§ 240.3a68–3 Meaning of "narrow-based security index" as used in the definition of "security-based swap."

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

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

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

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

(2) The index has been a narrow-based security index for no more than 45 business days over three consecutive calendar months.

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

(1)(i) A security-based swap on the index is traded on a national securities exchange or security-based swap execu-

tion facility for at least 30 days as a security-based swap on a narrow-based security index; or

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

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

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

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

[77 FR 48356, Aug. 13, 2012]

§ 240.3a68–4 Regulation of mixed swaps.

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

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

(1) That is neither executed on nor subject to the rules of a designated contract market, national securities

exchange, swap execution facility, security-based swap execution facility, or foreign board of trade;

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

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

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

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

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

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

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

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

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

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

(c) *Process for determining regulatory treatment for other mixed swaps*—(1) *In general.* Any person who desires or intends to list, trade, or clear a mixed swap (or class thereof) that is not subject to paragraph (b) of this section may request the Commission and the Commodity Futures Trading Commission to issue a joint order permitting the requesting person (and any other person or persons that subsequently lists, trades, or clears that mixed swap) to comply, as to parallel provisions only, with specified parallel provisions of either the Act (15 U.S.C. 78a *et seq.*) or the Commodity Exchange Act (7 U.S.C. 1 *et seq.*), and the rules and regulations thereunder (collectively, *specified parallel provisions*), instead of being required to comply with parallel provisions of both the Act and the Commodity Exchange Act. For purposes of

this paragraph (c), *parallel provisions* means comparable provisions of the Act and the Commodity Exchange Act that were added or amended by the Wall Street Transparency and Accountability Act of 2010 with respect to security-based swaps and swaps, and the rules and regulations thereunder.

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

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

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

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

(iv) An analysis of:

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

(B) The comparability of such parallel provisions;

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

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

(3) *Request withdrawal.* A person may withdraw a request made pursuant to paragraph (c)(1) of this section at any time prior to the issuance of a joint order under paragraph (c)(4) of this section by the Commission and the Commodity Futures Trading Commission in response to the request.

(4) *Issuance of orders.* In response to a request under paragraph (c)(1) of this section, the Commission and the Commodity Futures Trading Commission, as necessary to carry out the purposes of the Wall Street Transparency and Accountability Act of 2010, may issue a joint order, after notice and opportunity for comment, permitting the requesting person (and any other person or persons that subsequently lists, trades, or clears that mixed swap) to comply, as to parallel provisions only,

with the specified parallel provisions (or another subset of the parallel provisions that are the subject of the request, as the Commissions determine is appropriate), instead of being required to comply with parallel provisions of both the Act (15 U.S.C. 78a *et seq.*) and the Commodity Exchange Act (7 U.S.C. 1 *et seq.*). In determining the contents of such joint order, the Commission and the Commodity Futures Trading Commission may consider, among other things:

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

(ii) The comparability of such parallel provisions; and

(iii) The extent of any conflicts or differences between such parallel provisions.

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

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

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

[77 FR 48356, Aug. 13, 2012]

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

The term *security-based swap* as used in section 3(a)(68) of the Act (15 U.S.C. 78c(a)(68)) does not include an agreement, contract, or transaction that is based on or references a qualifying for-

eign futures contract (as defined in § 240.3a12–8 on the debt securities of any one or more of the foreign governments enumerated in § 240.3a12–8, provided that such agreement, contract, or transaction satisfies the following conditions:

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

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

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

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

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

[77 FR 48356, Aug. 13, 2012]

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

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