

**§ 240.3a68-1a**

**17 CFR Ch. II (4-1-16 Edition)**

and the rules and regulations thereunder, a person also shall include the following security-based swap positions:

(i) If such person is a U.S. person, any security-based swap position of a non-U.S. person for which the non-U.S. person's counterparty to the security-based swap has rights of recourse against that U.S. person.

NOTE TO PARAGRAPH (c)(1)(i). This paragraph describes attribution requirements for a U.S. person solely with respect to the guarantee of the obligations of a non-U.S. person under a security-based swap. The Commission and the Commodity Futures Trading Commission previously provided an interpretation about attribution to a U.S. parent, other affiliate, or guarantor to the extent that the counterparties to those positions have recourse against that parent, other affiliate, or guarantor in connection with the position. See Intermediary Definitions Adopting Release, <http://www.gpo.gov/fdsys/pkg/FR-2012-08-13/pdf/2012-18003.pdf>. The Commission explained that it intended to issue separate releases addressing the application of the major participant definition, and Title VII generally, to non-U.S. persons. See *id.* at note 1041.

(ii) If such person is a non-U.S. person:

(A) Any security-based swap position of a U.S. person for which that person's counterparty has rights of recourse against the non-U.S. person; and

(B) Any security-based swap position of another non-U.S. person entered into with a U.S. person counterparty who has rights of recourse against the first non-U.S. person, provided, however, that this paragraph (c)(1)(ii)(B) shall not apply to positions described in § 240.3a67-10(b)(3)(i)(A) and (B).

(2) *Exceptions.* Notwithstanding paragraph (c)(1) of this section, a person shall not include such security-based swap positions if the person whose performance is guaranteed in connection with the security-based swap is:

(i) Subject to capital regulation by the Commission or the Commodity Futures Trading Commission (including, but not limited to regulation as a swap dealer, major swap participant, security-based swap dealer, major security-based swap participant, futures commission merchant, broker, or dealer);

(ii) Regulated as a bank in the United States;

(iii) Subject to capital standards, adopted by the person's home country supervisor, that are consistent in all respects with the Capital Accord of the Basel Committee on Banking Supervision; or

(iv) Deemed not to be a major security-based swap participant pursuant to § 240.3a67-8(a).

[79 FR 47369, Aug. 12, 2014]

FURTHER DEFINITION OF SWAP, SECURITY-BASED SWAP, AND SECURITY-BASED SWAP AGREEMENT; MIXED SWAPS; SECURITY-BASED SWAP AGREEMENT RECORDKEEPING

**§ 240.3a68-1a Meaning of "issuers of securities in a narrow-based security index" as used in section 3(a)(68)(A)(ii)(III) of the Act.**

(a) Notwithstanding § 240.3a68-3(a), and solely for purposes of determining whether a credit default swap is a security-based swap under section 3(a)(68)(A)(ii)(III) of the Act (15 U.S.C. 78c(a)(68)(A)(ii)(III)), the term *issuers of securities in a narrow-based security index* as used in section 3(a)(68)(A)(ii)(III) of the Act means issuers of securities included in an index (including an index referencing loan borrowers or loans of such borrowers) in which:

(1)(i) There are nine or fewer non-affiliated issuers of securities that are reference entities included in the index, provided that an issuer of securities shall not be deemed a reference entity included in the index for purposes of this section unless:

(A) A credit event with respect to such reference entity would result in a payment by the credit protection seller to the credit protection buyer under the credit default swap based on the related notional amount allocated to such reference entity; or

(B) The fact of such credit event or the calculation in accordance with paragraph (a)(1)(i)(A) of this section of the amount owed with respect to such credit event is taken into account in determining whether to make any future payments under the credit default swap with respect to any future credit events;

(ii) The effective notional amount allocated to any reference entity included in the index comprises more than 30 percent of the index's weighting;

(iii) The effective notional amount allocated to any five non-affiliated reference entities included in the index comprises more than 60 percent of the index's weighting; or

(iv) Except as provided in paragraph (b) of this section, for each reference entity included in the index, none of the criteria in paragraphs (a)(1)(iv)(A) through (a)(1)(iv)(H) of this section is satisfied:

(A) The reference entity included in the index is required to file reports pursuant to section 13 or section 15(d) of the Act (15 U.S.C. 78m or 78o(d));

(B) The reference entity included in the index is eligible to rely on the exemption provided in §240.12g3-2(b);

(C) The reference entity included in the index has a worldwide market value of its outstanding common equity held by non-affiliates of \$700 million or more;

(D) The reference entity included in the index (other than a reference entity included in the index that is an issuing entity of an asset-backed security as defined in section 3(a)(79) of the Act (15 U.S.C. 78c(a)(79))) has outstanding notes, bonds, debentures, loans, or evidences of indebtedness (other than revolving credit facilities) having a total remaining principal amount of at least \$1 billion;

(E) The reference entity included in the index is the issuer of an exempted security as defined in section 3(a)(12) of the Act (15 U.S.C. 78c(a)(12)) (other than any municipal security as defined in section 3(a)(29) of the Act (15 U.S.C. 78c(a)(29)));

(F) The reference entity included in the index is a government of a foreign country or a political subdivision of a foreign country;

(G) If the reference entity included in the index is an issuing entity of an asset-backed security as defined in section 3(a)(79) of the Act (15 U.S.C. 78c(a)(79)), such asset-backed security was issued in a transaction registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) and has publicly available distribution reports; and

(H) For a credit default swap entered into solely between eligible contract participants as defined in section 3(a)(65) of the Act (15 U.S.C. 78c(a)(65)):

(1) The reference entity included in the index (other than a reference entity included in the index that is an issuing entity of an asset-backed security as defined in section 3(a)(79) of the Act (15 U.S.C. 78c(a)(79))) makes available to the public or otherwise makes available to such eligible contract participant information about the reference entity included in the index pursuant to §230.144A(d)(4) of this chapter;

(2) Financial information about the reference entity included in the index (other than a reference entity included in the index that is an issuing entity of an asset-backed security as defined in section 3(a)(79) of the Act (15 U.S.C. 78c(a)(79))) is otherwise publicly available; or

(3) In the case of a reference entity included in the index that is an issuing entity of an asset-backed security as defined in section 3(a)(79) of the Act (15 U.S.C. 78c(a)(79)), information of the type and level included in publicly available distribution reports for similar asset-backed securities is publicly available about both the reference entity included in the index and such asset-backed security; and

(2)(i) The index is not composed solely of reference entities that are issuers of exempted securities as defined in section 3(a)(12) of the Act (15 U.S.C. 78c(a)(12)), as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in section 3(a)(29) of the Act (15 U.S.C. 78c(a)(29))), as in effect on the date of enactment of the Futures Trading Act of 1982; and

(ii) Without taking into account any portion of the index composed of reference entities that are issuers of exempted securities as defined in section 3(a)(12) of the Act (15 U.S.C. 78c(a)(12)), as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in section 3(a)(29) of the Act (15 U.S.C. 78c(a)(29))), the remaining portion of the index would be within the term "issuer of securities in a narrow-based

security index” under paragraph (a)(1) of this section.

(b) Paragraph (a)(1)(iv) of this section will not apply with respect to a reference entity included in the index if:

(1) The effective notional amounts allocated to such reference entity comprise less than five percent of the index’s weighting; and

(2) The effective notional amounts allocated to reference entities included in the index that satisfy paragraph (a)(1)(iv) of this section comprise at least 80 percent of the index’s weighting.

(c) For purposes of this section:

(1) A reference entity included in the index is affiliated with another reference entity included in the index (for purposes of paragraph (c)(4) of this section) or another entity (for purposes of paragraph (c)(5) of this section) if it controls, is controlled by, or is under common control with, that other reference entity included in the index or other entity, as applicable; provided that each reference entity included in the index that is an issuing entity of an asset-backed security as defined in section 3(a)(79) of the Act (15 U.S.C. 78c(a)(79)) will not be considered affiliated with any other reference entity included in the index or any other entity that is an issuing entity of an asset-backed security.

(2) Control for purposes of this section means ownership of more than 50 percent of the equity of a reference entity included in the index (for purposes of paragraph (c)(4) of this section) or another entity (for purposes of paragraph (c)(5) of this section), or the ability to direct the voting of more than 50 percent of the voting equity of a reference entity included in the index (for purposes of paragraph (c)(4) of this section) or another entity (for purposes of paragraph (c)(5) of this section).

(3) In identifying a reference entity included in the index for purposes of this section, the term *reference entity* includes:

(i) An issuer of securities;

(ii) An issuer of securities that is an issuing entity of an asset-backed security as defined in section 3(a)(79) of the Act (15 U.S.C. 78c(a)(79)); and

(iii) An issuer of securities that is a borrower with respect to any loan identified in an index of borrowers or loans.

(4) For purposes of calculating the thresholds in paragraphs (a)(1)(i) through (a)(1)(iii) of this section, the term *reference entity included in the index* includes a single reference entity included in the index or a group of affiliated reference entities included in the index as determined in accordance with paragraph (c)(1) of this section (with each reference entity included in the index that is an issuing entity of an asset-backed security as defined in section 3(a)(79) of the Act (15 U.S.C. 78c(a)(79)) being considered a separate reference entity included in the index).

(5) For purposes of determining whether one of the criterion in either paragraphs (a)(1)(iv)(A) through (a)(1)(iv)(D) of this section or paragraphs (a)(1)(iv)(H)(1) and (a)(1)(iv)(H)(2) of this section is met, the term *reference entity included in the index* includes a single reference entity included in the index or a group of affiliated entities as determined in accordance with paragraph (c)(1) of this section (with each issuing entity of an asset-backed security as defined in section 3(a)(79) of the Act (15 U.S.C. 78c(a)(79)) being considered a separate entity).

[77 FR 48356, Aug. 13, 2012, as amended at 79 FR 57344, Sept. 24, 2014]

**§ 240.3a68-1b Meaning of “narrow-based security index” as used in section 3(a)(68)(A)(ii)(I) of the Act.**

(a) Notwithstanding § 240.3a68-3(a), and solely for purposes of determining whether a credit default swap is a security-based swap under section 3(a)(68)(A)(ii)(I) of the Act (15 U.S.C. 78c(a)(68)(A)(ii)(I)), the term *narrow-based security index* as used in section 3(a)(68)(A)(ii)(I) of the Act means an index in which:

(1)(i) The index is composed of nine or fewer securities or securities that are issued by nine or fewer non-affiliated issuers, provided that a security shall not be deemed a component of the index for purposes of this section unless:

(A) A credit event with respect to the issuer of such security or a credit event

with respect to such security would result in a payment by the credit protection seller to the credit protection buyer under the credit default swap based on the related notional amount allocated to such security; or

(B) The fact of such credit event or the calculation in accordance with paragraph (a)(1)(i)(A) of this section of the amount owed with respect to such credit event is taken into account in determining whether to make any future payments under the credit default swap with respect to any future credit events;

(ii) The effective notional amount allocated to the securities of any issuer included in the index comprises more than 30 percent of the index's weighting;

(iii) The effective notional amount allocated to the securities of any five non-affiliated issuers included in the index comprises more than 60 percent of the index's weighting; or

(iv) Except as provided in paragraph (b) of this section, for each security included in the index none of the criteria in paragraphs (a)(1)(iv)(A) through (a)(1)(iv)(H) of this section is satisfied:

(A) The issuer of the security included in the index is required to file reports pursuant to section 13 or section 15(d) of the Act (15 U.S.C. 78m or 78o(d));

(B) The issuer of the security included in the index is eligible to rely on the exemption provided in §240.12g3-2(b);

(C) The issuer of the security included in the index has a worldwide market value of its outstanding common equity held by non-affiliates of \$700 million or more;

(D) The issuer of the security included in the index (other than an issuer of the security that is an issuing entity of an asset-backed security as defined in section 3(a)(79) of the Act (15 U.S.C. 78c(a)(79))) has outstanding notes, bonds, debentures, loans, or evidences of indebtedness (other than revolving credit facilities) having a total remaining principal amount of at least \$1 billion;

(E) The security included in the index is an exempted security as defined in section 3(a)(12) of the Act (15 U.S.C. 78c(a)(12)) (other than any mu-

nicipal security as defined in section 3(a)(29) of the Act (15 U.S.C. 78c(a)(29)));

(F) The issuer of the security included in the index is a government of a foreign country or a political subdivision of a foreign country;

(G) If the security included in the index is an asset-backed security as defined in section 3(a)(79) of the Act (15 U.S.C. 78c(a)(79)), the security was issued in a transaction registered under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) and has publicly available distribution reports; and

(H) For a credit default swap entered into solely between eligible contract participants as defined in section 3(a)(65) of the Act (15 U.S.C. 78c(a)(65));

(1) The issuer of the security included in the index (other than an issuer of the security that is an issuing entity of an asset-backed security as defined in section 3(a)(79) of the Act (15 U.S.C. 78c(a)(79))) makes available to the public or otherwise makes available to such eligible contract participant information about such issuer pursuant to §230.144A(d)(4) of this chapter;

(2) Financial information about the issuer of the security included in the index (other than an issuer of the security that is an issuing entity of an asset-backed security as defined in section 3(a)(79) of the Act (15 U.S.C. 78c(a)(79))) is otherwise publicly available; or

(3) In the case of an asset-backed security as defined in section 3(a)(79) of the Act (15 U.S.C. 78c(a)(79)), information of the type and level included in public distribution reports for similar asset-backed securities is publicly available about both the issuing entity and such asset-backed security; and

(2)(i) The index is not composed solely of exempted securities as defined in section 3(a)(12) of the Act (15 U.S.C. 78c(a)(12)), as in effect on the date of enactment of the Futures Trading Act of 1982 (other than any municipal security as defined in section 3(a)(29) of the Act (15 U.S.C. 78c(a)(29))), as in effect on the date of enactment of the Futures Trading Act of 1982; and

(ii) Without taking into account any portion of the index composed of exempted securities as defined in section 3(a)(12) of the Act (15 U.S.C. 78c(a)(12)), as in effect on the date of enactment of

the Futures Trading Act of 1982 (other than any municipal security as defined in section 3(a)(29) of the Act (15 U.S.C. 78c(a)(29))), the remaining portion of the index would be within the term “narrow-based security index” under paragraph (a)(1) of this section.

(b) Paragraph (a)(1)(iv) of this section will not apply with respect to securities of an issuer included in the index if:

(1) The effective notional amounts allocated to all securities of such issuer included in the index comprise less than five percent of the index’s weighting; and

(2) The securities that satisfy paragraph (a)(1)(iv) of this section comprise at least 80 percent of the index’s weighting.

(c) For purposes of this section:

(1) An issuer of securities included in the index is affiliated with another issuer of securities included in the index (for purposes of paragraph (c)(4) of this section) or another entity (for purposes of paragraph (c)(5) of this section) if it controls, is controlled by, or is under common control with, that other issuer or other entity, as applicable; provided that each issuer of securities included in the index that is an issuing entity of an asset-backed security as defined in section 3(a)(79) of the Act (15 U.S.C. 78c(a)(79)) will not be considered affiliated with any other issuer of securities included in the index or any other entity that is an issuing entity of an asset-backed security.

(2) Control for purposes of this section means ownership of more than 50 percent of the equity of an issuer of securities included in the index (for purposes of paragraph (c)(4) of this section) or another entity (for purposes of paragraph (c)(5) of this section), or the ability to direct the voting of more than 50 percent of the voting equity an issuer of securities included in the index (for purposes of paragraph (c)(4) of this section) or another entity (for purposes of paragraph (c)(5) of this section).

(3) In identifying an issuer of securities included in the index for purposes of this section, the term *issuer* includes:

(i) An issuer of securities; and

(ii) An issuer of securities that is an issuing entity of an asset-backed security as defined in section 3(a)(79) of the Act (15 U.S.C. 78c(a)(79)).

(4) For purposes of calculating the thresholds in paragraphs (a)(1)(i) through (a)(1)(iii) of this section, the term *issuer of the security included in the index* includes a single issuer of securities included in the index or a group of affiliated issuers of securities included in the index as determined in accordance with paragraph (c)(1) of this section (with each issuer of securities included in the index that is an issuing entity of an asset-backed security as defined in section 3(a)(79) of the Act (15 U.S.C. 78c(a)(79)) being considered a separate issuer of securities included in the index).

(5) For purposes of determining whether one of the criterion in either paragraphs (a)(1)(iv)(A) through (a)(1)(iv)(D) of this section or paragraphs (a)(1)(iv)(H)(1) and (a)(1)(iv)(H)(2) of this section is met, the term *issuer of the security included in the index* includes a single issuer of securities included in the index or a group affiliated entities as determined in accordance with paragraph (c)(1) of this section (with each issuing entity of an asset-backed security as defined in section 3(a)(79) of the Act (15 U.S.C. 78c(a)(79)) being considered a separate entity).

[77 FR 48356, Aug. 13, 2012, as amended at 79 FR 57344, Sept. 24, 2014]

**§ 240.3a68-2 Requests for interpretation of swaps, security-based swaps, and mixed swaps.**

(a) *In general.* Any person may submit a request to the Commission and the Commodity Futures Trading Commission to provide a joint interpretation of whether a particular agreement, contract, or transaction (or class thereof) is:

(1) A swap, as that term is defined in section 3(a)(69) of the Act (15 U.S.C. 78c(a)(69)) and the rules and regulations promulgated thereunder;

(2) A security-based swap, as that term is defined in section 3(a)(68) of the Act (15 U.S.C. 78c(a)(68)) and the rules and regulations promulgated thereunder; or

## Securities and Exchange Commission

## § 240.3a68-2

(3) A mixed swap, as that term is defined in section 3(a)(68)(D) of the Act and the rules and regulations promulgated thereunder.

(b) *Request process.* In making a request pursuant to paragraph (a) of this section, the requesting person must provide the Commission and the Commodity Futures Trading Commission with the following:

(1) All material information regarding the terms of the agreement, contract, or transaction (or class thereof);

(2) A statement of the economic characteristics and purpose of the agreement, contract, or transaction (or class thereof);

(3) The requesting person's determination as to whether the agreement, contract, or transaction (or class thereof) should be characterized as a swap, a security-based swap, or both (i.e., a mixed swap), including the basis for such determination; and

(4) Such other information as may be requested by the Commission or the Commodity Futures Trading Commission.

(c) *Request withdrawal.* A person may withdraw a request made pursuant to paragraph (a) of this section at any time prior to the issuance of a joint interpretation or joint proposed rule by the Commission and the Commodity Futures Trading Commission in response to the request; provided, however, that notwithstanding such withdrawal, the Commission and the Commodity Futures Trading Commission may provide a joint interpretation of whether the agreement, contract, or transaction (or class thereof) is a swap, a security-based swap, or both (i.e., a mixed swap).

(d) *Request by the Commission or the Commodity Futures Trading Commission.* In the absence of a request for a joint interpretation under paragraph (a) of this section:

(1) If the Commission or the Commodity Futures Trading Commission receives a proposal to list, trade, or clear an agreement, contract, or transaction (or class thereof) that raises questions as to the appropriate characterization of such agreement, contract, or transaction (or class thereof) as a swap, a security-based swap, or both (i.e., a mixed swap), the Commission or

the Commodity Futures Trading Commission, as applicable, promptly shall notify the other of the agreement, contract, or transaction (or class thereof); and

(2) The Commission or the Commodity Futures Trading Commission, or their Chairmen jointly, may submit a request for a joint interpretation as described in paragraph (a) of this section; such submission shall be made pursuant to paragraph (b) of this section, and may be withdrawn pursuant to paragraph (c) of this section.

(e) *Timeframe for joint interpretation.*

(1) If the Commission and the Commodity Futures Trading Commission determine to issue a joint interpretation as described in paragraph (a) of this section, such joint interpretation shall be issued within 120 days after receipt of a complete submission requesting a joint interpretation under paragraph (a) or (d) of this section.

(2) The Commission and the Commodity Futures Trading Commission shall consult with the Board of Governors of the Federal Reserve System prior to issuing any joint interpretation as described in paragraph (a) of this section.

(3) If the Commission and the Commodity Futures Trading Commission seek public comment with respect to a joint interpretation regarding an agreement, contract, or transaction (or class thereof), the 120-day period described in paragraph (e)(1) of this section shall be stayed during the pendency of the comment period, but shall recommence with the business day after the public comment period ends.

(4) Nothing in this section shall require the Commission and the Commodity Futures Trading Commission to issue any joint interpretation.

(5) If the Commission and the Commodity Futures Trading Commission do not issue a joint interpretation within the time period described in paragraph (e)(1) or (e)(3) of this section, each of the Commission and the Commodity Futures Trading Commission shall publicly provide the reasons for not issuing such a joint interpretation within the applicable timeframes.

(f) *Joint proposed rule.* (1) Rather than issue a joint interpretation pursuant to

**§ 240.3a68-3**

**17 CFR Ch. II (4-1-16 Edition)**

paragraph (a) of this section, the Commission and the Commodity Futures Trading Commission may issue a joint proposed rule, in consultation with the Board of Governors of the Federal Reserve System, to further define one or more of the terms swap, security-based swap, or mixed swap.

(2) A joint proposed rule described in paragraph (f)(1) of this section shall be issued within the timeframe for issuing a joint interpretation set forth in paragraph (e) of this section.

[77 FR 48356, Aug. 13, 2012]

**§ 240.3a68-3 Meaning of “narrow-based security index” as used in the definition of “security-based swap.”**

(a) *In general.* Except as otherwise provided in § 240.3a68-1a and § 240.3a68-1b, for purposes of section 3(a)(68) of the Act (15 U.S.C. 78c(a)(68)), the term *narrow-based security index* has the meaning set forth in section 3(a)(55) of the Act (15 U.S.C. 78c(a)(55)), and the rules, regulations, and orders of the Commission thereunder.

(b) *Tolerance period for swaps traded on designated contract markets, swap execution facilities and foreign boards of trade.* Notwithstanding paragraph (a) of this section, solely for purposes of swaps traded on or subject to the rules of a designated contract market, swap execution facility, or foreign board of trade pursuant to the Commodity Exchange Act (7 U.S.C. 1 *et seq.*), a security index underlying such swaps shall not be considered a narrow-based security index if:

(1)(i) A swap on the index is traded on or subject to the rules of a designated contract market, swap execution facility, or foreign board of trade pursuant to the Commodity Exchange Act (7 U.S.C. 1 *et seq.*) for at least 30 days as a swap on an index that was not a narrow-based security index; or

(ii) Such index was not a narrow-based security index during every trading day of the six full calendar months preceding a date no earlier than 30 days prior to the commencement of trading of a swap on such index on a market described in paragraph (b)(1)(i) of this section; and

(2) The index has been a narrow-based security index for no more than 45

business days over three consecutive calendar months.

(c) *Tolerance period for security-based swaps traded on national securities exchanges or security-based swap execution facilities.* Notwithstanding paragraph (a) of this section, solely for purposes of security-based swaps traded on a national securities exchange or security-based swap execution facility, a security index underlying such security-based swaps shall be considered a narrow-based security index if:

(1)(i) A security-based swap on the index is traded on a national securities exchange or security-based swap execution facility for at least 30 days as a security-based swap on a narrow-based security index; or

(ii) Such index was a narrow-based security index during every trading day of the six full calendar months preceding a date no earlier than 30 days prior to the commencement of trading of a security-based swap on such index on a market described in paragraph (c)(1)(i) of this section; and

(2) The index has been a security index that is not a narrow-based security index for no more than 45 business days over three consecutive calendar months.

(d) *Grace period.* (1) Solely with respect to a swap that is traded on or subject to the rules of a designated contract market, swap execution facility or foreign board of trade pursuant to the Commodity Exchange Act (7 U.S.C. 1 *et seq.*), an index that becomes a narrow-based security index under paragraph (b) of this section solely because it was a narrow-based security index for more than 45 business days over three consecutive calendar months shall not be a narrow-based security index for the following three calendar months.

(2) Solely with respect to a security-based swap that is traded on a national securities exchange or security-based swap execution facility, an index that becomes a security index that is not a narrow-based security index under paragraph (c) of this section solely because it was not a narrow-based security index for more than 45 business days over three consecutive calendar

months shall be a narrow-based security index for the following three calendar months.

[77 FR 48356, Aug. 13, 2012]

**§ 240.3a68-4 Regulation of mixed swaps.**

(a) *In general.* The term mixed swap has the meaning set forth in section 3(a)(68)(D) of the Act (15 U.S.C. 78c(a)(68)(D)).

(b) *Regulation of bilateral uncleared mixed swaps entered into by dually-registered dealers or major participants.* A mixed swap:

(1) That is neither executed on nor subject to the rules of a designated contract market, national securities exchange, swap execution facility, security-based swap execution facility, or foreign board of trade;

(2) That will not be submitted to a derivatives clearing organization or registered or exempt clearing agency to be cleared; and

(3) Where at least one party is registered with the Commission as a security-based swap dealer or major security-based swap participant and also with the Commodity Futures Trading Commission as a swap dealer or major swap participant, shall be subject to:

(i) The following provisions of the Commodity Exchange Act (7 U.S.C. 1 *et seq.*), and the rules and regulations promulgated thereunder, set forth in the rules and regulations of the Commodity Futures Trading Commission:

(A) Examinations and information sharing: 7 U.S.C. 6s(f) and 12;

(B) Enforcement: 7 U.S.C. 2(a)(1)(B), 6(b), 6b, 6c, 6s(h)(1)(A), 6s(h)(4)(A), 9, 13b, 13a-1, 13a-2, 13, 13c(a), 13c(b), 15 and 26;

(C) Reporting to a swap data repository: 7 U.S.C. 6r;

(D) Real-time reporting: 7 U.S.C. 2(a)(13);

(E) Capital: 7 U.S.C. 6s(e); and

(F) Position Limits: 7 U.S.C. 6a; and

(ii) The provisions of the Federal securities laws, as defined in section 3(a)(47) of the Act (15 U.S.C. 78c(a)(47)), and the rules and regulations promulgated thereunder.

(c) *Process for determining regulatory treatment for other mixed swaps—(1) In general.* Any person who desires or intends to list, trade, or clear a mixed

swap (or class thereof) that is not subject to paragraph (b) of this section may request the Commission and the Commodity Futures Trading Commission to issue a joint order permitting the requesting person (and any other person or persons that subsequently lists, trades, or clears that mixed swap) to comply, as to parallel provisions only, with specified parallel provisions of either the Act (15 U.S.C. 78a *et seq.*) or the Commodity Exchange Act (7 U.S.C. 1 *et seq.*), and the rules and regulations thereunder (collectively, *specified parallel provisions*), instead of being required to comply with parallel provisions of both the Act and the Commodity Exchange Act. For purposes of this paragraph (c), *parallel provisions* means comparable provisions of the Act and the Commodity Exchange Act that were added or amended by the Wall Street Transparency and Accountability Act of 2010 with respect to security-based swaps and swaps, and the rules and regulations thereunder.

(2) *Request process.* A person submitting a request pursuant to paragraph (c)(1) of this section must provide the Commission and the Commodity Futures Trading Commission with the following:

(i) All material information regarding the terms of the specified, or specified class of, mixed swap;

(ii) The economic characteristics and purpose of the specified, or specified class of, mixed swap;

(iii) The specified parallel provisions, and the reasons the person believes such specified parallel provisions would be appropriate for the mixed swap (or class thereof); and

(iv) An analysis of:

(A) The nature and purposes of the parallel provisions that are the subject of the request;

(B) The comparability of such parallel provisions;

(C) The extent of any conflicts or differences between such parallel provisions; and

(D) Such other information as may be requested by the Commission or the Commodity Futures Trading Commission.

(3) *Request withdrawal.* A person may withdraw a request made pursuant to paragraph (c)(1) of this section at any



**§ 240.3a68-5**

**17 CFR Ch. II (4-1-16 Edition)**

time prior to the issuance of a joint order under paragraph (c)(4) of this section by the Commission and the Commodity Futures Trading Commission in response to the request.

(4) *Issuance of orders.* In response to a request under paragraph (c)(1) of this section, the Commission and the Commodity Futures Trading Commission, as necessary to carry out the purposes of the Wall Street Transparency and Accountability Act of 2010, may issue a joint order, after notice and opportunity for comment, permitting the requesting person (and any other person or persons that subsequently lists, trades, or clears that mixed swap) to comply, as to parallel provisions only, with the specified parallel provisions (or another subset of the parallel provisions that are the subject of the request, as the Commissions determine is appropriate), instead of being required to comply with parallel provisions of both the Act (15 U.S.C. 78a *et seq.*) and the Commodity Exchange Act (7 U.S.C. 1 *et seq.*). In determining the contents of such joint order, the Commission and the Commodity Futures Trading Commission may consider, among other things:

- (i) The nature and purposes of the parallel provisions that are the subject of the request;
- (ii) The comparability of such parallel provisions; and
- (iii) The extent of any conflicts or differences between such parallel provisions.

(5) *Timeframe.* (i) If the Commission and the Commodity Futures Trading Commission determine to issue a joint order as described in paragraph (c)(4) of this section, such joint order shall be issued within 120 days after receipt of a complete request for a joint order under paragraph (c)(1) of this section, which time period shall be stayed during the pendency of the public comment period provided for in paragraph (c)(4) of this section and shall recommence with the business day after the public comment period ends.

(ii) Nothing in this section shall require the Commission and the Commodity Futures Trading Commission to issue any joint order.

(iii) If the Commission and the Commodity Futures Trading Commission

do not issue a joint order within the time period described in paragraph (c)(5)(i) of this section, each of the Commission and the Commodity Futures Trading Commission shall publicly provide the reasons for not issuing such a joint order within that timeframe.

[77 FR 48356, Aug. 13, 2012]

**§ 240.3a68-5 Regulation of certain futures contracts on foreign sovereign debt.**

The term *security-based swap* as used in section 3(a)(68) of the Act (15 U.S.C. 78c(a)(68)) does not include an agreement, contract, or transaction that is based on or references a qualifying foreign futures contract (as defined in § 240.3a12-8 on the debt securities of any one or more of the foreign governments enumerated in § 240.3a12-8, provided that such agreement, contract, or transaction satisfies the following conditions:

(a) The futures contract that the agreement, contract, or transaction references or upon which the agreement, contract, or transaction is based is a qualifying foreign futures contract that satisfies the conditions of § 240.3a12-8 applicable to qualifying foreign futures contracts;

(b) The agreement, contract, or transaction is traded on or through a board of trade (as defined in 7 U.S.C. 2);

(c) The debt securities upon which the qualifying foreign futures contract is based or referenced and any security used to determine the cash settlement amount pursuant to paragraph (d) of this section were not registered under the Securities Act of 1933 (15 U.S.C. 77 *et seq.*) or the subject of any American depositary receipt registered under the Securities Act of 1933;

(d) The agreement, contract, or transaction may only be cash settled; and

(e) The agreement, contract or transaction is not entered into by the issuer of the debt securities upon which the qualifying foreign futures contract is based or referenced (including any security used to determine the cash payment due on settlement of such agreement, contract or transaction), an affiliate (as defined in the Securities Act of 1933 (15 U.S.C. 77 *et seq.*) and the

## Securities and Exchange Commission

## § 240.3a69-1

rules and regulations thereunder) of the issuer, or an underwriter of such issuer's debt securities.

[77 FR 48356, Aug. 13, 2012]

### § 240.3a69-1 Safe Harbor Definition of "security-based swap" and "swap" as used in sections 3(a)(68) and 3(a)(69) of the Act—insurance.

(a) This paragraph is a non-exclusive safe harbor. The terms *security-based swap* as used in section 3(a)(68) of the Act (15 U.S.C. 78c(a)(68)) and *swap* as used in section 3(a)(69) of the Act (15 U.S.C. 78c(a)(69)) do not include an agreement, contract, or transaction that:

(1) By its terms or by law, as a condition of performance on the agreement, contract, or transaction:

(i) Requires the beneficiary of the agreement, contract, or transaction to have an insurable interest that is the subject of the agreement, contract, or transaction and thereby carry the risk of loss with respect to that interest continuously throughout the duration of the agreement, contract, or transaction;

(ii) Requires that loss to occur and to be proved, and that any payment or indemnification therefor be limited to the value of the insurable interest;

(iii) Is not traded, separately from the insured interest, on an organized market or over the counter; and

(iv) With respect to financial guaranty insurance only, in the event of payment default or insolvency of the obligor, any acceleration of payments under the policy is at the sole discretion of the insurer; and

(2) Is provided:

(i)(A) By a person that is subject to supervision by the insurance commissioner (or similar official or agency) of any State, as defined in section 3(a)(16) of the Act (15 U.S.C. 78c(a)(16)), or by the United States or an agency or instrumentality thereof; and

(B) Such agreement, contract, or transaction is regulated as insurance under applicable State law or the laws of the United States;

(ii)(A) Directly or indirectly by the United States, any State or any of their respective agencies or instrumentalities; or

(B) Pursuant to a statutorily authorized program thereof; or

(iii) In the case of reinsurance only by a person to another person that satisfies the conditions set forth in paragraph (a)(2) of this section, provided that:

(A) Such person is not prohibited by applicable State law or the laws of the United States from offering such agreement, contract, or transaction to such person that satisfies the conditions set forth in paragraph (a)(2) of this section;

(B) The agreement, contract, or transaction to be reinsured satisfies the conditions set forth in paragraph (a)(1) or (3) of this section; and

(C) Except as otherwise permitted under applicable State law, the total amount reimbursable by all reinsurers for such agreement, contract, or transaction may not exceed the claims or losses paid by the person writing the risk being ceded or transferred by such person; or

(iv) In the case of non-admitted insurance by a person who:

(A) Is located outside of the United States and listed on the Quarterly Listing of Alien Insurers as maintained by the International Insurers Department of the National Association of Insurance Commissioners; or

(B) Meets the eligibility criteria for non-admitted insurers under applicable State law; or

(3) Is provided in accordance with the conditions set forth in paragraph (a)(2) of this section and is one of the following types of products:

(i) Surety bond;

(ii) Fidelity bond;

(iii) Life insurance;

(iv) Health insurance;

(v) Long term care insurance;

(vi) Title insurance;

(vii) Property and casualty insurance;

(viii) Annuity;

(ix) Disability insurance;

(x) Insurance against default on individual residential mortgages; and

(xi) Reinsurance of any of the foregoing products identified in paragraphs (i) through (x) of this section.

(b) The terms security-based swap as used in section 3(a)(68) of the Act (15 U.S.C. 78c(a)(68)) and swap as used in section 3(a)(69) of the Act (15 U.S.C.

**§ 240.3a69-2**

**17 CFR Ch. II (4-1-16 Edition)**

78c(a)(69)) do not include an agreement, contract, or transaction that was entered into on or before the effective date of this section and that, at such time that it was entered into, was provided in accordance with the conditions set forth in paragraph (a)(2) of this section.

[77 FR 48356, Aug. 13, 2012]

**§ 240.3a69-2 Definition of “swap” as used in section 3(a)(69) of the Act—additional products.**

(a) *In general.* The term *swap* has the meaning set forth in section 3(a)(69) of the Act (15 U.S.C. 78c(a)(69)).

(b) *Inclusion of particular products.* (1) The term *swap* includes, without limiting the meaning set forth in section 3(a)(69) of the Act (15 U.S.C. 78c(a)(69)), the following agreements, contracts, and transactions:

- (i) A cross-currency swap;
- (ii) A currency option, foreign currency option, foreign exchange option and foreign exchange rate option;
- (iii) A foreign exchange forward;
- (iv) A foreign exchange swap;
- (v) A forward rate agreement; and
- (vi) A non-deliverable forward involving foreign exchange.

(2) The term *swap* does not include an agreement, contract, or transaction described in paragraph (b)(1) of this section that is otherwise excluded by section 1a(47)(B) of the Commodity Exchange Act (7 U.S.C. 1a(47)(B)).

(c) *Foreign exchange forwards and foreign exchange swaps.* Notwithstanding paragraph (b)(2) of this section:

(1) A foreign exchange forward or a foreign exchange swap shall not be considered a swap if the Secretary of the Treasury makes a determination described in section 1a(47)(E)(i) of the Commodity Exchange Act (7 U.S.C. 1a(47)(E)(i)).

(2) Notwithstanding paragraph (c)(1) of this section:

(i) The reporting requirements set forth in section 4r of the Commodity Exchange Act (7 U.S.C. 6r) and regulations promulgated thereunder shall apply to a foreign exchange forward or foreign exchange swap; and

(ii) The business conduct standards set forth in section 4s(h) of the Commodity Exchange Act (7 U.S.C. 6s) and regulations promulgated thereunder

shall apply to a swap dealer or major swap participant that is a party to a foreign exchange forward or foreign exchange swap.

(3) For purposes of section 1a(47)(E) of the Commodity Exchange Act (7 U.S.C. 1a(47)(E)) and this section, the term *foreign exchange forward* has the meaning set forth in section 1a(24) of the Commodity Exchange Act (7 U.S.C. 1a(24)).

(4) For purposes of section 1a(47)(E) of the Commodity Exchange Act (7 U.S.C. 1a(47)(E)) and this section, the term *foreign exchange swap* has the meaning set forth in section 1a(25) of the Commodity Exchange Act (7 U.S.C. 1a(25)).

(5) For purposes of sections 1a(24) and 1a(25) of the Commodity Exchange Act (7 U.S.C. 1a(24) and (25)) and this section, the following transactions are not foreign exchange forwards or foreign exchange swaps:

- (i) A currency swap or a cross-currency swap;
- (ii) A currency option, foreign currency option, foreign exchange option, or foreign exchange rate option; and
- (iii) A non-deliverable forward involving foreign exchange.

[77 FR 48356, Aug. 13, 2012]

**§ 240.3a69-3 Books and records requirements for security-based swap agreements.**

(a) A person registered as a swap data repository under section 21 of the Commodity Exchange Act (7 U.S.C. 24a) and the rules and regulations thereunder:

(1) Shall not be required to keep and maintain additional books and records regarding security-based swap agreements other than the books and records regarding swaps required to be kept and maintained pursuant to section 21 of the Commodity Exchange Act (7 U.S.C. 24a) and the rules and regulations thereunder; and

(2) Shall not be required to collect and maintain additional data regarding security-based swap agreements other than the data regarding swaps required to be collected and maintained by such persons pursuant to section 21 of the Commodity Exchange Act (7 U.S.C. 24a) and the rules and regulations thereunder.

## Securities and Exchange Commission

## § 240.3a71-2

(b) A person shall not be required to keep and maintain additional books and records, including daily trading records, regarding security-based swap agreements other than the books and records regarding swaps required to be kept and maintained by such persons pursuant to section 4s of the Commodity Exchange Act (7 U.S.C. 6s) and the rules and regulations thereunder if such person is registered as:

(1) A swap dealer under section 4s(a)(1) of the Commodity Exchange Act (7 U.S.C. 6s(a)(1)) and the rules and regulations thereunder;

(2) A major swap participant under section 4s(a)(2) of the Commodity Exchange Act (7 U.S.C. 6s(a)(2)) and the rules and regulations thereunder;

(3) A security-based swap dealer under section 15F(a)(1) of the Act (15 U.S.C. 78o-10(a)(1)) and the rules and regulations thereunder; or

(4) A major security-based swap participant under section 15F(a)(2) of the Act (15 U.S.C. 78o-10(a)(2)) and the rules and regulations thereunder.

(c) The term *security-based swap agreement* has the meaning set forth in section 3(a)(78) of the Act (15 U.S.C. 78c(a)(78)).

[77 FR 48356, Aug. 13, 2012]

### § 240.3a71-1 Definition of “security-based swap dealer.”

(a) *General.* The term *security-based swap dealer* in general means any person who:

(1) Holds itself out as a dealer in security-based swaps;

(2) Makes a market in security-based swaps;

(3) Regularly enters into security-based swaps with counterparties as an ordinary course of business for its own account; or

(4) Engages in any activity causing it to be commonly known in the trade as a dealer or market maker in security-based swaps.

(b) *Exception.* The term *security-based swap dealer* does not include a person that enters into security-based swaps for such person’s own account, either individually or in a fiduciary capacity, but not as a part of regular business.

(c) *Scope of designation.* A person that is a security-based swap dealer in general shall be deemed to be a security-

based swap dealer with respect to each security-based swap it enters into, regardless of the type, class, or category of the security-based swap or the person’s activities in connection with the security-based swap, unless the Commission limits the person’s designation as a security-based swap dealer to specified types, classes, or categories of security-based swaps or specified activities of the person in connection with security-based swaps.

(d) *Inter-affiliate activities*—(1) *General.* In determining whether a person is a security-based swap dealer, that person’s security-based swaps with majority-owned affiliates shall not be considered.

(2) *Meaning of majority-owned.* For these purposes the counterparties to a security-based swap are majority-owned affiliates if one counterparty directly or indirectly owns a majority interest in the other, or if a third party directly or indirectly owns a majority interest in both counterparties to the security-based swap, where “majority interest” is the right to vote or direct the vote of a majority of a class of voting securities of an entity, the power to sell or direct the sale of a majority of a class of voting securities of an entity, or the right to receive upon dissolution or the contribution of a majority of the capital of a partnership.

[78 FR 30751, May 23, 2013]

### § 240.3a71-2 De minimis exception.

(a) *Requirements.* For purposes of section 3(a)(71) of the Act (15 U.S.C. 78c(a)(71)) and § 240.3a71-1, a person that is not currently registered as a security-based swap dealer shall be deemed not to be a security-based swap dealer, and, therefore, shall not be subject to section 15F of the Act (15 U.S.C. 78o-10) and the rules, regulations and interpretations issued thereunder, as a result of security-based swap dealing activity that meets the following conditions:

(1) *Notional thresholds.* The security-based swap positions connected with the dealing activity in which the person—or any other entity controlling, controlled by or under common control with the person—engages over the course of the immediately preceding 12 months (or following the effective date of final rules implementing section

§ 240.3a71-2

17 CFR Ch. II (4-1-16 Edition)

3(a)(68) of the Act (15 U.S.C. 78c(a)(68)) if that period is less than 12 months) have:

(i) An aggregate gross notional amount of no more than \$3 billion, subject to a phase-in level of an aggregate gross notional amount of no more than \$8 billion applied in accordance with paragraph (a)(2)(i) of this section, with regard to credit default swaps that constitute security-based swaps;

(ii) An aggregate gross notional amount of no more than \$150 million, subject to a phase-in level of an aggregate gross notional amount of no more than \$400 million applied in accordance with paragraph (a)(2)(i) of this section, with regard to security-based swaps not described in paragraph (a)(1)(i) of this section; and

(iii) An aggregate gross notional amount of no more than \$25 million with regard to all security-based swaps in which the counterparty is a special entity (as that term is defined in section 15F(h)(2)(C) of the Act (15 U.S.C. 78o-10(h)(2)(C))).

(2) *Phase-in procedure*—(i) *Phase-in period*. For purposes of paragraphs (a)(1)(i) and (ii) of this section, a person that engages in security-based swap dealing activity that does not exceed either of the phase-in levels set forth in paragraphs (a)(1)(i) and (ii) of this section, as applicable, shall be deemed not to be a security-based swap dealer, and, therefore, shall not be subject to Section 15F of the Act (15 U.S.C. 78o-10) and the rules, regulations and interpretations issued thereunder, as a result of its security-based swap dealing activity, until the “phase-in termination date” established as provided in paragraph (a)(2)(ii) of this section; provided, however, that this phase-in period shall not be available to the extent that a person engages in security-based swap dealing activity with counterparties that are natural persons, other than natural persons who qualify as eligible contract participants by virtue of section 1a(18)(A)(xi)(II) of the Commodity Exchange Act, (7 U.S.C. 1a(18)(A)(xi)(II)). The Commission shall announce the phase-in termination date on the Commission Web site and publish such date in the FEDERAL REGISTER.

(ii) *Establishment of phase-in termination date*. (A) Nine months after the publication of the staff report described in Appendix A of this section, and after giving due consideration to that report and any associated public comment, the Commission may either:

(1) Terminate the phase-in period set forth in paragraph (a)(2)(i) of this section, in which case the phase-in termination date shall be established by the Commission by order published in the FEDERAL REGISTER; or

(2) Determine that it is necessary or appropriate in the public interest to propose through rulemaking an alternative to the \$3 billion and \$150 million amounts set forth in paragraphs (a)(1)(i) and (ii) of this section, as applicable, that would constitute a *de minimis* quantity of security-based swap dealing in connection with transactions with or on behalf of customers within the meaning of section 3(a)(71)(D) of the Act, (15 U.S.C. 78c(a)(71)(D)), in which case the Commission shall by order published in the FEDERAL REGISTER provide notice of such determination to propose through rulemaking an alternative, which order shall also establish the phase-in termination date.

(B) If the phase-in termination date has not been previously established pursuant to paragraph (a)(2)(ii)(A) of this section, then in any event the phase-in termination date shall occur five years after the data collection initiation date defined in paragraph (a)(2)(iii) of this section.

(iii) *Data collection initiation date*. The term “*data collection initiation date*” shall mean the date that is the later of: the last compliance date for the registration and regulatory requirements for security-based swap dealers and major security-based swap participants under Section 15F of the Act (15 U.S.C. 78o-10); or the first date on which compliance with the trade-by-trade reporting rules for credit-related and equity-related security-based swaps to a registered security-based swap data repository is required. The Commission shall announce the data collection initiation date on the Commission Web site and publish such date in the FEDERAL REGISTER.

## Securities and Exchange Commission

## § 240.3a71-2A

(3) *Use of effective notional amounts.* For purposes of paragraph (a)(1) of this section, if the stated notional amount of a security-based swap is leveraged or enhanced by the structure of the security-based swap, the calculation shall be based on the effective notional amount of the security-based swap rather than on the stated notional amount.

(b) *Registration period for persons that no longer can take advantage of the exception.* A person that has not registered as a security-based swap dealer by virtue of satisfying the requirements of paragraph (a) of this section, but that no longer can take advantage of the *de minimis* exception provided for in paragraph (a) of this section, will be deemed not to be a security-based swap dealer under section 3(a)(71) of the Act (15 U.S.C. 78c(a)(71)) and subject to the requirements of section 15F of the Act (15 U.S.C. 78o-10) and the rules, regulations and interpretations issued thereunder until the earlier of the date on which it submits a complete application for registration pursuant to section 15F(b) (15 U.S.C. 78o-10(b)) or two months after the end of the month in which that person becomes no longer able to take advantage of the exception.

(c) *Applicability to registered security-based swap dealers.* A person who currently is registered as a security-based swap dealer may apply to withdraw that registration, while continuing to engage in security-based swap dealing activity in reliance on this section, so long as that person has been registered as a security-based swap dealer for at least 12 months and satisfies the conditions of paragraph (a) of this section.

(d) *Future adjustments to scope of the de minimis exception.* The Commission may by rule or regulation change the requirements of the *de minimis* exception described in paragraphs (a) through (c) of this section.

(e) *Voluntary registration.* Notwithstanding paragraph (a) of this section, a person that chooses to register with the Commission as a security-based swap dealer shall be deemed to be a security-based swap dealer, and, therefore, shall be subject to Section 15F of the Act (15 U.S.C. 78o-10) and the rules,

regulations and interpretations issued thereunder.

[78 FR 30751, May 23, 2013]

### **§ 240.3a71-2A Report regarding the “security-based swap dealer” and “major security-based swap participant” definitions (Appendix A to 17 CFR 240.3a71-2).**

Appendix A to § 240.3a71-2 sets forth guidelines applicable to a report that the Commission has directed its staff to make in connection with the rules and interpretations further defining the Act’s definitions of the terms “security-based swap dealer” (including the *de minimis* exception to that definition) and “major security-based swap participant.” The Commission intends to consider this report in reviewing the effect and application of these rules based on the evolution of the security-based swap market following the implementation of the registration and regulatory requirements of Section 15F of the Act (15 U.S.C. 78o-10). The report may also be informative as to potential changes to the rules further defining those terms. In producing this report, the staff shall consider security-based swap data collected by the Commission pursuant to other Title VII rules, as well as any other applicable information as the staff may determine to be appropriate for its analysis.

(a) *Report topics.* As appropriate, based on the availability of data and information, the report should address the following topics:

(1) *De minimis exception.* In connection with the *de minimis* exception to the definition of “security-based swap dealer,” the report generally should assess whether any of the *de minimis* thresholds set forth in paragraph (a)(1) of § 240.3a71-2 should be increased or decreased;

(2) *General security-based swap dealer analysis.* In connection with the definition of “security-based swap dealer,” the report generally should consider the factors that are useful for identifying security-based swap dealing activity, including the application of the dealer-trader distinction for that purpose, and the potential use of more objective tests or safe harbors as part of the analysis;

(3) *General major security-based swap participant analysis.* In connection with the definition of “major security-based swap participant,” the report generally should consider the tests used to identify the presence of a “substantial position” in a major category of security-based swaps, and the tests used to identify persons whose security-based swap positions create “substantial counterparty exposure,” including the potential use of alternative tests or thresholds;

(4) *Commercial risk hedging exclusion.* In connection with the definition of “major security-based swap participant,” the report generally should consider the definition of “hedging or mitigating commercial risk,” including whether that latter definition inappropriately permits certain positions to be excluded from the “substantial position” analysis, and whether the continued availability of the exclusion for such hedging positions should be conditioned on a person assessing and documenting the hedging effectiveness of those positions;

(5) *Highly leveraged financial entities.* In connection with the definition of “major security-based swap participant,” the report generally should consider the definition of “highly leveraged,” including whether alternative approaches should be used to identify highly leveraged financial entities;

(6) *Inter-affiliate exclusions.* In connection with the definitions of “security-based swap dealer” and “major security-based swap participant,” the report generally should consider the impact of rule provisions excluding inter-affiliate transactions from the relevant analyses, and should assess potential alternative approaches for such exclusions; and

(7) *Other topics.* Any other analysis of security-based swap data and information the Commission or the staff deem relevant to this rule.

(b) *Timing of report.* The report shall be completed no later than three years following the data collection initiation date, established pursuant to § 240.3a71-2(a)(2)(iii).

(c) *Public comment on the report.* Following completion of the report, the report shall be published in the FEDERAL REGISTER for public comment.

### § 240.3a71-3 Cross-border security-based swap dealing activity.

(a) *Definitions.* As used in this section, the following terms shall have the meanings indicated:

(1) *Conduit affiliate*—(i) *Definition.* *Conduit affiliate* means a person, other than a U.S. person, that:

(A) Is directly or indirectly majority-owned by one or more U.S. persons; and

(B) In the regular course of business enters into security-based swaps with one or more other non-U.S. persons, or with foreign branches of U.S. banks that are registered as security-based swap dealers, for the purpose of hedging or mitigating risks faced by, or otherwise taking positions on behalf of, one or more U.S. persons (other than U.S. persons that are registered as security-based swap dealers or major security-based swap participants) who are controlling, controlled by, or under common control with the person, and enters into offsetting security-based swaps or other arrangements with such U.S. persons to transfer risks and benefits of those security-based swaps.

(ii) *Majority-ownership standard.* The majority-ownership standard in paragraph (a)(1)(i)(A) of this section is satisfied if one or more persons described in § 240.3a71-3(a)(4)(i)(B) directly or indirectly own a majority interest in the non-U.S. person, where “majority interest” is the right to vote or direct the vote of a majority of a class of voting securities of an entity, the power to sell or direct the sale of a majority of a class of voting securities of an entity, or the right to receive upon dissolution, or the contribution of, a majority of the capital of a partnership.

(2) *Foreign branch* means any branch of a U.S. bank if:

(i) The branch is located outside the United States;

(ii) The branch operates for valid business reasons; and

(iii) The branch is engaged in the business of banking and is subject to substantive banking regulation in the jurisdiction where located.

(3) *Transaction conducted through a foreign branch*—(i) *Definition.* *Transaction conducted through a foreign branch* means a security-based swap transaction that is arranged, negotiated, and executed by a U.S. person

## Securities and Exchange Commission

## § 240.3a71-3

through a foreign branch of such U.S. person if:

(A) The foreign branch is the counterparty to such security-based swap transaction; and

(B) The security-based swap transaction is arranged, negotiated, and executed on behalf of the foreign branch solely by persons located outside the United States.

(ii) *Representations.* A person shall not be required to consider its counterparty's activity in connection with paragraph (a)(3)(i)(B) of this section in determining whether a security-based swap transaction is a transaction conducted through a foreign branch if such person receives a representation from its counterparty that the security-based swap transaction is arranged, negotiated, and executed on behalf of the foreign branch solely by persons located outside the United States, unless such person knows or has reason to know that the representation is not accurate; for the purposes of this final rule a person would have reason to know the representation is not accurate if a reasonable person should know, under all of the facts of which the person is aware, that it is not accurate.

(4) *U.S. person.* (i) Except as provided in paragraph (a)(4)(iii) of this section, *U.S. person* means any person that is:

(A) A natural person resident in the United States;

(B) A partnership, corporation, trust, investment vehicle, or other legal person organized, incorporated, or established under the laws of the United States or having its principal place of business in the United States;

(C) An account (whether discretionary or non-discretionary) of a U.S. person; or

(D) An estate of a decedent who was a resident of the United States at the time of death.

(ii) For purposes of this section, *principal place of business* means the location from which the officers, partners, or managers of the legal person primarily direct, control, and coordinate the activities of the legal person. With respect to an externally managed investment vehicle, this location is the office from which the manager of the vehicle primarily directs, controls, and

coordinates the investment activities of the vehicle.

(iii) The term *U.S. person* does not include the International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, and their agencies and pension plans, and any other similar international organizations, their agencies and pension plans.

(iv) A person shall not be required to consider its counterparty to a security-based swap to be a U.S. person if such person receives a representation from the counterparty that the counterparty does not satisfy the criteria set forth in paragraph (a)(4)(i) of this section, unless such person knows or has reason to know that the representation is not accurate; for the purposes of this final rule a person would have reason to know the representation is not accurate if a reasonable person should know, under all of the facts of which the person is aware, that it is not accurate.

(5) *United States* means the United States of America, its territories and possessions, any State of the United States, and the District of Columbia.

(b) *Application of de minimis exception to cross-border dealing activity.* For purposes of calculating the amount of security-based swap positions connected with dealing activity under § 240.3a71-2(a)(1), except as provided in § 240.3a71-5, a person shall include the following security-based swap transactions:

(1)(i) If such person is a U.S. person, all security-based swap transactions connected with the dealing activity in which such person engages, including transactions conducted through a foreign branch;

(ii) If such person is a conduit affiliate, all security-based swap transactions connected with the dealing activity in which such person engages; and

(iii) If such person is a non-U.S. person other than a conduit affiliate, all of the following types of transactions:

(A) Security-based swap transactions connected with the dealing activity in which such person engages that are entered into with a U.S. person; provided,



**§ 240.3a71-4**

**17 CFR Ch. II (4-1-16 Edition)**

however, that this paragraph (b)(1)(iii)(A) shall not apply to:

(1) Transactions with a U.S. person counterparty that constitute transactions conducted through a foreign branch of the counterparty, when the counterparty is a registered security-based swap dealer; and

(2) Transactions with a U.S. person counterparty that constitute transactions conducted through a foreign branch of the counterparty, when the transaction is entered into prior to 60 days following the earliest date on which the registration of security-based swap dealers is first required pursuant to the applicable final rules and regulations; and

(B) Security-based swap transactions connected with the dealing activity in which such person engages for which the counterparty to the security-based swap has rights of recourse against a U.S. person that is controlling, controlled by, or under common control with the non-U.S. person; for these purposes a counterparty has rights of recourse against the U.S. person if the counterparty has a conditional or unconditional legally enforceable right, in whole or in part, to receive payments from, or otherwise collect from, the U.S. person in connection with the security-based swap; and

(2) If such person engages in transactions described in paragraph (b)(1) of this section, except as provided in § 240.3a71-4, all of the following types of security-based swap transactions:

(i) Security-based swap transactions connected with the dealing activity in which any U.S. person controlling, controlled by, or under common control with such person engages, including transactions conducted through a foreign branch;

(ii) Security-based swap transactions connected with the dealing activity in which any conduit affiliate controlling, controlled by, or under common control with such person engages; and

(iii) Security-based swap transactions connected with the dealing activity of any non-U.S. person, other than a conduit affiliate, that is controlling, controlled by, or under common control with such person, that are

described in paragraph (b)(1)(iii) of this section.

[79 FR 47370, Aug. 12, 2014]

EFFECTIVE DATE NOTE: At 81 FR 8637, Feb. 19, 2016, § 240.3a71-3 was amended by adding paragraph (b)(1)(iii)(C), effective Apr. 19, 2016. For the convenience of the user, the added text is set forth as follows:

**§ 240.3a71-3 Cross-border security-based swap dealing activity.**

\* \* \* \* \*

- (b) \* \* \*
- (1) \* \* \*
- (iii) \* \* \*

(C) Unless such person is a person described in paragraph (a)(4)(iii) of this section, security-based swap transactions connected with such person's security-based swap dealing activity that are arranged, negotiated, or executed by personnel of such non-U.S. person located in a U.S. branch or office, or by personnel of an agent of such non-U.S. person located in a U.S. branch or office; and

\* \* \* \* \*

**§ 240.3a71-4 Exception from aggregation for affiliated groups with registered security-based swap dealers.**

Notwithstanding §§ 240.3a71-2(a)(1) and 240.3a71-3(b)(2), a person shall not include the security-based swap transactions of another person (an "affiliate") controlling, controlled by, or under common control with such person where such affiliate either is:

- (a) Registered with the Commission as a security-based swap dealer; or
- (b) Deemed not to be a security-based swap dealer pursuant to § 240.3a71-2(b).

[79 FR 47370, Aug. 12, 2014]

**§ 240.3a71-5 Exception for cleared transactions executed on a swap execution facility.**

(a) For purposes of § 240.3a71-3(b)(1), a non-U.S. person, other than a conduit affiliate, shall not include its security-based swap transactions that are entered into anonymously on an execution facility or national securities exchange and are cleared through a clearing agency; and

(b) For purposes of § 240.3a71-3(b)(2), a person shall not include security-based swap transactions of an affiliated non-

Securities and Exchange Commission

§ 240.3b-4

U.S. person, other than a conduit affiliate, when such transactions are entered into anonymously on an execution facility or national securities exchange and are cleared through a clearing agency.

[79 FR 47370, Aug. 12, 2014]

EFFECTIVE DATE NOTE: At 81 FR 8637, Feb. 19, 2016, § 240.3a71-5 was amended by adding paragraph (c), effective Apr. 19, 2016. For the convenience of the user, the added text is set forth as follows:

§ 240.3a71-5 Exception for cleared transactions executed on a swap execution facility.

\* \* \* \* \*

(c) The exceptions in paragraphs (a) and (b) of this section shall not apply to any security-based swap transactions of a non-U.S. person or of an affiliated non-U.S. person connected with the person's security-based swap dealing activity that are arranged, negotiated, or executed by personnel of such non-U.S. person located in a U.S. branch or office, or by personnel of an agent of such non-U.S. person located in a U.S. branch or office.

DEFINITIONS

§ 240.3b-1 Definition of "listed".

The term listed means admitted to full trading privileges upon application by the issuer or its fiscal agent or, in the case of the securities of a foreign corporation, upon application by a banker engaged in distributing them; and includes securities for which authority to add to the list on official notice of issuance has been granted.

(Sec. 3, 48 Stat. 884; 15 U.S.C. 78c)

[13 FR 8179, Dec. 22, 1948]

§ 240.3b-2 Definition of "officer".

The term officer means a president, vice president, secretary, treasury or principal financial officer, comptroller or principal accounting officer, and any person routinely performing corresponding functions with respect to any organization whether incorporated or unincorporated.

[47 FR 11464, Mar. 16, 1982; 47 FR 11819, Mar. 19, 1982]

§ 240.3b-3 [Reserved]

§ 240.3b-4 Definition of "foreign government," "foreign issuer" and "foreign private issuer".

(a) The term foreign government means the government of any foreign country or of any political subdivision of a foreign country.

(b) The term foreign issuer means any issuer which is a foreign government, a national of any foreign country or a corporation or other organization incorporated or organized under the laws of any foreign country.

(c) The term foreign private issuer means any foreign issuer other than a foreign government except for an issuer meeting the following conditions as of the last business day of its most recently completed second fiscal quarter:

(1) More than 50 percent of the issuer's outstanding voting securities are directly or indirectly held of record by residents of the United States; and

(2) Any of the following:

(i) The majority of the executive officers or directors are United States citizens or residents;

(ii) More than 50 percent of the assets of the issuer are located in the United States; or

(iii) The business of the issuer is administered principally in the United States.

INSTRUCTION TO PARAGRAPH (c)(1): To determine the percentage of outstanding voting securities held by U.S. residents:

A. Use the method of calculating record ownership in Rule 12g3-2(a) under the Act (§240.12g3-2(a)), except that your inquiry as to the amount of shares represented by accounts of customers resident in the United States may be limited to brokers, dealers, banks and other nominees located in:

(1) The United States,

(2) Your jurisdiction of incorporation, and

(3) The jurisdiction that is the primary trading market for your voting securities, if different than your jurisdiction of incorporation.

B. If, after reasonable inquiry, you are unable to obtain information about the amount of shares represented by accounts of customers resident in the United States, you may assume, for purposes of this definition, that the customers are residents of the jurisdiction in which the nominee has its principal place of business.

C. Count shares of voting securities beneficially owned by residents of the United