<sup>97</sup> As discussed in the 2022 Proposal, in addition to providing the CFTC and Mexican Commission with information necessary to

comprehensively assess the financial condition of a nonbank SD on an ongoing basis, the financial reports further provide the CFTC and Mexican Commission with information regarding potential changes in a nonbank SD's risk profile by disclosing changes in account balances reported over a period of time.<sup>98</sup> Such changes in account balances may indicate, among other things, that the nonbank SD has entered into new lines of business, has increased its activity in an existing line of business relative to other activities, or has terminated a previous line of business.<sup>99</sup>

In assessing the comparability between the CFTC Financial Reporting Rules and the Mexican Financial Reporting Rules, the Commission noted that the prompt and effective monitoring of the financial condition of nonbank SDs through the receipt and review of periodic financial reports supports the CFTC and the Mexican Commission in meeting their respective objectives of ensuring the safety and soundness of nonbank SDs. In this regard, the Commission stated that the early identification of potential financial issues provides the CFTC and the Mexican Commission with an opportunity to address such issues with the nonbank SD before they develop to a state where the financial condition of the firm is impaired such that it may no longer hold a sufficient amount of qualifying regulatory capital to absorb decreases in the value of firm assets, absorb increases in the value of firm liabilities, or to cover losses from the firm's business activities, including the firm's swap dealing activities and obligations to swap counterparties.<sup>100</sup>

##### 2. Comment Analysis and Final Determination

In response to the Commission's request for comment, Better Markets identified certain differences between the CFTC Capital Rules and CFTC Financial Reporting Rules and the Mexican Capital Rules and Mexican Financial Reporting Rules and stated that the differences mandated denial of the request for a comparability determination.<sup>101</sup> Better Markets further

<sup>89</sup> Condition 22 of the final Comparability Order. The Commission notes that it made certain non-substantive changes to the language of final Condition 22 as compared to the proposed condition.

<sup>90</sup> See 2022 Proposal at 76381. As stated in the 2022 Proposal, the Commission may also amend or supplement the Comparability Order to address any material changes to the CFTC Capital Rules and CFTC Financial Reporting Rules, including rule amendments to capital rules of the Federal Reserve Board that are incorporated into the CFTC Capital Rules' Bank-Based Approach under Commission Regulation 23.101(a)(1)(i), that are adopted after the final Comparability Order is issued. See *id.*, (n. 91).

<sup>91</sup> See 2022 Proposal at 76382.

<sup>92</sup> The BCBS's mandate is to strengthen the regulation, supervision and practices of banks with the purpose of enhancing financial stability. See *Basel Committee Charter* available on the Bank for International Settlement website: [www.bis.org/bcbs/charter.htm](http://www.bis.org/bcbs/charter.htm). See also 2022 Proposal at 76382.

<sup>93</sup> See 2022 Proposal at 76382.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 76383.

<sup>101</sup> Better Markets Letter at pp. 8–13. Better Markets asserted that the Mexican capital rules are different from the Commission's capital rules with respect to the definition and types of capital permitted to meet regulatory requirements; the approaches to ensuring adequate levels of capital; and, the minimum dollar amount of regulatory capital required. Better Markets also stated that the reporting requirements are different as demonstrated by the number of conditions included

stated that the imposition of conditions to achieve comparability between the regimes is a de facto admission that the regulations are not comparable and that the request should be denied.<sup>102</sup> Better Markets observed that the conditions added another set of capital and reporting requirements that Mexican nonbank SDs will have to abide by in addition to the Mexican laws and rules, requiring the CFTC to monitor compliance with all of the conditions, exacerbating the complexity of the administration of the capital and financial reporting rules.<sup>103</sup>

As described herein and in the 2022 Proposal, Commission staff has engaged in a detailed, comprehensive study and evaluation of the Mexican capital and financial reporting framework and has confirmed that its understanding of the elements and application of the framework is accurate. The Commission has also concluded, based on its evaluation, that the Mexican Commission has a comprehensive oversight program for monitoring Mexican nonbank SD's compliance with relevant Mexican Capital Rules.

Furthermore, as discussed in section I.E. above, the conditions set forth in the Comparability Order are generally intended to ensure that: (i) only Mexican nonbank SDs that are subject to the laws and regulations assessed under the Comparability Determination are eligible for substituted compliance; (ii) the Mexican nonbank SDs are subject to supervision by the Mexican Commission; and (iii) the Mexican nonbank SDs provide information to the Commission and NFA that is relevant to the ongoing supervision of their operations and financial condition. Considering this thorough analysis and the ongoing requirement for Mexican nonbank SDs to provide information to the Commission and NFA demonstrating compliance with the Comparability Order, the Commission is confident that it is capable of effectively conducting, together with NFA, oversight of the Mexican nonbank SDs in a manner consistent with the conduct of oversight of U.S.-domiciled nonbank SDs. In light of the Commission's ultimate conclusion that the Mexican capital and financial reporting requirements are comparable based on the standards articulated in Commission Regulation 23.106(a)(3), the Commission believes that a failure to issue a Comparability Determination and

in the 2022 Proposal that would require Mexican nonbank SDs to file additional reports with the Commission. Better Markets comments are addressed in the appropriate sections below.

<sup>102</sup> *Id.* at p. 2.

<sup>103</sup> *Id.* at p. 13.

Comparability Order would in fact be "suboptimal and undesirable" as it would impose duplicative requirements that would result in increased costs for registrants and market participants without a commensurate benefit from an oversight perspective.

As discussed in sections I.B. and E. above, and detailed herein, the Commission finds that the CFTC Capital Rules and CFTC Financial Reporting Rules and the Mexican Capital Rules and Mexican Financial Reporting Rules are comparable in purpose and effect, and have overall comparative objectives, notwithstanding the identified differences. In this regard, the Commission notes that instead of conducting a line-by-line assessment or comparison of the Mexican Capital and Mexican Financial Reporting Rules and the CFTC Capital and CFTC Financial Reporting Rules, it has applied in the assessment set forth in this determination and order, a principles-based, holistic approach in assessing the comparability of the rules, consistent with the standard of review it adopted in Commission Regulation 23.106(a)(3). Based on that principles-based, holistic assessment, the individual elements which are described in more detail below in sections II.B through II.F. below, the Commission has determined that both sets of rules are designed to ensure the safety and soundness of nonbank SDs and achieve comparable outcomes. As such, the Commission adopts the Comparability Determination and Comparability Order as proposed with respect to the analysis of the regulatory objectives of the CFTC Capital Rules and Financial Reporting Rules and the Mexican Capital and Financial Reporting Rules.

#### *B. Nonbank Swap Dealer Qualifying Capital*

##### 1. Preliminary Determination

As discussed in the 2022 Proposal, the Commission preliminarily determined that the Mexican Capital Rules are comparable in purpose and effect to CFTC Capital Rules with regard to the types and characteristics of a nonbank SD's equity that qualifies as regulatory capital in meeting its minimum requirements.<sup>104</sup> The Commission explained that the Mexican Capital Rules and the CFTC Capital Rules for nonbank SDs both require a nonbank SD to maintain a quantity of high-quality and permanent capital, all defined in a manner that is consistent with the BCBS framework, that based on the firm's activities and on-balance

sheet and off-balance sheet exposures, is sufficient to absorb losses and decreases in the value of firm assets and increases in the value of firm liabilities without resulting in the firm becoming insolvent.<sup>105</sup> The Commission observed that the Mexican Capital Rules and the CFTC Capital Rules permit nonbank SDs to recognize comparable forms of equity capital and qualifying subordinated debt instruments toward meeting minimum capital requirements, with both the Mexican Capital Rules and the CFTC Capital Rules emphasizing high quality capital instruments.

In support of its preliminary Comparability Determination, the Commission noted that the CFTC Capital Rules require a nonbank SD electing the Bank-Based Approach to maintain regulatory capital in the form of common equity tier 1 capital, additional tier 1 capital, and tier 2 capital in amounts that meet certain stated minimum requirements set forth in Commission Regulation 23.101.<sup>106</sup> Common equity tier 1 capital is generally composed of an entity's common stock instruments, and any related surpluses, retained earnings, and accumulated other comprehensive income, and is a more conservative or permanent form of capital that is last in line to receive distributions in the event of the entity's insolvency.<sup>107</sup> Additional tier 1 capital is generally composed of equity instruments such as preferred stock and certain hybrid securities that may be converted to common stock if triggering events occur and may have a preference in distributions over common equity tier 1 capital in the event of an insolvency.<sup>108</sup> Total tier 1 capital is composed of common equity tier 1 capital and further includes additional tier 1 capital. Tier 2 capital includes certain types of instruments that include both debt and equity characteristics such as qualifying subordinated debt.<sup>109</sup> Subordinated debt must meet certain conditions to qualify as tier 2 capital under the CFTC Capital Rules.<sup>110</sup>

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 76383 (citing to Commission Regulation 23.101(a)(1)(i)). The terms "common equity tier 1 capital," "additional tier 1 capital," and "tier 2 capital" are defined in the bank holding company regulations of the Federal Reserve Board. See 12 CFR 217.20.

<sup>107</sup> 12 CFR 217.20(b).

<sup>108</sup> 12 CFR 217.20(c).

<sup>109</sup> 12 CFR 217.20(d).

<sup>110</sup> The subordinated debt must meet the requirements set forth in SEC Rule 18a-1d. Specifically, subordinated debt instruments must have a term of at least one year (with the exception of approved revolving subordinated debt agreements which may have a maturity term that is

<sup>104</sup> See 2022 Proposal at 76384.

The preliminary Comparability Determination also noted that the Mexican Capital Rules limit the composition of regulatory capital to common equity tier 1 capital, additional tier 1 capital, and tier 2 capital in a manner consistent with the BCBS framework.<sup>111</sup> As the Commission observed, the Mexican Capital Rules provide that: (i) common equity tier 1 capital may generally be composed of retained earnings and common equity instruments; (ii) additional tier 1 capital may include other capital instruments and certain long-term convertible debt instruments; and (iii) tier 2 capital may include certain qualifying subordinated debt instruments.<sup>112</sup>

Based on its comparative assessment, the Commission preliminarily found that equity instruments that qualify as common equity tier 1 capital and additional tier 1 capital under the Mexican Capital Rules and the CFTC Capital Rules have similar characteristics (*e.g.*, the equity must be in the form of high-quality, committed, and permanent capital) and the equity instruments generally have no priority to the distribution of firm assets or income with respect to other shareholders or creditors of the firm, which makes this equity available to a nonbank SD to absorb unexpected losses, including counterparty defaults.<sup>113</sup>

The Commission also found that instruments that qualify as tier 2 capital under the Mexican Capital Rules and the CFTC Capital Rules have similar characteristics. Specifically, the Commission noted that the qualifying conditions imposed on subordinated debt instruments under the Mexican Capital Rules and the CFTC Capital Rules are comparable in that they are designed to ensure that the subordinated debt has qualities that support its recognition by a nonbank SD as equity for capital purposes.<sup>114</sup> The

less than one year), and contain terms that effectively subordinate the rights of lenders to receive any payments, including accrued interest, to other creditors of the firm. 17 CFR 23.101(a)(1)(i)(B) and 17 CFR 240.18a-1d.

<sup>111</sup> See 2022 Proposal at 76383 and Article 162 of the General Provisions. As discussed in the 2022 Proposal, the Mexican Capital Rules employ different terminology to refer to the components of total capital than the CFTC Capital Rules and the BCBS framework. For example, the Mexican Capital Rules refer to total capital as “net capital,” common equity tier 1 capital as “fundamental capital,” and the 8 percent requirement is described as a “capitalization index” requirement. 2022 Proposal at 76379 (n. 67). Where appropriate, this Comparability Determination uses the same terminology that is used in the CFTC Capital Rules and in the BCBS framework, for ease of reference.

<sup>112</sup> See 2022 Proposal at 76383.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

proposed conditions include, in the case of the CFTC Capital Rules, regulatory requirements that effectively subordinate the claims of debt holders to interest and repayment of the debt to the claims of other creditors of the nonbank SD, and, in the case of the Mexican Capital Rules, regulatory requirements that provide Mexican nonbank SDs with the right to cancel scheduled interest payments and to convert the debt to common equity of the firm.<sup>115</sup>

## 2. Comment Analysis and Final Determination

The Commission did not receive comments regarding its preliminary determination that the Mexican Capital Rules are comparable in purpose and effect to the CFTC Rules with respect to the types of and characteristics of a nonbank SD’s equity and subordinated debt that qualifies as regulatory capital to meet minimum regulatory capital requirements. Therefore, the Commission finds that the Mexican Capital Rules and the CFTC Capital Rules, are comparable in purpose and effect, and achieve comparable regulatory outcomes, with respect to the types of capital instruments that qualify as regulatory capital. Both the Mexican Capital Rules and the CFTC Capital Rules limit regulatory capital to permanent and conservative forms of capital, including common equity, capital surpluses, retained earnings, and subordinate debt where debt holders effectively subordinate their claims to repayment to all other creditors of the nonbank SD in the event of the firm’s insolvency. Limiting regulatory capital to the above categories of equity and debt instruments promotes the safety and soundness of the nonbank SD by helping to ensure that the regulatory capital is not withdrawn or converted to other equity instruments that may have rights or priority with respect to payments, such as dividends or distributions in insolvency, over other creditors, including swap counterparties. The Commission, therefore, is adopting the Comparability Order as proposed with respect to the types and characteristics of equity and subordinated debt that qualifies as regulatory capital to meet minimum capital requirements under the Mexican Capital Rules.

<sup>115</sup> *Id.*, (referencing 17 CFR 240.18a-1d and Articles 162 and 162 Bis of the General Provisions).

## C. Nonbank Swap Dealer Minimum Capital Requirement

### 1. Introduction to Nonbank Swap Dealer Minimum Capital Requirements

As reflected in the 2022 Proposal, the CFTC Capital Rules require a nonbank SD electing the Bank-Based Approach to maintain regulatory capital in an amount that satisfies each of the following criteria: (i) an amount of common equity tier 1 capital of at least \$20 million; (ii) an aggregate amount of common equity tier 1 capital, additional tier 1 capital, and tier 2 capital equal or greater than 8 percent of the nonbank SD’s total risk-weighted assets, provided that common equity tier 1 capital comprises at least 6.5 percent of the 8 percent; (iii) an aggregate of common equity tier 1 capital, additional tier 1 capital, and tier 2 capital in an amount equal to or in excess of 8 percent of the nonbank SD’s uncleared swap margin amount; <sup>116</sup> and (iv) the amount of capital required by NFA.<sup>117</sup>

In comparison, the Mexican Capital Rules require each Mexican nonbank SD to maintain qualifying regulatory capital to satisfy the following capital ratios, expressed as a percentage of the firm’s total risk-weighted assets: (i) common equity tier 1 capital equal to at least 4.5 percent of the firm’s risk-weighted assets; (ii) total tier 1 capital (*i.e.*, common equity tier 1 capital plus additional tier 1 capital) equal to at least 6 percent of the firm’s risk-weighted assets; (iii) total capital (*i.e.*, an aggregate amount of common equity tier 1 capital, additional tier 1 capital, and tier 2 capital) equal to at least 8 percent of the firm’s risk-weighted assets; and (iv) an additional capital conservation buffer of 2.5 percent of the firm’s risk-

<sup>116</sup> The term “uncleared swap margin” is defined in Commission Regulation 23.100 to generally mean the amount of initial margin that a nonbank SD would be required to collect from each counterparty for each outstanding swap position of the nonbank SD. 17 CFR 23.100. A nonbank SD must include all swap positions in the calculation of the uncleared swap margin amount, including swaps that are exempt or excluded from the scope of the Commission’s uncleared swap margin regulations. A nonbank SD must compute the uncleared swap margin amount in accordance with the Commission’s margin rules for uncleared swaps. 17 CFR 23.154.

<sup>117</sup> 17 CFR 23.101(a)(1)(i). See also 2022 Proposal at 76388. Commission Regulation 23.101(a)(1)(i) sets forth one of the minimum thresholds that a nonbank SD must meet as the “the amount of capital required by a registered futures association.” As previously noted, NFA is currently the only entity that is a registered futures association. NFA has adopted the Commission’s capital requirements as its own requirements, and has not adopted any additional or stricter minimum capital requirements. See, NFA rulebook, Financial Requirements Section 18 Swap Dealer and Major Swap Participant Financial Requirements, available at [nfa.futures.org](https://www.nfa.futures.org).

weighted asset that must be met with common equity tier 1 capital.<sup>118</sup>

## 2. Preliminary Determination and Comment Analysis

While noting certain differences in the minimum capital requirements and calculation of regulatory capital between the Mexican Capital Rules and the CFTC Capital Rules, the Commission preliminarily found that the Mexican Capital Rules and CFTC Capital Rules, subject to the proposed conditions in the 2022 proposed Comparability Determination and proposed Comparability Order, achieve comparable outcomes by requiring a nonbank SD to maintain a minimum level of qualifying regulatory capital and subordinated debt to absorb losses from the firm's business activities, including its swap dealing activities, and decreases in the value of the firm's assets and increases in the firm's liabilities without the nonbank SD becoming insolvent.<sup>119</sup> As further discussed below, the Commission's preliminary finding of comparability was based on a principles-based, holistic comparative analysis of the three minimum capital requirement thresholds of the CFTC Capital Rules' Bank-Based Approach referenced above and the respective elements of the Mexican Capital Rules' requirements.

### a. Fixed Amount Minimum Capital Requirement

As noted above, prong (i) of the CFTC Capital Rules requires each nonbank SD electing the Bank-Based Approach to maintain a minimum of \$20 million of common equity tier 1 capital. The CFTC's \$20 million fixed-dollar minimum capital requirement is intended to ensure that each nonbank SD maintains a level of regulatory capital, without regard to the level of the firm's dealing and other activities, sufficient to meet its obligations to swap market participants given the firm's status as a CFTC-registered nonbank SD, and to help ensure the safety and soundness of the nonbank SD.<sup>120</sup>

In comparison, the Commission observed that the Mexican Capital Rules contain a requirement that each Mexican nonbank SD maintain a fixed amount of minimum paid-in capital that is based on the services or activities performed by the firm.<sup>121</sup> The minimum

paid-in capital requirement is a fixed value of capital that is indexed annually to "Unidades de Inversion" (Inflation Indexed Units) ("UDIs"). Mexican nonbank SDs that performed the broadest array of activities as of the year ending December 31, 2021 were subject to a minimum paid-in capital requirement that equaled approximately MXN \$90,000,000 (or USD \$4,300,000).<sup>122</sup>

Although the Mexican Capital Rules and the CFTC Capital Rules both require nonbank SDs to hold a minimum amount of regulatory capital that is not based on the risk-weighted assets of the firms, the Commission recognized that the \$20 million of common equity tier 1 capital required under the CFTC Capital Rules is materially higher than the estimated \$4.3 million of minimum paid-in capital required under the Mexican Capital Rules. In the Commission's view, the \$20 million represented a more appropriate level of minimum capital to help ensure the safety and soundness of the nonbank SD that is engaging in uncleared swap transactions.<sup>123</sup> As such, the Commission proposed to condition the Comparability Order to require each Mexican nonbank SD to maintain, at all times, a minimum amount of peso-denominated fundamental capital equal to or in excess of the equivalent of \$20 million.<sup>124</sup> The Commission proposed that a Mexican nonbank SD might convert the peso-denominated amount of this minimum capital requirement to the U.S. dollar equivalent based on a commercially reasonable and observed exchange rate.<sup>125</sup>

One commenter, Better Markets, asserted that the difference between the CFTC Capital Rules \$20 million minimum common equity tier 1 capital requirement and the Mexican Capital Rules minimum paid-in capital requirement of approximately \$4.3 million "demonstrates a fatal lack of comparability" between the CFTC

capital requirement, Mexican Central Bank also imposes limits on a Mexican nonbank SD's overall leverage. See 2022 Proposal at 76387 and Section C.B1 of Circular 115/2002, issued by the Mexican Central Bank on November 11, 2002, as amended.

<sup>122</sup> Considering an exchange rate per USD of MXN \$20.7882 as published by the Mexican Central Bank in the Federal Official Gazette (Diario Oficial de la Federacion) on July 12, 2022. See 2022 Proposal at 76388.

<sup>123</sup> See 2022 Proposal at 76388.

<sup>124</sup> *Id.* The Commission proposed that the minimum fixed amount of capital be held in fundamental capital, given that the Commission had preliminarily found that fundamental capital, as defined in Articles 162 and 162 Bis of the General Provisions, is comparable to common equity tier 1 capital required under the CFTC Capital Rules.

<sup>125</sup> *Id.*

Capital Rules and the Mexican Capital Rules.<sup>126</sup> As noted above, the Commission recognized the difference in the requirement under the Mexican Capital Rules and the CFTC Capital Rules with respect to the \$20 million minimum dollar amount of regulatory capital a nonbank SD is required to maintain. The Commission's proposed a condition, however, effectively addresses this difference by providing that a Mexican nonbank SD may not avail itself of substituted compliance unless it maintains an amount of fundamental capital denominated in pesos that is equal to or in excess of the equivalent of \$20 million. The imposition of the condition was consistent with the Commission authority under Commission Regulation 23.106(a)(5). Furthermore, as discussed in section I.E. above, the Commission has stated that entities relying on substituted compliance may be required to comply with certain Commission imposed requirements in situations where comparable regulation in their home jurisdiction are deemed to be lacking.<sup>127</sup> Therefore, the Commission believes that the requirement for Mexican nonbank SDs to maintain an amount of regulatory capital in the form of fundamental capital, as defined in Article 162 and Article 162 Bis of the General Provisions, equal to or in excess of the equivalent of \$20 million will impose an equally stringent standard to the analogue requirement under the CFTC Capital Rules and will appropriately address the substantially lower minimum fixed amount capital requirement under the Mexican Capital Rules. The Commission proposed that the minimum fixed amount of capital be held in fundamental capital, given that the Commission had preliminarily found that fundamental capital, as defined in Articles 162 and 162 Bis of the General Provisions, is comparable to common equity tier 1 capital required under the CFTC Capital Rules.<sup>128</sup>

In conclusion, the Commission finds that the Mexican Capital Rules and the CFTC Capital Rules, with the imposition of the condition for Mexican nonbank SDs to maintain a minimum level of fundamental capital in an amount equivalent to at least \$20 million, are comparable in purpose and effect and achieve comparable regulatory outcomes with respect to capital requirements based on a minimum dollar amount. The requirement for a nonbank SD with limited swap dealing or other business activities to maintain

<sup>118</sup> 2022 Proposal at 76386 and Articles 172 and 173 of the Law and Article 162 of the General Provisions.

<sup>119</sup> See 2022 Proposal at 76388.

<sup>120</sup> 85 FR 57492.

<sup>121</sup> See 2022 Proposal at 76388, citing Article 10 of the General Provisions. The Commission also noted that, in addition to the minimum paid-in-

<sup>126</sup> Better Markets Letter at p. 11.

<sup>127</sup> Guidance at 45343.

<sup>128</sup> 2022 Proposal at 76388.

a minimum level of regulatory capital equivalent to \$20 million helps to ensure the firm's safety and soundness by allowing it to absorb decreases in firm assets, absorb increases in firm liabilities, and meet obligations to swap counterparties, other creditors, and market participants, without the firm becoming insolvent.

**b. Minimum Capital Requirement Based on Risk-Weighted Assets**

Prong (ii) of the CFTC Capital Rules' minimum capital requirements described above requires each nonbank SD electing the Bank-Based Approach to maintain an aggregate of common equity tier 1 capital, additional tier 1 capital, and tier 2 capital in an amount equal to or greater than 8 percent of the nonbank SD's total risk-weighted assets, with common equity tier 1 capital comprising at least 6.5 percent of the 8 percent.<sup>129</sup> Risk-weighted assets are a nonbank SD's on-balance sheet and off-balance sheet exposures, including market risk and credit risk exposures, and include exposures associated with proprietary swap, security-based swap, equity, and futures positions, weighted according to risk. The requirements and capital ratios set forth in prong (ii) are based on the Federal Reserve Board's capital requirements for bank holding companies<sup>130</sup> and are consistent with the BCBS framework.<sup>131</sup> The requirement for each nonbank SD to maintain regulatory capital in an amount that equals or exceeds 8 percent of the firm's total risk-weighted assets is intended to help ensure that the nonbank SD's level of capital is sufficient to absorb decreases in the value of the firm's assets, absorb increases in the value of the firm's liabilities, and cover unexpected losses resulting from the firm's business activities, including losses resulting from collateralized and uncollateralized defaults from swap counterparties, without the nonbank SD becoming insolvent.<sup>132</sup>

<sup>129</sup> 17 CFR 23.101(a)(1)(i)(B).

<sup>130</sup> 12 CFR 217.10(a)(1). The minimum capital requirement for a bank holding company under the Federal Reserve Board's rules requires bank holding companies to satisfy their 8 percent minimum capital ratio requirement with a minimum of 4.5 percent of common equity tier 1 capital. The CFTC Capital Rules, however, require a nonbank SD to meet its minimum 8 percent capital ratio with at least 6.5 percent of common equity tier 1 capital. 17 CFR 23.101(a)(1)(i)(B).

<sup>131</sup> *Risk-based capital requirements RBC20, Calculation of minimum risk-based capital requirements* (Version effective as of 01 January 2023), published by the BCBS and available here: [https://www.bis.org/basel\\_framework/chapter/RBC/20.htm?inforce=20230101&published=20201126](https://www.bis.org/basel_framework/chapter/RBC/20.htm?inforce=20230101&published=20201126).

<sup>132</sup> See generally 85 FR 57461 at 57530.

The Mexican Capital Rules contain capital requirements for Mexican nonbank SDs that the Commission preliminarily found comparable in purpose and effect to the requirements in prong (ii) of the CFTC Capital Requirements.<sup>133</sup> Specifically, the Mexican Capital Rules require each Mexican nonbank SD to maintain: (i) common equity tier 1 capital equal to at least 4.5 percent of the Mexican nonbank SD's risk-weighted assets; (ii) total tier 1 capital (*i.e.*, common equity tier 1 capital plus additional tier 1 capital) equal to at least 6 percent of the Mexican nonbank SD's risk-weighted assets; and (iii) total capital (*i.e.*, an aggregate amount of common equity tier 1 capital, additional tier 1 capital, and tier 2 capital) equal to at least 8 percent of the Mexican nonbank SD's risk-weighted assets.<sup>134</sup> In addition, the Mexican Capital Rules require each Mexican nonbank SD to maintain an additional capital conservation buffer<sup>135</sup> equal to 2.5 percent of the Mexican nonbank SD's risk-weighted assets, which must be met with common equity tier 1 capital.<sup>136</sup> Thus, a Mexican nonbank SD is effectively required to maintain total qualifying regulatory capital equal to or greater than 10.5 percent of the firm's risk-weighted assets, which is a higher capital ratio than the 8 percent required of nonbank SDs under prong (iii) of the CFTC Capital Rules.<sup>137</sup>

The Commission also preliminarily found that the Mexican Capital Rules and the CFTC Capital Rules to be comparable with respect to the approaches used in the calculation of risk-weighted amounts for market risk and credit risk in determining the nonbank SD's risk-weighted assets.<sup>138</sup> The Commission also noted that Mexican nonbank SDs are not currently authorized by the Mexican Commission to use models to compute market risk or credit risk exposures.<sup>139</sup> Therefore,

<sup>133</sup> See 2022 Proposal at 76388.

<sup>134</sup> Articles 172 and 173 of the Law and Article 162 of the General Provisions.

<sup>135</sup> Mexico Application, p. 5.

<sup>136</sup> Articles 172 and 173 of the Law and Article 162 of the General Provisions.

<sup>137</sup> As noted above, the total capital requirement is the sum of the capital requirement equal to 8 percent of the firm's risk-weighted assets, plus the capital conservation buffer of 2.5 percent of the firm's risk-weighted assets. Articles 162 and 162 Bis of the General Provisions. See 2022 Proposal at 76388–76389.

<sup>138</sup> 2022 Proposal at 76389.

<sup>139</sup> As discussed in the 2022 Proposal, the Mexican Capital Rules do not permit Mexican nonbank SDs to use internal models to compute credit risk exposure amounts. Article 150 Bis of the General Provisions. Also, although the Mexican Capital Rules permit a Mexican nonbank SD to calculate market risk exposure amounts using

Mexican nonbank SDs must compute risk-weighted assets using standardized market risk and credit risk amounts set forth in the Mexican Capital Rules, which generally results in calculated risk-weighted asset amounts that are higher than model-based amounts.<sup>140</sup>

As the Commission observed, the standardized approaches under the Mexican Capital Rules and CFTC Capital Rules for calculating risk-weighted asset amounts for market risk and credit risk are both consistent with the approach under the BCBS framework and follow the same structure that is now the common global standard: (i) allocating assets to categories according to risk and assigning each category a risk weight; (ii) allocating counterparties according to risk assessments and assigning each a risk factor; (iii) calculating gross exposures based on valuation of assets; (iv) calculating a net exposure allowing offsets following well defined procedures and subject to clear limitations; (v) adjusting the net exposure by the market risk weights; and finally, (vi) for credit risk exposures, multiplying the sum of net exposures to each counterparty by their corresponding risk factor.<sup>141</sup>

More specifically, with respect to the calculation of standardized risk-weighted asset amounts for market risk, the Commission explained that the CFTC Capital Rules incorporate by reference the standardized market risk charges set forth in Commission Regulation 1.17 for FCMs and SEC Rule 18a–1 for nonbank security-based swap dealers (“SBSDs”).<sup>142</sup> The standardized market risk charges under Commission

internal models that comply with the guidelines issued by the Mexican Commission, the Applicants represented that, as of the filing date of the Application, no Mexican nonbank SD was approved to use internal models nor had any Mexican nonbank SD filed a model approval application with the Mexican Commission. See 2022 Proposal at 76380.

<sup>140</sup> For clarity, the Commission notes that it has not reviewed or evaluated the use of internal models to compute market or credit risk exposure amounts under the Mexican Capital Rules. Therefore, a Mexican nonbank SD that obtains the approval of the Mexican Commission to use models to compute market risk or credit risk exposure amounts and seeks to use such models in lieu of the standardized charges under the Commission's Comparability Order, may do so only after the Commission has reviewed and evaluated the use of the subject models for purpose of comparison to the corresponding CFTC requirements. The request to use internal market or credit risk models in lieu of standardized risk-weighting requirements may require the Commission to amend the Comparability Order. See 2022 Proposal at 76380 and 76389.

<sup>141</sup> See 2022 Proposal at 76389.

<sup>142</sup> See paragraph (3) of the definition of the term *BHC equivalent risk-weighted assets* in 17 CFR 23.100.

Regulation 1.17 and SEC Rule 18a-1 are calculated as a percentage of the market value or notional value of the nonbank SD's assets, including marketable securities and derivatives positions, with the percentages applied to the market value or notional value increasing as the expected or anticipated risk of the positions increases.<sup>143</sup> For example, CFTC Capital Rules require nonbank SDs to calculate standardized market risk-weighted asset amounts for uncleared swaps based on notional values of the swap positions multiplied by percentages set forth in the applicable rules.<sup>144</sup> In addition, market risk-weighted asset amounts for readily marketable equity securities are calculated by multiplying the fair market value of the securities by 15 percent.<sup>145</sup>

Under the CFTC Capital Rules, the resulting total market risk-weighted asset amount is multiplied by a factor of 12.5 to cancel the effect of the 8 percent multiplication factor applied to all of the nonbank SD's risk-weighted assets under prong (ii) of the rules' minimum capital requirements described above. As a result, a nonbank SD is effectively required to hold qualifying regulatory capital equal to or greater than 100 percent of the amount of its market risk exposure amount.<sup>146</sup>

Comparable to the CFTC Capital Rules, the Mexican Capital Rules require a Mexican nonbank SD to calculate its risk-weighted asset amounts for market risk based on standardized risk-weighting requirements published by the Mexican Commission, which include market risk-weighted amounts for interest rate,

foreign exchange, precious metals, and equity price risks.<sup>147</sup> For derivatives positions, a Mexican nonbank SD is required to calculate the risk-weighted asset amounts for market risk by using standardized risk weights based on the nature of the instrument underlying the derivatives position.<sup>148</sup> The market risk-weighted asset amounts are based on cumulative calculations for individual derivatives positions with limited recognition of offsets.<sup>149</sup> The resulting total market risk-weighted asset amount, including market risk amount for derivative positions, is multiplied by a factor of 12.5 to adjust the 8 percent multiplication factor applied to all of the Mexican nonbank SD's risk-weighted assets, which effectively requires a Mexican nonbank SD to hold qualifying regulatory capital equal to or greater than 100 percent of the firm's market risk exposure amount.<sup>150</sup>

With respect to standardized risk-weighted asset amounts for credit risk from non-derivatives positions, the Commission explained that under the CFTC Capital Rules, a nonbank SD must compute its on-balance sheet and off-balance sheet exposures in accordance with the standardized risk-weighting requirements adopted by the Federal Reserve Board and set forth in subpart D of 12 CFR 217 as if the SD itself were a bank holding company subject to subpart D.<sup>151</sup> Standardized risk-weighted asset amounts for credit risk are computed by multiplying the amount of the exposure by defined counterparty credit risk factors that range from 0 percent to 150 percent.<sup>152</sup> A nonbank SD with off-balance sheet exposures is required to calculate a risk-weighted asset amount for credit risk by multiplying each exposure by a credit conversion factor that ranges from 0

percent to 100 percent, depending on the type of exposure.<sup>153</sup>

With respect to credit risk exposures for derivatives positions, the Commission explained that under the CFTC Capital Rules, a nonbank SD may compute standardized counterparty credit risk exposures using either the current exposure method ("CEM") or the standardized approach for measuring counterparty credit risk ("SA-CCR").<sup>154</sup> Both CEM and SA-CCR are non-model, rules-based approaches to calculating counterparty credit risk exposures for derivatives positions. Credit risk exposure under CEM is the sum of: (i) the current exposure (*i.e.*, the positive mark-to-market) of the derivatives contract; and (ii) the potential future exposure, which is calculated as the product of the notional principal amount of the derivatives contract multiplied by a standard credit risk conversion factor set forth in the rules of the Federal Reserve Board.<sup>155</sup> Credit risk exposure under SA-CCR is defined as the exposure at default amount of a derivatives contract, which is computed by multiplying a factor of 1.4 by the sum of: (i) the replacement costs of the contract (*i.e.*, the positive mark-to-market); and (ii) the potential future exposure of the contract.<sup>156</sup>

In comparison, the Commission noted that Mexican Capital Rules also require a Mexican nonbank SD to calculate risk-weighted amounts for credit risk, for both non-derivative and derivative positions, under a standardized approach by taking the accounting value of each of its on-balance sheet and off-balance sheet positions, determining a conversion value to credit risk determined pursuant to Mexican regulation, and then applying a specific risk weight based on the type of issuer or counterparty, as applicable, and the assets' credit quality.<sup>157</sup> The resulting credit risk-weighted asset amount is also multiplied by a factor of 12.5 to adjust

<sup>143</sup> 17 CFR 1.17(c)(5) and 17 CFR 240.18a-1(c)(1).

<sup>144</sup> 17 CFR 1.17(c)(5)(iii).

<sup>145</sup> 17 CFR 1.17(c)(5)(v), referencing SEC Rule 15c3-1(c)(2)(vi) (17 CFR 240.15c3-1(c)(2)(vi)).

<sup>146</sup> 17 CFR 23.100 (definition of *BHC equivalent risk-weighted assets*). As noted, a nonbank SD is required to maintain qualifying capital (*i.e.*, an aggregate of common equity tier 1 capital, additional tier 1 capital, and tier 2 capital) in an amount that equals or exceeds 8 percent of its risk-weighted assets. The regulations, however, require the nonbank SD to effectively maintain qualifying capital equal to or in excess of 100 percent of its market risk-weighted assets by requiring the nonbank SD to multiply its market-risk weighted assets by a factor of 12.5. For example, the market risk exposure amount for marketable equity securities with a current fair market value of \$250,000 is \$37,500 (market value of \$250,000 × .15 standardized market risk factor). The nonbank SD is required to maintain regulatory capital equal to or in excess of full market risk exposure amount of \$37,500 (risk exposure amount of \$37,500 × 8 percent regulatory capital requirement equals \$3,000; the regulatory capital requirement is then multiplied by a factor of 12.5, which effectively requires the nonbank SD to hold regulatory capital in an amount equal to at least 100 percent of the market risk exposure amount (\$3,000 × 12.5 factor equals \$37,500)).

<sup>147</sup> See 2022 Proposal at 76386 and Article 150 Bis of the General Provisions. The Mexican Capital Rules do not have market risk charges specific to commodity risk as Mexican nonbank SDs are not permitted to engage in physical commodity transactions. *See id.*

<sup>148</sup> See 2022 Proposal at 76386 and Article 151 of the General Provisions.

<sup>149</sup> See 2022 Proposal at 76386 and Article 152 of the General Provisions.

<sup>150</sup> *Id.*

<sup>151</sup> Commission Regulation 23.101(a)(1)(i)(B) and paragraph (1) of the definition of the term *BHC equivalent risk-weighted assets* in Commission Regulation 23.100. *See also* 2022 Proposal at 76385.

<sup>152</sup> 12 CFR 217.32. Lower credit risk factors are assigned to entities with lower credit risk and higher credit risk factors are assigned to entities with higher credit risk. For example, a credit risk factor of 0 percent is applied to exposures to the U.S. government, the Federal Reserve Bank, and U.S. government agencies (12 CFR 217.32(a)(1)), and a credit risk factor of 100 percent is assigned to an exposure to foreign sovereigns that are not members of the Organization of Economic Cooperation and Development (12 CFR 217.32(a)(2)).

<sup>153</sup> 12 CFR 217.33. *See also* discussion in 2022 Proposal at 76385.

<sup>154</sup> 17 CFR 217.34 and 17 CFR 23.100 (defining the term *BHC risk-weighted assets* and providing that a nonbank SD that does not have model approval may use either CEM or SA-CCR to compute its exposures for over-the-counter derivative contracts without regard to the status of its affiliate with respect to the use of a calculation approach under the Federal Reserve Board's capital rules). *See also* discussion in 2022 Proposal at 76385.

<sup>155</sup> 12 CFR 217.34.

<sup>156</sup> 12 CFR 217.132(c).

<sup>157</sup> See 2022 Proposal at 76386-76387 and Articles 159, 160, and 161 of the General Provisions. Mexican nonbank SDs are required to use a standardized approach to computing all credit risk exposures as the Mexican Capital Rules do not authorize the use of internal credit risk models. Mexico Application at p. 11.

the 8 percent multiplication factor applied to all of the firm's risk-weighted assets, which effectively requires the Mexican nonbank SD to hold regulatory capital equal to or greater than 100 percent of the firm's total credit risk exposure.<sup>158</sup>

The Commission also noted certain differences between the Mexican Capital Rules and the CFTC Capital Rules with respect to a nonbank SD's computation of its market risk exposures and credit risk exposures that are included in the firm's risk-weighted assets. As noted above, the CFTC Capital Rules and Mexican Capital Rules both require a nonbank SD to maintain regulatory capital equal to or greater than 100 percent of the firm's market risk exposure amount.<sup>159</sup> The Mexican Capital Rules, however, also require a Mexican nonbank SD to maintain regulatory capital equal to or greater than 100 percent of its credit risk exposure amount.<sup>160</sup> The CFTC Capital Rules impose such requirement with respect to the credit risk exposure amount only to nonbank SDs using internal models to compute their risk-weighted asset amounts for credit risk.<sup>161</sup> The difference in approaches to computing risk-weighted assets would generally result in a nonbank SD having a larger amount of risk-weighted assets, and a higher minimum capital requirement based on risk-weighted assets, under the Mexican Capital Rules as compared to the CFTC Capital Rules.<sup>162</sup>

As further discussed in section III.C.1.c. below, the Commission also recognized that under the Mexican Capital Rules Mexican nonbank SDs are required to account for operational risk, in addition to market risk and credit

risk, in computing their minimum capital requirements.<sup>163</sup>

The Commission did not receive comments specifically addressing the Commission's comparative analysis of the minimum capital requirement based on risk-weighted assets. In conclusion, the Commission finds that the Mexican Capital Rules and the CFTC Capital Rules are comparable in purpose and effect with respect to the computation of minimum capital requirements based on a nonbank SD's risk-weighted assets. In this regard, the Commission finds that notwithstanding the differences discussed above, the Mexican Capital Rules and the CFTC Capital rules have a comparable approach to the computation of risk-weighted asset amounts for market risk and credit risk for on-balance sheet and off-balance sheet exposures, which are intended to ensure that a nonbank SD maintains a sufficient level of regulatory capital to absorb decreases in firm assets, absorb increases in firm liabilities, and meet obligations to counterparties and creditors, without the firm becoming insolvent.

#### c. Minimum Capital Requirement Based on the Uncleared Swap Margin Amount

As noted above, prong (ii) of the CFTC Capital Rules' Bank-Based Approach requires a nonbank SD to maintain regulatory capital in an amount equal to or greater than 8 percent of the firm's total uncleared swaps margin amount associated with its uncleared swap transactions to address potential operational, legal, and liquidity risks.<sup>164</sup> The Commission stated that the intent of the requirement was to establish a method of developing a minimum amount of required capital for a nonbank SD to meet its obligations as a SD to market participants, and to cover potential operational, legal, and liquidity risks.<sup>165</sup>

The Mexican Capital Rules differ from the CFTC Capital Rules in that they do not impose a capital requirement on Mexican nonbank SDs based on a percentage of the margin for uncleared swap transactions. In the 2022 Proposal, the Commission described, however,

how certain Mexican capital and liquidity requirements may compensate for the lack of direct analogue to the 8 percent uncleared swap margin amount requirement.<sup>166</sup> Specifically, the Commission noted that the Mexican Capital Rules require a Mexican nonbank SD to account for operational risk in computing their minimum capital requirements.<sup>167</sup> In this connection, the Mexican Capital Rules require a Mexican nonbank SD to calculate an operational risk exposure amount equal to 15 percent of a Mexican nonbank SD's average annual net positive income for the last three years, on a rolling basis.<sup>168</sup> The Mexican nonbank SD is then required to multiply the operational risk exposure amount by a factor of 12.5 and add the resultant amount to the total operational risk-weighted assets, which has the effect of requiring the Mexican nonbank SD to hold regulatory capital equal to or greater than 100 percent of its operational risk exposure amount.<sup>169</sup>

In addition, the Mexican Capital Rules require Mexican nonbank SDs to meet quantitative liquidity requirements, whereby a Mexican nonbank SD must hold or invest at least 20 percent of the firm's total capital in liquid assets comprised of: (i) bank deposits; (ii) highly liquid debt securities registered in Mexico; (iii) shares of debt investment funds; (iv) reserve funds created to maintain funds available to cover contingencies; and (v) high and low marketability shares subject to market value discounts of 20 and 25 percent, respectively.<sup>170</sup>

Addressing the Commission's request for comment regarding the comparability in purpose and effect between the requirement under the Mexican Capital Rules for a Mexican nonbank SD to account for operational risk by holding qualifying capital in an amount equal to 15 percent of its average annual net positive income from the last three years and the CFTC's capital requirement based on a nonbank SD's uncleared swap margin amount, one commenter, Better Markets stated that the requirements are not

<sup>158</sup> 2022 Proposal at 76387.

<sup>159</sup> The CFTC Capital Rules and the Mexican Capital Rules both require a nonbank SD to maintain regulatory capital equal to or in excess of 8 percent of the firm's total risk-weighted assets. Both sets of rules further require that the nonbank SD multiply its total market risk exposure amount by a factor of 12.5 and add the resultant amount to its total risk-weighted assets, which has the effect of requiring the nonbank SD to hold regulatory capital equal to or greater than 100 percent of its market risk exposure amount.

<sup>160</sup> The Mexican Capital Rules require a Mexican nonbank SD to multiply its total credit risk exposure amount by a factor of 12.5 and to add the resultant amount to its total credit risk-weighted assets, which has the effect of requiring the Mexican nonbank SD to hold regulatory capital equal to or greater than 100 percent of its credit risk exposure amount.

<sup>161</sup> A nonbank SD that computes its credit risk exposures using internal models must multiply the resulting capital requirement by a factor of 12.5. 12 CFR 217.131(e)(1)(iii), 217.131(e)(2)(iv), and 217.132(d)(9)(iii).

<sup>162</sup> See 2022 Proposal at 76389.

<sup>163</sup> See 2022 Proposal at 76387.

<sup>164</sup> More specifically, in establishing the requirement that a nonbank SD must maintain a level of regulatory capital in excess of 8 percent of the uncleared swap margin amount associated with the firm's swap transactions, the Commission stated that the intent of the uncleared swap margin amount was to establish a method of developing a minimum amount of capital for a nonbank SD to meet its obligations as a SD to market participants, and to cover potential operational risk, legal risk and liquidity risk, and not just the risks of its trading portfolio. 85 FR 57462 at 57485.

<sup>165</sup> See *id.*

<sup>166</sup> See 2022 Proposal at 76389–76390.

<sup>167</sup> 2022 Proposal at 76387 and Article 161 Bis of the General Provisions.

<sup>168</sup> The amount of the operational risk exposure is also subject to a floor equal to 5 percent and a ceiling equal to 15 percent of the monthly average sum of market and credit risk exposure amounts, calculated over the prior 36 months, also on a rolling basis. Article 161 Bis 3 of the General Provisions.

<sup>169</sup> See 2022 Proposal at 76387 and Article 161 Bis 5 of the General Provisions.

<sup>170</sup> See 2022 Proposal at 76390 and Article 146 of the General Provisions.



comparable.<sup>171</sup> In this connection, Better Markets asserted that the inclusion of operational risk as an additional risk exposure element in the calculation of the nonbank SD's total risk-weighted assets, the Mexican approach does not specifically address potential operational risks for uncleared swaps. More specifically, Better Markets argued that the approach mandated by the Mexican Capital Rules, which addresses the nonbank SD's total operational risk in the calculation of risk-weighted assets, provides for a lower capital amount to cover uncleared swaps margin.<sup>172</sup>

In contrast, the Associations Letter stated that the Mexican Capital Rules set out minimum capital level requirements that are sound, reflect similar regulatory concerns, and lead to comparable regulatory outcomes as the CFTC's Capital Rules, even if the Mexican Capital Rules do not include a stand-alone requirement based on the uncleared swap margin associated with an SD's swap transactions.<sup>173</sup> The Associations added that although Mexico's capital framework does not have a direct analogue to the 8 percent uncleared swap margin requirement, it has various other measures that achieve the same regulatory objective of ensuring that an SD maintains an amount of capital that is sufficient to cover the full range of risks a Mexican SD may face. The Associations explained that Mexico's capital framework requires that a Mexican SD calculate risk weighted assets incorporating risk exposure amounts composed of market, credit and equity exposures, and operational risk. The Associations further stated that Mexican SDs are subject to liquidity requirements that are designed to ensure that an SD has sufficient liquid assets to meet its ongoing obligations and that Mexican SDs are subject to leverage limitations that, similar to the uncleared swap margin requirement, are based principally on volume and counterparties without regard to risk-weighting. Lastly, as noted by the Associations, Mexican SDs must conduct regular stress tests to ensure that they have sufficient resources to withstand adverse economic scenarios.<sup>174</sup> Based on its holistic assessment, the Commission believes that the requirement to include an operational risk-weighted asset amount in the Mexican nonbank SD's total risk-weighted assets, as well as the various

regulatory measures seeking to ensure that Mexican nonbank SDs hold sufficient capital to cover the full range of risks that they may face, support the comparability of the Mexican Capital Rules and the CFTC Capital Rules even in the absence of a separate, stand-alone capital requirement that Mexican nonbank SDs must have qualified capital equal to or greater than 8 percent of the amount of uncleared swap margin.

In conclusion, the Commission finds that the Mexican Capital Rules and the CFTC Capital Rules are comparable in purpose and effect with respect to the requirement that a nonbank SD's minimum level of regulatory capital reflects potential operational risk exposures in addition to market risk and credit risk exposures. The Commission emphasizes that the intent of the minimum capital requirement based on a percentage of the nonbank SD's uncleared swap margin is to establish a minimum capital requirement that would help ensure that the nonbank SD meets its obligations as an SD to market participants, and to cover potential operational risk, legal risk, and liquidity risk in addition to the risks associated with its trading portfolio.<sup>175</sup> The Commission further notes that the minimum capital requirement based on a percentage of the nonbank SD's uncleared swap margin amount was conceived as a proxy, not an exact measure, for inherent risk in the SD's positions and operations, including operational risk, legal risk, and liquidity risk.<sup>176</sup> As the Commission noted in adopting the CFTC Capital Rules, although the amount of capital required of a nonbank SD under the uncleared swap margin calculation is directly related to the volume, size, complexity, and risk of the covered SD's positions, the minimum capital requirement is intended to cover a multitude of potential risks faced by the SD.<sup>177</sup> The Commission understands that other jurisdictions may adopt alternative measures to cover the same risks. In this regard, the Mexican Capital Rules address comparable risks albeit not through a requirement based on a Mexican nonbank SD's uncleared swap margin amount. Specifically, Mexican nonbank SDs are required to maintain a minimum level of regulatory capital based on an aggregate of the firm's total risk-weighted asset exposure amounts for market risk, credit risk, and operational risk exposures. The

Commission finds that, notwithstanding the differences in approaches, the Mexican Capital Rules and CFTC Capital Rules are comparable in purpose and effect in requiring nonbank SDs to maintain a minimum level of regulatory capital that addresses potential market risk, credit risk, and operational risk to help ensure the safety and soundness of the firm, and to ensure that the firm has sufficient capital to absorb decreases in firm assets, absorb increases in firm liabilities, and meet obligations to counterparties and creditors, without the firm becoming insolvent.

### 3. Final Determination

Based on its analysis of comments and its holistic assessment of the respective requirements discussed in sections II.C.2.a., b., and c. above, the Commission adopts the Comparability Determination and Comparability Order as proposed with respect to the minimum capital requirements and the calculation of regulatory capital, subject to the condition that Mexican nonbank SDs must maintain a minimum level of regulatory capital in the form of fundamental capital that equals or exceeds the equivalent of \$20 million U.S. dollars.

#### D. Nonbank Swap Dealer Financial Reporting Requirements

##### 1. Proposed Determination

The Commission detailed the requirements of the CFTC Financial Reporting Rules in the 2022 Proposal.<sup>178</sup> Specifically, the 2022 Proposal notes that the CFTC Financial Reporting Rules require nonbank SDs to file with the Commission and NFA periodic unaudited and annual audited financial reports.<sup>179</sup> The unaudited financial reports must include: (i) a statement of financial condition; (ii) a statement of income/loss; (iii) a statement demonstrating compliance with, and calculation of, the applicable regulatory minimum capital requirement; (iv) a statement of changes in ownership equity; (v) a statement of changes in liabilities subordinated to claims of general creditors; and (vi) such further material information necessary to make the required statements not misleading.<sup>180</sup> The annual audited financial reports must include the same financial statements that are required to be included in the unaudited financial reports, and must further include: (i) a statement of cash flows; (ii) appropriate footnote disclosures; and (iii) a reconciliation of any material

<sup>171</sup> Better Markets Letter at pp. 10–11.

<sup>172</sup> *Id.* at 10.

<sup>173</sup> Associations Letter at pp. 2–3.

<sup>174</sup> *Id.*

<sup>175</sup> See 2022 Proposal at 76384–76385 (referencing 85 FR 57462 at 57492).

<sup>176</sup> 85 FR 57462 at 57497.

<sup>177</sup> 85 FR 57462 at 57485 and 57497.

<sup>178</sup> 2022 Proposal at 76391–76392.

<sup>179</sup> *Id.* and 17 CFR 23.105(d) and (e).

<sup>180</sup> *Id.* and 17 CFR 23.105(d)(2).

differences between the financial statements contained in the annual audited financial reports and the financial statements contained in the unaudited financial reports prepared as of the nonbank SD's year end date.<sup>181</sup> In addition, a nonbank SD must attach to each unaudited and audited financial report an oath or affirmation that to the best knowledge and belief of the individual making the affirmation the information contained in the financial report is true and correct.<sup>182</sup> The individual making the oath or affirmation must be a duly authorized officer if the nonbank SD is a corporation, or one of the persons specified in the regulation for business organizations that are not corporations.<sup>183</sup>

The CFTC Financial Reporting Rules also require a nonbank SD to file the following financial information with the Commission and NFA on a monthly basis: (i) a schedule listing the nonbank SD's financial positions reported at fair market value;<sup>184</sup> (ii) schedules showing the nonbank SD's counterparty credit concentration for the 15 largest exposures in derivatives, a summary of its derivatives exposures by internal credit ratings, and the geographic distribution of derivatives exposures for the 10 largest countries;<sup>185</sup> and, (iii) for nonbank SDs approved to use internal capital models, certain model metrics, such as aggregate value-at-risk ("VaR") and counterparty credit risk information.<sup>186</sup>

The CFTC Financial Reporting Rules further require a nonbank SD to provide the Commission and NFA with information regarding the custodianship of margin for uncleared swap transactions ("Margin Report").<sup>187</sup> The Margin Report must contain: (i) the name and address of each custodian holding initial margin or variation margin on behalf of the nonbank SD or its swap counterparties; (ii) the amount of initial and variation margin required by the uncleared margin rules held by each custodian on behalf of the nonbank

SD and on behalf its swap counterparties; and (iii) the aggregate amount of initial margin that the nonbank SD is required to collect from, or post with, swap counterparties for uncleared swap transactions subject to the uncleared margin rules.<sup>188</sup>

A nonbank SD electing the Bank-Based Capital Approach is required to file the unaudited financial report, Schedule 1, schedules of counterparty credit exposures, and the Margin Report with the Commission and NFA no later than 17 business days after the applicable month-end reporting date.<sup>189</sup> A nonbank SD must file its annual report with the Commission and NFA no later than 60 calendar days after the end of its fiscal year.<sup>190</sup>

The 2022 Proposal also detailed relevant financial reporting requirements of the Mexican Financial Reporting Rules.<sup>191</sup> The Mexican Financial Reporting Rules require a Mexican nonbank SD to submit to the Mexican Commission quarterly consolidated financial reports.<sup>192</sup> The reports must contain a balance sheet, a statement of income/loss, a statement of changes in equity, a statement of cash flows, and a statement showing the firm's compliance with minimum capital requirements.<sup>193</sup> The quarterly consolidated financial reports must be for the quarters ending March, June, and September of each year, and must be filed with the Mexican Commission within the month following the last day of each quarter.<sup>194</sup>

A Mexican nonbank SD is also required to submit an annual consolidated financial report.<sup>195</sup> The annual report must contain the same statements that are required to be included in the quarterly consolidated financial report and must further include appropriate footnote disclosures relating to, among other topics, nominal amounts of derivatives contracts by type of instrument and by underlying valuation results, as well as the results obtained in the assessment of the adequacy of the firm's regulatory capital in relation to credit, market, and operational risk requirements.<sup>196</sup> The annual consolidated financial report must be filed within 90 calendar days of the Mexican nonbank SD's fiscal year end, and must contain an audit report

issued by an independent external auditor.<sup>197</sup>

In addition to the above consolidated financial reports, a Mexican nonbank SD must provide the Mexican Commission, on a monthly basis, with a balance sheet and income statement, along with additional financial information.<sup>198</sup> Such reports are due within 20 days following the end of the respective month.<sup>199</sup> On a quarterly basis, a Mexican nonbank SD also must provide the Mexican Commission with additional financial information regarding deferred income taxes, consolidation with respect to balance sheet and income statements, stockholders equity statements, and cash flow statements.<sup>200</sup>

A Mexican nonbank SD licensed to enter into derivatives transactions for its own account is also required to file with the Mexican Central Bank, during May of each year, a written communication issued by the Mexican nonbank SD's internal audit committee evidencing compliance in the performance of its derivatives transactions with each and all applicable legal provisions and, when required by the Mexican Central Bank, a Mexican nonbank SD also must provide the Mexican Central Bank with all the information related to the derivatives transactions performed by the firm.<sup>201</sup> Furthermore, a Mexican nonbank SD licensed to perform derivatives transactions is required to file a report with the Mexican Central Bank on a daily basis containing all the derivatives transactions performed by the Mexican nonbank SD.<sup>202</sup>

Based on its review of the Mexico Application and the relevant Mexican laws and regulations, the Commission preliminarily determined that, subject to the conditions specified in the 2022 Proposal and discussed below, the Mexican Financial Reporting Rules are comparable to the CFTC Financial Reporting Rules in purpose and effect.<sup>203</sup> The Commission noted that both rule sets provide the Mexican Commission and Mexican Central Bank, as applicable, and the Commission and NFA, respectively, with financial information to monitor a nonbank SD's compliance with capital requirements and to assess a nonbank SD's overall safety and soundness. Specifically, both the CFTC Financial Reporting Rules and the Mexican Financial Reporting Rules

<sup>181</sup> *Id.* and 17 CFR 23.105(e)(4).

<sup>182</sup> *Id.* and 17 CFR 23.105(f).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* and 17 CFR 23.105(l) and Schedule 1 of appendix B to subpart E of part 23 ("Schedule 1"). Schedule 1 includes a nonbank SD's holding of U.S. Treasury securities, U.S. government agency debt securities, foreign debt and equity securities, money market instruments, corporate obligations, spot commodities, and cleared and uncleared swaps, security-based swaps, and mixed swaps in addition to other position information.

<sup>185</sup> *Id.* and 17 CFR 23.105(l) and schedules 2, 3 and 4, respectively, of appendix B to subpart E of part 23.

<sup>186</sup> *Id.* and 17 CFR 23.105(k) and (l), and appendix B to subpart E of part 23.

<sup>187</sup> *Id.* and 17 CFR 23.105(m).

<sup>188</sup> *Id.*

<sup>189</sup> 17 CFR 23.105(k), (l), and (m).

<sup>190</sup> 17 CFR 23.105(e)(1).

<sup>191</sup> 2022 Proposal at 76392.

<sup>192</sup> *Id.* and Article 203 of the General Provisions.

<sup>193</sup> *Id.* and Article 180 of the General Provisions.

<sup>194</sup> *Id.* and Article 203 of the General Provisions.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* and Article 180 of the General Provisions.

<sup>197</sup> *Id.* and Article 203 of the General Provisions.

<sup>198</sup> *Id.* and Article 202 of the General Provisions.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* and Exhibit 9 of the General Provisions.

<sup>201</sup> *Id.* and Provision 3.1.3 of the Rule 4/2012 issued by the Mexican Central Bank.

<sup>202</sup> *Id.*, and Mexico Application at p. 19.

<sup>203</sup> 2022 Proposal at 76392.

require nonbank SDs to file statements of financial condition, statements of profit and loss, and statements of regulatory capital that collectively provide information for the Mexican Commission, CFTC, and NFA to assess a nonbank SD's overall ability to absorb decreases in the value of firm assets, absorb increases in the value of firm liabilities, and cover losses from business activities, including swap dealing activities, without the firm becoming insolvent.<sup>204</sup>

The proposed conditions in the proposed Comparability Order were intended to ensure that the Commission and NFA receive appropriate and timely financial information from Mexican nonbank SDs to monitor the firms' compliance with the Mexican Commission's capital requirements and to assess the firms' overall safety and soundness. The proposed conditions would require a Mexican nonbank SD to provide the Commission and NFA with copies of the monthly financial information, including a copy of its balance sheet and income statement, that the firm files with the Mexican Commission pursuant to Article 202 and Exhibit 9 of the General Provisions, as well as copies of the quarterly consolidated reports and annual audited financial reports that the firm files with the Mexican Commission pursuant to Article 203 of the General Provisions.<sup>205</sup> In addition, the Commission proposed a condition to require a Mexican nonbank SD to provide as part of its monthly filing, a statement of regulatory capital.<sup>206</sup> The proposed conditions would also require the annual audited and the unaudited monthly and quarterly financial reports to be translated into the English language.<sup>207</sup> The unaudited monthly and quarterly financial reports also must have balances converted from Mexican pesos to U.S. dollars.<sup>208</sup> Although the unaudited monthly and quarterly financial reports must have balances converted from Mexican pesos to U.S. dollars, the Commission stated that it would permit the annual audited financial report to be presented in either U.S. dollars or Mexican pesos to avoid potential negative impacts that such conversion may have on the firm's annual audit and the audit opinion expressed by the external auditor.<sup>209</sup> The proposed conditions also would require a Mexican nonbank SD to file

with the Commission and NFA the requisite information and financial reports within 15 business days of the earlier of the date the reports are filed with the Mexican Commission or the date the reports are required to be filed with the Mexican Commission.<sup>210</sup> The Commission stated that, in its preliminary view, the proposed filing dates provided sufficient time for the respective reports to be translated into the English language with balances converted from Mexican pesos to U.S. dollars, as applicable.<sup>211</sup>

In the Commission's preliminary view, its approach of requiring Mexican nonbank SDs to provide the Commission and NFA with copies of the monthly financial information, and the quarterly and annual financial reports, that the firms file with the Mexican Commission struck an appropriate balance of ensuring that the Commission receives the financial reporting necessary for the effective monitoring of the financial condition of the nonbank SDs, while also recognizing the propriety of providing substituted compliance based on the existing Mexican financial reporting requirements and regulatory structure.<sup>212</sup>

The Commission also proposed a condition to require Mexican nonbank SDs to file with the Commission and NFA, on a monthly basis, Schedule 1 showing the aggregate securities, commodities, and swap positions of the firm at fair market value as of the reporting date.<sup>213</sup> The Commission explained that Schedule 1 provides the Commission and NFA with detailed information regarding the fair market value of nonbank SD's financial positions as of the end of each month, including the firm's swaps positions, which allows the Commission and NFA to monitor the types of investments and other activities that the firm engages in and would assist the Commission and NFA in monitoring the safety and soundness of the firm.<sup>214</sup> The Commission proposed to require that Schedule 1 be filed by a Mexican nonbank SD along with the firm's monthly financial information filed pursuant to Article 202 and Exhibit 9 of the General Provisions.<sup>215</sup> The Commission also proposed to require that Schedule 1 be prepared in the

English language with balances reported in U.S. dollars.

The Commission also proposed a condition to require a Mexican nonbank SD to submit a statement by an authorized representative or representatives of the Mexican nonbank SD that, to the best knowledge and belief of the person(s), the information contained within the monthly financial information, the quarterly financial report, and the audited annual report, is true and correct, including as it relates to the translation of the reports into the English language and the conversion of balances to U.S. dollars.<sup>216</sup> The statement by an authorized representative or representatives of the Mexican nonbank SD was intended to be the equivalent of the oath or affirmation required of nonbank SDs under Commission Regulation 23.105(f),<sup>217</sup> to ensure that reports filed with the Commission and NFA were prepared and submitted by firm personnel with knowledge of the financial reporting of the firm who can attest to the accuracy of the reporting and translation.<sup>218</sup>

The Commission further proposed a condition that would require a Mexican nonbank SD to file a Margin Report with the Commission and NFA on a monthly basis.<sup>219</sup> The Commission noted that a Margin Report would assist the Commission and NFA in their assessment of the safety and soundness of the Mexican nonbank SDs by providing information regarding the firm's swaps book and the extent to which it has uncollateralized swap exposures to counterparties or has not met its margin obligations to swap counterparties. The Commission explained that this information, along with the list of custodians holding both the firm's and counterparties' swaps collateral, would assist with identifying potential financial impacts to the nonbank SD resulting from defaults on its swap transactions.<sup>220</sup>

<sup>216</sup> *Id.* and proposed Condition 12.

<sup>217</sup> 17 CFR 23.105(f). Commission Regulation 23.105(f) requires a nonbank SD to attach to each unaudited and audited financial report an oath or affirmation that to the best knowledge and belief of the individual making the affirmation the information contained in the financial report is true and correct. The individual making the oath or affirmation must be a duly authorized officer if the nonbank SD is a corporation, or one of the persons specified in the regulation for business organizations that are not corporations.

<sup>218</sup> 2022 Proposal at 76393.

<sup>219</sup> *Id.* and proposed Condition 13.

<sup>220</sup> 2022 Proposal at 76394.

<sup>204</sup> *Id.*

<sup>205</sup> 2022 Proposal at 76393.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* and proposed Conditions 9 and 10.

<sup>212</sup> *Id.* at 76393.

<sup>213</sup> *Id.* and proposed Condition 11.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

## 2. Comment Analysis and Final Determination

The Commission received comments regarding the comparability of financial reporting and specific comments addressing several of the financial reporting issues on which the Commission solicited feedback. Better Markets expressed a general disagreement with the Commission's preliminary finding of comparability, arguing that the number and variety of conditions regarding financial reporting are the most compelling evidence that the requirements are not comparable.<sup>221</sup> More specifically, Better Markets asserted that the 2022 Proposal did not provide a sufficient analysis supporting the Commission's preliminary finding of comparability between the various reports required under the Mexican Financial Reporting Rules and their U.S. counterparts.<sup>222</sup> In support of its statement, Better Markets noted that the Commission did not provide its basis for determining that the financial reports submitted by Mexican nonbank SDs would be useful to the Commission in monitoring the firms' financial condition.<sup>223</sup> In this regard, Better Markets stated that the Commission did not mention or describe whether the Mexican nonbank SDs must comply with the U.S. Generally Accepted Accounting Principles (GAAP), the International Financial Reporting Standards (IFRS), or another accounting standard adopted by Mexican authorities and that without knowing this important information, it is impossible to comment on whether the financial reports would be useful to the Commission.<sup>224</sup>

Better Markets also noted that the proposed comparability determination was conditioned on a Mexican nonbank SD submitting a statement by an authorized representative that, to the best knowledge and belief of the person, the information contained in reports submitted to the Commission is true and correct, in lieu of the oath or affirmation required by Commission Regulation 23.105(f).<sup>225</sup> Better Markets stated that there are material legal differences between a statement and the oath or affirmation required by the CFTC Financial Reporting Rules, further highlighting the differences between the regulatory reporting requirements of the U.S. and those of Mexico.<sup>226</sup>

As discussed in section I.E. above, the Commission does not believe that the inclusion of conditions in the Comparability Order demonstrates that the Mexican Financial Reporting Requirement are not comparable to CFTC Financial Reporting Requirements in achieving the overall objectives of ensuring the safety and soundness and effective monitoring of nonbank SDs. In addition, with respect to the comment related to the proposed Comparability Order's conditions regarding applicable accounting standards, the Commission notes that, as discussed in the 2022 Proposal, the quarterly and annual financial reports submitted by Mexican nonbank SDs will be prepared in accordance with the Accounting Criteria for Broker-Dealers.<sup>227</sup> For purposes of clarity, the Commission confirms that Mexican nonbank SDs may present the financial information required to be provided to the Commission and NFA under the final Comparability Order in accordance with generally accepted accounting principles that the Mexican nonbank SD uses to prepare general purpose financial statements in Mexico. This clarification is consistent with proposed Condition 8, which the Commission adopts subject to a minor modification in the final Comparability Order, requiring that the Mexican nonbank SD prepares and keeps current ledgers and other similar records "in accordance with accounting principles permitted by the Mexican Commission."<sup>228</sup> In taking the position that Mexican nonbank SDs may provide financial reporting prepared in accordance with the accounting standards applicable in their home jurisdiction, the Commission considered the nature of the financial reporting information that the Commission requires from nonbank SDs for purposes of monitoring their overall financial condition and compliance with capital requirements. Specifically, the Commission notes that calculating a firm's risk-weighted assets and capital ratio follows a rules-based approach consistent with the Basel standards and, consequently, the Commission does not

anticipate that a variation in the applicable accounting standards would materially impact this calculation.<sup>229</sup> In this regard, the Commission notes that Mexican nonbank SDs currently submit financial reports, including a statement of financial condition and a statement of regulatory capital, pursuant to CFTC Staff Letter 22-10.<sup>230</sup> The reports provide the Commission with appropriate information to assess the

<sup>229</sup> Furthermore, the Commission's approach to permitting Mexican nonbank SDs to maintain financial books and records, and to file financial reports and other financial information, prepared in accordance with local accounting standards is consistent with the SEC's final comparability determinations for non-U.S. SBSBs. See *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*, 86 FR 59797 (Oct. 28, 2021) at 59812 and *Order Specifying the Manner and Format of Filing Unaudited Financial and Operational Information by Security-Based Swap Dealers and Major Security-Based Swap Participants that are not U.S. Persons and are Relying on Substituted Compliance with Respect to Rule 18a-7*, 86 FR 59208 (Oct. 26, 2021) ("SEC Manner and Format Order") at 59219. Specifically, the SEC stated that the use of local reporting requirements will avoid non-U.S. SBSBs "having to perform and present two Basel capital calculations (one pursuant to local requirements and one pursuant to U.S. requirements)." SEC Manner and Format Order at 59219. The SEC noted, in this regard, that the Basel standards are international standards that have been adopted in the U.S. and in jurisdictions where substituted compliance is available for capital under the SEC comparability determinations and that, therefore, requirements for how firms calculate capital pursuant to the Basel standards generally should be similar. *Id.* In addition, if a Mexican nonbank SD becomes registered with the SEC as an SBSB and is required to file an unaudited SEC Form X-17A-5 Part II ("FOCUS Report"), the Commission's approach to permitting Mexican nonbank SDs to maintain financial books and records, and to file financial information, prepared in accordance with local accounting standards would facilitate financial reporting by such dually-registered entity. In such case, dually registered entities would not have to perform multiple calculations under different accounting standards or submit two different FOCUS Reports.

<sup>230</sup> CFTC Staff Letter No. 22-10, *Extension of Time-Limited No-Action Position for Foreign Based Nonbank Swap Dealers domiciled in Japan, Mexico, the United Kingdom, and the European Union*, issued by MPD on August 17, 2022. CFTC Staff Letter No. 22-10, which extended the expiration of CFTC Letter 21-20, provides that MPD would not recommend an enforcement action to the Commission if a non-U.S. nonbank SD covered by the letter, subject to certain conditions, complied with their respective home-country capital and financial reporting requirements in lieu of the Commission's capital and financial reporting requirements set forth in Commission Regulations 23.100 through 23.106, pending the Commission's determination of whether the capital and financial reporting requirements of certain foreign jurisdictions are comparable to the Commission's corresponding requirements.

<sup>227</sup> See 2022 Proposal at 76392.

<sup>228</sup> 2022 Proposal at 76399. Proposed Condition 8 stated that Mexican nonbank SDs must prepare and keep current ledgers and other similar records "in accordance with accounting principles required by the Mexican Commission." To promote consistency across the Comparability Determinations the Commission is adopting with respect to several other jurisdictions and to reflect the fact that certain jurisdictions may not issue a formal approval of the accounting standards used by nonbank SDs, the Commission is replacing the adjective "required" with the adjective "permitted" to refer to the accounting standards to be used by Mexican nonbank SDs.

<sup>221</sup> Better Markets Letter at p. 12.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

financial and operational condition of Mexican nonbank SDs, as well as the firms' compliance with the capital ratios imposed on Mexican nonbank SDs under the Mexican Capital Rules.

With respect to the comment related to the requirement for Mexican nonbank SDs to submit a statement from an authorized representative, the Commission notes, for completeness, that the proposed condition requires that an authorized representative of the Mexican nonbank SD provide a statement that, to the best of the knowledge and belief of the representative, the information contained in the financial reports filed with the Commission and NFA is true and correct, including the applicable translation of the reports to the English language and the conversion of balances to U.S. dollars. The proposed condition was based on current Commission Regulation 23.105(f), which provides that a nonbank SD must attach to each unaudited and annual audited financial report filed with the Commission and NFA an oath or affirmation that to the best knowledge and belief of the individual making the oath or affirmation the information in the financial reports is true and correct. Similar to the intent of Commission Regulation 23.105(f), the purpose of the proposed condition is to obtain a formal attestation from a representative with the appropriate knowledge and authority that the information provided in the requisite financial reports is accurate and properly translated. The Commission's choice of language in using the term "statement" was not intended to make a legal distinction between this term and the terms "oath" or "affirmation," but rather to select a generic term that is universally understood across jurisdictions to reflect the above-referenced purpose. In practice, the Commission does not believe that there is a material legal difference between the language of the proposed condition and the required oath or affirmation required under Commission Regulation 23.105(f). Instead, the Commission is of the view that the proposed condition would have the same legal effect as Commission Regulation 23.105(f) of providing the Commission with a stronger basis to take legal action if a Mexican nonbank SD files erroneous information.

Finally, the Associations addressed the Commission's request for comment on the compliance dates for the reporting conditions that the proposed Comparability Order would impose on Mexican nonbank SDs.<sup>231</sup> The

Associations requested that the Commission set the compliance date at least six months following the issue date of the final Comparability Order to allow Mexican nonbank SDs to adequately prepare for compliance with the reporting conditions imposed by the Comparability Order.<sup>232</sup>

The Commission believes that granting an additional period of time to allow Mexican nonbank SDs to develop and implement the necessary systems and processes for compliance with the Comparability Order is appropriate with respect to new reporting obligations imposed on Mexican nonbank SDs under the final Order. For other reporting obligations, for which a process already exists, such as the reports that Mexican nonbank SDs currently submit to the Commission and NFA pursuant to CFTC Staff Letter 22–10 and/or prepare pursuant to the Mexican Financial Reporting Rules, additional time for compliance does not appear necessary. Accordingly, the Commission is setting a compliance date of 180 calendar days after publication of the final Comparability Order in the **Federal Register** for Mexican nonbank SDs to file Schedule 1 and the Margin Report with the Commission and NFA under Conditions 11 and 13, respectively.

In an effort to align, where appropriate, the filing deadlines for financial reporting obligations imposed by the Comparability Order on Mexican nonbank SDs with the filing deadlines that the Commission proposed for nonbank SDs domiciled in several other jurisdictions, the Commission is also setting the filing deadline in final Condition 9 for the monthly financial information to 35 calendar days after the end of each month.<sup>233</sup> The filing deadline will apply to the monthly financial information filed with the Mexican Commission pursuant to Article 202 and Exhibit 9 of the General Provisions Applicable to Broker-Dealers, as well as to Schedule 1 and the Margin Report, which pursuant to final

<sup>232</sup> *Id.*

<sup>233</sup> See *Notice of Proposed Order and Request for Comment on an Application for a Capital Comparability Determination Submitted on Behalf of Nonbank Swap Dealers Domiciled in the French Republic and Federal Republic of Germany and Subject to Capital and Financial Reporting Requirements of the European Union*, 88 FR 41774 (June 27, 2023) and *Notice of Proposed Order and Request for Comment on an Application for a Capital Comparability Determination Submitted on Behalf of Nonbank Swap Dealers Subject to Capital and Financial Reporting Requirements of the United Kingdom and Regulated by the United Kingdom Prudential Regulation Authority*, 89 FR 8026 (Feb. 5, 2024).

Conditions 11 and 13 must be filed with the monthly financial information.

In summary, the Commission adopts the final Comparability Order and conditions substantially as proposed with respect to the comparability of the CFTC Financial Reporting Rules and Mexican Financial Reporting Requirements. The Commission also specifies, in final Conditions 9, 11, and 13, that the conversion of balances to U.S. dollars must be done using a commercially reasonable and observable Mexican peso/U.S. dollar spot rate as of the date of the respective report. Finally, the Commission grants an additional compliance period for the new reporting obligations imposed on Mexican nonbank SDs under the final Order set forth below.

#### E. Notice Requirements

##### 1. Preliminary Determination

The Commission noted in the 2022 Proposal that the CFTC Financial Reporting Rules require nonbank SDs to provide the Commission and NFA with written notice of certain defined events.<sup>234</sup> Commission Regulation 23.105(c) requires a nonbank SD to file written notice with the Commission and NFA of the following events: (i) the nonbank SD's regulatory capital is less than the minimum amount required; (ii) the nonbank SD's regulatory capital is less than 120 percent of the minimum amount required; (iii) the nonbank SD fails to make or to keep current required financial books and records; (iv) the nonbank SD experiences a reduction in the level of its excess regulatory capital of 30 percent or more from the amount last reported in a financial report filed with the Commission; (v) the nonbank SD plans to distribute capital to equity holders in an amount in excess of 30 percent of the firm's excess regulatory capital; (vi) the nonbank SD fails to post to, or collect from, a counterparty (or group of counterparties under common ownership or control) required initial and variation margin a counterparty, and the aggregate amount of such margin equals or exceeds 25 percent of the nonbank SD's minimum capital requirement; (vii) the nonbank SD fails to post to, or collect from, swap counterparties required initial and variation margin, and the aggregate amount of such margin equals or exceeds 50 percent of the nonbank SD's minimum capital requirement; and (viii) the nonbank SD is registered with the SEC as an SBSB and files a notice with the SEC under applicable SEC Rules.<sup>235</sup>

<sup>234</sup> 2022 Proposal at 76395 and 17 CFR 23.105(c).

<sup>235</sup> 17 CFR 23.105(c).

<sup>231</sup> Associations Letter at p. 4.

The notices are part of the Commission's overall program of helping to ensure the safety and soundness of nonbank SDs and the swaps markets in general.<sup>236</sup> Notices provide the Commission and NFA with an opportunity to assess whether there is an actual or potential financial and/or operational issue at a nonbank SD. In situations where there is an underlying issue, Commission and NFA staff engage with the nonbank SD in an effort to minimize potential adverse impacts on the firm, swap counterparties, and the larger swaps market.<sup>237</sup>

With respect to Mexican nonbank SDs, the Commission noted that the Mexican Financial Reporting Rules do not include explicit, predefined notice provisions that require the firms to file prompt notice with the Mexican Commission, or other relevant Mexican regulatory authority, in a manner that is comparable to the notice provisions set forth in Commission Regulation 23.105(c).<sup>238</sup> Therefore, the Commission proposed to condition the Comparability Order to require Mexican nonbank SDs to file certain notices mandated by Commission Regulation 23.105(c) with the Commission and NFA.<sup>239</sup> Specifically, the Commission proposed to require a Mexican nonbank SD to file notice with the Commission and NFA, within the timeframes set forth in the proposed conditions, if the firm: (i) fails to make or keep current the books and records required by the Mexican Commission; (ii) is informed by the Mexican Commission that the firm is not in compliance with any component of the Mexican Capital Rules or Mexican Financial Reporting Rules; (iii) maintains regulatory capital at a level that is below 120 percent of the minimum capital requirement set by the Mexican Capital Rules; (iv) experiences a 30 percent or more decrease in its excess regulatory capital as compared to the excess capital last reported in its financial forms filed with the Mexican Commission pursuant to Article 202 and Exhibit 9 of the General Provisions; (v) fails to post or collect initial margin or variation margin required under Mexican law and/or regulations or CFTC margin rules to be exchanged for uncleared swaps and non-cleared security-based swaps in amounts that exceed defined thresholds; and (vi) has received the approval of the Mexican Commission to a change in the firm's

fiscal year end date.<sup>240</sup> The notices would have to be translated into English prior to being filed with the Commission and NFA.<sup>241</sup>

The Commission proposed these conditions so that it and NFA would be alerted to the occurrence of any of the defined events in a prompt manner, which would allow the Commission and NFA to communicate with the impacted Mexican nonbank SD to assess the seriousness of the matter and the effectiveness of any actions that the Mexican nonbank SD may have taken to remediate the matter. As previously noted, the notices provide the Commission with "early warning" of potential adverse financial and operational issues at a nonbank SD. The receipt of "early warning" notices are an important component of the Commission's and NFA's programs for effectively overseeing the safety and soundness of nonbank SDs.

## 2. Comment Analysis and Final Determination

Better Markets stated that the proposed notice provisions in the proposed Comparability Determination and proposed Comparability Order represent regulatory gaps between the Mexican Financial Reporting Rules and the CFTC Financial Reporting Rules.<sup>242</sup> The Commission recognized that the Mexican Financial Reporting Rules do not include regulatory notices in a manner comparable to the CFTC Financial Reporting Rules. To address the lack of regulatory notices under the Mexican Financial Reporting Rules, the Commission included proposed conditions in the proposed Comparability Order that are consistent with the notice provisions imposed by the Commission on nonbank SDs under Commission Regulation 23.105(c). The proposed notice conditions are intended to ensure that the Commission and NFA receive necessary information to conduct ongoing monitoring of Mexican nonbank SDs for compliance with

<sup>240</sup> The Commission noted that it was aware of the Mexican Commission's intent to issue final rules addressing the margin requirements for uncleared swaps. See 2022 Proposal at 76396 (n. 237). As further noted in the 2022 Proposal, however, Mexican nonbank SDs are currently subject to the CFTC margin requirements for uncleared swap transactions as set forth in Commission Regulation 23.160 for cross-border transactions. *Id.* Commission Regulation 23.160 governs the cross-border application of the CFTC margin requirements for uncleared swaps depending on the category of entities involved in the transactions and the availability of substituted compliance.

<sup>241</sup> *Id.* at 76396.

<sup>242</sup> Better Markets Letter at p. 12.

relevant capital and financial reporting requirements.

As discussed in section I.E. above, in issuing a Comparability Order, the Commission is not ceding its supervisory and enforcement authorities. The Comparability Order permits Mexican nonbank SDs to satisfy the Commission's capital and financial reporting requirements by complying with certain laws and/or regulations of Mexico that have been found to be comparable to the Commission's laws and/or regulations in purpose and effect. The Commission and NFA, however, have a continuing obligation to conduct ongoing oversight, including potential examination, of Mexican nonbank SDs to ensure compliance with the Comparability Order, including its conditions. To that effect, the notice conditions set forth in the Comparability Order provide the Commission and NFA with information necessary to monitor for Mexican nonbank SDs for compliance with the Comparability Order and to evaluate the firms' operational and financial conditions.

Furthermore, to the extent that the notice conditions impose new obligations on Mexican nonbank SDs beyond what is currently in Mexican laws or regulations, the imposition of such conditions is consistent with Commission Regulation 23.106 and the Commission's established policy with regard to comparability determinations. As discussed in section I.E. above, the Commission contemplated that even in circumstances where the Commission finds two regulatory regimes comparable, the Commission may impose requirements on entities relying on substituted compliance where the Commission determines that the home jurisdiction's regime lacks comparable and comprehensive regulation on a specific issue.<sup>243</sup> The Commission's authority to impose such conditions is also evident from the language of Commission Regulation 23.106(a)(5), which states that the Commission may impose "any terms and conditions it deems appropriate, including certain capital adequacy and financial reporting requirements [on SDs]." <sup>244</sup> Therefore, the Commission believes that the imposition of conditions in the Comparability Order to require Mexican nonbank SDs to file notices of certain events with the Commission and NFA in a manner consistent with requirements imposed by the Commission on nonbank SDs under Commission Regulation 23.105(c)

<sup>243</sup> Guidance at 45343.

<sup>244</sup> 17 CFR 23.106(5).

<sup>236</sup> *Id.*

<sup>237</sup> See 2022 Proposal at 76395.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

appropriately addresses the fact that the Mexican Financial Reporting Rules do not include comparable regulatory requirements.

The Associations recommended in their joint comment letter that with respect to the proposed conditions to require that Mexican nonbank SDs provide notice if the firm experiences a 30 percent or more decrease in excess regulatory capital or if the firm fails to make or keep current books and records, that the Commission require a Mexican nonbank SD to file a notice within a defined period of time of when the firm “knows” or becomes “aware of” the reportable event instead of when the firm “experiences” or “should have known” of the reportable event.<sup>245</sup> In support of the recommendation, the Associations noted that it was practically challenging for a firm to submit a notification prior to the discovery of the relevant failure.<sup>246</sup>

With regard to the proposed requirement that a Mexican nonbank SD notify the Commission and NFA if the firm “experiences” a 30 percent or more decrease in its excess regulatory capital, the Commission believes that it is appropriate to impose the condition as proposed to ensure consistency with Commission Regulation 23.105(c)(4).<sup>247</sup> In this regard, a nonbank SD will be expected to maintain diligent recordkeeping allowing it to become aware of substantial reductions in capital in a timely manner and to establish procedures for the timely provision of the requisite notification. As to the proposed requirement in Condition 17 (renumbered Condition 19 in the final Comparability Order) that a Mexican nonbank SD notify the Commission and NFA within 24 hours of when it “knows or should have known that it has failed to make or keep current the books and records required by the Mexican Commission,” the Commission will align the language of the condition with the timing standard of Commission Regulation 23.105(c)(3), while also granting additional time for the notice to be translated into English. As such, the Commission will require the notice to be provided within 24 hours “if [the firm] fails to make or keep” current the books and records. Although the Commission is adjusting

the language in Condition 19 of the final Comparability Order, the Commission emphasizes that this condition imposes a requirement to provide a prompt notice upon the occurrence of the reportable event. Maintaining current books and records of all financial transactions is a fundamental recordkeeping requirement for a registered nonbank SD, and is essential to provide management with the information necessary to ensure that transactions are timely and accurately reported and that the firm complies with capital and other regulatory requirements. The Commission believes that it is necessary for a nonbank SD to maintain internal controls and procedures to affirmatively monitor that books and records are being maintained on a current basis. For further clarification of this condition, the Commission confirms that the notice requirement will apply with respect to books and records addressing the Mexican nonbank SD’s financial condition and financial reporting requirements, and has revised the condition to so specify.

Separately, to promote consistency across the Comparability Determinations the Commission is adopting with respect to other jurisdictions, the Commission will revise the proposed early warning notice condition requiring a Mexican nonbank SD to provide a notice to the Commission and NFA if its regulatory capital falls below 120 percent of the minimum capital requirement.<sup>248</sup> Instead of requiring a notice if the Mexican nonbank SD’s capital falls below 120 percent of the minimum capital requirement, the Commission will require that the Mexican nonbank SD provide a notice to the Commission and NFA if it breaches its capital conservation buffer requirement.<sup>249</sup> The notice must be prepared in the English language. The Commission believes that this condition, combined with the condition requiring that a Mexican nonbank SD provide notice to the Commission and NFA if it experiences 30 percent or more decrease in its excess regulatory capital, would provide a timely opportunity to the Commission and NFA to initiate conversations and fact finding with a Mexican nonbank SD that may be experiencing operational or financial issues that may adversely

impact the firm’s ability to meet its obligations to market participants, including customers or swap counterparties. Given that Mexican nonbank SDs are subject to the requirement to maintain a capital conservation buffer pursuant to the Mexican Capital Rules, the condition requiring notice in case of a breach of the buffer requirement will not have a material operational impact on Mexican nonbank SDs.

The Associations also requested that the Commission set the compliance date at least six months following the issue date of the Comparability Order to adequately prepare for compliance with the notice reporting obligations imposed by the Comparability Order.<sup>250</sup> Similar to its position with regard to the financial reporting obligations, the Commission believes that it is appropriate to grant an additional period of time to allow Mexican nonbank SDs to establish and implement the necessary systems and processes to comply with the newly imposed notice reporting obligations that require monitoring of thresholds for which Mexican nonbank SDs do not have an established process. Accordingly, the Commission is setting a compliance date of 180 calendar days after publication of the final Comparability Order in the **Federal Register** with respect to the notice obligations under final Conditions 18 and 20 of the Comparability Order. Given the nature of the remaining notice obligation, the Commission believes that Mexican nonbank SDs should be in a position to comply with all other notice obligations, including those requiring Mexican nonbanks SDs to provide notice to the Commission and NFA if they fail to make or keep current financial books and records, or if they fail to maintain regulatory capital equal to, or in excess of, the U.S. dollar equivalent of \$20 million, immediately upon effectiveness of the Comparability Order.

With regard to Condition 20, which requires a Mexican nonbank SD to provide notice if it fails to post or collect initial or variation margin exceeding certain thresholds, the Commission notes, for clarity, that in proposing a notice condition based on thresholds of “required” margin, the Commission’s intent was to set the notice trigger by reference to margin amounts that are legally required to be exchanged under the applicable margin requirements. To determine the applicable margin requirements, the Commission will consider the

<sup>245</sup> Associations Letter at p. 4.

<sup>246</sup> *Id.*

<sup>247</sup> 17 CFR 23.105(c)(4). For clarity, by “excess regulatory capital,” the Commission refers to the capital ratio by which the firm’s capital exceeds the core capital ratio requirement of 8 percent of the firm’s risk-weighted assets. For instance, if a firm maintains a capital ratio of 20 percent, its excess regulatory capital would be 12 percent. In this example, 30 percent of the excess regulatory capital would equal 3.6 percent.

<sup>248</sup> 17 CFR 23.105(c)(2).

<sup>249</sup> As noted in Section I.I.C.2.b., Mexican nonbank SDs are required to maintain a capital conservation buffer of 2.5 percent of the Mexican nonbank SD’s risk-weighted assets that must be met with fundamental capital. Articles 172 and 173 of the Law and Articles 162 and 162 Bis of the General Provisions.

<sup>250</sup> Associations Letter at p. 4.

framework set forth in Commission Regulation 23.160.<sup>251</sup> To the extent Mexican nonbank SDs intending to rely on the Comparability Order have inquiries regarding the scope of uncleared swap margin transactions to be monitored for purposes of complying with final Condition 20, MPD will discuss such inquiries with the Mexican nonbank SD during the confirmation process referenced in final Condition 6 of the Comparability Order.

The Commission did not receive any comments with respect to the following proposed notice conditions: (i) the Mexican nonbank SD files notice with the Commission and NFA within 24 hours of being informed by the Mexican Commission that the firm is not in compliance with any component of the Mexican Capital Rules or Mexican Financial Reporting Rules (proposed Condition 14); (ii) the Mexican nonbank SD provides notice to the Commission and NFA if it initiates the process of seeking the approval of the Mexican Commission to use internal models to compute market risk and/or credit risk (proposed Condition 7); or (iii) the Mexican nonbank SD files notice of the Mexican Commission approving a change in the firm's fiscal year-end date, which must be filed with the Commission and NFA at least 15 business days prior to the effective date of the change (proposed Condition 19).

The Commission, having considered the 2022 Proposal, is adopting the above conditions as proposed.<sup>252</sup> The Commission is also revising the final conditions by adding Condition 17 to the Comparability Order, which requires a Mexican nonbank SD to file notice with the Commission and NFA within 24 hours if the firm fails to maintain regulatory capital in the form of fundamental capital, as defined by Article 162 and Article 162 Bis of the General Provisions, equal to or in excess of the equivalent of \$20 million. The requirement to provide such notice will impose a consistent condition and obligation on non-U.S. nonbank SDs across the non-U.S. jurisdictions that are the subject to Commission Comparability Orders, and will provide the Commission and NFA with information to monitor the financial condition of non-bank SDs.

The Commission is also adopting a compliance date for certain notice requirements as discussed above in the final Comparability Order.

## F. Supervision and Enforcement

### 1. Preliminary Determination

The 2022 Proposal contained a discussion of the Commission's and NFA's ongoing supervision of nonbank SDs to assess their compliance with the CEA, Commission regulations, and NFA rules by reviewing financial reports, risk exposure reports, and other filings submitted by nonbank SDs with the Commission and NFA.<sup>253</sup> As discussed, the Commission and NFA also conduct periodic examinations as part of their supervision of nonbank SDs, including routine on-site examinations of nonbank SDs' books, records, and operations to ensure compliance with CFTC and NFA requirements.<sup>254</sup>

The Commission also referred to the financial reports and notices required under the CFTC Financial Reporting Rules, noting that the reports and notices provide the Commission and NFA with information necessary to ensure the nonbank SD's compliance with minimum capital requirements; assess the firm's overall safety and soundness and ability to meet its financial obligations to customers, counterparties, creditors, and general market participants; and identify potential issues at a nonbank SD that may impact the firm's ability to maintain compliance with the CEA, Commission regulations, and NFA requirements.<sup>255</sup> As discussed, the Commission and NFA also have the authority to require a nonbank SD to provide any additional financial and/or operational information as the Commission or NFA may specify to monitor the safety and soundness of the firm.<sup>256</sup>

The Commission further noted that it has authority to take disciplinary actions against a nonbank SD for failing to comply with the CEA and Commission regulations. In this regard, section 4b-1(a) of the CEA<sup>257</sup> provides the Commission with exclusive authority to enforce the capital

requirements imposed on nonbank SDs adopted under section 4s(e) of the CEA.<sup>258</sup>

With respect to the Mexican authorities' power to supervise Mexican nonbank SDs and to carry out enforcement actions, the Commission noted that the Mexican Commission has supervisory, inspection, and surveillance powers, which include the authority to require a Mexican nonbank SD to provide the Mexican Commission with all necessary information and documentation to verify the Mexican nonbank SD's compliance with the Mexican Law and General Provisions.<sup>259</sup> In addition, as noted in section II.D.1. above, the Mexican Central Bank requires a Mexican nonbank SD licensed to enter into derivatives transactions for its own account to file, with the Mexican Central Bank, an annual written communication issued by the Mexican nonbank SD's internal audit committee evidencing compliance in the performance of its derivatives transactions with each and all applicable legal provisions.<sup>260</sup> When required by the Mexican Central Bank, a Mexican nonbank SD also must provide the Mexican Central Bank with all the information related to the derivatives transactions performed by the firm.<sup>261</sup> Furthermore, the Mexican Commission also has the authority to require a Mexican nonbank SD to adopt any necessary measures to correct irregular activities, and the Mexican Commission has the authority to conduct all necessary on-site inspections of a Mexican nonbank SD.<sup>262</sup> The Commission also explained that the Mexican Commission uses information provided through the mandatory financial reporting and annual stress test assessments that Mexican nonbank SDs are required to conduct, to monitor Mexican nonbank SDs' compliance with the Mexican

<sup>258</sup> 7 U.S.C. 6s(e).

<sup>259</sup> 2022 Proposal at 76396 and Article 350 of the Law, Articles 5 and 19 of the Mexican Commission Law and the Supervision Regulations of the Mexican Commission.

<sup>260</sup> Provision 3.1.3. of the Rule 4/2012 issued by the Mexican Central Bank. *See also* 2022 Proposal at 76392.

<sup>261</sup> *Id.*

<sup>262</sup> Pursuant to Article 358 of the Law, the Mexican Commission and the Mexican Central Bank are authorized to provide foreign financial authorities with information that they deem appropriate within the scope of their competence, such as documents, records, declarations and other evidence that the authorities have in their possession by virtue of having obtained the information in the exercise of their powers and duties, provided that there is an agreement with the relevant foreign financial authorities for the exchange of information, in consideration of the principle of reciprocity. *See* 2022 Proposal at 76396.

<sup>253</sup> 2022 Proposal at 76396.

<sup>254</sup> Section 17(p)(2) of the CEA (7 U.S.C. 21(p)(2)) requires NFA as a registered futures association to establish minimum capital and financial requirements for non-bank SDs and to implement a program to audit and enforce compliance with such requirements. Section 17(p)(2) further provides that NFA's capital and financial requirements may not be less stringent than the capital and financial requirements imposed by the Commission. *See* 2022 Proposal at 76396.

<sup>255</sup> *See* 2022 Proposal at 76396.

<sup>256</sup> 17 CFR 23.105(h). *See also* 2022 Proposal at 76396. Regulation 23.105(h) provides that the Commission or NFA may, by written notice, require a nonbank SD to file financial or operational information on a daily basis or other basis with the Commission and/or NFA.

<sup>257</sup> 7 U.S.C. 6b-1(a).

<sup>251</sup> 17 CFR 23.160.

<sup>252</sup> The Commission is renumbering proposed Conditions 14, 18, and 19 as Conditions 15, 20, and 21, respectively, in the final Comparability Order.



Capital Rules and to assess the firm's overall safety, soundness, and ability to meet financial obligations to customers, counterparties, and creditors.<sup>263</sup> As discussed in the proposed Comparability Determination, the Mexican Commission also uses financial reporting from Mexican nonbank SDs as a component of its risk-based methodology in setting the frequency and scope of its examinations of Mexican nonbank SDs.<sup>264</sup> The Mexican Commission generally conducts an examination, including on-site visits, of each firm at least once every two years. The Mexican Commission will also conduct an examination of a firm, including an on-site visit, to the extent that its daily, routine surveillance indicates a need for an immediate review.<sup>265</sup>

As noted in the proposed Comparability Determination, the Mexican Commission may also impose fines against Mexican nonbank SDs for failing to comply with relevant Mexican laws and regulations<sup>266</sup> and may order a Mexican nonbank SD that fails to comply with the applicable regulatory capital ratios, including the 2.5 percent common equity tier 1 capital buffer, to take corrective measures.<sup>267</sup> The Mexican Commission may also revoke a Mexican nonbank SD's license to operate as a broker-dealer if the firm fails to comply with the above

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* Fines may range from approximately \$130,000 to \$432,000 for failing to maintain sufficient regulatory capital in relation to the risks in the Mexican nonbank SD's operations and from approximately \$43,000 to \$432,000 if a Mexican nonbank SD for failing to comply with applicable information or documentation requirements made by the Mexican Commission or to provide the required periodic informational filings. Article 392 paragraphs I, subparagraph (a) and paragraph III, subparagraph (v), of the Law.

<sup>267</sup> Corrective measures may include the following: (i) a prohibition on entering into transactions whose execution would cause a total capital ratio to be less than 8 percent of the risk-weighted assets; (ii) a requirement that the Mexican nonbank SD submit for the approval of the Mexican Commission a recovery capital plan; (iii) a suspension of the payment of dividends; (iv) a suspension of the programs of acquisition of shares of the capital stock of the Mexican nonbank SD; (v) a suspension of payments of compensation, extraordinary bonuses, or other remuneration in addition to the salary of the chief executive officer ("CEO") and officials of the two hierarchical levels below the CEO, as well as a requirement to refrain from granting new compensation in the future for the CEO and officials; (vi) an engagement with external auditors or other specialized third parties to carry out special audits on specific issues; and (vii) a limitation on the execution of new transactions that may cause an increase in risk-weighted assets and/or cause greater impairment in the Mexican nonbank SD's regulatory capital ratios. See 2022 Proposal at 76396 and Article 153 of the Law.

corrective measures or if the firm reports losses that reduce its capital to a level below the minimum required.<sup>268</sup>

Based on its review of the Application and its analysis of the relevant laws and regulations, the Commission preliminarily found that the Mexican Commission has the necessary powers to supervise, investigate, and discipline entities for compliance with its capital, financial and reporting requirements, and to detect and deter violations of, and ensure compliance with, the applicable capital and financial reporting requirements in Mexico.<sup>269</sup> Furthermore, the Commission also noted that it retains supervision, examination, and enforcement authority over Mexican nonbank SDs that are covered by a Comparability Order.<sup>270</sup> Specifically, the Commission noted that a non-U.S. nonbank SD that operates under substituted compliance remains subject to the Commission's examination authority and may be subject to a Commission enforcement action if the firm fails to comply with a foreign jurisdiction's capital adequacy or financial reporting requirements.<sup>271</sup> The ability of the Commission to exercise its enforcement authority over a Mexican nonbank SD is not conditioned upon a finding by the Mexican Commission of a violation of the Mexican Capital Rules or Mexican Financial Reporting Rules. In addition, as each Mexican nonbank SDs is a member of NFA, the firm is subject to NFA membership rules, examination authority, and disciplinary process.<sup>272</sup>

## 2. Comment Analysis and Final Determination

In response to the request for comment, Better Markets asserted that while the 2022 Proposal states that the Mexican Commission has the necessary powers to supervise, investigate, and discipline Mexican nonbank SDs for compliance with applicable capital, financial, and reporting requirements, the Commission does not provide details regarding the demonstrated past effectiveness of the Mexican Commission's supervision and enforcement of Mexican nonbank SDs.<sup>273</sup> The Commission does not believe that Commission Regulation

<sup>268</sup> *Id.*

<sup>269</sup> 2022 Proposal at 76397–76398.

<sup>270</sup> 2022 Proposal at 76377.

<sup>271</sup> *Id.* See also, 17 CFR 23.106(a)(4)(ii), which provides that all nonbank SDs, regardless of whether they rely on a Comparability Order or Comparability Determination, remain subject to the Commission's examination and enforcement authority.

<sup>272</sup> 7 U.S.C. 21(p).

<sup>273</sup> Better Markets Letter at p. 13, citing 2022 Proposal at 76397.

23.106 requires the Commission to perform an assessment of the historical effectiveness of the foreign jurisdictions' supervision and enforcement programs.

The Commission's evaluation of the laws and regulations granting the Mexican authorities' supervisory and enforcement authority, as discussed in section II.F.1. above, is consistent with the standard of review articulated in Commission Regulation 23.106(a)(3). Specifically, Commission Regulation 23.106(a)(3) provides that the Commission may consider all relevant factors in performing the comparability assessment, including the ability of the relevant regulatory authority to supervise and enforce compliance with the relevant foreign jurisdiction's capital adequacy and financial reporting requirements.

The Commission's assessment of the Mexican Commission's supervisory program included an evaluation of the Mexican Commission's ability to supervise Mexican nonbank SDs based on current Mexican laws and regulations, as discussed in section II.F.1. above. This evaluation included an assessment of the financial reporting that Mexican nonbank SDs are required to provide to the Mexican Commission, the authority of the Mexican Commission to conduct examinations, including onsite inspections of Mexican nonbank SDs, and the authority of the Mexican Commission to impose sanctions or take other action to address noncompliance with applicable laws and regulations. Based upon its evaluation, the Commission preliminarily determined that Mexican laws and regulations are comparable in purpose and effect to the CEA and Commission regulations, and that the Mexican Commission has appropriate authority to supervise Mexican nonbank SDs for compliance with applicable Mexican Capital Rules and Mexican Financial Reporting Rules. The Commission further determined, based on applicable Mexican laws and regulations, that the Mexican Commission has the ability to sanction Mexican nonbank SDs for failing to comply with regulatory requirements. Specifically, as discussed in section II.F.1. above, the Mexican Commission has the authority to impose fines<sup>274</sup> and may order a Mexican nonbank SD that fails to comply with the applicable regulatory capital ratios to take corrective measures, including the suspension of payment of compensation to senior officials and a limitation on the execution of new transactions that

<sup>274</sup> Article 392 paragraphs I, subparagraph (a) and paragraph III, subparagraph (v), of the Law.

may cause an increase in risk-weighted assets.<sup>275</sup> The Mexican Commission may also revoke a Mexican nonbank SD's license to operate as a broker-dealer if the firm fails to comply with the above corrective measures or if the firm reports losses that reduce its capital to a level below the minimum required.<sup>276</sup>

Better Markets further stated that an information sharing agreement is necessary for the Commission to communicate and consult with the Mexican Commission to facilitate cooperation and information sharing regarding the supervision of Mexican nonbank SDs.<sup>277</sup> Better Markets further stated that the proposed Comparability Order does not contain a draft of the terms and conditions of an information sharing agreement, include a discussion of the timing of entering into an information sharing agreement, or condition the Comparability Order on the Commission entering into an information sharing agreement with the Mexican Commission.<sup>278</sup> Better Markets further asserted that given that enforcement is a critical component of any comparability determination, any comparability determination must be conditioned upon first executing an appropriate information sharing agreement.<sup>279</sup>

The substituted compliance framework set forth in Commission Regulation 23.106 allows a Mexican nonbank SD to satisfy the Commission's capital and financial reporting rules by complying with Mexican capital and financial reporting rules that the Commission has found comparable in purpose and effect and has specified in the Comparability Order, subject to conditions that are also specified in the Comparability Order. Commission Regulation 23.106 does not precondition the Commission's ability to issue a Comparability Order on the Commission and the authority or authorities in the relevant foreign jurisdiction entering into a formal MOU or similar arrangement.

As discussed in this Comparability Determination, by issuing a Comparability Order, the Commission is not ceding its supervision and enforcement authorities. Mexican nonbank SDs that are subject to a Comparability Order are registered with the Commission as SDs and are members of NFA, and, as such, are subject to the CEA, Commission

regulations, and NFA membership rules and requirements. Mexican nonbank SDs covered by a Comparability Order also remain subject to the Commission's examination and enforcement authority with respect to all elements of the CEA and Commission regulations, including capital and financial reporting.<sup>280</sup> In this regard, Mexican nonbank SDs are required to directly provide the Commission with additional information upon the Commission's request to facilitate the ongoing supervision of such firms.<sup>281</sup> Furthermore, section 17 of NFA's SD Financial Requirements rule provides that each SD member of NFA must file the financial, operational, risk management and other information required by NFA in the form and manner prescribed by NFA.<sup>282</sup> The ability to obtain information directly from Mexican nonbank SDs ensures that the Commission and NFA have access to the information necessary to monitor the financial condition of such firms and to assess the firms' compliance with applicable capital and financial reporting requirements.

In addition, as detailed in section I.E. above, the conditions set forth in the Comparability Order reflect that the Commission and NFA have a continuing obligation to conduct ongoing oversight, including potential examination, of Mexican nonbank SDs to ensure compliance with the Comparability Order. Specifically, as part of this oversight, the conditions require Mexican nonbank SDs to file directly with the Commission and NFA financial reports and notices that are comparable to the financial reports and notices filed by nonbank SDs domiciled in the U.S. In addition to requiring Mexican nonbank SDs to maintain current books and records reflecting all transactions,<sup>283</sup> the conditions further require each Mexican nonbank SD covered by the Comparability Order to file directly with the Commission and NFA: (i) notice that the firm was informed by the Mexican Commission that it is not in compliance with any component of the Mexican Capital Rules or Mexican Financial Reporting Rules;<sup>284</sup> (ii) monthly, quarterly, and annual financial reports;<sup>285</sup> (iii) notice that the firm has experienced a decrease

of 30 percent or more in its excess regulatory capital as compared to the last excess regulatory capital reported in filings with the Commission and NFA;<sup>286</sup> (iv) notice that the firm has breached its capital conservation buffer;<sup>287</sup> (v) notice that the firm has failed to maintain regulatory capital in the form of fundamental capital in amount equal to or in excess of the equivalent of \$20 million;<sup>288</sup> and (vi) notice that the firm has failed to make or keep current financial books and records required by the Mexican Commission.<sup>289</sup> The Comparability Order further requires the Applicants to provide notice to the Commission of any material changes to the information submitted in the application, including, but not limited to, proposed and final material changes to the Mexican Capital Rules or Mexican Financial Reporting Rules and proposed and final material changes to the Mexican Commission's supervisory authority or supervisory regime over Mexican nonbank SDs.<sup>290</sup> The financial information and notices required to be filed directly with the Commission and NFA under the Comparability Order, and through the Commission's and NFA's direct authority to obtain additional information from Mexican nonbank SDs, will allow the Commission and NFA to conduct ongoing oversight of such firms to assess their overall safety and soundness.

Although Commission Regulation 23.106 does not condition the issuance of a Comparability Order on the Commission and the authority or authorities in the relevant foreign jurisdiction having entered into a formal MOU or similar arrangement, the Commission recognizes the benefit that such an arrangement may provide.<sup>291</sup> Specifically, although Commission staff may engage directly with Mexican nonbank SDs to obtain information regarding their financial and operational condition, it may not be able to exchange and discuss such firm-specific information<sup>292</sup> with the relevant

<sup>286</sup> Condition 18 of the final Comparability Order.

<sup>287</sup> Condition 16 of the final Comparability Order.

<sup>288</sup> Condition 17 of the final Comparability Order.

<sup>289</sup> Condition 19 of the final Comparability Order.

<sup>290</sup> Condition 22 of the final Comparability Order.

<sup>291</sup> In an enforcement-related context, both the Commission and the Mexican Commission are signatories to the *International Organization of Securities Commission's Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information* (revised May 2012).

<sup>292</sup> The sharing of non-public information by CFTC staff would require assurances related to the use and treatment of such information in a manner consistent with section 8(e) of the CEA, 7 U.S.C. 12(e).

<sup>280</sup> 17 CFR 23.106(a)(4)(ii).

<sup>281</sup> 17 CFR 23.105(h).

<sup>282</sup> *NFA Financial Requirements, Section 17. Swap Dealer and Major Swap Participant Reporting Requirements*, available at NFA's website: <https://www.nfa.futures.org/rulebooksql/index.aspx>.

<sup>283</sup> Condition 8 of the final Comparability Order.

<sup>284</sup> Condition 15 of the final Comparability Order.

<sup>285</sup> Conditions 9 and 10 of the final Comparability Order.

<sup>275</sup> Article 153 of the Law.

<sup>276</sup> *Id.*

<sup>277</sup> Better Markets Letter p. 13.

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

authorities or reach shared expectations on procedures for conducting on-site examinations in Mexico. Therefore, Commission staff will continue its engagement with staff of the Mexican authorities to negotiate and finalize an MOU or similar arrangement to facilitate the joint supervision of Mexican nonbank SDs.

Based on the analysis set out above, the Commission finds that the Mexican Commission and the Mexican Central Bank maintain supervisory programs over Mexican nonbank SDs that are comparable to the Commission's supervisory program over nonbank SDs. The Mexican authorities' supervisory programs are comparable in purpose and effect to the Commission's supervisory program in that the respective programs are designed to monitor the safety and soundness of nonbank SDs through a combination of periodic financial reporting and examinations. Also, as noted above, the Commission and NFA will receive notices from Mexican nonbank SDs that are comparable to the notices received from nonbank SDs. The Commission and NFA will use the above information to assess compliance with the Comparability Order and the financial condition of Mexican nonbank SDs.

In addition, the Commission finds that the Mexican Commission has sufficient enforcement authority over nonbank SDs, comparable to the CFTC's enforcement authority. As discussed in section II.F.1. above, the Mexican Commission and the CFTC may sanction nonbank SDs for noncompliance with capital and financial reporting requirements by imposing fines or, if necessary, revoking the firms' registration. Furthermore, as discussed above, NFA may also take disciplinary action against a nonbank SD for failure to comply with its rules, including nonbank SD capital and financial reporting requirements. Accordingly, the Commission is adopting the Comparability Order as proposed with respect to the Commission's analysis concerning the comparability of the supervisory programs and enforcement authorities of the Commission, NFA, and the Mexican authorities with respect to nonbank SD capital and financial reporting.

### III. Final Comparability Determination and Comparability Order

#### A. Commission's Final Comparability Determination

Based on the Mexico Application and the Commission's review of applicable Mexican laws and regulations, as well as the review of comments submitted in

response to the Commission's request for comment on the Mexico Application and the proposed Comparability Determination and Comparability Order, the Commission finds that the Mexican Capital Rules and the Mexican Financial Reporting Rules, subject to the conditions set forth in the Comparability Order below, achieve comparable outcomes and are comparable in purpose and effect to the CFTC Capital Rules and CFTC Financial Reporting Rules. In reaching this conclusion, the Commission recognizes that there are certain differences between the Mexican Capital Rules and CFTC Capital Rules and certain differences between the Mexican Financial Reporting Rules and the CFTC Financial Reporting Rules. The Comparability Order below is subject to conditions that are necessary to promote consistency in regulatory outcomes, or to reflect the scope of substituted compliance that would be available notwithstanding certain differences. In the Commission's view, the differences between the two rule sets would not be inconsistent with providing a substituted compliance framework for Mexican nonbank SDs subject to the conditions specified in the proposed Order below.

Furthermore, the Comparability Determination and Comparability Order are limited to the comparison of the Mexican Capital Rules to the Bank-Based Approach under the CFTC Capital Rules. As noted previously, the Applicants have not requested, and the Commission has not performed, a comparison of the Mexican Capital Rules to the Commission's NLA Approach or TNW Approach.

#### B. Order Providing Conditional Capital Comparability Determination for Mexican Nonbank Swap Dealers

*It is hereby determined and ordered,* pursuant to Commodity Futures Trading Commission ("CFTC" or "Commission") Regulation 23.106 (17 CFR 23.106) under the Commodity Exchange Act ("CEA") (7 U.S.C. 1 *et seq.*) that a swap dealer ("SD") organized and domiciled in Mexico and subject to the Commission's capital and financial reporting requirements under sections 4s(e) and (f) of the CEA (7 U.S.C. 6s(e) and (f)) may satisfy the capital requirements under section 4s(e) of the CEA and Commission Regulation 23.101(a)(1)(i) (17 CFR 23.101(a)(1)(i)) ("CFTC Capital Rules"), and the financial reporting rules under section 4s(f) of the CEA and Commission Regulation 23.105 (17 CFR 23.105) ("CFTC Financial Reporting Rules"), by complying with certain specified

Mexican laws and regulations cited below and otherwise complying with the following conditions, as amended or superseded from time to time:

(1) The SD is not subject to regulation by a prudential regulator defined in section 1a(39) of the CEA (7 U.S.C. 1a(39));

(2) The SD is organized under the laws of Mexico and is domiciled in Mexico (a "Mexican nonbank SD");

(3) The Mexican nonbank SD is a licensed casa de bolsa (broker-dealer) with the Mexican Comision Nacional Bancaria y de Valores (Mexican Banking and Securities Commission) (the "Mexican Commission");

(4) The Mexican nonbank SD is subject to and complies with: Articles 2, 113, 153, 172, 173, 228, 350, 358, and 392 of the Ley del Mercado de Valores (Securities Market Law) (referred to as "the Law"); Articles 5 and 19 of the Mexican Commission Law, the Supervision Regulations of the Mexican Commission; Articles 10, 137, 144, 146, 150 through 158 Bis, 159, 160, 161, 161 Bis through 161 Bis 5, 162, 162 Bis, 162 Bis 1, 163, 163 Bis, 169, 169 Bis, 175, 176, 179, 180, 201, 202, 203, 204 Bis 1, 204 Bis 2, 204 Bis 3, 204 Bis 7 through Bis 21, 214, 216, 217, Exhibits 5 and 9 of the Disposiciones de Caracter General Aplicables a las Casa De Bolsa ("General Provisions Applicable to Broker-Dealers"); section C.B1 of Circular 115/2002, issued by Banco de Mexico (the "Mexican Central Bank"); and Provision 3.1.3 of Rule 4/2012, issued by the Mexican Central Bank (collectively, the "Mexican Capital Rules" and "Mexican Financial Reporting Rules");

(5) The Mexican nonbank SD maintains at all times fundamental capital, as defined in Article 162 and Article 162 Bis of the General Provisions Applicable to Broker-Dealers, equal to or in excess of the equivalent of \$20 million in United States dollars ("U.S. dollars"). The Mexican nonbank SD shall use a commercially reasonable and observed peso/U.S. dollar exchange rate to convert the value of the peso-denominated fundamental capital to U.S. dollars;

(6) The Mexican nonbank SD has filed with the Commission a notice stating its intention to comply with the Mexican Capital Rules and Mexican Financial Reporting Rules in lieu of the CFTC Capital Rules and CFTC Financial Reporting Rules. The notice of intent must include the Mexican nonbank SD's representations that the firm is organized and domiciled in Mexico; is a licensed casa de bolsa with the Mexican Commission; and is subject to, and complies with, the Mexican Capital Rules and Mexican Financial Reporting

Rules. The Mexican nonbank SD may not rely on this Comparability Order until it receives confirmation from Commission staff, acting pursuant to authority delegated by the Commission under Commission Regulation 140.91(a)(11) (17 CFR 140.91(a)(11)), that the Mexican nonbank SD may comply with the Mexican Capital Rules and Mexican Financial Reporting Rules in lieu of the CFTC Capital Rules and CFTC Financial Reporting Rules. Each notice filed pursuant to this condition must be prepared in the English language and submitted to the Commission via email to the following address: *MPDFinancialRequirements@cftc.gov*;

(7) The Mexican nonbank SD shall provide notice to the Commission and National Futures Association (“NFA”) if at any time it initiates the process of seeking the approval of the Mexican Commission to use internal models to compute market risk and/or credit risk. The Mexican nonbank SD shall not use internal models to compute its regulatory capital under the terms of this Comparability Order without the authorization of the Commission or NFA;

(8) The Mexican nonbank SD prepares and keeps current ledgers and other similar records in accordance with accounting principles permitted by the Mexican Commission;

(9) The Mexican nonbank SD files with the Commission and with NFA a copy of its quarterly financial report filed with the Mexican Commission pursuant to Article 203 of the General Provisions Applicable to Broker-Dealers and a copy of the monthly financial information, including the monthly balance sheet and income statement, filed with the Mexican Commission pursuant to Article 202 and Exhibit 9 of the General Provisions Applicable to Broker-Dealers. The Mexican nonbank SD must also include with the monthly information provided to the Commission and NFA a statement of regulatory capital as of each month end. The quarterly financial report and monthly financial information must be translated into the English language and balances must be converted to U.S. dollars, using a commercially reasonable and observable Mexican peso/U.S. dollar spot rate as of the date of the report. The quarterly financial report must be filed with the Commission and NFA within 15 business days of the earlier of the date the quarterly financial report is filed with the Mexican Commission or the date that the financial report is required to be filed with the Mexican Commission. The monthly financial

information must be filed with the Commission and NFA within 35 calendar days after the end of each month;

(10) The Mexican nonbank SD files with the Commission and with NFA a copy of its audited annual financial report that is required to be filed with the Mexican Commission in accordance with Article 203 of the General Provisions Applicable to Broker-Dealers. The audited annual report must be translated into the English language. The audited annual report must be filed with the Commission and NFA within 15 business days of the earlier of the date the audited annual report is filed with the Mexican Commission or the date that the audited annual report is required to be filed with the Mexican Commission;

(11) The Mexican nonbank SD files Schedule 1 of appendix B to subpart E of part 23 of the Commission’s regulations (17 CFR part 23 subpart E—appendix B) with the Commission and NFA on a monthly basis. Schedule 1 must be prepared in the English language with balances reported in U.S. dollars, using a commercially reasonable and observable Mexican peso/U.S. dollar spot rate as of the date of the report, and must be filed with the Commission and NFA together with the financial information set forth in Condition (9);

(12) A Mexican nonbank SD that is a registered securities-based swap dealer with the U.S. Securities and Exchange Commission (“SEC”) and is required to file a monthly Form X-17A-5 (“FOCUS Report”) with the SEC, or its designee, must file a copy of the FOCUS Report with the Commission and NFA within 35 calendar days after the end of each month. A Mexican nonbank SD that files a FOCUS Report with the Commission and NFA pursuant to this condition is not required to file the financial reports and schedules specified in Conditions 9 and 11 of this Comparability Order;

(13) The Mexican nonbank SD files a margin report containing the information specified in Commission Regulation 23.105(m) (17 CFR 23.105(m)) with the Commission and with NFA on a monthly basis (“Margin Report”). The Margin Report must be filed together with the monthly financial information required by Article 202 and Exhibit 9 of the General Provisions Applicable to Broker-Dealers (Condition 9). The margin report must be in the English language and balances reported in U.S. dollars, using a commercially reasonable and observable Mexican peso/U.S. dollar spot rate as of the date of the report;

(14) The Mexican nonbank SD must submit with the monthly financial information, the quarterly financial report, and the audited annual report required under Conditions (9)–(12) of this Comparability Order a statement by an authorized representative or representatives of the Mexican nonbank SD that to the best knowledge and belief of the representative or representatives the information contained in the reports, including the translation of the reports into the English language and the conversion of balances into the reports to U.S. dollars (as applicable), is true and correct. The statement must be prepared in the English language;

(15) The Mexican nonbank SD files a notice with the Commission and NFA within 24 hours of being informed by the Mexican Commission that the firm is not in compliance with any component of the Mexican Capital Rules or Mexican Financial Reporting Rules. The notice must be prepared in the English language;

(16) The Mexican nonbank SD files a notice with the Commission and NFA within 24 hours of when the firm breaches the capital conservation buffer, which the Mexican nonbank SD is required to maintain pursuant to Article 162 of the General Provisions Applicable to Broker-Dealers. The notice must be prepared in the English language;

(17) The Mexican nonbank SD files a notice within 24 hours with the Commission and NFA if it fails to maintain regulatory capital in the form of fundamental capital, as defined in Article 162 and Article 162 Bis of the General Provisions Applicable to Broker-Dealers, equal to or in excess of the U.S. dollar equivalent of \$20 million using a commercially reasonable and observable peso/U.S. dollar exchange rate. The notice must be prepared in the English language;

(18) The Mexican nonbank SD files a notice with the Commission and NFA if it experiences a 30 percent or more decrease in its excess regulatory capital as compared to that last reported in the financial information filed with the Mexican Commission pursuant to Article 202 and Exhibit 9 of the General Provisions Applicable to Broker-Dealers. The notice must be prepared in the English language and filed within two business days of the firm experiencing the 30 percent or more decrease in excess regulatory capital;

(19) The Mexican nonbank SD files a notice with the Commission and NFA within 24 hours if it fails to make or keep current the financial books and records required by the Mexican

Commission. The notice must be prepared in the English language;

(20) The Mexican nonbank SD files a notice with the Commission and NFA within 24 hours of the occurrence of any of the following: (i) a single counterparty, or group of counterparties under common ownership or control, fails to post required initial margin or pay required variation margin to the Mexican nonbank SD on uncleared swap and security-based swap positions that, in the aggregate, exceeds 25 percent of the Mexican nonbank SD's minimum capital requirement; (ii) counterparties fail to post required initial margin or pay required variation margin to the Mexican nonbank SD for uncleared swap and security-based swap positions that, in the aggregate, exceeds 50 percent of the Mexican nonbank SD's minimum capital requirement; (iii) a Mexican nonbank SD fails to post required initial margin or pay required variation margin for uncleared swap and security-based swap positions to a single counterparty or group of counterparties under common ownership and control that, in the aggregate, exceeds 25 percent of the Mexican nonbank SD's minimum capital requirement; and (iv) the Mexican nonbank SD fails to post required initial margin or pay required variation margin to counterparties for uncleared swap and security-based swap positions that, in the aggregate, exceeds 50 percent of the Mexican nonbank SD's minimum capital requirement. For purposes of the calculation, the Mexican nonbank SD's minimum capital requirement is the core capital requirement under the Mexican Capital Rules, excluding capital buffers. The notice must be prepared in the English language;

(21) The Mexican nonbank SD files a notice with the Commission and NFA of a change in its fiscal year end approved or permitted to go into effect by the Mexican Commission. The notice required by this condition will satisfy the requirement for a nonbank SD to obtain the approval of NFA for a change in fiscal year end under Commission Regulation 23.105(g) (17 CFR 23.105(g)). The notice of change in fiscal year end must be prepared in the English language and filed with the Commission and NFA at least 15 business days prior to the effective date of the Mexican nonbank SD's change in fiscal year end;

(22) The Applicants notify the Commission of any material changes to the information submitted in their application, including, but not limited to, proposed and final material changes to the Mexican Capital Rules or Mexican Financial Reporting Rules and proposed

and final material changes to the Mexican Commission's supervisory authority or supervisory regime over Mexican nonbank SDs. The notice must be prepared in the English language; and

(23) Unless otherwise noted in the conditions above, the reports, notices, and other statements required to be filed by Mexican nonbank SD with the Commission or NFA pursuant to the conditions of this Comparability Order must be submitted electronically to the Commission and NFA in accordance with instructions provided by the Commission or NFA.

*It is also hereby determined and ordered* that this Comparability Order becomes effective upon its publication in the **Federal Register**, with the exception of Conditions 11, 13, 18, and 20, which will become effective 180 calendar days after publication of the Comparability Order in the **Federal Register**.

Issued in Washington, DC, on July 3, 2024, by the Commission.

**Christopher Kirkpatrick**,  
*Secretary of the Commission.*

**Note:** The following appendices will not appear in the Code of Federal Regulations.

**Appendices to Order Granting Conditional Substituted Compliance in Connection with Certain Capital and Financial Reporting Requirements Applicable to Nonbank Swap Dealer Subject to Regulation by the Mexican Comision Nacional Bancaria y de Valores and Banco de Mexico—Commission Voting Summary, Chairman's Statement, and Commissioners' Statements**

**Appendix 1—Commission Voting Summary**

On this matter, Chairman Behnam and Commissioners Johnson, Goldsmith Romero, Mersinger, and Pham voted in the affirmative. No Commissioner voted in the negative.

**Appendix 2—Statement of Support of Chairman Rostin Behnam**

I support the Commission's approval of four comparability determinations and related orders finding that the capital and financial reporting requirements in Japan, Mexico, the European Union (France and Germany), and the United Kingdom (for swap dealers (SDs) designated for prudential supervision by the UK Prudential Regulation Authority (PRA)) are comparable to the Commission's capital and financial reporting requirements applicable to nonbank SDs. These are the first comparability determinations that the Commission has finalized for applications filed following the July 2020 adoption of its regulatory

framework for substituted compliance for non-U.S. domiciled nonbank SDs.<sup>1</sup> There are currently 15 non-U.S. nonbank SDs that are eligible to comply with these conditional orders: three in Japan; three in Mexico; two in Germany and one in France for the EU; and six in the UK that are PRA-designated.

As part of the process leading to the Commission's final comparability determinations and orders, Commission staff engaged in a thorough analysis of each foreign jurisdictions' capital and financial reporting frameworks and considered the public comments received on the proposed determinations and orders. Based on those reviews, the Commission has determined that the respective foreign jurisdictions' rules are comparable in purpose and effect, and achieve comparable outcomes, to the CFTC's capital and financial reporting rules. Specifically, the Commission considered the scope and objectives of the foreign regulators' capital adequacy and financial reporting requirements; the ability of those regulators to supervise and enforce compliance with their respective capital and financial reporting requirements; and other facts or circumstances the Commission deemed relevant for each of the applications.

In certain instances, the Commission found that a foreign jurisdiction's rules impose stricter standards. In limited circumstances, where the Commission concluded that a foreign jurisdiction lacks comparable and comprehensive requirements on a specific issue, the Commission included a targeted condition designed to impose an equally stringent standard. The Commission has issued the final orders consistent with its authority to issue a comparability determination with the conditions it deems appropriate. These conditions aim to ensure that the orders only apply to nonbank SDs that are eligible for substituted compliance in these respective jurisdictions and that those non-U.S. nonbank SDs comply with the foreign country's capital and financial reporting requirements as well as certain additional capital, financial reporting, recordkeeping, and regulatory notice requirements. This approach acknowledges that jurisdictions may adopt unique approaches to achieving comparable outcomes. As a result, the Commission has focused on whether the applicable foreign jurisdiction's capital and financial reporting requirements achieve comparable outcomes to the corresponding Commission requirements for nonbank SDs, not whether they are comparable in every aspect or contain identical elements.

With these comparability determinations, the Commission fully retains its enforcement and examination authority as well as its ability to obtain financial and event specific reporting to maintain direct oversight of nonbank SDs located in these four jurisdictions. The avoidance of duplicative requirements without a commensurate benefit to the Commission's oversight function reflects the Commission's approach

<sup>1</sup> *Capital Requirements of Swap Dealers and Major Swap Participants*, 85 FR 57462 (Sept. 15, 2020). The Commission issued the final rule on July 24, 2020.

to recognizing the global nature of the swap markets with dually-registered SDs that operate in multiple jurisdictions, which mandate prudent capital and financial reporting requirements. This is, however, an added benefit and not the Commission's sole justification for issuing these comparability determinations.

The comparability orders will become effective upon their publication in the **Federal Register**. For several order conditions, the Commission is granting an additional compliance period of 180 calendar days. To rely on a comparability order, an eligible non-U.S. nonbank SD must notify the Commission of its intention to satisfy the Commission's capital and financial requirements by substituted compliance and receive a Commission confirmation before relying on a determination.

I appreciate the hard work and dedication of the staff in the Market Participants Division over the past several years to propose and finalize these four determinations. I also thank the staff in the Office of the General Counsel and the Office of International Affairs for their support on these matters.

### Appendix 3—Statement of Commissioner Kristin N. Johnson

I support the Commodity Futures Trading Commission's (Commission or CFTC) issuance of four final capital and financial reporting comparability determinations and related orders (together, Final Comparability Determinations) for non-U.S. nonbank swap dealers (foreign nonbank SDs) and non-U.S. nonbank major swap participants (foreign nonbank MSPs) organized and domiciled in the United Kingdom (UK), the European Union (specifically, France and Germany), Mexico, and Japan.<sup>1</sup>

The Final Comparability Determinations allow eligible foreign nonbank SDs to satisfy certain capital and financial reporting requirements under the Commodity Exchange Act (CEA) and Commission regulations if they: (1) are subject to, and comply with, comparable capital and financial reporting requirements under the laws and regulations applicable in their home countries and (2) comply with the conditions enumerated in the applicable Final Comparability Determination. Under this conditional substituted compliance framework, foreign nonbank SDs in the relevant jurisdictions that comply with these conditions are deemed to be in compliance with the Commission's capital and financial reporting requirements.

Well-calibrated capital requirements create a cushion to absorb unexpected losses in times of market stress, and well-calibrated financial reporting requirements provide the Commission with information to monitor the business operations and financial condition of registered SDs. These tools are critical to managing systemic risk and fostering the stability of U.S. derivatives markets and the

<sup>1</sup> Though the Final Comparability Determinations will apply to foreign nonbank MSPs in the relevant jurisdictions, there are no such MSPs currently registered with the Commission at this time. I will refer only to SDs herein.

U.S. financial system. The Commission's substituted compliance framework addresses the need to promote sound global derivatives regulation while mitigating potentially duplicative cross-border regulatory requirements for non-U.S. market participants operating in our markets. Where the Commission permits substituted compliance, it must retain sufficient oversight, examination, and enforcement authority to ensure compliance with the foreign jurisdiction's laws and the conditions to substituted compliance.

Crucially, while these Final Comparability Determinations permit foreign nonbank SDs to comply with home country regulations in lieu of compliance with Commission regulations, the Commission is also imposing important guardrails to ensure continuous supervision of the operations and financial condition of the foreign SD.

### Background

For an example of the detrimental consequences of failing to adequately capitalize nonbank swap market participants, one need look no further than the 2008 global financial crisis. According to the U.S. Government Accountability Office, the crisis, which threatened the stability of the U.S. financial system and the health of the U.S. economy, may have led to \$10 trillion in losses, including large declines in employment and household wealth, reduced tax revenues from lower economic activity, and lost economic output.<sup>2</sup> In response to the crisis, in 2010, the U.S. Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act), which amended the CEA to create a new regulatory framework for swaps.

As amended, section 4s(e) of the CEA directs the Commission and prudential regulators to impose minimum capital requirements on SDs registered with the Commission. Section 4s(e) adopts separate approaches for the imposition of minimum capital requirements on bank and nonbank SDs. For bank SDs, prudential regulators are authorized to set the minimum capital requirements. For nonbank SDs, the Commission is authorized to set those requirements. The amended CEA also sets out financial reporting requirements for SDs. Under section 4s(f) of the CEA, registered SDs are required to make financial condition reports and other reports regarding transactions and positions as mandated by Commission regulations.

In 2020, the Commission adopted regulations implementing both the capital and financial reporting requirements for SDs, which were amended in 2024 (the Capital and Financial Reporting Rules).<sup>3</sup> The Capital and Financial Reporting Rules set minimum capital levels that nonbank SDs must maintain and financial reporting

<sup>2</sup> United States Government Accountability Office, Financial Regulatory Reform: Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act (Jan. 2013), <https://fraser.stlouisfed.org/title/gao-reports-testimonies-6136/financial-regulatory-reform-622249>.

<sup>3</sup> Capital Requirements of Swap Dealers and Major Swap Participants, 85 FR 57462 (Sept. 15, 2020).

requirements that nonbank SDs must comply with, including filing periodic unaudited financial statements and an annual audited financial report.<sup>4</sup>

Like the U.S., many other nations adopted their own regulatory regimes to govern swaps markets in the aftermath of the financial crisis. Since then, regulators from around the world have endeavored to improve the resilience of swaps markets and establish a global set of standards on critical risk management issues, such as capital and financial reporting requirements. These efforts led to the development of the Principles for Financial Market Infrastructures, to which many jurisdictions, including our own, look for guidance.<sup>5</sup>

The Dodd-Frank Act amendments specifically address the cross-border application of the CFTC's swaps regime. Section 2(i) of the CEA establishes that the CEA's swaps provisions apply to foreign swaps activities that have a "direct and significant" connection to, or effect on, U.S. markets. In line with section 2(i) of the CEA, the Capital and Financial Reporting Rules set out a substituted compliance framework in Commission Regulation 23.106 for foreign nonbank SDs seeking to comply with the Commission's capital and financial reporting requirements.

The substituted compliance framework consists of comparability determinations that afford "due consideration [to] international comity principles" while being "consistent with . . . the Commission's interest in focusing its authority on potential significant risks to the U.S. financial system."<sup>6</sup> The determinations involve an assessment of the home-country requirements that is a principles-based, holistic approach, focusing on whether the applicable home-country requirements have comparable objectives and achieve comparable outcomes to the Commission's Capital and Financial Reporting Rules.

### Today's Final Comparability Determinations

The Final Comparability Determinations will apply to 15 foreign nonbank SDs currently registered with the Commission and subject to oversight by the UK Prudential Regulation Authority, the European Central Bank, the Mexican Comisión Nacional Bancaria y de Valores, and the Financial Services Agency of Japan. I commend staff for their hard work on the Final

<sup>4</sup> The reporting requirements imposed on bank SD and bank MSPs were "more limited" "as the financial condition of these entities will be predominantly supervised by the applicable prudential regulator and subject to its capital and financial reporting requirements." *Id.* at 57513. In May 2024, the Commission adopted amendments to the Capital and Financial Reporting Rules that codified two previously-issued staff letters providing interpretive guidance and no-action relief and made other technical amendments. 89 FR 45569 (May 23, 2024).

<sup>5</sup> Principles for Financial Market Infrastructures, Bank for International Settlements and International Organization of Securities Commissions (Apr. 2012), <https://www.bis.org/cpmi/publ/d101a.pdf>.

<sup>6</sup> Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants, 85 FR 56924, 56924 (Sept. 14, 2020).

Comparability Determinations, including their work to thoroughly and thoughtfully analyze and address comments.

Importantly, while the Final Comparability Determinations permit foreign nonbank SDs in the relevant jurisdictions to comply with home country regulations in lieu of compliance with Commission regulations, there are numerous protections in place to ensure the Commission's ability to supervise on an ongoing basis the adequacy of the foreign nonbank SDs' compliance. The Final Comparability Determinations all include key conditions with which the foreign nonbank SDs must comply. For example, each of the Final Comparability Determinations requires that the foreign nonbank SDs provide monthly and annual financial reports to the Commission—and the Commission can request additional information as required to facilitate ongoing supervision. Each Final Comparability Determination also requires the foreign nonbank SDs to notify the Commission if adverse events occur, such as a significant decrease in excess regulatory capital, a significant failure of a counterparty to post required margin, or non-compliance with certain capital or financial reporting requirements. Finally, in recognition of the fact that a country's capital standards and financial reporting requirements may change over time, the Final Comparability Determinations require the foreign nonbank SDs to provide notice of material changes to the home country capital or financial reporting frameworks.

Moreover, the foreign nonbank SDs subject to these determinations are registered with the Commission and are members of the National Futures Association (NFA). Therefore, these entities are subject to the CEA, Commission regulations, and NFA membership rules, and each entity remains subject to Commission supervisory, examination and enforcement authority. As noted in the Final Comparability Determinations, if a foreign SD fails to comply with its home country's capital and financial reporting requirements, the Commission may initiate an action for a violation of the Commission's Capital and Financial Reporting Rules.

As I have previously noted,<sup>7</sup> it is important to recognize foreign market participants' compliance with the laws and regulations of their regulators when the requirements lead

<sup>7</sup> Kristin N. Johnson, Commissioner, CFTC, *Combating Systemic Risk and Fostering Integrity of the Global Financial System Through Rigorous Standards and International Comity* (Jan. 24, 2024), <https://www.cftc.gov/PressRoom/SpeechesTestimony/johnsonstatement012424>; Kristin N. Johnson, Commissioner, CFTC, *Statement in Support of Notice and Order on EU Capital Comparability Determination* (June 7, 2023), <https://www.cftc.gov/PressRoom/SpeechesTestimony/johnsonstatement060723c>; Kristin N. Johnson, Commissioner, CFTC, *Statement in Support of Proposed Order and Request for Comment on Mexican Capital Comparability Determination* (Nov. 10, 2022), <https://www.cftc.gov/PressRoom/SpeechesTestimony/johnsonstatement111022c>; Kristin N. Johnson, Commissioner, CFTC, *Statement in Support of Proposed Order on Japanese Capital Comparability Determination* (July 27, 2022), <https://www.cftc.gov/PressRoom/SpeechesTestimony/johnsonstatement072722c>.

to an outcome that is comparable to the outcome of complying with the CFTC's corresponding requirements. Respect for partner regulators in foreign jurisdictions advances the Commission as a global standard setter for sound derivatives regulation and enhances market stability.

I thank the staff in the Market Participants Division for their hard work on these matters, particularly Amanda Olear, Tom Smith, and Lily Bozhanova.

#### Appendix 4—Statement of Commissioner Caroline D. Pham

I am pleased to support the order granting conditional substituted compliance in connection with certain capital and financial reporting requirements applicable to nonbank swap dealers subject to regulation by the Mexico Comision Nacional Bancaria y de Valores (CNBV) and Banco de Mexico (Mexico Final Order). The Mexico Final Order, on balance, reflects an appropriate approach by the CFTC to collaboration with non-U.S. regulators that is consistent with IOSCO's 2020 report on *Good Practices on Processes for Deference*.<sup>1</sup>

I would like to thank Amanda Olear, Thomas Smith, Rafael Martinez, Warren Gorlick, Lilya Bozhanova, and Justin McPhee from the CFTC's Market Participants Division for their truly hard work on the Mexico Final Order and for addressing my concerns regarding the conditions for notice requirements.<sup>2</sup> I also thank the CNBV and Banco de Mexico for their assistance and support.

The CFTC's capital comparability determinations are the result of tireless efforts spanning over a decade since the global financial crisis. I commend the staff for working together with our regulatory counterparts around the world to promote regulatory cohesion and financial stability, and mitigate market fragmentation and systemic risk.

[FR Doc. 2024-15093 Filed 7-17-24; 8:45 am]

BILLING CODE 6351-01-P

## COMMODITY FUTURES TRADING COMMISSION

### 17 CFR Chapter I

#### Order Granting Conditional Substituted Compliance in Connection With Certain Capital and Financial Reporting Requirements Applicable to Nonbank Swap Dealers Subject to Regulation by the United Kingdom Prudential Regulation Authority

**AGENCY:** Commodity Futures Trading Commission.

<sup>1</sup> IOSCO Report, "Good Practices on Processes for Deference" (June 2020), <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD659.pdf>.

<sup>2</sup> Concurring Statement of Commissioner Caroline D. Pham Regarding Proposed Order and Request for Comment on an Application for a Capital Comparability Determination (Nov. 10, 2022), <https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement111022>.

**ACTION:** Order.

**SUMMARY:** On February 5, 2024, the Commodity Futures Trading Commission issued a notice and request for comment on an application submitted by the Institute of International Bankers, International Swaps and Derivatives Association, and Securities Industry and Financial Markets Association requesting that the Commission determine that registered nonbank swap dealers organized and domiciled in the United Kingdom may comply with certain capital and financial reporting requirements under the Commodity Exchange Act and Commission regulations by being subject to, and complying with, corresponding capital and financial reporting requirements of the United Kingdom Prudential Regulation Authority. The Commission also solicited public comment on a proposed comparability determination and related order providing for the conditional availability of substituted compliance in connection with the application.

The Commission is adopting the proposed order with certain modifications and clarifications to address comments. The final order provides that a nonbank swap dealer organized and domiciled in the United Kingdom may satisfy the capital requirements under the Commodity Exchange Act and Commission applicable Commission regulations and the financial reporting rules under the Commodity Exchange Act and applicable Commission regulations by complying with certain specified United Kingdom laws and regulations and conditions set forth in the order.

**DATES:** This determination was made by the Commission on June 24, 2024.

**FOR FURTHER INFORMATION CONTACT:** Amanda L. Olear, Director, 202-418-5283, [aolear@cftc.gov](mailto:aolear@cftc.gov); Thomas Smith, Deputy Director, 202-418-5495, [tsmith@cftc.gov](mailto:tsmith@cftc.gov); Rafael Martinez, Associate Director, 202-418-5462, [rmartinez@cftc.gov](mailto:rmartinez@cftc.gov); Liliya Bozhanova, Special Counsel, 202-418-6232, [lbozhanova@cftc.gov](mailto:lbozhanova@cftc.gov); Joo Hong, Risk Analyst, 202-418-6221, [jhong@cftc.gov](mailto:jhong@cftc.gov); Justin McPhee, Risk Analyst, 202-418-6223, [jmchpee@cftc.gov](mailto:jmchpee@cftc.gov), Market Participants Division; Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

**SUPPLEMENTARY INFORMATION:** The Commodity Futures Trading Commission ("Commission" or "CFTC") is issuing an order providing that registered nonbank swap dealers ("SDs") organized and domiciled in the