POSTAL REGULATORY COMMISSION

[Docket Nos. MC2021–51 and CP2021–53; Docket Nos. MC2021–52 and CP2021–54; Docket Nos. MC2021–53 and CP2021–55]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* December 31, 2020.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov*. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

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I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the market dominant or the competitive product list, or the modification of an existing product currently appearing on the market dominant or the competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern market dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* MC2021–51 and CP2021–53; *Filing Title:* USPS Request to Add Parcel Select Contract 45 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 21, 2020; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Curtis E. Kidd; *Comments Due:* December 31, 2020.

2. *Docket No(s).:* MC2021–52 and CP2021–54; *Filing Title:* USPS Request to Add Priority Mail & First-Class Package Service Contract 184 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 21, 2020; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Curtis E. Kidd; *Comments Due:* December 31, 2020.

3. *Docket No(s).:* MC2021–53 and CP2021–55; *Filing Title:* USPS Request to Add Priority Mail & First-Class Package Service Contract 185 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* December 21, 2020; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Curtis E. Kidd; *Comments Due:* December 31, 2020.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2020–28721 Filed 12–28–20; 8:45 am]

BILLING CODE 7710–FW–P

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90765; File No. S7–16–20]

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

December 22, 2020.

I. Overview

The Bundesanstalt für Finanzdienstleistungsaufsicht (''BaFin''), the German financial authority, has submitted a ''substituted compliance'' application requesting that the Commission determine, pursuant to the Securities Exchange Act of 1934 (''Exchange Act'') rule 3a71–6, that security-based swap dealers and major-security based swap participants (''SBS Entities'') subject to regulation in Germany conditionally may satisfy requirements under the Exchange Act by complying with comparable German and European Union (''EU'') requirements.[1] BaFin's request particularly sought substituted compliance in connection with certain Exchange Act requirements related to risk control (but not including nonbank capital and margin requirements), internal supervision and compliance, counterparty protection, and books and records. The application incorporated comparability analyses regarding applicable German and EU law, as well as information regarding German supervisory and enforcement frameworks.

On November 13, 2020, the Commission published a notice of BaFin's completed application, accompanied by a proposed Order to conditionally grant substituted compliance in connection with the application.[2] The proposal incorporated a number of conditions to tailor the scope of substituted compliance consistent with the prerequisite that relevant German and EU requirements produce regulatory outcomes that are

[1] *See* Letter from Elisabeth Roegele, Chief Executive Director of Securities Supervision and Deputy President, BaFin, to Vanessa Countryman, Secretary, Commission, dated Nov. 6, 2020 (''BaFin Application''). The application is available on the Commission's website at: *https://www.sec.gov/files/germany-BaFin-complete-application-substituted-compliance-11062020.pdf*.

[2] Exchange Act Release No. 90378 (Nov. 9, 2020), 85 FR 72726 (Nov. 13, 2020) (''German Substituted Compliance Notice and Proposed Order'').

comparable to relevant requirements under the Exchange Act.

This Order has been modified from the proposal in certain respects to address commenter concerns or to make clarifying changes, as discussed below. In making these substituted compliance determinations, the Commission continues to recognize that other regulatory regimes will have exclusions, exceptions and exemptions that may not align perfectly with the corresponding requirements under the Exchange Act. Where the German regime produces comparable outcomes notwithstanding those particular differences, the Commission has made a positive substituted compliance determination. Conversely, where those exclusions, exemptions and exceptions lead to outcomes that are not comparable, the Commission has not made a positive substituted compliance determination.

Under the substituted compliance framework, failure to comply with the applicable foreign requirements and other conditions to the Order would lead to a violation of the applicable requirements under the Exchange Act and potential enforcement action by the Commission (as opposed to automatic revocation of the substituted compliance order).

II. Substituted Compliance Framework and Prerequisites

A. Substituted Compliance Availability and Purpose

As discussed in the German Substituted Compliance Notice and Proposed Order, rule 3a71–6 provides a framework whereby non-U.S. SBS Entities may satisfy certain requirements under Exchange Act section 15F by complying with comparable regulatory requirements of a foreign jurisdiction. Because substituted compliance does not constitute exemptive relief, but instead provides an alternative method by which non-U.S. SBS Entities may comply with applicable Exchange Act requirements, the non-U.S. SBS Entities would remain subject to the relevant requirements under section 15F. The Commission accordingly will retain the authority to inspect, examine and supervise those SBS Entities' compliance and take enforcement action as appropriate.[3]

Under rule 3a71–6, substituted compliance potentially is available in connection with section 15F requirements regarding: Business conduct and supervision; chief compliance officers; trade acknowledgment and verification; capital; margin; recordkeeping and reporting; and portfolio reconciliation, portfolio compression and trading relationship documentation.[4]

Substituted compliance is not available in connection with antifraud prohibitions and certain other requirements under the Federal securities laws, however.[5] SBS Entities in Germany accordingly must comply directly with those requirements notwithstanding the availability of substituted compliance for other requirements.

The substituted compliance framework reflects the cross-border nature of the security-based swap market, and is intended to promote efficiency and competition by helping to address potential duplication and inconsistency between relevant U.S. and foreign requirements.[6] In practice, substituted compliance may be expected to help achieve those goals by making it possible for SBS Entities to leverage their existing systems and practices to comply with relevant Exchange Act requirements in conjunction with their compliance with relevant foreign requirements. The registration compliance date for SBS Entities is October 6, 2021,[7] and substituted compliance should assist relevant non-U.S. security-based swap market participants in preparing for registration.

B. Specific Prerequisites

1. Comparability of Regulatory Outcomes

As provided by rule 3a71–6, substituted compliance in part is conditioned on the Commission determining the analogous foreign requirements are ''comparable'' to applicable requirements under the Exchange Act, after accounting for factors such as ''the scope and objectives of the relevant foreign regulatory requirements'' and ''the effectiveness of the supervisory compliance program administered, and the enforcement authority exercised'' by the foreign authority. The comparability assessments are to be based on a ''holistic approach'' that ''will focus on the comparability of regulatory outcomes rather than predicating substituted compliance on requirement-by-requirement similarity.'' [8]

2. Memorandum of Understanding

Exchange Act rule 3a71–6(a)(2)(ii) further predicates the availability of substituted compliance on the Commission and the foreign financial regulatory authority having entered into a supervisory and enforcement memorandum of understanding and/or other arrangement with the relevant foreign financial regulatory authority ''addressing supervisory and enforcement cooperation and other matters arising under the substituted compliance determination.'' The Commission and BaFin recently entered into the relevant memorandum of understanding, thus satisfying this prerequisite.[9]

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[3] *Id.* at 72727.

[4] *Id.*

[5] *Id.* (addressing unavailability of substituted compliance in connection with antifraud provisions, as well as provisions related to transactions with counterparties that are not eligible contract participants (''ECPs''), segregation of customer assets, required clearing upon counterparty election, regulatory reporting and public dissemination, and registration of offerings).

[6] *See generally* Exchange Act Release No. 77617 (Apr. 14, 2016), 81 FR 29960, 30073 (May 13, 2016) (''Business Conduct Adopting Release'') (noting that the cross-border nature of the security-based swap market poses special regulatory challenges, in that relevant U.S. requirements ''have the potential to lead to requirements that are duplicative of or in conflict with applicable foreign business conduct requirements, even when the two sets of requirements implement similar goals and lead to similar results'').

[7] *See* ''Key Dates for Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants,'' available at *https://www.sec.gov/page/key-dates-registration-security-based-swap-dealers-and-major-security-based-swap-participants.*

[8] *See* German Substituted Compliance Notice and Proposed Order, 85 FR at 72727. In the German Substituted Compliance Notice and Proposed Order, the Commission preliminarily concluded that this comparability prerequisite was met in connection with a number of requirements under the Exchange Act, in some cases with the addition of conditions to help ensure the comparability of regulatory outcomes.

[9] The Commission and BaFin have entered into a memorandum of understanding to address substituted compliance cooperation, a copy of which the Commission expects to publish on its website at *www.sec.gov* under the ''Substituted Compliance'' tab, which is located on the ''Security-Based Swap Markets'' page in the Division of Trading and Markets section of the site. BaFin and the ECB share responsibility for supervising compliance with certain provisions of EU and German law. The MOU contemplates that there may be books and records and information related to Covered Entities that are in the possession of the ECB's single supervisory mechanism (''SSM'') or otherwise cannot be shared by BaFin without the consent of the ECB/SSM (''ECB Information''). The MOU provides that upon the SEC's request BaFin will use its best efforts to assist the SEC in obtaining ECB information in a prompt manner. This arrangement addresses BaFin's cooperation with respect to ECB information in connection with the current application, which does not include capital and margin requirements. *Compare with* Exchange Act Release No. 34–90766 (December 22, 2020) (''French Substituted Compliance Notice and Proposed Order''). As discussed below, under the Order reliance on substituted compliance is conditioned in part on the applicable MOU remaining in force. *See* part III.B, *infra.*

III. General Availability of Substituted Compliance Under the Order

A. Covered Entities

1. Proposed Approach

Under the proposal, the definition of ''Covered Entity'' specified which entities could make use of substituted compliance. Consistent with the availability of substituted compliance under Exchange Act rule 3a71–6, the proposed definition in part would limit the availability of substituted compliance to SBS Entities that are not U.S. persons. In addition, to help ensure that firms that rely on substituted compliance are subject to relevant German and EU requirements and oversight, the proposed definition would require that Covered Entities be investment firms or credit institutions that BaFin has authorized to provide investment services or perform investment activities in Germany.[10]

2. Final Provisions

Commenters did not address the proposed ''Covered Entity'' definition, and the Commission is issuing the definition as proposed.[11] Substituted compliance accordingly is available only to non-U.S. firms, and requires relevant German and EU requirements and oversight.

B. Additional General Conditions

1. Proposed Approach

The proposal also incorporated a number of additional general conditions intended to predicate a positive substituted compliance determination on the applicability of relevant German and EU requirements needed to establish comparability:

- ''Subject to and Complies with'' applicability condition—For each relevant section of the proposed Order, a positive substituted compliance determination would be predicated on the entity being subject to and complying with the applicable German and EU requirements needed to establish comparability.[12]
- MiFID ''investment services or activities''—The Covered Entity's security-based swap activities would have to constitute ''investment services or activities'' for purposes of applicable provisions [13] under MiFID, WpHG and related EU and German requirements, and must fall within the scope of the firm's authorization from BaFin.[14]
- MiFID ''clients''—The Covered Entity's counterparties (or potential counterparties) would have to be ''clients'' (or potential ''clients'') for purposes of MiFID, WpHG and related EU and German requirements.[15]
- MiFID ''financial instruments''—The relevant security-based swaps would have to be ''financial instruments'' for purposes of [applicable provisions under] MiFID, WpHG and related EU and German requirements.[16]
- CRD ''institutions''—The Covered Entity would have to be an ''institution'' for purposes of applicable provisions under CRD, KWG and CRR and related EU and German requirements.[17]

In addition, consistent with the requirements of rule 3a71–6 and the Commission's need for access to information regarding registered entities, substituted compliance under the proposal further would be conditioned on the Commission and BaFin having an applicable memorandum of understanding or other arrangement addressing cooperation with respect to the substituted compliance Order at the time the Covered Entity makes use of substituted compliance.[18]

Also, to assist the Commission's oversight over firms that avail themselves of substituted compliance, a Covered Entity relying on the substituted compliance order must provide notice of its intent to rely on the order by notifying the Commission in writing.[19]

2. Final Provisions

Commenters did not address the proposed general conditions, and the Commission is issuing those general conditions largely as proposed.[20] The Commission is making two technical changes to the introductory paragraph and definitions section of the Order, however.[21] In the Commission's view, the conditions are structured appropriately to predicate a positive substituted compliance determination on the applicability of relevant German and EU requirements needed to establish comparability, as well as on the continued effectiveness of the requisite MOU, and the provision of notice to the Commission regarding the Covered Entity's intent to rely on substituted compliance.

C. European Union Cross-Border Matters

1. Proposed Approach

The proposal also included general conditions addressing the cross-border

[10] German Substituted Compliance Notice and Proposed Order, 85 FR at 72729.

[11] *See* paragraph (f)(1) to the Order.

[12] The Commission noted, as an example, that this proposed condition would not be satisfied when the comparable German or EU requirements would not apply to the security-based swap activities of a third-country branch of a German SBS Entity. German Substituted Compliance Notice and Proposed Order, 85 FR at 72730.

[13] Under this condition, a Covered Entity's security-based swap activities must constitute ''investment services or activities'' only to the extent that the relevant part of the Order requires the Covered Entity to be subject to and comply with a provision of MiFID, WpHG and related EU and German requirements. If the relevant part of the Order does not require the Covered Entity to be subject to and comply with one of those provisions, then the Covered Entity's security-based swap activities do not have to constitute ''investment services or activities'' to be able to use substituted compliance under that part of the Order.

[14] German Substituted Compliance Notice and Proposed Order, 85 FR at 72730. The EU's Markets in Financial Instruments Directive (''MiFID''), Directive 2014/65/EU, has been implemented in Germany via amendments to the Securities Trading Act—Wertpapierhandelsgesetz (''WpHG''). MiFID and WgHG address, *inter alia,* organizational, compliance and conduct requirements applicable to nonbank ''investment firms.'' In significant part, those requirements also apply to credit institutions that provide investment services or perform investment activities. Commission Delegated Regulation (EU) 2017/565 (''MiFID Org Reg'') in part supplements MiFID with respect to organizational requirements for firms. The Markets in Financial Instruments Regulation (''MiFIR''), Regulation (EU) 648/2012, generally addresses trading venues and transparency. Commission Delegated Directive (EU) 2017/593 (''MiFID Delegated Directive'') in part supplements MiFID with regard to safeguarding client property, and in Germany is implemented in relevant part by the WpHG. Directive (EU) 2015/849 (''MLD'') addresses requirements on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and in Germany has been implemented by the Money Laundering Act—Geldwäschegesetz (''GwG'').

[15] German Substituted Compliance Notice and Proposed Order, 85 FR at 72730.

[16] *Id.*

[17] *Id.* The EU's Capital Requirements Directive IV (''CRD''), Directive 2013/36/EU has been adopted in Germany via amendments to the Banking Act—Kreditwesengesetz (''KWG''). CRD and KWG set forth prudential requirements and certain related requirements applicable to credit institutions and certain nonbank investment firms. Certain CRD requirements regarding reporting obligations have been incorporated into German law by the Finanzdienstleistungsaufsichtsgesetz (''FinDAG''). The Capital Requirements Regulation (''CRR''), Regulation (EU) 575/2013 further addresses prudential requirements and related recordkeeping requirements for credit institutions and certain investment firms. Commission Implementing Regulation (EU) 680/2014 (''CRR Reporting ITS'') sets forth implementing technical standard regarding supervisory reporting.

[18] *Id.* at 72730. The Commission and BaFin have entered into a memorandum of understanding to address substituted compliance cooperation. *See* note 9, *supra.* Consistent with the final Order, Covered Entities must ensure that this memorandum of understanding remains in place at the time the Covered Entity relies on substituted compliance.

[19] *Id.*

[20] *See* paragraphs (a)(1) through (6) to the Order.

[21] The introductory paragraph of the Order adds ''as may be amended or superseded from time to time'' to clarify that the Order, including the Order's conditions, may be amended or superseded from time to time. Similarly, the EU and German laws defined in the Order clarify that the EU and German laws referenced therein may be ''amended or superseded from time to time.''

application of MiFID, MAR and EU and German requirements adopted pursuant to MiFID or MAR. For some requirements under MiFID (and other EU and Member State requirements adopted pursuant to MiFID), EU law allocates the responsibility for supervising and enforcing those requirements to authorities of the Member State where an entity provides certain services. Similarly, for some requirements under MAR (and other EU and Member State requirements adopted pursuant to MAR), EU law allocates the responsibility for supervising and enforcing those requirements to authorities of potentially multiple Member States. To help ensure that the prerequisites to substituted compliance with respect to supervision and enforcement are satisfied in fact, the proposal provided substituted compliance only if BaFin is responsible for supervision and enforcement of those requirements.[22]

2. Commenter Views and Final Provisions

As noted above, commenters did not address the general conditions, including those related to EU cross-border matters. The Commission is issuing as proposed the general conditions related to EU cross-border matters.[23] In the Commission's view, these conditions are structured appropriately to permit the use of substituted compliance only when BaFin is the entity responsible for supervising a Covered Entity's compliance with a relevant provision of MiFID, MAR or related EU or German requirements.

IV. Substituted Compliance for Risk Control Requirements

A. Proposed Approach

BaFin's application in part requested substituted compliance in connection with risk control requirements relating to:

- Risk management systems—Internal risk management system requirements that address the obligation of registered entities to follow policies and procedures reasonably designed to help manage the risks associated with their business activities.
- Trade acknowledgment and verification—Trade acknowledgment and verification requirements intended to help avoid legal and operational risks by requiring definitive written records of transactions and procedures to avoid disagreements regarding the meaning of transaction terms.
- Portfolio reconciliation and dispute reporting—Portfolio reconciliation and dispute reporting provisions that require that counterparties engage in portfolio reconciliation and resolve discrepancies in connection with uncleared security-based swaps, and to provide prompt notification to the Commission and applicable prudential regulators regarding certain valuation disputes.
- Portfolio compression—Portfolio compression provisions that require that SBS Entities have procedures addressing bilateral offset, bilateral compression and multilateral compression in connection with uncleared security-based swaps.
- Trading relationship documentation—Trading relationship documentation provisions that require SBS Entities to have procedures to execute written security-based swap trading relationship documentation with their counterparties prior to, or contemporaneously with, executing certain security-based swaps.[24]

Taken as a whole, these risk control requirements help to promote market stability by mandating that registered entities follow practices that are appropriate to manage the market, counterparty, operational and legal risks associated with their security-based swap businesses.

In proposing to provide conditional substituted compliance in connection with this part of BaFin's application, the Commission preliminarily concluded that the relevant German and EU requirements in general would produce regulatory outcomes that are comparable to those associated with those risk control requirements, by subjecting German entities to financial responsibility, risk mitigation and documentation practices that are appropriate to the risks associated with their security-based swap businesses.[25] Substituted compliance under the proposal was to be conditioned in part on Covered Entities being subject to the specified German and EU provisions that in the aggregate produce regulatory outcomes that are comparable to those associated with the risk control requirements under the Exchange Act.[26]

Substituted compliance under the proposal further would be subject to certain additional conditions to help ensure the comparability of outcomes. First, substituted compliance in connection with the trading relationship documentation provisions would be conditioned on the requirement that the Covered Entity not treat its counterparties as ''eligible counterparties'' for purposes of relevant MiFID provisions.[27] In addition, substituted compliance related to trading relationship documentation under the proposal would not extend to certain disclosures regarding legal and bankruptcy status.[28] Finally, substituted compliance in connection with dispute reporting requirements would be conditioned on the Covered Entity having to provide the Commission with reports regarding disputes between counterparties on the same basis as they provide those reports to competent authorities pursuant to EU law.[29]

B. Commenter Views and Final Provisions

Commenters expressed general support for the proposed approach toward substituted compliance for the risk control provisions, but requested that the Commission modify aspects of the proposal related to risk management systems, trade acknowledgement and verification, and trading relationship documentation.[30] After considering

[22] *See* German Substituted Compliance Notice and Proposed Order, 85 FR at 72730, 72743–44.

[23] *See* paragraphs (a)(7)(i) and (ii) to the Order.

[24] German Substituted Compliance Notice and Proposed Order, 85 FR at 72730–31.

[25] *Id.* at 72731.

[26] *Id.* at 72731 n.48. Those proposed conditions in part addressed compliance with certain requirements arising under the European Market Infrastructure Regulation (''EMIR''), Regulation (EU) 648/2012. EMIR in part imposes certain risk-mitigation requirements on counterparties in connection with uncleared OTC transactions. Delegated Regulation (EU) 149/2013 (''EMIR RTS'') supplements EMIR with various regulatory technical standards, including standards addressing confirmations, portfolio reconciliation, portfolio compression and dispute resolution. Delegated Regulation (EU) 2016/2251 (''EMIR Margin RTS'') further supplements EMIR with regulatory technical standards related to risk mitigation techniques.

[27] *Id.* at 72731. Certain relevant German and EU requirements that provide for this type of documentation do not apply to investment firms' transactions with ''eligible counterparties.''

[28] *Id.* The trading relationship documentation provisions of rule 15F(b)(5) requires certain disclosures regarding the status of the SBS Entity or its counterparty as an insured depository institution or financial counterparty, and regarding the possible application of the insolvency regime set forth under Title II of the Dodd-Frank Act or the Federal Deposit Insurance Act. Documentation requirements under applicable German and EU law would not be expected to address the disclosure of information related to insolvency procedures under U.S. law.

[29] *Id.* Under the Exchange Act requirement, SBS Entities must promptly report, to the Commission, valuation disputes in excess of $20 million that have been outstanding for three or five business days (depending on counterparty types). EU requirements provide that firms must report at least monthly, to competent authorities, disputes between counterparties in excess of €15 million and outstanding for at least 15 business days.

[30] *See* Letter from Kyle Brandon, Managing Director, Head of Derivative Policy, SIFMA (Dec. 8, 2020) (''SIFMA Letter''). The other comments expressed generally concurrence with the SIFMA Letter, but did not otherwise comment specifically on the risk control requirements. *See* Letter from

Continued

commenter views, the Commission is providing for substituted compliance in connection with the risk control requirements largely as provided by the proposal, with certain discrete changes discussed below.

The Commission continues to conclude that, taken as a whole, applicable requirements under German and EU law subject German entities to financial responsibility, risk mitigation and documentation practices that are appropriate to the risks associated with their security-based swap businesses, and thus produce regulatory outcomes that are comparable to the outcomes associated with the relevant risk control requirements under the Exchange Act. Although the Commission recognizes that there are differences between the approaches taken by the relevant risk control requirements under the Exchange Act and relevant German and EU requirements, the Commission continues to believe that those differences on balance should not preclude substituted compliance for these requirements, as the relevant German and EU requirements taken as a whole produce comparable regulatory outcomes.

Substituted compliance for risk management system requirements is conditioned on Covered Entities complying with specified German and EU requirements that promote risk management within those entities, consistent with the proposal.[31] The Commission has considered commenter views recommending that those underlying German and EU requirements be targeted in certain respects, but concludes that those requirements as a whole are crafted to produce a regulatory outcome comparable to requirements under the Exchange Act and to avoid ambiguity in application.[32]

For trade acknowledgment and verification requirements, substituted compliance is conditioned on Covered Entities complying with confirmation requirements pursuant to EMIR and MiFID, consistent with the proposal.[33] The Commission has considered commenter views recommending that substituted compliance should only be conditioned on compliance with the EMIR confirmation requirements, but concludes that both sets of requirements contribute to the conclusion that German and EU law produces a comparable regulatory outcome to the trade acknowledgement and verification requirements under the Exchange Act.[34]

Substituted compliance for trading relationship documentation requirements has been modified from the proposal after taking into account issues raised by commenters.[35] In contrast to the proposal—which would not have provided substituted compliance in connection with the rule 15Fi–5(b)(5) disclosures regarding the status of the entity or its counterparty as an insured depository institution or financial counterparty (on the grounds that the relevant German and EU provisions do not address the disclosure of that type of information)—the Order will provide for substituted compliance in connection with that disclosure unless the counterparty to the Covered Entity is a U.S. person.[36] Also, the portion of the Order that conditions substituted compliance on the Covered Entity not treating its counterparties as ''eligible counterparties'' for purposes of relevant MiFID provisions has been modified from the proposal to better clarify the targeted nature of that condition.[37] The Order also has been modified to better target the German and

Jan Ford, Head of Compliance, Americas and Co-Head of SBS Council, Deutsche Bank, and Gary Kane, Co-Head Institutional Client Group, Americas and Co-Head of SBS Council, Deutsche Bank (Dec. 8, 2020) (''Deutsche Bank Letter'') at 2 (''strongly endorse the comments and recommendations'' in the SIFMA Letter); Letter from Wim Mijs, Chief Executive Officer, European Banking Federation (Dec. 8, 2020) (''EBF Letter'') at 1 (''strongly support'' the SIFMA Letter). Comments may be found on the Commission's website at: *https://www.sec.gov/comments/s7-16-20/s71620.htm.*

[31] Substituted compliance for the risk management system requirements particularly is conditioned on Covered Entities being subject to and complying with: MiFID art. 16(4)–(5) and WpHG sec. 80 (addressing administrative and accounting procedures, internal control mechanisms, risk assessment procedures and information processing system safeguards); MiFID Org Reg art. 21–24 (addressing risk management and internal audit); CRD art. 74, 76 and 79–87 and KWG sections 25a, 25b, 25c (other than 25c(2)), 25d (other than 25d(3) and 25d(11)) (addressing internal governance and the treatment of various categories of risk); and EMIR Margin RTS art. 2 (addressing required risk management procedures for the exchange of collateral for non-centrally cleared over-the-counter derivatives contracts); CRR art. 286–88 and 293 (addressing counterparty credit risk management and risk management systems); EMIR Margin RTS art. 2 (addressing general provisions for risk management procedures). *See* paragraph (b)(1) to the Order.

[32] SIFMA recommended that the predicates to substituted compliance not include MiFID Org Reg article 22 (related to compliance), or the CRD, KWG and CRR provisions noted above. In the Commission's view, removal of those compliance, risk management, audit, governance and related conditional would fail to promote risk management consistent with the requisite regulatory outcome. SIFMA also recommended the addition of an ''in each case relating to risk management'' limitation to those prerequisites, on the grounds that not all of the applicable provisions are limited in scope to internal risk management. In the Commision's view, however, this type of limitation would be expected to lead to ambiguity, resulting in uncertainty regarding the availability and application of substituted compliance.

[33] Substituted compliance for the trade acknowledgement and verification requirements particularly is conditioned on the Covered Entity being subject to and complying with: MiFID art. 25(6) and WpHG sec. 63(12) (addressing reports on services), MiFID Org Reg art. 59–61 (addressing essential information regarding executed orders and portfolio management), EMIR art. 11(1)(a) (addressing required bilateral confirmations for uncleared over-the-counter derivatives) and EMIR RTS art. 12 (addressing timeliness of confirmations). *See* para (b)(2) to the Order.

[34] SIFMA recommended that substituted compliance for trade acknowledgement and verification need only be conditioned on compliance with EMIR confirmation requirements, consistent with the CFTC's approach to substituted compliance. The MiFID confirmation requirement specifies data elements that are not directly addressed by the EMIR confirmation requirement, and in the Commission's view the holistic approach for comparing regulatory outcomes should seek to reflect the whole of a jurisdiction's relevant requirements, rather than select subsets of those requirements.

[35] Substituted compliance in connection with trading relationship documentation requirements is conditioned on Covered Entities being subject to and complying with: MiFID art. 25(5) and WpHG sec. 83(2) (addressing required records of documents regarding parties' rights and obligations and other terms on which the investment firm will provide services); MiFID Org Reg art. 24, 58, 73 and applicable parts of Annex I (addressing audit requirements, records related to appropriateness assessments, client agreements and parties' rights and obligations); and EMIR Margin RTS art. 2 (addressing general provisions for risk management procedures, including procedures providing for or specifying the terms of agreements). *See* para. (b)(5)(i) to the Order. Those EMIR requirements apply only to ''OTC derivatives contracts,'' which are defined as derivatives contracts not executed on certain ''regulated markets'' or equivalent ''third-country markets.'' *See* EMIR art. 2(7). The EMIR-related conditions accordingly will not impede substituted compliance in connection with exchange-traded or market-traded security-based swaps that do not constitute ''OTC derivatives contracts.''

[36] *See* paragraph (b)(5) to the Order. After considering commenter views, the Commission concludes that the absence of such disclosure would not preclude a comparable regulatory outcome when the counterparty is not a U.S. person, as the insolvency-related consequences that are the subject of the disclosure would not be applicable to non-U.S. counterparties in most cases. *In this respect the Commission notes that the requirements of EMIR Margin art. 2 in part address procedures providing for or specifying the terms of agreements entered into by the counterparties, including applicable governing law for non-cleared derivatives. EMIR Margin RTS art. 2 further provides that counterparties which enter into a netting or collateral exchange agreement must perform an independent legal review regarding enforceability.*

[37] In particular, the Order condition that does not allow for application of the MiFID ''eligible counterparty'' exception has been modified from the proposal by including ''in relation to the MiFID and WpHG provisions specified in paragraph (b)(5)(i)'' language. This technical change clarifies that the condition does not address a Covered Entity's use of the ''eligible counterparty'' exception in unrelated circumstances (such as when the Covered Entity's relies on the exception in connection with its non-SBS business, or in connection with activities and business for which the Covered Entity does not seek substituted compliance).

EU law prerequisites to substituted compliance for those requirements.[38]

The Commission received no comments related to substituted compliance in connection with portfolio reconciliation and dispute reporting requirements, and the Commission is providing for substituted compliance in connection with those requirements as proposed.[39] Substituted compliance in connection with the dispute reporting requirements is conditioned in part on the Covered Entities providing the Commission with reports regarding disputes between counterparties on the same basis as the entities provide those reports to competent authorities pursuant to EU law, to allow the Commission to obtain notice regarding key information in a manner that makes use of existing obligations under EU law.[40]

Finally, the Commission received no comments related to substituted compliance in connection with portfolio compression requirements, and the Commission is providing for substituted compliance in connection with those requirements as proposed.[41]

[38] In particular, the Order has been modified from the proposal by removing MiFID Org Reg article 56, related to records of appropriateness assessments, as those records do not advance the purposes behind the trading relationship documentation requirement to the same extent as the other relevant provisions. The Order, however, does not incorporate the suggested addition of ''in each case relating to written agreements with security-based swap counterparties'' language that may be expected to be ambiguous in application.

[39] *See* paragraph (b)(3) to the Order. Substituted compliance in connection with those requirements is conditioned in part on Covered Entities being subject to and complying with EMIR art. 11(1)(b) (addressing required portfolio reconciliation and dispute resolution for uncleared over-the-counter derivatives) and EMIR RTS art. 13 and 15 (addressing further requirements related to portfolio reconciliation and dispute resolution). *See* para. (b)(3)(i) to the proposed Order.

[40] *See* paragraph (b)(3)(ii) to the Order. The Commission recognizes the differences between the two sets of requirements—under which Exchange Act rule 15Fi–3 requires SBS Entities to report valuation disputes in excess of $20 million that have been outstanding for three or five business days (depending on counterparty types), while EMIR RTS art. 15(2) requires firms to report disputes between counterparties in excess of €15 million and outstanding for at least 15 business days. In the Commission's view, the two requirements produce comparable regulatory outcomes notwithstanding those differences.

[41] *See* paragraph (b)(4) to the Order. Substituted compliance in connection with portfolio compression requirements is conditioned on Covered Entities being subject to and complying with EMIR RTS art. 14 (also addressing portfolio protection).

V. Substituted Compliance for Internal Supervision and Compliance Requirements

A. Proposed Approach

BaFin's application further requested substituted compliance in connection with requirements relating to:

- Internal supervision—Diligent supervision and conflict of interest provisions that generally require SBS Entities to establish, maintain and enforce supervisory policies and procedures that reasonably are designed to prevent violations of applicable law, and implement certain systems and interest.
- Chief compliance officers—Chief compliance officer provisions that generally require SBS Entities to designate individuals with the responsibility and authority to establish, administer and review compliance policies and procedures, to resolve conflicts of interest, and to prepare and certify annual compliance reports to the Commission.
- Additional Exchange Act section 15F(j) requirements—Certain additional requirements related to information-gathering, and antitrust prohibitions.[42]

Taken as a whole, those requirements generally help to advance SBS Entities' use of structures, processes and responsible personnel reasonably designed to promote compliance with applicable law, identify and cure instances of noncompliance, and manage conflicts of interest.

In proposing to provide conditional substituted compliance in connection with this part of BaFin's application, the Commission preliminarily concluded that the relevant German and EU requirements in general would produce comparable regulatory outcomes by providing that German SBS Entities have structures and processes that reasonably are designed to promote compliance with applicable law and to identify and cure instances of non-compliance and manage conflicts of interest. Substituted compliance under the proposal was to be conditioned in part on SBS Entities being subject to and complying with specified German and EU provisions that in the aggregate produce regulatory outcomes that are comparable to those associated with those internal supervision, compliance and related requirements under the Exchange Act.[43]

Under the proposal, substituted compliance would be subject to certain additional conditions to help ensure the comparability of outcomes. First, substituted compliance in connection with the internal supervision requirements would be conditioned on the SBS Entities complying with applicable German and EU supervisory and compliance provisions *as if* those provisions also require the entities to comply with applicable requirements under the Exchange Act and the other conditions to the Order. This condition was intended to reflect that, even with substituted compliance, SBS Entities still directly would be subject to a number of requirements under the Exchange Act and conditions to the final Order that fall outside the ambit of German and EU internal supervision and compliance requirements.[44]

For similar reasons, the proposal would condition substituted compliance in connection with compliance report requirements on the Covered Entity annually providing the Commission with certain compliance reports required pursuant to regulations under MiFID. Those reports must be in English, be accompanied by a certification under penalty of law that the report is accurate and complete, and would have to address the SBS Entity's compliance with other conditions to the substituted compliance order.[45] In addition, substituted compliance under the proposal would not extend to antitrust provisions under the Exchange Act, based on the preliminary conclusion that allowing an alternative means of compliance would not lead to comparable regulatory outcomes.[46]

B. Commenter Views and Final Provisions

Commenters expressed general support for the proposed approach toward substituted compliance, but requested that the Commission modify aspects of the proposed order. After considering commenter views, the Commission is providing for substituted compliance that generally is consistent with the proposal, with certain clarifying changes discussed below.[47]

The Commission continues to conclude that, taken as a whole, applicable requirements under German and EU law require that SBS Entities have structures and processes that reasonably are designed to promote

[42] German Substituted Compliance Notice and Proposed Order, 85 FR at 72732.

[43] *Id.* at 72733 n.62.

[44] *Id.* at 72733. The condition was intended to allow Covered Entities to use their existing internal supervision and compliance frameworks to comply with the relevant Exchange Act requirements and order conditions, rather than having to establish separate special-purpose supervision and compliance frameworks.

[45] *Id.* at 72733–34.

[46] *Id.* at 72734.

[47] *See* paragraph (c) to the Order.

compliance with applicable law and to identify and cure instances of non-compliance and manage conflicts of interest, and thus produce regulatory outcomes that are comparable to those associated with the above-described internal supervision, chief compliance officer, conflict of interest and information-related requirements. Although there are differences between the approaches taken by the relevant risk control requirements under the Exchange Act and relevant German and EU requirements, the Commission continues to believe that the relevant German and EU requirements taken as a whole produce comparable regulatory outcomes.

Substituted compliance in connection with those requirements is conditioned in part on Covered Entities being subject to and complying with specified German and EU provisions that promote compliance and address conflicts of interest.[48] The Commission has considered commenter views regarding those prerequisites, but concludes that those German and EU provisions as a whole are appropriate to produce comparable regulatory outcomes.[49]

The Order retains, with clarifications, proposed provisions to target substituted compliance as needed to promote the consistency of regulatory outcomes. Accordingly, substituted compliance in connection with internal supervision is conditioned on the Covered Entity complying with applicable German and EU supervisory and compliance provisions *as if* those provisions also require SBS Entities to comply with applicable requirements under the Exchange Act and the other applicable conditions to the Order.[50] Similarly, substituted compliance in connection with the chief compliance officer requirements is conditioned on the Covered Entity annually providing certain compliance reports to the Commission, in English, with a certification under penalty of law that the report is accurate and complete, and with the report addressing the SBS Entity's compliance with other applicable conditions to the order.[51] For the reasons discussed in the proposal, moreover, the substituted compliance Order does not extend to antitrust provisions under the Exchange Act.

VI. Substituted Compliance for Counterparty Protection Requirements

A. Proposed Approach

BaFin's application in part requested substituted compliance in connection with counterparty protection requirements relating to:

- Disclosure of material risks and characteristics and material incentives or conflicts of interest—Requirements that an SBS Entity disclose to certain security-based swap counterparties certain information about the material risks and characteristics of the security-based swap, as well as material incentives or conflicts of interest that the SBS Entity may have in connection with the security-based swap.
- Daily mark disclosure—Requirements that an SBS Entity provide daily mark information to certain security-based swap counterparties.
- Fair and balanced communications—Requirements that an SBS Entity communicate with security-based swap counterparties in a fair and balanced manner based on principles of fair dealing and good faith.
- Clearing rights disclosure—Requirements that an SBS Entity provide certain counterparties with information regarding clearing rights under the Exchange Act.
- ''Know your counterparty''—Requirements that an SBS Entity establish, maintain and enforce written policies and procedures to obtain and retain certain information regarding a security-based swap counterparty that is necessary for conducting business with that counterparty.
- Suitability—Requirements for a security-based swap dealer to undertake reasonable diligence to understand the potential risks and rewards of any recommendation of a security-based swap or trading strategy involving a security-based swap that it makes to certain counterparties and to have a reasonable basis to believe that the recommendation is suitable for the counterparty.

Taken as a whole, these counterparty protection requirements help to ''bring professional standards of conduct to, and increase transparency in, the security-based swap market and to require registered [entities] to treat parties to these transactions fairly.'' [52]

The proposal provided for substituted compliance in connection with fair and balanced communications, disclosure of material risks and characteristics, disclosure of material incentives or conflicts of interest, ''know your counterparty,'' suitability and daily mark disclosure requirements. In proposing to provide conditional substituted compliance for these requirements, the Commission preliminarily concluded that the relevant German and EU requirements in general would produce regulatory outcomes that are comparable to requirements under the Exchange Act, by subjecting German Covered Entities to obligations that promote standards of professional conduct, transparency and the fair treatment of parties.

As proposed, substituted compliance for these requirements would be subject to certain conditions to help ensure the comparability of outcomes. First, under the proposal, substituted compliance for fair and balanced communications, disclosure of material risks and characteristics, disclosure of material incentives or conflicts of interest, ''know your counterparty'' and suitability requirements would be conditioned on Covered Entities being subject to, and complying with, relevant

[48] In connection with the internal supervision, chief compliance officer and conflict of interest and information-gathering provisions, Covered Entities particularly must comply with: MiFID art. 16 and 23 and WpHG sec. 63, 80 and 83–84 (addressing organizational requirements and conflicts of interest); MiFID Org Reg art. 21–37 (addressing organizational requirements, compliance, risk management, internal audit, senior management responsibility, complaints handling, remuneration policies and practices, personal transaction restrictions, outsourcing, conflicts of interest and investment research and marketing); MiFID Org Reg 72–76 and Annex IV (addressing recordkeeping, including records of orders, transactions and communications); and CRD articles 74, 76, 79–87, 88(1) and 91(1)–(2), 91(7)–(9), 92–95 and KWG sections 25a, 25b, 25c (other than 25c(2)), 25d (other than 25d(3) and 25d(11)), 25e and 25f (addressing internal governance, recovery and resolution plans, risk management policies, and management body and remuneration policies). *See* paragraph (c)(3).

[49] SIFMA in part recommended removal of certain risk-related and record-related provisions from the conditions. The Commission, however, does not believe that excluding those provisions would promote supervisory and compliance goals consistent with the necessary regulatory outcome. The Commission also is not incorporating additional suggested language to focus the application of underlying German and EU provisions (by requiring compliance with German and EU requirements only to the extent they ''relate to'' oversight arrangements, compliance and conflict of interest management), as that type of limitation may cause ambiguity.

[50] *See* paragraph (c)(4) to the Order. For clarity, the Order has been modified from the proposal to provide that the Covered Entity must comply with relevant German and EU provisions as if those provisions address ''applicable'' conditions to the Order connected to requirements for which the Covered Entity is relying on substituted compliance. That part of the condition does not apply to parts of the Order for which the Covered Entity does not rely on substituted compliance.

[51] *See* paragraph (c)(3)(ii) to the Order. Here too, the Order has been modified from the proposal to clarify that the compliance report need only address other applicable conditions to the Order. This condition is not intended to create an independent requirement that the Covered Entity provide the relevant compliance reports to German or EU authorities, and does not address the ability of German or EU authorities to obtain and review such records.

[52] *See* Business Conduct Adopting Release, 81 FR at 30065.

German and EU requirements.[53] Second, the proposal would additionally condition substituted compliance for suitability requirements on the counterparty being a per se ''professional client'' as defined in MiFID (rather than a ''retail client'' or an elective ''professional client'' [54]) and not a ''special entity'' as defined in Exchange Act section 15F(h)(2)(C) and Exchange Act rule 15Fh–2(d).[55] Finally, in the proposal the Commission preliminarily viewed EU daily portfolio reconciliation requirements as comparable to Exchange Act daily mark disclosure requirements.[56] These daily portfolio reconciliation requirements apply to portfolios of a financial counterparty or a non-financial counterparty subject to the clearing obligation in EMIR in which the counterparties have 500 or more OTC derivatives contracts outstanding with each other.[57] The Commission preliminarily viewed EU portfolio reconciliation requirements for other types of portfolios, which may be reconciled less frequently than each business day, as not comparable to Exchange Act daily mark requirements.[58] Accordingly, the proposal would condition substituted compliance for daily mark requirements on the Covered Entity being required to reconcile, and in fact reconciling, the portfolio containing the relevant security-based swap on each business day pursuant to relevant EU requirements.[59]

The proposal would not provide substituted compliance in connection with Exchange Act requirements for SBS Entities to disclose a counterparty's clearing rights under Exchange Act section 3C(g)(5). BaFin's application argued that certain EU provisions related to a counterparty's clearing rights in the European Union are comparable to requirements to disclose the counterparty's Exchange Act-based clearing rights. Because these EU provisions do not require disclosure of these clearing rights, the Commission preliminarily viewed the EU clearing provisions as not comparable to Exchange Act clearing rights disclosure requirements.

B. Commenter Views and Final Provisions

After considering commenter views, the Commission is providing for substituted compliance in connection with fair and balanced communications, disclosure of material risks and characteristics, disclosure of material incentives or conflicts of interest, ''know your counterparty,'' suitability and daily mark disclosure requirements, in each case consistent with the proposal except for one clarifying change regarding substituted compliance for suitability requirements.[60] This action is grounded in the Commission's conclusion that, taken as a whole, applicable requirements under German and EU law subject German Covered Entities to obligations that promote standards of professional conduct, transparency and the fair treatment of parties, and thus produce regulatory outcomes that are comparable to the outcomes associated with the relevant counterparty protection requirements under the Exchange Act.

Consistent with the proposal, substituted compliance is conditioned on certain conditions to help ensure the comparability of outcomes. Substituted compliance for fair and balanced communications,[61] disclosure of material risks and characteristics,[62] disclosure of material incentives or conflicts of interest,[63] ''know your counterparty'' [64] and suitability [65] requirements is conditioned on Covered Entities being subject to, and complying with, relevant German and EU requirements. A commenter requested that the Commission remove from the list of German and EU suitability requirements MiFID article 24(3), WpHG section 63(6) and MiFID Org Reg article 21(1)(b) and (d), stating that these provisions are unrelated to suitability requirements.[66] The Commission notes that a portion of MiFID's suitability requirements directs Member States to require investment firms and credit institutions to ensure that persons giving investment advice or information about financial instruments, investment services or ancillary services to clients on behalf of the firm possess the necessary knowledge and competence to fulfill certain obligations, including the obligation in MiFID article 24(3).[67] In comparing EU and German suitability requirements to Exchange Act suitability requirements, BaFin's application likewise states that firms must ensure persons giving this type of advice ''possess the necessary knowledge and competence to comply with the requirement that all information provided to clients is fair, clear and not misleading [as required by

[53] *See* German Substituted Compliance Notice and Proposed Order, 85 FR at 72735 n.81.

[54] Annex II of MiFID describes which clients are ''professional clients.'' Section I of Annex II describes the types of clients considered to be professional clients unless the client elects non-professional treatment; these clients are per se professional clients. Section II of Annex II describes the types of clients who may be treated as professional clients on request; these clients are elective professional clients. *See* MiFID Annex II. Retail clients are those that are not professional clients. *See* MiFID article 4(1)(11).

[55] *See* German Substituted Compliance Notice and Proposed Order, 85 FR at 72736.

[56] *See* German Substituted Compliance Notice and Proposed Order, 85 FR at 72735.

[57] *See* EMIR RTS article 13(3)(a)(i); EMIR article 10.

[58] *See* German Substituted Compliance Notice and Proposed Order, 85 FR at 72735.

[59] *See* German Substituted Compliance Notice and Proposed Order, 85 FR at 72735.

[60] *See* para. (d) to the Order.

[61] In connection with fair and balanced communications requirements, Covered Entities must be subject to and comply with: (i) Either MiFID art. 24(1), (3) and WpHG sections 63(1), (6) or MiFID art. 30(1) and WpHG section 68(1); and (ii) MiFID art. 24(4)–(5); WpHG sections 63(7) and 64(1); MiFID Org Reg art. 46–48; Market Abuse Regulation art. 12(1)(c) and 15; and MAR Investment Recommendations Regulation art. 5, in each case in relation to the communication for which substituted compliance is applied. *See* para. (d)(5) to the Order.

[62] In connection with requirements related to disclosure of information regarding material risks and characteristics, Covered Entities must be subject to and comply with: MiFID art. 24(4); WpHG sections 63(7) and 64(1); and MiFID Org Reg art. 48–50, in each case in relation to the security-based swap for which substituted compliance is applied. *See* para. (d)(1) to the Order.

[63] In connection with requirements related to disclosure of information regarding material incentives or conflicts of interest, Covered Entities must be subject to and comply with either: (i) MiFID art. 23(2)–(3); WpHG section 63(2); and MiFID Org Reg art. 33–35; (ii) MiFID art. 24(9); WpHG section 70; and MiFID Delegated Directive art. 11(5); or (iii) Market Abuse Regulation art. 20(1), in each case in relation to the security-based swap for which substituted compliance is applied. *See* para. (d)(2) to the Order.

[64] In connection with ''know your counterparty'' requirements, Covered Entities must be subject to and comply with: MiFID art. 16(2); WpHG section 80(1); MiFID Org Reg art. 21–22, 25–26 and applicable parts of Annex I; CRD art. 74(1) and 85(1); KWG section 25a; MLD art. 11 and 13; GwG sections 10–11; MLD art. 8(3) and 8(4)(a) as applied to internal policies, controls and procedures regarding recordkeeping of customer due diligence activities; GwG section 6(1)–(2) as applied to principles, procedures and controls regarding recordkeeping of customer due diligence activities, in each case in relation to the security-based swap for which substituted compliance is applied. *See* para. (d)(3) to the Order.

[65] In connection with suitability requirements, Covered Entities must be subject to and comply with: MiFID art. 24(2)–(3) and 25(1)–(2); WpHG sections 63(5)–(6), 80(9)–(13) and 87(1)–(2); and MiFID Org Reg art. 21(1)(b) and (d), 54 and 55, in each case in relation to the recommendation of a security-based swap or trading strategy involving a security-based swap that is provided by or on behalf of the Covered Entity and for which substituted compliance is applied. *See* para. (d)(4)(i) to the Order.

[66] *See* SIFMA Letter at 14; *see also* Deutsche Bank Letter at 2; EBF Letter at 1.

[67] *See* MiFID art. 24(3) (all information addressed to clients or potential clients must be fair, clear and not misleading); MiFID art. 25(1) (partial suitability requirement applicable to investment firms); MiFID art. 1(3)(b) (when providing one or more investment services and/or performing investment activities, credit institutions are subject to MiFID arts. 24(3) and 25(1)).

MiFID article 24(3)].'' [68] WpHG section 63(6) is the German law transposition of MiFID article 24(3).[69] MiFID Org Reg article 21(1)(b) requires investment firms and credit institutions to ensure that employees are aware of the procedures to be followed for the proper discharge of their responsibilities, which include the knowledge and competence requirements described above.[70] MiFID Org Reg article 21(1)(d) requires investment firms and credit institutions to employ personnel with the skills, knowledge and expertise necessary for the discharge of their responsibilities, which also include the knowledge and competence requirements described above.[71] Because these requirements contribute to the Commission's conclusion that EU and German requirements are comparable to Exchange Act suitability requirements, the Commission is adopting the condition as proposed, and requiring a Covered Entity to be subject to and comply with those EU and German requirements if the Covered Entity wishes to make use of substituted compliance for Exchange Act suitability requirements. The commenter also requested that the Commission clarify Covered Entities relying on substituted compliance must be subject to and comply with these requirements in relation to the recommendation of a security-based swap or trading strategy involving a security-based swap that is provided by or on behalf of the Covered Entity.[72] The Commission agrees that specifying the types of recommendations subject to this condition will provide useful clarity to market participants considering whether to make use of substituted compliance for Exchange Act suitability requirements, and is including this clarification in the Order.[73] Substituted compliance for suitability requirements additionally is conditioned on the counterparty being a per se ''professional client'' as defined in MiFID and not a ''special entity'' as defined in Exchange Act section 15F(h)(2)(C) and Exchange Act rule 15Fh–2(d).[74]

Substituted compliance for daily mark requirements also is conditioned on the Covered Entity being required to reconcile, and in fact reconciling, the portfolio containing the relevant security-based swap on each business day pursuant to relevant EU requirements.[75] A commenter suggested that this condition should apply only to security-based swaps with U.S. counterparties; for all other transactions subject to Exchange Act daily mark requirements, the commenter proposed that the Commission grant substituted compliance if the Covered Entity complies with EU mark-to-market (or mark-to-model) and reporting requirements.[76] The commenter provided three reasons in support of this bifurcated approach and, for the reasons explained below, the Commission declines to adopt it.

First, the commenter stated that non-U.S. security-based swap dealers would face significant challenges and costs to identify which security-based swaps with non-U.S. counterparties were arranged, negotiated or executed by personnel of the security-based swap dealer or its agent located in a U.S. branch or office (''ANE Transactions''), and thus subject to Exchange Act daily mark requirements.[77] According to the commenter, many non-U.S. security-based swap dealers may choose to block U.S. personnel from taking part in security-based swaps with non-U.S. counterparties that are not subject to the EU's daily portfolio reconciliation requirements, thereby avoiding creation of an ANE Transaction that is not eligible for substituted compliance and the attendant challenges and costs of identifying those transactions.[78] The commenter asserted that daily mark requirements should not apply to a non-U.S. security-based swap dealer's ANE Transactions because the Commission did not require compliance with daily mark requirements in connection with the exception provided in Exchange Act rule 3a71–3(d)(1) to counting certain ANE Transactions towards security-based swap dealer registration thresholds.[79] The commenter noted that daily mark requirements do not apply to certain ANE Transactions excepted from those thresholds because there is no ''ongoing relationship between . . . the entity whose personnel interact with the counterparty . . . and the counterparty.'' [80] The commenter stated that a similar rationale applies to the application of daily mark requirements to a non-U.S. security-based swap dealer's ANE Transactions.[81]

The Commission previously has addressed why ANE Transactions are subject to Exchange Act daily mark requirements, as well as the costs and challenges of identifying such transactions.[82] As noted above, substituted compliance does not constitute exemptive relief, but instead provides an alternative method by which non-U.S. SBS Entities may comply with applicable Exchange Act requirements. The Commission is providing for substituted compliance for daily mark requirements based on comparability of outcomes with respect to ANE Transactions to the same extent as it is providing substituted compliance with respect to all other

[68] *See* BaFin Application Annex A category 4 at 75–76.

[69] *See* BaFin Application Annex A category 4 at 75.

[70] *See* MiFID Org Reg art. 21(1)(b) (requirement for investment firm employees to be aware of procedures for the proper discharge of their responsibilities; requirement implements MiFID art. 16(2)–(10)); MiFID Org Reg art. 1(2) (in portions of MiFID Org Reg that implement MiFID requirements to which credit institutions are subject, references to investment firms encompass credit institutions); MiFID art. 1(3)(a) (credit institutions are subject to MiFID art. 16).

[71] *See* MiFID Org Reg art. 21(1)(d) (requirement for investment firms to employ personnel with the knowledge, skills and expertise necessary for the discharge of their responsibilities; requirement implements MiFID art. 16(2)–(10)); MiFID Org Reg art. 1(2) (in portions of MiFID Org Reg that implement MiFID requirements to which credit institutions are subject, references to investment firms encompass credit institutions); MiFID art. 1(3)(a) (credit institutions are subject to MiFID art. 16).

[72] *See* SIFMA Letter at 14; *see also* Deutsche Bank Letter at 2; EBF Letter at 1. The proposed Order would have required a Covered Entity relying on substituted compliance to be subject to and comply with EU and German suitability requirements in relation to a recommendation that is provided by or on behalf of the Covered Entity. *See* German Substituted Compliance Notice and Proposed Order, 85 FR at 72745.

[73] *See* para. (d)(4)(i) to the Order.

[74] *See* para. (d)(4)(ii) to the Order.

[75] Covered Entities must be required to reconcile, and in fact reconcile, the portfolio containing the security-based swap for which substituted compliance is applied, on each business day pursuant to EMIR articles 11(1)(b) and 11(2) and EMIR RTS article 13. *See* para. (d)(6) to the Order.

[76] *See* SIFMA Letter at 6; *see also* Deutsche Bank Letter at 2; EBF Letter at 1.

[77] *See* SIFMA Letter at 3–5.

[78] *See* SIFMA Letter at 4.

[79] *See* SIFMA Letter at 4; *see also* Exchange Act Release No. 87780 (Dec. 18, 2019), 85 FR 6270 (Feb. 4, 2020) (''Cross-Border Adopting Release'').

[80] *See* SIFMA Letter at 4 (citing Cross-Border Adopting Release, 85 FR at 6288).

[81] *See* SIFMA Letter at 4.

[82] *See* Business Conduct Adopting Release, 81 FR at 30065–69 (adoption of cross-border rules governing application of transaction-level requirements such as daily mark requirements to ANE Transactions); Business Conduct Adopting Release, 81 FR at 30065 (applying transaction-level requirements to ANE Transactions will ''help maintain market integrity by subjecting the large number of transactions that involve relevant dealing activity in the United States to these requirements, even if both counterparties are non-U.S. persons''). In response to the commenter's previous statements that business conduct standards such as daily mark requirements should not apply to any transactions between two non-U.S. persons, the Commission concluded, ''given the significant role registered [security-based swap dealers] play in the market, applying the business conduct requirements to their U.S. business should help protect the integrity of the U.S. market.'' *See* Business Conduct Adopting Release, 81 FR at 30066 (considering comment letter from Timothy W. Cameron, Esq., Managing Director, and Laura Martin, Managing Director and Associate General Counsel, Asset Management Group, Securities Industry and Financial Markets Association, dated July 13, 2015, at 2, 5).

transactions. Moreover, the commenters' comparison to the exception from counting certain ANE Transactions towards security-based swap dealer registration thresholds is inapt. As the commenter notes, in connection with that exception, a registered entity whose U.S.-located personnel participates in an ANE Transaction that is eligible for the exception is not a counterparty to the resulting security-based swap.[83] BaFin's application, in contrast, relates to a registered SBS Entity's obligation to provide daily mark disclosure to its counterparty. The security-based swap dealer whose U.S. personnel arranged, negotiated or executed the security-based swap will be a counterparty to the security-based swap and will have an on-going relationship with its counterparty.

Second, the commenter stated that EU mark-to-market (and mark-to-model) requirements are comparable to Exchange Act daily mark requirements.[84] In the proposal, the Commission preliminarily concluded that mark-to-market (and mark-to-model) requirements are not comparable to daily mark requirements because they do not require the Covered Entity to disclose the contract valuation to the counterparty.[85] In reply, the commenter stated that EU variation margin requirements mandate that some counterparties exchange variation margin calculated in accordance with these mark-to-market (or mark-to-model) requirements, with adjustments to these valuations ''generally not permissible.'' [86] However, the variation margin requirements cited by the commenter require only that counterparties determine the amount of variation margin to be collected in respect of the aggregate valuations of all contracts in a netting set; counterparties are not required to disclose the valuations of individual contracts.[87] Moreover, these EU requirements permit the amount of variation margin to be adjusted by the net value of each contract in the netting set at the point of entry into the contract, as well as by values of variation margin previously collected or posted.[88] In determining whether EU variation margin requirements are comparable to Exchange Act daily mark requirements, the Commission is mindful that this comparability is essential to maintaining a level playing field among German SBS Entities, which are potentially eligible to use substituted compliance pursuant to the Order, other SBS Entities that are not U.S. persons, which may apply to use substituted compliance in respect of other applicable foreign requirements, and SBS Entities that are U.S. persons, which are not eligible to use substituted compliance. In the Commission's view, the EU variation margin requirements cited by the commenter, which do not require disclosure of the unadjusted valuation of each contract in the netting set, do not produce outcomes that are comparable to Exchange Act requirements to disclose the individualized daily mark of a security-based swap. Accordingly, the Commission does not view the EU variation margin requirements cited by the commenter as comparable to Exchange Act daily mark requirements.

Third, the commenter stated that the EU reporting requirements cited by BaFin are comparable to Exchange Act daily mark requirements.[89] In the proposal, the Commission preliminarily concluded that in practice U.S. counterparties may encounter challenges when attempting to access daily marks for different security-based swaps reported to multiple EU trade repositories with which they may not otherwise have business relationships.[90] In reply, the commenter stated that these challenges should not be as relevant for EU and other non-U.S. counterparties if they are already subject to EU reporting obligations.[91] The commenter's position, however, highlights that U.S. counterparties, as well as non-U.S. counterparties without existing business relationships with multiple EU trade repositories, still may encounter challenges in receiving daily marks from these daily trade reports. Moreover, the Commission is mindful that allowing Covered Entities to treat U.S. person counterparties differently for purposes of Exchange Act daily mark requirements could lead to disparities in security-based swap market access between U.S. and non-U.S. counterparties. In the proposal, the Commission also expressed concern that daily mark information reported to trade repositories may be less current, given the time necessary for reporting and for the trade repository to make the information available.[92] The commenter reported that in its experience data is available promptly from trade repositories.[93] This report of the commenter's experience lessens the Commission's concern with respect to timing, but does not overcome the Commission's concerns regarding barriers to U.S. counterparties' access to EU trade repository data and the potential for disparities in the availability of substituted compliance for daily mark requirements to reduce U.S. counterparties' access to security-based swap markets. Accordingly, the Commission continues to view the EU trade reporting requirements cited by BaFin as not comparable to Exchange Act daily mark requirements.

The Commission recognizes that there are differences between the approaches taken by fair and balanced communications, disclosure of material risks and characteristics, disclosure of material incentives or conflicts of interest, ''know your counterparty,'' suitability and daily mark disclosure requirements under the Exchange Act, on the one hand, and relevant German and EU requirements, on the other hand. The Commission continues to view those differences, when coupled with the conditions described above, as not so material as to be inconsistent with substituted compliance within the requisite outcomes-oriented context. With respect to clearing rights disclosure requirements, however, consistent with the proposal the Commission is not providing substituted compliance. Because EU clearing provisions do not require disclosure of a counterparty's clearing rights under Exchange Act section 3C(g)(5), the Commission views those provisions as not comparable to Exchange Act clearing rights disclosure requirements.

VII. Substituted Compliance for Recordkeeping, Reporting and Notification Requirements

A. Proposed Approach

BaFin's application in part requests substituted compliance for requirements applicable to SBS Entities under the Exchange Act relating to:

- *Recordmaking*—Requirements that prescribed records be made and kept current.
- *Record Preservation*—Requirements that address preservation of records.
- *Reporting*—Requirements that address certain reports.
- *Notification*—Requirements that address notification of the Commission

[83] *See* Exchange Act rule 3a71–3(d)(1).

[84] *See* SIFMA Letter at 5.

[85] *See* German Substituted Compliance Notice and Proposed Order, 85 FR at 72735.

[86] *See* SIFMA Letter at 5 (citing EMIR Margin RTS art. 10).

[87] *See* EMIR Margin RTS art. 10.

[88] *See* EMIR Margin RTS art. 10.

[89] See SIFMA Letter at 5.

[90] *See* German Substituted Compliance Notice and Proposed Order, 85 FR at 72735; *see also* BaFin Application Annex A category 4 at 54–56.

[91] See SIFMA Letter at 5.

[92] *See* German Substituted Compliance Notice and Proposed Order, 85 FR at 72735.

[93] *See* SIFMA Letter at 5.

when certain financial or operational problems occur.[94]

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

In proposing to provide conditional substituted compliance in connection with this part of BaFin's application, the Commission preliminarily concluded that the relevant German and EU requirements, subject to certain proposed conditions and limitations, would produce regulatory outcomes that are comparable to the outcomes associated with the recordkeeping, reporting, and notification requirements under the Exchange Act applicable to prudentially regulated SBS Entities pursuant to Exchange Act rules 18a–5, 18a–6, 18a–7, and 18a–8.[95]

Substituted compliance under the proposal was to be conditioned in part on SBS Entities being subject to specific conditions necessary to promote consistency in regulatory outcomes, or to reflect the scope of substituted compliance that would be available in connection with associated Exchange Act rules.[96] In addition, substituted compliance in connection with select areas under the proposal would be subject to specific conditions to promote consistency in regulatory outcomes, or to reflect the scope of substituted compliance for associated rules:

- *Recordmaking*—Under the proposal, the SBS Entity would need to: (a) Preserve the data elements to create certain records required by the Commission's rule and furnish the record in the format required by that rule; (b) make certain records related to the SBS Entity segregation rule if the firm is not exempt from that rule; and (c) make certain records related to business conduct requirements for which substituted compliance was proposed to not be available.[97]
- *Record preservation*—Under the proposal, the SBS Entity would need to: (a) Preserve records related to the SBS Entity segregation rule if the firm is not exempt from that rule; and (b) preserve certain records related to Regulation SBSR and business conduct requirements for which substituted compliance was proposed to not be available.[98]
- *Reporting*—Under the proposal, the SBS Entity would need to report financial and operational information in the manner and format specified by Commission order or rule.[99]
- *Notification*—Under the proposal, the SBS Entity would need to: (a) Simultaneously transmit to the Commission a copy of any notice required to be sent by comparable German and EU laws and include contact information of a person who can provide further details about the notice; and (b) comply with the requirement in the Commission's rule to provide notice of failure to make a required deposit into the reserve account required by the SBS Entity segregation rule.[100]

In connection with the proposal, the Commission also addressed the application of inspection and production requirements imposed on SBS Entities under the Exchange Act, and noted that BaFin had provided the Commission with adequate assurances that no law or policy would impede the ability of any entity that is directly supervised by BaFin that may register with the Commission ''to provide prompt access to the Commission to such entity's books and records or to submit to onsite inspection or examination by the Commission.'' [101]

B. Commenter Views and Final Provisions

Commenters supported the Commission's preliminary view that substituted compliance be made available with respect to the recordkeeping, reporting, and notification requirements of Exchange Act rules 18a–5, 18a–6, 18a–7, and 18a–8 applicable to prudentially regulated SBS Entities.[102] Commenters did not address the proposed conditions relating to Exchange rules 18a–5, 18a–6, and 18a–8. After considering commenter views, the Commission is providing for substituted compliance in connection with the recordkeeping, reporting, and notification requirements of Exchange Act rules 18a–5, 18a–6, 18a–7, and 18a–8 applicable to prudentially regulated SBS Entities consistent with the proposal except for two modifications to the condition in paragraph (e)(3)(ii) of the Order relating to rule 18a–7.[103] First, the Commission is modifying the condition to require that the financial information be presented in accordance with generally accepted accounting principles (''GAAP'') that the SBS Entity uses to prepare general purpose publicly available or available to be issued financial statements in Germany.[104] Second, the Order clarifies that the prudentially regulated SBS Entity files ''periodic unaudited'' financial and operational information because Exchange Act rule 18a–7 does not require that the FOCUS Report Part IIC be audited by an independent public accountant.

In response to the Commission's proposal regarding recordkeeping, reporting, and notification requirements, a commenter stated that the Commission should permit substituted compliance for both prudentially regulated and non-prudentially regulated SBS Entities.[105] However, the recordkeeping, reporting, and notification requirements for non-prudentially regulated SBS Entities are broader than the requirements for prudentially regulated SBS Entities. These broader requirements address the fact that the Commission has capital and margin authority and oversight responsibility with respect to non-

[94] *See* German Substituted Compliance Notice and Proposed Order, 85 FR at 72732 (citing Exchange Act rules 18a–5, 18a–6, 18a–7, and 18a–8). The Commission noted that it does not administer or oversee capital and margin requirements for prudentially regulated SBS Entities, and took the preliminary position that it would be appropriate to consider substituted compliance for recordkeeping, reporting and notification requirements applicable to nonbank SBS Entities in connection with a potential substituted compliance request for capital and margin requirements.

[95] The Commission also recognized that the comparability assessment for certain of the recordkeeping and notification requirements also appropriately may consider the extent to which those requirements are linked to separate requirements in the Exchange Act that may be subject to a substituted compliance application. *See id.* at 72736 (noting that a number of recordkeeping requirements serve a primary purpose of promoting and/or documenting SBS Entities' compliance with associated Exchange Act requirements; further stating that when substituted compliance is permitted for the associated Exchange Act requirements, substituted compliance also may be appropriate for the linked recordkeeping and notification requirements).

[96] These included compliance with certain requirements associated with CRD, CRR, EMIR, MiFID, MiFID Org Reg, MiFIR, KWG, WpHG, GwG and certain EU guidelines.

[97] *See id.* at 72737.

[98] *See id.* at 72737–38.

[99] *See id.* at 72738.

[100] *See id.* at 72738–39.

[101] *See id.* at 72739.

[102] *See* SIFMA Letter. *See also* Deutsche Bank Letter; EBF Letter (supporting SIFMA's comments).

[103] *See* paragraph (e)(3)(ii) to the Order.

[104] In the German Substituted Compliance Notice and Proposed Order, the Commission stated that SBS Entities could be permitted to present the information reported in FOCUS Report Part IIC in accordance with GAAP that the SBS Entity uses to prepare publicly available general purpose financial statements in its home jurisdiction instead of U.S. GAAP if other GAAP, such as International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board (IASB), is used by the SBS Entity in preparing general purpose financial statements.

[105] *See* SIFMA Letter at 6.

prudentially regulated SBS Entities (but not with respect to prudentially regulated SBS Entities). The Commission continues to believe it is appropriate to defer consideration of requirements that apply to non-prudentially regulated SBS Entities until such time as it receives an application seeking substituted compliance for capital and margin requirements. This will allow the Commission to make a more complete decision that considers the substantive capital and margin requirements that are linked with the recordkeeping, reporting, notification, and securities count rules that apply to non-prudentially regulated SBS Entities.

The Commission received comments regarding the Commission's proposed condition that substituted compliance with respect to Exchange Act rule 18a–7's FOCUS Report Part IIC filing requirement be conditioned on SBS Entities filing unaudited financial and operational information in the manner and format specified by Commission order or rule. The commenters made suggestions about the scope and requirements of such a Commission order or rule. First, commenters requested that SBS Entities be allowed to file other Commission or Federal Reserve Board (''FRB'') filings instead of or in combination with extracts from filings made with home country supervisors.[106] Second, a commenter asked that the financial and operational information in the filings be permitted to be consolidated at the same consolidation level that is used in the relevant Commission, FRB, or home jurisdiction reports.[107] Third, a commenter proposed that the Commission permit an SBS Entity to complete the capital line items in the filings, if the FOCUS Report Part IIC is used as the filing form, in a manner consistent with its home country capital standards and related reporting.[108] Fourth, commenters sought additional time to furnish the filings to the Commission to align with local filing deadlines.[109] Finally, commenters supported a potential approach identified by the Commission under which SBS Entities would be permitted to satisfy their Exchange Act rule 18a–7 obligations for a two-year period by filing the FOCUS Report Part IIC with only a limited number of the required line items completed.[110]

The Commission will consider these comments as it works towards completing a Commission order or rule pursuant to the provision in this Order that substituted compliance with respect to Exchange Act rule 18a–7's FOCUS Report Part IIC filing requirement is conditioned on SBS Entities filing unaudited financial and operational information in the manner and format specified by Commission order or rule.[111] In this regard, the Commission welcomes further comment and engagement from interested parties on: (1) A potential interim two-year order or rule that requires a limited number of the line items on the FOCUS Report Part IIC to be completed; and (2) the nature and scope of a more permanent order or rule for the filing of financial and operational information.

VIII. Supervisory and Enforcement Considerations

A. Preliminary Analysis

Exchange Act rule 3a71–6(a)(2)(i) provides that the Commission's assessments regarding the comparability of foreign requirements in part should take into account ''the effectiveness of the supervisory program administered, and the enforcement authority exercised'' by the foreign financial regulatory authority. This provision is intended to help ensure that substituted compliance is not predicated on rules that appear high-quality on paper if market participants in practice are allowed to fall short of their obligations, while also recognizing that differences among supervisory and enforcement regimes should not be assumed to reflect flaws in one regime or another.[112] BaFin's application accordingly included information regarding the supervisory and enforcement framework applicable to derivatives markets and market participants in Germany.

In proposing to grant substituted compliance in connection with Germany, the Commission preliminarily concluded that the relevant supervisory and enforcement considerations were consistent with substituted compliance. That preliminary conclusion took into account information regarding BaFin's and the ECB's roles and practices in supervising credit institutions located in Germany, as well as their enforcement-related authority and practices.[113]

B. Conclusions

Commenters did not address the Commission's preliminary conclusions regarding supervisory and enforcement considerations, and the Commission continues to conclude that the relevant supervisory and enforcement considerations in Germany are consistent with substituted compliance. In particular, based on the available information regarding BaFin's and the ECB's authority and practices to oversee market participants' compliance with applicable requirements and to take action in the event of violations, the Commission remains of the view that, consistent with rule 3a71–6, comparability determinations reflect German and EU requirements as they apply in practice.

To be clear, the supervisory and enforcement considerations addressed by rule 3a71–6 do not mandate that the Commission make judgments regarding the comparative merits of U.S. and foreign supervisory and enforcement frameworks, or to require specific findings regarding the supervisory and enforcement effectiveness of a foreign regime. The rule 3a71–6 considerations regarding supervisory and enforcement effectiveness instead address whether comparability analyses related to substituted compliance reflect requirements that market participants must follow, and for which market participants are subject to enforcement consequences in the event of violations. Those considerations are satisfied here.

IX. Conclusion

It is hereby determined and ordered, pursuant to rule 3a71–6 under the Exchange Act, that a Covered Entity (as defined in paragraph (f)(1) of this Order) may satisfy the requirements under the Exchange Act that are addressed in paragraphs (b) through (e) of this Order so long as the Covered Entity is subject to and complies with relevant requirements of the Federal Republic of Germany and the European Union and with the conditions to this Order, as may be amended or superseded from time to time.

(a) General Conditions

This Order is subject to the following general conditions, in addition to the

[106] *See* SIFMA Letter at 8; Deutsche Bank Letter at 2.

[107] *See* SIFMA Letter at 8.

[108] *See* SIFMA Letter at 8.

[109] *See* SIFMA Letter at 8; Deutsche Bank Letter at 2.

[110] *See* SIFMA Letter at 8–9; Deutsche Bank Letter at 2.

[111] The Commission intends to issue an order sufficiently in advance of the compliance date for Exchange rule 18a–7 to provide SBS Entities time to configure their systems to comply with the filing requirement. When the order is issued, the Commission will consider whether it would be appropriate to provide additional time before the first filing is required if SBS Entities indicate that they will have trouble configuring their systems to comply with the filing requirement.

[112] *See* German Substituted Compliance Notice and Proposed Order, 85 FR at 72739.

[113] *See id.* at 72739–40.

conditions specified in paragraphs (b) through (e):

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

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

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

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

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

(6) *Notice to Commission.* A Covered Entity relying on this Order must provide notice of its intent to rely on this Order by notifying the Commission in writing. Such notice must be sent to an email address provided on the Commission's website. The notice must include the contact information of an individual who can provide further information about the matter that is the subject of the notice.

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

(i) If, in relation to a particular service provided by a Covered Entity, responsibility for ensuring compliance with any provision of MiFID or any other EU or German requirement adopted pursuant to MiFID listed in paragraphs (b) through (e) of this Order is allocated to an authority of the Member State of the European Union in whose territory a Covered Entity provides the service, BaFin must be the authority responsible for supervision and enforcement of that provision or requirement in relation to the particular service.

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

(b) Substituted Compliance in Connection With Risk Control Requirements

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

(1) *Internal risk management.* The requirements of Exchange Act section 15F(j)(2) and related aspects of Exchange Act rule 15Fh–3(h)(2)(iii)(I), provided that the Covered Entity is subject to and complies with the requirements of: MiFID articles 16(4) and 16(5); WpHG section 80; MiFID Org Reg articles 21–24; CRD articles 74, 76 and 79–87; KWG sections 25a, 25b, 25c (other than 25c(2)), 25d (other than 25d(3) and 25d(11)), 25(e) and 25(f); CRR articles 286–88 and 293; and EMIR Margin RTS article 2.

(2) *Trade acknowledgement and verification.* The requirements of Exchange Act rule 15Fi–2, provided that the Covered Entity is subject to and complies with the requirements of MiFID article 25(6), WpHG section 63(12), MiFID Org Reg articles 59–61, EMIR article 11(1)(a) and EMIR RTS article 12.

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

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

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

(4) *Portfolio compression.* The requirements of Exchange Act rule 15Fi–4, provided that the Covered Entity is subject to and complies with the requirements of EMIR RTS article 14.

(5) *Trading relationship documentation.* The requirements of Exchange Act rule 15Fi–5, other than paragraph (b)(5) to that rule when the counterparty is a U.S. person, provided that:

(i) The Covered Entity is subject to and complies with the requirements of MiFID article 25(5), WpHG section 83(2), MiFID Org Reg articles 24, 58, 73 and applicable parts of Annex I, and EMIR Margin RTS article 2; and

(ii) The Covered Entity does not treat the applicable counterparty as an ''eligible counterparty'' for purposes of MiFID article 30 and WpHG section 68, in relation to the MiFID and WpHG provisions specified in paragraph (b)(5)(i).

(c) Substituted Compliance in Connection With Internal Supervision and Compliance Requirements and Certain Exchange Act Section 15F(J) Requirements

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

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

(i) The Covered Entity is subject to and complies with the requirements identified in paragraph (c)(3);

(ii) The Covered Entity complies with paragraph (c)(4) to this Order; and

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

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

(i) The Covered Entity complies with the requirements identified in paragraph (c)(3) to this Order;

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

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

(B) Include a certification that, under penalty of law, the report is accurate and complete; and

(C) Address the firm's compliance with other applicable conditions to this Order in connection with requirements for which the Covered Entity is relying on this Order.

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

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

(i) Applicable requirements under the Exchange Act; and

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

(d) Substituted Compliance in Connection With Counterparty Protection Requirements

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

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

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

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

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

(iii) MAR article 20(1).

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

(4) *Suitability.* The requirements of Exchange Act rule 15Fh–3(f), provided that:

(i) The Covered Entity is subject to and complies with the requirements of MiFID articles 24(2)–(3) and 25(1)–(2); WpHG sections 63(5)–(6), 80(9)–(13) and 87(1)–(2); and MiFID Org Reg articles 21(1)(b) and (d), 54 and 55, in each case in relation to the recommendation of a security-based swap or trading strategy involving a security-based swap that is provided by or on behalf of the Covered Entity; and

(ii) The counterparty to which the Covered Entity makes the recommendation is a ''professional client'' mentioned in MiFID Annex II section I and WpHG section 67(2) and is not a ''special entity'' as defined in Exchange Act section 15F(h)(2)(C) and Exchange Act rule 15Fh–2(d).

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

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

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

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

(e) Substituted Compliance in Connection With Recordkeeping, Reporting, and Notification Requirements

This Order extends to the following provisions related to Commission requirements to:

(1) *Make and keep current certain records.* The requirements to make and keep current records of Exchange Act rule 18a–5 applicable to prudentially regulated security-based swap dealers and major security-based swap participants; provided that:

(i) The Covered Entity is subject to and complies with the following requirements: CRR articles 103 and 103(b)(ii); EMIR articles 9(2), 11(1)(a), and 39(4); EMIR RTS 148/2013; MiFID articles 9(1), 16(3), 16(6)–16(9), 25(1), 25(5), and 25(6); MiFID Delegated Directive article 2; MiFID Org Reg. articles 16(7), 21(1)(a), 35, 59, 72, 73, 74, 75, 76, and applicable parts of Annex I; MiFID Org Reg. Annex IV; MiFIR article 25; MLD4 articles 11 and 13; EBA/ESMA Guidelines on Management Suitability guidelines 74, 75, and 172, and Annex III; CRD articles 88, 91(1), and 91(8); KWG sections 25c(1) and 25d(1)–(3); WpHG section 63, section 64, section 81 paragraph 1, section 83 paragraphs 1 through 8, and section 84; and GwG section 10, paragraph 1, points 1 through 3;

(ii)(A) The Covered Entity preserves all of the data elements necessary to create the records required by Exchange Act rules 18a–5(b)(1), (2), (3), and (7); and

(B) The Covered Entity upon request furnishes promptly to representatives of the Commission the records required by those rules;

(iii) The Covered Entity makes and keeps current the records required by Exchange Act rules 18a–5(b)(9) and (10) if the Covered Entity is not exempt from the requirements of Exchange Act rule 18a–4;

(iv) The Covered Entity makes and keeps current the records required by Exchange Act rule 18a–5(b)(12); and

(v) Except with respect to requirements of Exchange Act rules 15Fh–3 and 15Fk–1 to which this Order extends pursuant paragraphs (c)(2) and

(d), the Covered Entity makes and keeps current the records required by Exchange Act rule 18a–5(b)(13).

(2) *Preserve records.* The record preservation requirements of Exchange Act rule 18a–6 applicable to prudentially regulated security-based swap dealers and major security-based swap participants; provided that:

(i) The Covered Entity is subject to and complies with the following requirements: CRD articles 88, 91(1), and 91(8); CRR articles 99, 104(1)(j), 294, 394, 415–428, and 430; CRR Reporting ITS Article 14 and Annexes I–V, VIII–XIII; EMIR articles 9(1) and 9(2); MiFID articles 9(1), 16(3), and 69(2); MiFID Org Reg. articles 21(1)(a), 21(2), 35, 58, 72(1), 72(3), 73, and 76; MiFIR articles 16(2), 16(5), 16(6), 16(7), 25(1), 25(5), 31(1) and 72; MLD4 articles 11 and 13; EBA/ESMA Guidelines on Management Suitability guidelines 74, 75, and 172, and Annex III; EBA Guidelines on Outsourcing section 13.3; KWG 25c(1) and 25d(1)–(3); WpHG sections 6, 7, 63, 64, and 80 and section 83 paragraphs 1, 2, 3, and 8; and GwG sections 10 and 11;

(ii) The Covered Entity preserves the records required by Exchange Act rule 18a–6(b)(2)(v) if the Covered Entity is not exempt from the requirements of Exchange Act rule 18a–4;

(iii) Except with respect to requirements of Exchange Act rules 15Fh–3 and 15Fk–1 to which this Order extends pursuant to paragraphs (c)(2) and (d), the Covered Entity preserves the records required by Exchange Act rule 18a–6(b)(2)(vii); and

(iv) The Covered Entity preserves the records required by Exchange Act rule 18a–6(b)(2)(vi) and (b)(2)(viii).

(3) *File Financial and Operational Information.* The reporting requirements of Exchange Act rule 18a–7 applicable to prudentially regulated security-based swap dealers and major security-based swap participants; provided that:

(i) The Covered Entity is subject to and complies with the following requirements: CRR articles 99, 104(1)(j), 394, 415–428, and 430; CRR Reporting ITS chapter 2 and Annexes I–V and VII–XIII; and Commission Delegated Regulation (EU) 2017/1443, as amended or superseded from time to time; and

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

(4) *Provide Notification.* The notification requirements of Exchange Act rule 18a–8 applicable to prudentially regulated security-based swap dealers and major security-based swap participants; provided that:

(i) The Covered Entity is subject to and complies with the following requirements: CRD article 71; MiFID article 73; KWG section 24 paragraph 1; and FinDAG section 4d; and

(ii) The Covered Entity:

(A) Simultaneously transmits to the principal office of the Commission or to an email address provided on the Commission's website a copy of any notice required to be sent by the German and EU laws referenced in paragraph (e)(3)(i) of this order; and

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

(iii) The Covered Entity complies with notification requirements of Exchange Act rule 18a–8(g) if the Covered Entity is not exempt from Exchange Act rule 18a–4.

(5) *Examination and Production of Records.* Notwithstanding the forgoing provisions of paragraph (e) of this Order, prudentially regulated security-based swap dealers and major security-based swap participants remains subject to the requirement of Exchange Act section 15F(f) to keep books and records open to inspection by any representative of the Commission and the requirement of Exchange Act rule 18a–6(g) to furnish promptly to a representative of the Commission legible, true, complete, and current copies of those records of the Covered Entity that are required to be preserved under Exchange Act rule 18a–6, or any other records of the Covered Entity that are subject to examination or required to be made or maintained pursuant to Exchange Act section 15F that are requested by a representative of the Commission.

(f) Definitions

(1) ''Covered Entity'' means an entity that:

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

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

(iii) Is an investment firm or credit institution authorized by BaFin to provide investment services or perform investment activities in the Federal Republic of Germany.

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

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

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

(5) ''MiFID Delegated Directive'' means Commission Delegated Directive (EU) 2017/593, as amended or superseded from time to time.

(6) ''MLD'' means Directive (EU) 2015/849, as amended or superseded from time to time.

(7) ''GwG'' means Germany's ''Geldwäschegesetz,'' as amended or superseded from time to time.

(8) ''MiFIR'' means Regulation (EU) 600/2014, as amended or superseded from time to time.

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

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

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

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

(13) ''CRD'' means Directive 2013/36/EU, as amended or superseded from time to time.

(14) ''KWG'' means Germany's ''Kreditwesengesetz,'' as amended or superseded from time to time.

(15) ''CRR'' means Regulation (EU) 575/2013, as amended or superseded from time to time.

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

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

(18) ''FinDAG'' means Germany's ''Finanzdienstleistungsaufsichtsgesetz,'' as amended or superseded from time to time.

(19) ''BaFin'' means the Bundesanstalt für Finanzdienstleistungsaufsicht.

By the Commission.

Vanessa A. Countryman,

Secretary.

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