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Security-Based Swap Data Repository Registration, Duties, and Core Principles; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 232, 240, and 249

[Release No. 34–74246; File No. S7–35–10]

RIN 3235–AK79

Security-Based Swap Data Repository Registration, Duties, and Core Principles

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: Pursuant to Section 763(i) of Title VII (''Title VII'') of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (''Dodd-Frank Act''), the Securities and Exchange Commission (''Commission'') is adopting new rules under the Securities Exchange Act of 1934 (''Exchange Act'') governing the security-based swap data repository (''SDR'') registration process, duties, and core principles. The Commission is also adopting a new registration form. Additionally, the Commission is amending several of its existing rules and regulations in order to accommodate SDRs. First, the Commission is amending Regulation S–T and Exchange Act Rule 24b–2 to clarify that all filings by SDRs, including any confidential portion, and their requests for confidential treatment must be filed electronically. Second, the Commission is amending Regulation S–T by, among other things, adding a new rule that specifically applies to the electronic filing of SDRs' financial reports.

DATES: *Effective Date:* May 18, 2015. *Compliance Date:* March 18, 2016.

FOR FURTHER INFORMATION CONTACT: Paula Jenson, Acting Chief Counsel; Jo Anne Swindler, Assistant Director; Richard Vorosmarti, Branch Chief; Angie Le, Special Counsel; or Kevin Schopp, Special Counsel, Division of Trading and Markets, at (202) 551–5750, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549. For questions regarding the SDR registration process, please contact Jeffrey Mooney, Assistant Director, Stephanie Park, Senior Special Counsel, Andrew Shanbrom, Special Counsel, or Elizabeth Fitzgerald, Special Counsel, Division of Trading and Markets, at (202) 551–5710.

SUPPLEMENTARY INFORMATION: The Commission is taking several actions. First, the Commission is adopting Rules 13n–1 to 13n–12 (''SDR Rules'') under the Exchange Act governing SDRs and a new form for registration as a security-based swap data repository (''Form SDR''). Second, the Commission is adopting technical amendments to Regulation S–T and Exchange Act Rule 24b–2 to clarify that all filings by SDRs, including any confidential portion, and their requests for confidential treatment must be filed electronically. Third, the Commission is amending Regulation S–T, including adopting new Rule 407, as a technical amendment related to Rule 13n–11, which is applicable to the electronic filing of SDRs' financial reports.

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I. Introduction

A. Proposed Rules Governing the SDR Registration Process, Duties, and Core Principles, and Form SDR

Title VII of the Dodd-Frank Act provides for a comprehensive new regulatory framework for security-based swaps (''SBSs''), including the regulation of SDRs.[1] SDRs are required to collect and maintain accurate SBS transaction data so that relevant authorities can access and analyze the data from secure, central locations, thereby putting them in a better position to monitor for potential market abuse and risks to financial stability. On November 19, 2010, the Commission proposed new Rules 13n–1 to 13n–11 under the Exchange Act governing the SDR registration process, duties, and core principles, and new Form SDR, through which applicants would seek to register as SDRs.[2]

Subsequently, on May 1, 2013, the Commission issued a proposing release discussing cross-border SBS activities, including activities involving SDRs.[3] In that release, the Commission proposed guidance regarding the application of certain SDR requirements in the cross-border context;[4] new Rule 13n–12 under the Exchange Act, which would provide certain SDRs with an exemption from Exchange Act Section 13(n) and the rules and regulations thereunder;[5] and guidance to specify how SDRs may comply with the notification requirement in the Exchange Act and how the Commission proposes to determine whether a relevant authority is appropriate for purposes of receiving SBS data from an SDR.[6] In addition, the Commission proposed an exemption from the indemnification requirement in the Exchange Act.[7]

B. Related Commission Actions

In conjunction with issuing the Proposing Release on November 19, 2010, the Commission also proposed Regulation SBSR to implement the Dodd-Frank Act's provisions relating to reporting SBS information to SDRs, including standards for the data elements that must be provided to SDRs.[8] Subsequently, on June 15, 2011, the Commission issued an exemptive order, which provided guidance and certain exemptions with respect to the requirements under Title VII, including requirements governing SDRs, which would have had to be complied with as of July 16, 2011 (*i.e.,* the effective date of Title VII).[9] Later, on June 11, 2012, the Commission issued a statement of general policy on the anticipated sequencing of compliance dates of final rules to be adopted under Title VII.[10] On May 1, 2013, the Commission re-proposed Regulation SBSR in the Cross-Border Proposing Release.[11] At the same time, the Commission reopened the comment period for certain rules proposed under Title VII, including the SDR Rules and Form SDR, and the Implementation Policy Statement.[12]

The Commission is concurrently adopting Regulation SBSR in a separate release.[13] The Dodd-Frank Act requires the Commission to engage in rulemaking for the public dissemination of SBS transaction, volume, and pricing data,[14] and provides the Commission with discretion to determine an appropriate approach to implement this important function. Regulation SBSR requires SDRs to undertake this role.[15]

As discussed in the Proposing Release, when considered in conjunction with Regulation SBSR, the rules that the Commission adopts in this release seek to provide improved transparency to regulators and the markets through comprehensive regulations for SBS transaction data and

[1] Public Law 111–203, section 761(a) (adding Exchange Act Section 3(a)(75) (defining SDR)) and section 763(i) (adding Exchange Act Section 13(n) (establishing a regulatory regime for SDRs)).

[2] *See* Security-Based Swap Data Repository Registration, Duties, and Core Principles, Exchange Act Release No. 63347 (Nov. 19, 2010), 75 FR 77306 (Dec. 10, 2010), *corrected at* 75 FR 79320 (Dec. 20, 2010) *and* 76 FR 2287 (Jan. 13, 2011) (''Proposing Release'').

[3] Cross-Border Security-Based Swap Activities; Re-Proposal of Regulation SBSR and Certain Rules and Forms Relating to the Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants, Exchange Act Release No. 69490 (May 1, 2013), 78 FR 30968 (May 23, 2013) (''Cross-Border Proposing Release'').

[4] Cross-Border Proposing Release, 78 FR at 31041–44, *supra* note 3.

[5] Cross-Border Proposing Release, 78 FR at 31209, *supra* note 3.

[6] Cross-Border Proposing Release, 78 FR at 31046–48, *supra* note 3.

[7] Cross-Border Proposing Release, 78 FR at 31209, *supra* note 3 (proposing Rule 13n–4(d)).

[8] Regulation SBSR-Reporting and Dissemination of Security-Based Swap Information, Exchange Act Release No. 63346 (Nov. 19, 2010), 75 FR 75208 (Dec. 2, 2010) (''Regulation SBSR Proposing Release'').

[9] *See* Temporary Exemptions and Other Temporary Relief, Together With Information on Compliance Dates for New Provisions of the Securities Exchange Act of 1934 Applicable to Security-Based Swaps, Exchange Act Release No. 64678 (June 15, 2011), 76 FR 36287 (June 22, 2011) (''Effective Date Order''). The Effective Date Order included temporary exemptions from Exchange Act Sections 13(n)(5)(D)(i), 13(n)(5)(F), 13(n)(5)(G), 13(n)(5)(H), 13(n)(7)(A), 13(n)(7)(B), and 13(n)(7)(C), each of which will expire on the earlier of (1) the date the Commission grants registration to the SDR and (2) the earliest compliance date set forth in any of the final rules regarding the registration of SDRs. *Id.* at 36306. In addition, the Commission granted temporary exemptions from Exchange Act Section 29(b) in connection with the above listed provisions of the Exchange Act until such date as the Commission specifies. *Id.* at 36307. Section 29(b) generally provides that contracts made in violation of any provision of the Exchange Act, or the rules thereunder, shall be void ''(1) as regards the rights of any person who, in violation of any such provision . . . shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision. . . .'' 15 U.S.C. 78cc(b).

[10] *See* Statement of General Policy on the Sequencing of the Compliance Dates for Final Rules Applicable to Security-Based Swaps Adopted Pursuant to the Securities Exchange Act of 1934 and the Dodd-Frank Wall Street Reform and Consumer Protection Act, Exchange Act Release No. 67177 (June 11, 2012), 77 FR 35625 (June 14, 2012) (''Implementation Policy Statement'').

[11] Cross-Border Proposing Release, 78 FR at 31210–31216, *supra* note 3. The Commission subsequently adopted certain aspects of the Cross-Border Proposing Release, which, as discussed below, has implications on this release. *See* Application of ''Security-Based Swap Dealer'' and ''Major Security-Based Swap Participant'' Definitions to Cross-Border Security-Based Swap Activities, Exchange Act Release No. 72472 (June 25, 2014), 79 FR 39068 (July 9, 2014) *republished at* 79 FR 47278 (Aug. 12, 2014) (''Cross-Border Adopting Release'').

[12] Reopening of Comment Periods for Certain Rulemaking Releases and Policy Statement Applicable to Security-Based Swaps Proposed Pursuant to the Securities Exchange Act of 1934 and the Dodd-Frank Wall Street Reform and Consumer Protection Act, Exchange Act Release No. 69491 (May 1, 2013), 78 FR 30800 (May 23, 2013) (''Reopening Release'').

[13] Regulation SBSR-Reporting and Dissemination of Security-Based Swap Information, Exchange Act Release No. 74244 (Feb. 11, 2015) (''Regulation SBSR Adopting Release''). The Commission is also concurrently proposing certain new rules and amendments to Regulation SBSR. *See* Regulation SBSR-Reporting and Dissemination of Security-Based Swap Information, Exchange Act Release No. 74245 (Feb. 11, 2015) (''Regulation SBSR Proposed Amendments Release'').

[14] Exchange Act Section 13(m)(1), 15 U.S.C. 78m(m)(1), as added by Dodd-Frank Act Section 763(i).

[15] *See* Regulation SBSR Adopting Release, *supra* note 13. In a separate proposal relating to implementation of Dodd-Frank Act Section 763(i) (adding Exchange Act Section 13(n)(5)(E)), the Commission proposed rules that would require SDRs to collect data related to monitoring the compliance and frequency of end-user clearing exemption claims. *See* End-User Exception to Mandatory Clearing of Security-Based Swaps, Exchange Act Release No. 63556 (Dec. 15, 2010), 75 FR 79992 (Dec. 21, 2010) (''End-User Exception Proposing Release'').

SDRs.[16] In combination, these rules represent a significant step forward in providing a regulatory framework that promotes transparency and efficiency in the OTC derivatives markets and creates important infrastructure to assist relevant authorities in performing their market oversight functions.

C. Public Comment

In each of the releases discussed above, the Commission requested comment on a number of issues related to the proposed SDR Rules. In addition, Commission staff and Commodity Futures Trading Commission (''CFTC'') staff conducted joint public roundtables, including, for example, a joint public roundtable on implementation issues raised by Title VII (''Implementation Joint Roundtable'') [17] and a joint public roundtable on international issues relating to the implementation of Title VII (''International Joint Roundtable'').[18]

The Commission received twenty comment letters in response to the Proposing Release and the Reopening Release [19] as well as six letters submitted with respect to SDRs prior to the Proposing Release.[20] The Commission also received three comment letters that address issues related to SDRs, among others, after the Proposing Release through the Commission's solicitation for comments,[21] which will be addressed in this release. In addition, the Commission received one letter in response to the Implementation Policy Statement,[22] two letters in response to the Implementation Joint Roundtable [23] and a letter in response to the International Joint Roundtable,[24] all of which are relevant to the Proposing Release and are addressed in this release.[25] The Commission also received four comment letters in response to the Cross-Border Proposing Release relating directly to the proposed SDR Rules.[26]

The Commission also considered relevant comments submitted with respect to proposed Regulation SBSR,[27] the interim temporary final rule for reporting of SBS transaction data,[28] and proposed rules for the registration and regulation of security-based swap execution facilities (''SB SEFs'').[29]

[16] Proposing Release, 75 FR at 77307, *supra* note 2.

[17] *See* Joint Public Roundtable on Issues Related to the Schedule for Implementing Final Rules for Swaps and Security-Based Swaps Under the Dodd-Frank Wall Street Reform and Consumer Protection Act, Exchange Act Release No. 64314 (Apr. 20, 2011), 76 FR 23221 (Apr. 26, 2011). Transcripts for the public roundtable are available on the Commission's Web site at *http://www.sec.gov/news/press/2011/2011-90-transcript.pdf*.

[18] *See* Joint Public Roundtable on International Issues Relating to the Implementation of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Exchange Act Release No. 64939 (July 21, 2011); 76 FR 44507 (July 26, 2011). The transcript for the public roundtable is available on the Commission's Web site at: *http://www.sec.gov/news/press/2011/2011-151-transcript.pdf*.

[19] *See* letters from The Bank of New York Mellon Corporation (''BNY Mellon''); Better Markets, Inc. dated January 24, 2011 (''Better Markets 1''); Better Markets, Inc. dated July 22, 2013 (''Better Markets 2''); Better Markets, Inc. dated October 18, 2013 (''Better Markets 3''); Chris Barnard (''Barnard''); Depository Trust & Clearing Corporation dated January 24, 2011 (''DTCC 2''); Depository Trust & Clearing Corporation dated June 3, 2011 (''DTCC 3''); Depository Trust & Clearing Corporation dated July 21, 2011 (''DTCC 4''); Depository Trust & Clearing Corporation dated July 22, 2013 (''DTCC 5''); Ethics Metrics (''Ethics Metrics''); European Securities and Markets Authority (''ESMA''); International Swaps and Derivatives Association dated June 28, 2013 (''ISDA''); Managed Funds Association dated January 24, 2011 (''MFA 1''); Managed Funds Association dated March 24, 2011 (''MFA 2''); Markit North America Inc. (''Markit''); MarkitSERV LLC (''MarkitSERV''); Ralph S. Saul (''Saul''); and TriOptima AB (''TriOptima''). Two of these comment letters did not raise issues relating to the SDR Rules. *See* letters from the Chicago Mercantile Exchange, Inc. and ICE Trade Vault, LLC dated November 19, 2013 (relating to Regulation SBSR) and Financial Services Roundtable, Futures Industry Association, Institute of International Bankers, International Swaps and Derivatives Association, Investment Company Institute, Securities Industry and Financial Markets Association dated May 21, 2013 (requesting 90-day extension of the comment period for the Cross-Border Proposing Release). The comments that the Commission received on the Proposing Release and the Reopening Release are available on the Commission's Web site at *http://www.sec.gov/comments/s7-35-10/s73510.shtml*.

[20] *See* letters from Benchmark Solutions (''Benchmark*''); Coalition for Derivatives End-Users (''CDEU*''); Depository Trust & Clearing Corporation dated November 15, 2010 (''DTCC 1*''); Morgan Stanley (''Morgan Stanley*''); Robin McLeish (''McLeish*''); and Securities Industry and Financial Markets Association (''SIFMA*''), available on the Commission's Web site at *http://www.sec.gov/comments/df-title-vii/swap-data-repositories/swap-data-repositories.shtml*. To facilitate public input on the Dodd-Frank Act, the Commission provided a series of email links, organized by topic, on its Web site at *http://www.sec.gov/spotlight/regreformcomments.shtml*.

[21] *See* letters from Barclays Capital Inc. (''Barclays*''); Financial Services Forum, Futures Industry Association, International Swaps and Derivatives Association, and Securities Industry and Financial Markets Association (''FSF*''); and Futures Industry Association, The Financial Services Roundtable, Institute of International Bankers, Insured Retirement Institute, International Swaps and Derivatives Association, Securities Industry and Financial Markets Association, and U.S. Chamber of Commerce (''FIA*''), available on the Commission's Web site at *http://www.sec.gov/comments/df-title-vii/swap-data-repositories/swap-data-repositories.shtml*.

[22] *See* letter from Securities Industry and Financial Markets Association (''SIFMA Implementation''), available on the Commission's Web site at *http://www.sec.gov/comments/s7-05-12/s70512-11.pdf*.

[23] *See* letters from The Financial Services Roundtable (''FSR Implementation''), available on the Commission's Web site at *http://www.sec.gov/comments/4-625/4625-1.pdf*; and Association of Institutional Investors (''AII Implementation''), available on the Commission's Web site at *http://www.sec.gov/comments/4-625/4625-5.pdf*.

[24] *See* letter from Bank of America Merrill Lynch, Barclays Capital, BNP Paribas, Citi, Crédit Agricole Corporate and Investment Bank, Credit Suisse Securities (USA), Deutsche Bank AG, HSBC, Morgan Stanley, Nomura Securities International, Inc., Société Générale, and UBS Securities LLC (''US & Foreign Banks''), available on the Commission's Web site at *http://www.sec.gov/comments/4-636/4636-4.pdf*; Joint Public Roundtable on International Issues Relating to the Implementation of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Exchange Act Release No. 64939 (July 21, 2011); 76 FR 44507 (July 26, 2011).

[25] One commenter recommended that the Commission ''encourage the formation of a planning group composed of market participants'' to address the questions in the Proposing Release. Saul, *supra* note 19. The Commission believes that market participants have had sufficient opportunities to comment on the Proposing Release and market participants have taken advantage of these opportunities. Therefore, the Commission does not believe that a planning group composed of market participants is necessary.

[26] *See* letters from Better Markets, Inc. dated August 21, 2013 (''Better Markets CB''); Depository Trust & Clearing Corporation dated August 21, 2013 (''DTCC CB''); ICE Trade Vault, LLC (''ICE CB''); and Institute of International Bankers (''IIB CB''). The comments that the Commission received on the Cross-Border Proposing Release are available on the Commission's Web site at *http://sec.gov/comments/s7-02-13/s70213.shtml*. The Commission addressed comment letters in response to the Cross-Border Proposing Release that address Title VII generally and do not relate directly to the proposed SDR Rules in the Cross-Border Adopting Release. *See* Cross-Border Adopting Release, 79 FR at 47281–2, *supra* note 11.

[27] Regulation SBSR Proposing Release, *supra* note 8. *See* letters from Bank of America, Merrill Lynch et al. (''BofA SBSR''); Barclays Bank PLC, BNP Paribas S.A., Deutsche Bank AG, Royal Bank of Canada, The Royal Bank of Scotland Group PLC, Société Générale, and UBS AG (''Foreign Banks SBSR''); Depository Trust & Clearing Corporation (''DTCC SBSR''); Financial Industry Regulatory Authority (''FINRA SBSR''); International Swaps and Derivatives Association & Securities Industry and Financial Markets Association (''ISDA SIFMA SBSR''); Managed Funds Association (''MFA SBSR''); Société Générale (''Société Générale SBSR''); The Bank of Tokyo-Mitsubishi UFJ, Ltd., Mizuho Corporate Bank, Ltd., and Sumitomo Mitsui Banking Corporation (''Bank of Tokyo SBSR''); Tradeweb (''Tradeweb SBSR''); and Wholesale Markets Brokers' Association, Americas (''WMBAA SBSR''). The comments that the Commission received on the Regulation SBSR Proposing Release are available on the Commission's Web site at *http://www.sec.gov/comments/s7-34-10/s73410.shtml*. *See also* Cross-Border Proposing Release, 78 FR at 31210–6, *supra* note 3 (re-proposing Regulation SBSR).

[28] Reporting of Security-Based Swap Transaction Data, Exchange Act Release No. 63094 (Oct. 13, 2010), 75 FR 64643 (Oct. 20, 2010) (''Temporary Rule Release''). *See* letters from International Swaps and Derivatives Association (''ISDA Temp Rule'') and Deutsche Bank AG (''Deutsche Temp Rule''). The comments that the Commission received on the Temporary Rule Release are available on the Commission's Web site at *http://www.sec.gov/comments/s7-28-10/s72810.shtml*.

[29] Registration and Regulation of Security-Based Swap Execution Facilities, Exchange Act Release No. 63825 (Feb. 2, 2011), 76 FR 10948 (Feb. 28, 2011) (''SB SEF Proposing Release''). *See* letter from Tradeweb Markets LLC (''Tradeweb SB SEF''). The comments that the Commission received on the SB SEF Proposing Release are available on the

Continued

While commenters generally supported the Commission's approach set forth in the Proposing Release and the Cross-Border Proposing Release with respect to the proposed SDR Rules,[30] they set forth a range of opinions addressing issues raised by the proposed rules and provided information regarding industry practices. In particular, commenters discussed SDRs' registration, enumerated duties, market access to services and data, governance arrangements, conflicts of interest, data collection and maintenance, privacy and disclosure requirements, and chief compliance officers (''CCOs''). The Commission has carefully reviewed and considered all of the comments that it received relating to the proposed rules.[31] As adopted, the SDR Rules and new Form SDR have been modified from the proposal, in part to respond to these comments.[32] The revisions to each proposed rule are described in more detail throughout this release. The following are among the most significant changes from the Commission's proposed rules:

- Form SDR: In the Proposing Release, the Commission asked whether it should combine Form SDR and Form SIP such that an SDR would register as an SDR and a securities information processer (''SIP'') using only one form.[33] After further consideration and in response to comments received, the Commission has determined that Form SDR should be modified from the proposal to allow an SDR to register as both an SDR and SIP on one form.[34]
- Access by Relevant Authorities: The Commission proposed Rules 13n–4(b)(9) and (10) and Rule 13n–4(d) relating to relevant authorities' access to SBS data maintained by SDRs. The Commission has determined not to adopt these rules at this time and anticipates soliciting additional public comment regarding such relevant authorities' access.
- Automated Systems: The Commission proposed Rule 13n–6 to provide standards for SDRs with regard to their automated systems' capacity, resiliency, and security. After further consideration, and as explained more fully below, the Commission has determined to adopt an abbreviated version of proposed Rule 13n–6.[35]
- CCO: In the Proposing Release, the Commission asked whether it should prohibit officers, directors, or employees of an SDR from, directly or indirectly, taking any action to coerce, manipulate, mislead, or fraudulently influence the SDR's CCO in the performance of his responsibilities. The Commission has decided to adopt new Rule 13n–11(h).

D. Other Initiatives Considered in This Rulemaking

The Commission also recognizes the CFTC's companion efforts in promulgating rules governing swap data repositories pursuant to Dodd-Frank Act Section 728. The CFTC adopted final rules on swap data repositories on August 4, 2011.[36] The CFTC also adopted rules regarding swap data recordkeeping and reporting requirements, some of which pertain to subjects covered in this release.[37] Commission staff consulted with CFTC staff with respect to the rules applicable to swap data repositories and SDRs, as well as with prudential regulators,[38] and the Commission has taken into consideration comments received supporting harmonization of the CFTC's rules for swap data repositories with the SDR Rules.[39] The Commission believes that the final SDR Rules are largely consistent with the rules adopted by the CFTC.[40] While one commenter recommended adopting joint rules with the CFTC,[41] the Commission has not done so. Congress did not require the two agencies to engage in joint rulemakings on this topic.[42] In addition, the CFTC has already adopted its final rules for swap data repositories.[43] The Commission does not believe that the differences between the rules adopted herein and the CFTC's rules regarding

Commission's Web site at *http://www.sec.gov/comments/s7-06-11/s70611.shtml*.

[30] *See, e.g.,* Barnard, *supra* note 19 (generally supporting the proposed SDR Rules and agreeing that establishing SDRs will enhance transparency and promote standardization in the SBS market); MFA 1, *supra* note 19 (fully supporting the objectives of the Dodd-Frank Act and the proposed rules to enhance transparency in the SBS market); Markit, *supra* note 19 (supporting the Commission's objectives of increasing transparency and efficiency in the OTC derivatives markets and of reducing both systemic and counterparty risk); DTCC 2, *supra* note 19 (supporting the Commission's efforts to establish a comprehensive new framework for the regulation of SDRs and noting that ''[i]mposing requirements on [SDRs] would promote safety and soundness for all U.S. markets by bringing increased transparency and oversight to [the SBS market]''); IIB CB, *supra* note 26 (believing that ''the Commission has appropriately sought to take into account the greater extent to which the SBS markets are globally interconnected, as well as the role that foreign regulators therefore must play as the primary supervisors of SBS market participants based abroad'').

[31] The Commission also considered certain comments submitted with respect to other proposed Commission rulemakings, related CFTC rulemakings, and international initiatives. *See* Sections I.C and I.D discussing other comments and initiatives considered in this rulemaking.

[32] As discussed below, comments relating to relevant authorities' access to SBS data will be addressed in a separate release.

[33] Proposing Release, 75 FR at 77313, *supra* note 2.

[34] *See* Section VI.A.1.c of this release discussing the combination of Form SDR and Form SIP.

[35] *See* Section VI.F of this release discussing Rule 13n–6.

[36] *See* Swap Data Repositories: Registration Standards, Duties and Core Principles, 76 FR 54538 (Sept. 1, 2011) (''CFTC Part 49 Adopting Release''). *See also* Swap Data Repositories—Access to SDR Data by Market Participants, 79 FR 16672 (Mar. 26, 2014) (CFTC adopting interim final rule regarding access to swap data repositories' data).

[37] *See* Swap Data Recordkeeping and Reporting Requirements, 77 FR 2136 (Jan. 13, 2012) (''CFTC Part 45 Adopting Release''). *See also* Review of Swap Data Recordkeeping and Reporting Requirements, 79 FR 16689 (Mar. 26, 2014) (CFTC requesting comment on specific swap data reporting and recordkeeping rules).

[38] *See* Dodd-Frank Act Section 712(a)(2) (requiring the Commission to consult and coordinate to the extent possible with the CFTC and prudential regulators for ''the purposes of assuring regulatory consistency and comparability, to the extent possible'').

[39] *See* DTCC 2, *supra* note 19 (recommending that to the extent that there are any differences, ''the Commission and the CFTC should harmonize the regimes that oversee SDRs'' and noting that ''harmonization is a more important priority than the exact nature of the consistent standard, as SDRs can adjust to meet a single standard but not multiple, inconsistent standards''); DTCC 5, *supra* note 19 (urging the Commission to harmonize its rules with the CFTC's rules by working, to the extent possible, with the CFTC to minimize the number of regulatory inconsistencies between the two agencies); DTCC CB, *supra* note 26 (''Given the significant number of registered entities (execution platforms, clearinghouses, SDRs, dealers, and major swap participants) that will face dual oversight, unnecessary distinctions in the registration and regulation of these entities risk jeopardizing regulatory compliance, add confusion to Dodd-Frank Act implementation, and ultimately impose unnecessary costs.''); Better Markets CB, *supra* note 26 (recommending that the Commission ''promote harmony with the CFTC's cross-border guidance, subject to its primary duty and recognizing that its statutory authority and jurisdiction is distinct from that of the CFTC'' and that the Commission ''adopt rules that are at least as strong as the CFTC's guidance, consistent with its statutory authority, but should go further than the CFTC wherever necessary, and again consistent with its statutory authority, to better fulfill the goals of the Dodd-Frank Act''). *But see* Better Markets 2, *supra* note 19 (recommending that ''all of the substantive rule provisions proposed [as of July 22, 2013] must remain as strong as possible, irrespective of . . . the CFTC's approach to the implementation of Title VII'').

[40] *See* DTCC 2, *supra* note 19 (observing that, with respect to the Commission's proposed rules and the CFTC's proposed rules for swap data repositories, ''[t]here appear to be relatively narrow differences between the Commission's and the CFTC's approaches to the regulation of SDRs'').

[41] FSR Implementation, *supra* note 23 (supporting a Title VII-wide harmonization process and recommending adopting joint SEC–CFTC rules in areas, such as SDRs, where they are not required to do so). The commenter stated that the ''process of jointly adopting final rules would ensure consistency on the most critical points. It would also ensure that final rules are adopted at the same time, so that market participants do not have to bear the cost of complying with one set of rules before they know whether their actions will be consistent with the other rules to which they will be subject.'' *Id.*

[42] *Cf., e.g.,* Dodd-Frank Act Section 712(d) (requiring joint rulemaking regarding certain definitions).

[43] CFTC Part 49 Adopting Release, *supra* note 36; CFTC Part 45 Adopting Release, *supra* note 37.

swap data repositories will place undue burdens on persons that register as both SDRs and swap data repositories.[44]

Finally, Commission staff has consulted and coordinated with foreign regulators through bilateral and multilateral discussions, including in groups that have prepared reports related to SDRs.[45] For example, the Committee on Payments and Market Infrastructures (''CPMI''), formerly known as the Committee on Payment and Settlement Systems (''CPSS''),[46] and the International Organization of Securities Commissions (''IOSCO,''[47] jointly, ''CPSS–IOSCO'') have issued several reports applicable to SDRs. First, in May 2010, CPSS and the Technical Committee of IOSCO issued a consultative report that presented a set of factors for trade repositories in the OTC derivatives markets to consider in designing and operating their services and for relevant authorities to consider in regulating and overseeing trade repositories (''CPSS–IOSCO Trade Repository Report'').[48] Second, in January 2012, CPSS and the Technical Committee of IOSCO issued a final report on OTC derivatives data reporting and aggregation requirements.[49] Third, in April 2012, CPSS–IOSCO issued a final report that sets forth risk management and related standards applicable to financial market infrastructures, including trade repositories (''PFMI Report'').[50] Fourth, in August 2013, CPSS and the Board of IOSCO issued a report on authorities' access to trade repository data (''CPSS–IOSCO Access Report'').[51] The Commission has taken these discussions and reports into consideration in developing the final SDR Rules and Form SDR.[52]

II. Broad Economic Considerations and Baseline

This section describes the most significant economic considerations that the Commission has taken into account in adopting Form SDR and the SDR Rules, as well as the baseline for evaluating the economic effects of the final SDR Rules. The Commission is sensitive to the economic consequences and effects, including the costs and benefits, of Form SDR and the SDR Rules. A detailed analysis of the particular economic effects—including the costs and benefits and the impact on efficiency, competition, and capital formation—that may result from Form SDR and the final SDR Rules is discussed in Section VIII of this release.

A. Broad Economic Considerations

The SBS market prior to the passage of the Dodd-Frank Act has been described as being opaque,[53] in part because price and volume data for SBS transactions were not publicly available. In opaque markets, price and volume information is difficult or impossible to obtain, and access to price and volume information confers a competitive advantage on market participants with such access. In the SBS market, for example, SBS dealers currently gain access to proprietary transaction-level price and volume information by observing order flow. Large SBS dealers and other large market participants with a large share of order flow have an informational advantage over smaller SBS dealers and non-dealers who, in the absence of pre-trade transparency, observe a smaller subset of the market. As the Commission highlights in Section II.B below, the majority of SBS market activity, and therefore information about market activity, is concentrated in a small number of SBS dealers and widely dispersed among other market participants. Greater access by SBS dealers to non-public information about order flow enables better assessment of current market values by SBS dealers, permitting them to extract economic rents from counterparties who are less informed.[54] Non-dealers are aware of this information asymmetry, and certain non-dealers—particularly larger entities who transact with many dealers—may be able to obtain access to competitive pricing or otherwise demand a price discount that reflects the information asymmetry. Typically, however, the market participants with an information advantage will earn economic rents from their non-public information. In the SBS market, it is predominantly SBS dealers who observe the greatest order flow and benefit from market opacity.

The Commission expects that SDRs will play a critical role in enhancing transparency and competitive access to information in the SBS market. In order to increase the transparency of the OTC derivatives market, Title VII requires the Commission to undertake a number of rulemakings, including the SDR Rules and Regulation SBSR,[55] to establish a framework for the regulatory reporting of SBS transaction information to SDRs, public dissemination of transaction-level information, and a framework for SDRs to provide access to the

[44] *See* Section VIII of this release discussing economic analysis.

[45] *See* Dodd-Frank Act Section 752 (relating to international harmonization); DTCC 3, *supra* note 19 (''The global SDR framework emerging from the Dodd-Frank Act and European regulatory processes must provide comprehensive data for all derivatives markets globally. If the global regulatory process is not harmonized, both the published and regulator-only accessible data will be fragmented, resulting in misleading reporting of exposures, uncertain risk concentration reports and a decreased ability to identify systemic risk.'').

[46] CPMI is an international standard setting body for payment, clearing, and securities settlement systems. It serves as a forum for central banks to monitor and analyze developments in domestic payment, clearing, and settlement systems as well as in cross-border and multicurrency settlement schemes. *See http://www.bis.org/cpmi/.*

[47] IOSCO is an international standard setting body for securities regulation. It serves as a forum to review regulatory issues related to international securities and futures transactions. *See http://www.iosco.org.*

[48] *See* Considerations for Trade Repositories in OTC Derivatives Markets, CPSS–IOSCO (May 2010), *available at http://www.iosco.org/library/pubdocs/pdf/IOSCOPD321.pdf.*

[49] *See* Report on OTC Derivatives Data Reporting and Aggregation Requirements, CPSS–IOSCO (Jan. 2012), *available at http://www.iosco.org/library/pubdocs/pdf/IOSCOPD366.pdf.*

[50] *See* Principles for Financial Market Infrastructures, CPSS–IOSCO (Apr. 2012), *available at http://www.iosco.org/library/pubdocs/pdf/IOSCOPD377.pdf.* The PFMI Report incorporated feedback received on the CPSS–IOSCO Trade Repository Report. Commission representatives participated in the development and drafting of the PFMI Report. In particular, Commission staff co-chaired the Editorial Team, a working group within CPSS–IOSCO that drafted both the consultative and final versions of the PFMI Report. The Commission believes that the standards applicable to trade repositories set forth in the PFMI Report are generally consistent with the final SDR Rules.

[51] *See* Authorities' Access to Trade Repository Data, CPSS–IOSCO (Aug. 2013), *available at http://www.iosco.org/library/pubdocs/pdf/IOSCOPD417.pdf.*

[52] If any provision of these rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

[53] With respect to one type of SBS, credit default swaps (''CDSs''), the Government Accountability Office found that ''comprehensive and consistent data on the overall market have not been readily available,'' ''authoritative information about the actual size of the [CDS] market is generally not available,'' and regulators currently are unable ''to monitor activities across the market.'' Government Accountability Office, GAO–09–397T, *Systemic Risk: Regulatory Oversight and Recent Initiatives to Address Risk Posed by Credit Default Swaps,* at 2, 5, 27, (2009) *available at http://www.gao.gov/new.items/d09397t.pdf; see also* Robert E. Litan, *The Derivatives Dealers' Club and Derivatives Market Reform: A Guide for Policy Makers, Citizens and Other Interested Parties,* Brookings Institution (Apr. 7, 2010), *http://www.brookings.edu/~/media/research/files/papers/2010/4/07%20derivatives%20litan/0407_derivatives_litan.pdf;* Michael Mackenzie, *Era of an Opaque Swaps Market Ends,* Financial Times, June 25, 2010, *http://www.ft.com/intl/cms/s/0/f49f635c-8081-11df-be5a-00144feabdc0.html#axzz3HLUjYNI7.*

[54] In this situation, economic rents are the profits that SBS dealers earn by trading with counterparties who are less informed. In a market with competitive access to information, there is no informational premium; SBS dealers only earn a liquidity premium. The difference between the competitive liquidity premium and the actual profits that SBS dealers earn is the economic rent.

[55] *See* Regulation SBSR Adopting Release, *supra* note 13.

information to the Commission. Persons that meet the definition of an SDR will be required, absent an exemption, to comply with all SDR obligations, including the SDR Rules requiring SDRs to collect and maintain accurate data and the requirements under Regulation SBSR to publicly disseminate transaction-level information. Reporting of SBS transaction information and public dissemination of accurate transaction price and volume information should promote price discovery and lessen the informational advantage enjoyed by SBS dealers with access to order flow.[56] By requiring SDRs to collect SBS transaction, volume, and pricing information and publicly disseminate information, the SDR Rules and Regulation SBSR may promote transparency in the SBS market.[57]

In addition to lessening the informational advantage currently available to SBS dealers, increased transparency of the SBS market could have other widespread benefits. Public availability of SBS price and volume information could lower the costs of SBS trading by reducing implicit trading costs.[58] To the extent that implicit costs of SBS trading are reduced and the availability of the data necessary to evaluate the performance of a market participant's SBS dealer using transaction cost analysis, more market participants may be inclined to trade in the SBS market.[59]

Allowing competitive, impartial access to the most recent transaction price and volume information may promote the efficiency of SBS trading and increase opportunities for risk-sharing in other ways. In particular, as in other securities markets, quoted bids and offers should form and adjust according to the reporting of executed trades, attracting liquidity from hedgers and other market participants that do not observe customer order flow and do not benefit from opacity.

Separately, the SDR Rules are designed to, among other things, make available to the Commission SBS data that will provide a broad view of the SBS market and help monitor for pockets of risk that might not otherwise be observed by financial market regulators.[60] Unlike most other securities transactions, SBSs involve ongoing financial obligations between counterparties during the life of transactions that typically span several years. Counterparties to an SBS rely on each other's creditworthiness and bear this credit risk and market risk until the SBS terminates or expires. This can lead to market instability when a large market participant, such as an SBS dealer, major SBS market participant, or central counterparty (''CCP''), becomes financially distressed. The default of a large market participant could introduce the potential for sequential counterparty failure; the resulting uncertainty could reduce the willingness of market participants to extend credit, and substantially reduce liquidity and valuations for particular types of financial instruments.[61] A broad view of the SBS market, including aggregate market exposures to referenced entities (instruments), positions taken by individual entities or groups, and data elements necessary for a person to determine the market value of the transaction could provide the Commission with a better understanding of the actual and potential risks in the SBS market and promote better risk monitoring efforts. The information provided by SDRs could also help the Commission detect market manipulation, fraud, and other market abuses.

The extent of the benefits discussed above may be limited by the inaccuracy or incompleteness of SBS data maintained by SDRs.[62] The Commission believes, however, that the SDR Rules relating to data accuracy[63] and maintenance[64] will help minimize the inaccuracy or incompleteness of SBS data maintained by SDRs. The benefits discussed above may have associated costs for compliance with the SDR Rules and Regulation SBSR. Persons that meet the definition of an SDR will be required to invest in infrastructure necessary to comply with rules for collecting, maintaining, and disseminating accurate data. Such infrastructure costs may ultimately be reflected in the prices that SBS dealers charge to customers, mitigating the reduction in indirect trading costs that may accrue from reducing SBS dealers' information advantage.

The SDR Rules permit the possibility of multiple SDRs within an asset class.[65] If there are multiple SDRs in any given asset class, then differences in how each

[56] Price discovery refers to the process by which buyers seek the lowest available prices and sellers seek the highest available prices. This process reveals the prices that best match buyers to sellers. *See* Larry Harris, *Trading & Exchanges: Market Microstructure for Practitioners* 94 (2003). Price discovery may be hindered by such things as a scarcity of buyers or sellers or an asymmetry of information between potential buyers and sellers. For example, when traders are asymmetrically informed, liquidity suppliers set their prices far from the market to recover from uninformed traders what they lose to well-informed traders. *See id.* at 312.

[57] Regulation SBSR requires that the economic terms of the transaction, with the exception of the identities of the counterparties, be publicly disseminated. These terms include the product ID, date and time of execution, price, and notional amount of an SBS. *See* Regulation SBSR Adopting Release, *supra* note 13 (Rules 901(c) and 902).

[58] Implicit trading cost is the difference between the price at which a market participant can enter into an SBS and the theoretical fundamental value of that SBS. Post-trade transparency has been shown to lower implicit trading costs in US corporate bond markets, which, prior to the introduction of FINRA's Trade Reporting and Compliance Engine (TRACE), was a dealer-centric over-the-counter (''OTC'') market characterized by limited transparency, similar to the SBS market. *See, e.g.,* Amy K. Edwards, Lawrence Harris, & Michael S. Piwowar, *Corporate Bond Market Transparency and Transaction Costs,* 62 Journal of Finance 1421 (2007); Hendrik Bessembinder, William F. Maxwell, & Kumar Venkataraman, *Market Transparency, Liquidity, Externalities and Institutional Trading Costs in Corporate Bonds,* 82 Journal of Financial Economics 251 (2006).

[59] Transaction cost analysis refers to an evaluation of the price received by a market participant relative to prevailing market prices at the time the decision to transact was made as well as transaction prices received by other market participants just before and just after the transaction.

[60] *See* Exchange Act Section 13(n)(5)(D), 15 U.S.C. 78m(n)(5)(D), and Rule 13n-4(b)(5) (requiring SDRs to provide direct electronic access to the Commission). *See also* 156 Cong. Rec. S5920 (daily ed. July 15, 2010) (statement of Sen. Lincoln) (''These new 'data repositories' will be required to register with the CFTC and the SEC and be subject to the statutory duties and core principles which will assist the CFTC and the SEC in their oversight and market regulation responsibilities.'').

[61] *See, e.g.,* Markus K. Brunnermeier and Lasse Heje Pedersen, *Market Liquidity and Funding Liquidity,* 22 Review of Financial Studies 2201 (2009); Denis Gromb and Dimitri Vayanos, *A Model of Financial Market Liquidity Based on Intermediary Capital,* 8 Journal of the European Economic Association 456 (2010).

[62] The CFTC's experience with collecting swap data suggests that the benefits of receiving information from trade repositories may be reduced by inaccuracies or inconsistencies in information maintained by trade repositories. *See, e.g.,* Andrew Ackerman, *CFTC Seeks Comment on Improving Swaps Data Stream; Data Problems Have Hobbled Efforts to See More Clearly Into Swaps Market,* Wall Street Journal Mar. 19, 2014, *http://online.wsj.com/news/articles/SB10001424052702304026304579449552899867592* (noting that ''a series of data problems . . . have hobbled efforts to see more clearly into the multitrillion-dollar swaps market''). The CFTC has published a request for comment on specific swap data reporting and recordkeeping rules to determine how these rules were being applied and whether or what clarifications, enhancements, or guidance may be appropriate. *See* Review of Swap Data Recordkeeping and Reporting Requirements, 79 FR 16689 (Mar. 26, 2014).

[63] *See, e.g.,* Rule 13n–5(b)(3) (requiring an SDR to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that the transaction data and positions that it maintains are complete and accurate).

[64] *See, e.g.,* Rule 13n–5(b)(4) (requiring an SDR to maintain transaction data and related identifying information for not less than five years after the applicable SBS expires and historical positions for not less than five years); Rule 13n–5(b)(5) (requiring an SDR to establish, maintain, and enforce written policies and procedures reasonably designed to prevent any provision in a valid SBS from being invalidated or modified through the procedures or operations of the SDR).

[65] *See* Section IV of this release discussing number of SDRs and consolidation of SBS data.

SDR accepts, stores, and disseminates SBS data may cause fragmentation in the SBS data, thereby making it more difficult for the Commission and the public to compile, compare, and analyze market information. As discussed below, the Commission anticipates that it will propose for public comment detailed specifications of acceptable formats and taxonomies that would facilitate an accurate interpretation, aggregation, and analysis of SBS data by the Commission.[66] The Commission believes that these specifications may help reduce any difficulties resulting from the fragmentation of data among multiple SDRs by facilitating the clear, uniform reporting of SBS data to the Commission.

B. Baseline

To assess the economic impact of the SDR Rules described in this release, the Commission is using as a baseline the SBS market as it exists today, including applicable rules that have already been adopted and excluding rules that have been proposed, but not yet finalized. The Commission acknowledges limitations in the degree to which the Commission can quantitatively characterize the current state of the SBS market. As described in more detail below, because the available data on SBS transactions do not cover the entire market, the Commission has developed an understanding of market activity using a sample that includes only certain portions of the market.

1. Transparency in the SBS Market

There currently is no robust, widely accessible source of information about individual SBS transactions. Nevertheless, market participants can gather certain limited information for the single-name CDS market from a variety of sources. For example, some vendors provide indicative quotes. Indicative quotes are not based on actual transactions and, as such, they may not reflect the true value. Moreover, these quotes do not represent firm commitments to buy or sell protection on particular reference entities. However, market participants can gather information from indicative quotes that may inform their trading. In addition, one entity as part of its single-name CDS clearing, makes its daily settlement prices on 5 year single-name CDSs available to the public on its Web site.[67] A more complete database of current and historical settlement prices is available by subscription.

In addition to the pricing data discussed above, there is limited, publicly-disseminated information about aggregate SBS market activity. The Depository Trust and Clearing Corporation—Trade Information Warehouse (''DTCC–TIW'') publishes weekly transaction and position reports for single-name CDSs. ICE Clear Credit also provides aggregated volumes of clearing activity. Additionally, large multilateral organizations periodically report measures of market activity. For example, the Bank for International Settlements (''BIS'') reports gross notional outstanding for single-name CDSs and equity forwards and swaps semiannually.

Market participants that are SBS dealers can also draw inferences about SBS market activity by observing order flow. This source of proprietary information is most useful for SBS dealers with large market shares.

Finally, DTCC–TIW voluntarily provides to the Commission data on individual CDS transactions. This information is made available to the Commission in accordance with an agreement between the DTCC–TIW and the OTC Derivatives Regulators' Forum (''ODRF''), of which the Commission is a member. While DTCC–TIW generally provides this information to regulators that are members of the ODRF, DTCC–TIW does not make the information available to the public.

2. Current Security-Based Swap Market

The Commission's analysis of the current state of the SBS market is based on data obtained from DTCC–TIW, particularly data regarding the activity of market participants for single-name CDSs from 2008 to 2013. While other repositories may collect data on transactions in total return swaps on equity and debt, the Commission does not currently have access to such data for these products (or other products that are SBSs). Although the Commission has previously noted that the definition of SBS is not limited to single-name CDSs, the Commission believes that the single-name CDS data is sufficiently representative of the SBS market and therefore can directly inform the analysis of the state of the current SBS market.[68] The Commission believes that DTCC–TIW's data for single-name CDSs is reasonably comprehensive because it includes data on almost all single-name CDS transactions and market participants trading in single-name CDSs.[69] The Commission notes that the data that it receives from DTCC–TIW does not encompass CDS transactions that both: (i) Do not involve any U.S. counterparty,[70] and (ii) are not based on a U.S. reference entity. Notwithstanding this limitation, the Commission believes that DTCC–TIW data provides sufficient information to identify the types of market participants active in the SBS market and the general pattern of dealing within that market.[71]

a. Security-Based Swap Market Participants

A key characteristic of SBS activity is that it is concentrated among a relatively small number of entities that

[66] *See* Section VI.D.2.c.ii of this release.

[67] *See https://www.theice.com/cds/MarkitSingleNames.shtml.* End-of-Day (''EOD'') prices are established for all cleared CDS single name and index instruments using a price discovery process developed for the CDS market. Clearing participants are required to submit prices every business day, and the clearing house conducts a daily auction-like process resulting in periodic trade executions among clearing participants. This process determines the clearing house EOD prices, which are used for daily mark-to-market purposes.

[68] According to data published by BIS, the global notional amount outstanding in equity forwards and swaps as of December 2013 was $2.28 trillion. The notional amount outstanding was approximately $11.32 trillion for single-name CDSs, approximately $9.70 trillion for multi-name index CDSs, and approximately $0.95 trillion for multi-name, non-index CDSs. *See* Bank of International Settlement, BIS Quarterly Review, Statistical Annex, Table 19 (June 2014), *available at http://www.bis.org/publ/qtrpdf/r_qt1406.htm.* For purposes of this analysis, the Commission assumes that multi-name index CDSs are not narrow-based index CDSs, and therefore do not fall within the definition of SBS. *See* Exchange Act Section 3(a)(68)(A), 15 U.S.C. 78c(a)(68)(A); *see also* Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement''; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, Exchange Act Release No. 67453 (July 18, 2012), 77 FR 48207 (Aug. 13, 2012). The Commission also assumes that instruments reported as equity forwards and swaps include instruments such as total return swaps on individual equities that fall with the definition of SBS, potentially resulting in underestimation of the proportion of the SBS market represented by single-name CDSs. Although the BIS data reflects the global OTC derivatives market, and not only the U.S. market, the Commission is not aware of any reason to believe that these ratios differ significantly in the U.S. market.

[69] *See* ISDA, CDS Marketplace, Exposures & Activity, *http://www.isdacdsmarketplace.com/exposures_and_activity* (''DTCC Deriv/SERV's Trade Information Warehouse is the only comprehensive trade repository and post-trade processing infrastructure for OTC credit derivatives in the world. Its Deriv/SERV matching and confirmation service electronically matches and confirms more than 98% of credit default swaps transactions globally.'').

[70] The Commission notes that DTCC–TIW's entity domicile determinations may not reflect the Commission's definition of ''U.S. person'' in all cases.

[71] In 2013, DTCC–TIW reported on its Web site new trades in single-name CDSs with gross notional of $12.0 trillion. DTCC–TIW provided to the Commission data that included only transactions with a U.S. counterparty or a U.S. reference entity. During the same period, this data included new trades with gross notional equaling $9.3 trillion, or 77% of the total reported by DTCC–TIW.

engage in dealing activities.[72] Based on DTCC–TIW data that the Commission has received, thousands of other market participants appear as counterparties to SBS transactions, including, but not limited to, investment companies, pension funds, private (hedge) funds, sovereign entities, and industrial companies. The Commission observes that most end users of SBSs do not directly trade SBSs, but instead use dealers, banks, or investment advisers as agents to establish the end users' positions. Based on the Commission's analysis of DTCC–TIW data, there were 1,800 entities engaged directly in trading CDSs between November 2006 and December 2013.[73] Table 1 below highlights that of these entities, there were 17, or approximately 0.9%, that were ISDA-recognized dealers.[74] The vast majority of transactions (84.1%) measured by the number of counterparties (each transaction has two counterparties or transaction sides) were executed by ISDA-recognized dealers. Thus, a small set of dealers observe the largest share of the market and potentially benefit the most from opacity.

TABLE 1—THE NUMBER OF TRANSACTING AGENTS IN THE CDS MARKET BY COUNTERPARTY TYPE AND THE FRACTION OF TOTAL TRADING ACTIVITY, FROM NOVEMBER 2006 THROUGH DECEMBER 2013, REPRESENTED BY EACH COUNTERPARTY TYPE.

Transacting agents	Number	Percent	Transaction share (%)
Investment Advisers	1,347	74.8	9.7
—SEC registered	*529*	*29.4*	*5.9*
Banks	256	14.2	5.0
Pension Funds	29	1.6	0.1
Insurance Companies	36	2.0	0.2
ISDA-Recognized Dealers	17	0.9	84.1
Other	115	6.4	1.0
Total	1,800	100.0	100.0

Principal holders of CDS risk exposure are represented by accounts in DTCC–TIW.[75] As highlighted in Table 2 below, Commission staff's analysis of these accounts in DTCC–TIW shows that the 1,800 transacting agents (entities directly engaged in trading) described above represented 10,054 principal risk holders (entities bearing the risk of the CDS). In some cases, the principal risk holder may have been represented by an investment adviser that served as the transacting agent. In other cases, the principal risk holder may have participated directly as the transacting agent. Each account does not necessarily represent a separate legal person; one legal person may allocate transactions across multiple accounts. For example, the 17 ISDA-recognized dealers described above allocated transactions across 69 accounts.

Among the accounts, there are 1,086 Dodd-Frank Act-defined special entities and 636 investment companies registered under the Investment Company Act of 1940.[76] Private funds comprise the largest type of account holders that the Commission was able to classify, and although not verified through a recognized database, most of the funds the Commission was not able to classify appear to be private funds.[77] While the Commission anticipates that some of these accounts may prefer to operate in an opaque market (if, for example, they are relying on a proprietary trading strategy and wish to keep their transactions anonymous), the data suggest that the vast majority of principal risk holders in CDS may benefit from the Dodd-Frank Act's transparency requirements. As discussed above and in Section VIII below, dealers are the category of market participants most likely to benefit from opaqueness. As shown in Table 1, of the 1,800 transacting agents in the 2006–2013 sample, 17 (or 0.9%) are ISDA-recognized dealers. Similarly, as shown in Table 2, of the 10,054 accounts with CDS transactions, 69 (or 0.7%) are accounts held by ISDA-recognized dealers. As many as 99% of market participants may benefit from increasing transparency.

[72] *See* Cross-Border Adopting Release, 79 FR at 47293, *supra* note 11. All data in this section cites updated data from this release and the accompanying discussion.

[73] These 1,800 transacting agents represent over 10,000 accounts representing principal risk holders. *See* Regulation SBSR Adopting Release, *supra* note 13 and Cross Border Adopting Release, 79 FR at 47293–4, *supra* note 11 (discussing the number of transacting agents and accounts of principal risk holders).

[74] For the purpose of this analysis, the ISDA-recognized dealers are those identified by ISDA as a recognized dealer in any year during the relevant period. Dealers are only included in the ISDA-recognized dealer category during the calendar year in which they are so identified. The complete list of ISDA recognized dealers is: JP Morgan Chase NA (and Bear Stearns), Morgan Stanley, Bank of America NA (and Merrill Lynch), Goldman Sachs, Deutsche Bank AG, Barclays Capital, Citigroup, UBS, Credit Suisse AG, RBS Group, BNP Paribas, HSBC Bank, Lehman Brothers, Société Générale, Credit Agricole, Wells Fargo, and Nomura. *See* ISDA, Operations Benchmarking Surveys, *available at http://www2.isda.org/functional-areas/research/surveys/operations-benchmarking-surveys.*

[75] ''Accounts'' as defined in the DTCC–TIW context are not equivalent to ''accounts'' in the definition of ''U.S. person'' provided by Exchange Act Rule 3a71–3(a)(4)(i)(C). They also do not necessarily represent separate legal persons. One entity or legal person may have multiple accounts. For example, a bank may have one DTCC account for its U.S. headquarters and one DTCC account for one of its foreign branches.

[76] There remain over 4,600 DTCC ''accounts'' unclassified by type. Although unclassified, each was manually reviewed to verify that it was not likely to be a special entity within the meaning of the Dodd-Frank Act and instead was likely to be an entity such as a corporation, an insurance company, or a bank.

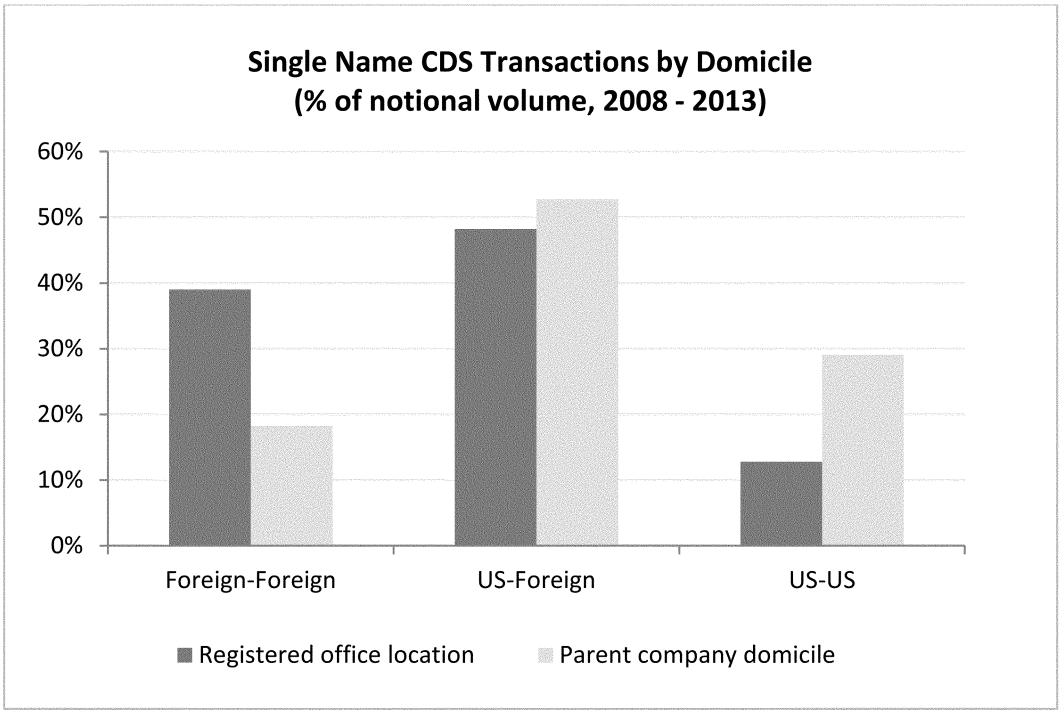
[77] ''Private funds'' encompass various unregistered pooled investment vehicles, including hedge funds, private equity funds, and venture capital funds.

TABLE 2—THE NUMBER AND PERCENTAGE OF ACCOUNT HOLDERS—BY TYPE—WHO PARTICIPATE IN THE CDS MARKET THROUGH A REGISTERED INVESTMENT ADVISER, AN UNREGISTERED INVESTMENT ADVISER, OR DIRECTLY AS A TRANSACTING AGENT FROM NOVEMBER 2006 THROUGH DECEMBER 2013

Account holders by type	Number	Represented by a registered investment adviser		Represented by an unregistered investment adviser		Participant is transacting agent [78]	
Private Funds	2,914	1,395	48%	1,496	51%	23	1%
Dodd-Frank Act Special Entities	1,086	1,050	97%	12	1%	24	2%
Registered Investment Companies	636	620	97%	14	2%	2	0%
Banks (non-ISDA-recognized dealers)	369	25	7%	5	1%	339	92%
Insurance Companies	224	144	64%	21	9%	59	26%
ISDA-Recognized Dealers	69	0	0%	0	0%	69	100%
Foreign Sovereigns	63	45	71%	2	3%	16	25%
Non-Financial Corporations	57	39	68%	3	5%	15	26%
Finance Companies	10	5	50%	0	0%	5	50%
Other/Unclassified	4,626	3,131	68%	1,295	28%	200	4%
All	10,054	6,454	64%	2,848	28%	752	7%

Although the SBS market is global in nature, 61% of the transaction volume in the 2008–2013 period included at least one U.S.-domiciled entity (see Figure 1). Moreover, 18% of the CDS transactions reflected in DTCC–TIW data that include at least one U.S.-domiciled counterparty or a U.S. reference entity were between U.S.-domiciled entities and foreign-domiciled counterparties.

Figure 1: The fraction of notional volume in North American corporate single-name CDS between (1) two U.S.-domiciled accounts, (2) one U.S.-domiciled account and one non-U.S.-domiciled account, and (3) two non-U.S.-domiciled accounts, computed from January 2008 through December 2013.



The cross-border nature of the SBS market is growing over time. Figure 2 below is a chart of (1) the percentage of new accounts with a domicile in the United States,[79] (2) the percentage of new accounts with a domicile outside

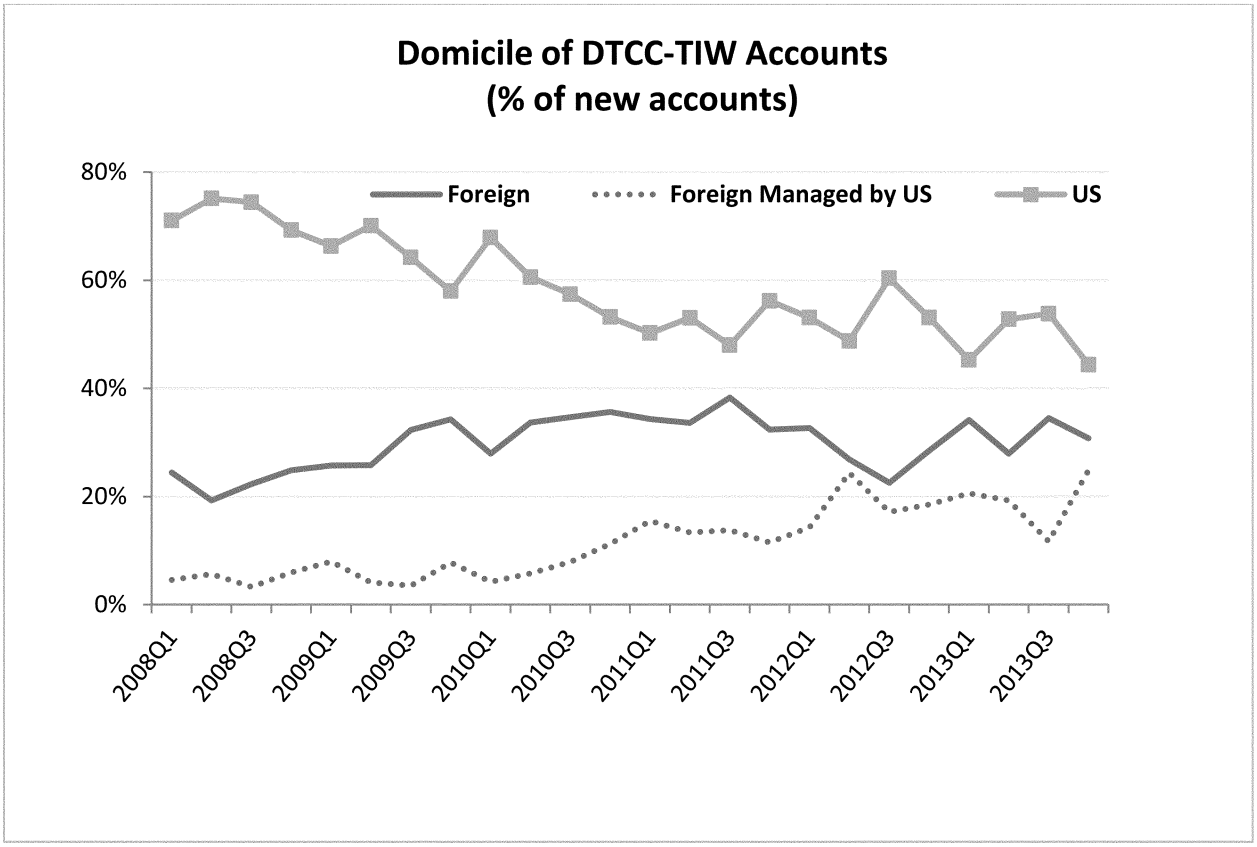
[78] This column reflects the number of participants who are also trading for their own accounts.

[79] The domicile classifications in DTCC–TIW are based on the market participants' own reporting and have not been verified by Commission staff. Prior to enactment of the Dodd-Frank Act, account holders did not formally report their domicile to DTCC–TIW because there was no systematic requirement to do so. After enactment of the Dodd-Frank Act, the DTCC–TIW has collected the registered office location of the account. This information is self-reported on a voluntary basis. It is possible that some market participants may misclassify their domicile status because the databases in DTCC–TIW do not assign a unique legal entity identifier to each separate entity. It is

Continued

the United States, and (3) the percentage of new accounts outside the United States, but managed by a U.S. entity, foreign accounts that include new accounts of a foreign branch of a U.S. bank, and new accounts of a foreign subsidiary of a U.S. entity. Over time, a greater share of accounts entering the DTCC–TIW data either have a foreign domicile or have a foreign domicile while being managed by a U.S. person. The increase in foreign accounts may reflect an increase in participation by foreign accountholders and the increase in foreign accounts managed by U.S. persons may reflect the flexibility with which market participants can restructure their market participation in response to regulatory intervention, competitive pressures, and other factors. There are, however, alternative explanations for the shifts in new account domicile in Figure 2. Changes in the domicile of new accounts through time may reflect improvements in reporting by market participants to DTCC–TIW. Additionally, because the data includes only accounts that are domiciled in the United States, transact with U.S.-domiciled counterparties, or transact in single-name CDSs with U.S. reference entities, changes in the domicile of new accounts may reflect increased transaction activity between U.S. and non-U.S. counterparties.

Figure 2: The percentage of (1) new accounts with a domicile in the United States (referred to below as "US"), (2) new accounts with a domicile outside the United States (referred to below as "Foreign"), and (3) new accounts outside the United States, but managed by a U.S. entity, new accounts of a foreign branch of a U.S. bank, and new accounts of a foreign subsidiary of a U.S. entity (collectively referred to below as "Foreign managed by US"). Unique, new accounts are aggregated each quarter and shares are computed on a quarterly basis, from January 2008 through December 2013. The sample includes accounts that are domiciled in the United States, transact with U.S.-domiciled accounts, or transact in CDSs that reference U.S. entities. (Source: DTCC-TIW)



b. Security-Based Swap Data Repositories

No SDRs are currently registered with the Commission. The Commission is aware of one entity in the market (*i.e.,* the DTCC–TIW) that has been accepting voluntary reporting of single-name and index CDS transactions. In 2013, DTCC–TIW received approximately 3.1 million records of CDS transactions, of which

also possible that the domicile classifications may not correspond precisely to the definition of U.S. person under the rules defined in Exchange Act Rule 3a71–3(a)(4), 17 CFR 240.3a71–3(a)(4). Notwithstanding these limitations, the Commission believes that the cross-border and foreign activity demonstrates the nature of the single-name CDS market.

approximately 800,000 were price forming.[80]

The CFTC has provisionally registered four swap data repositories.[81] These swap data repositories are: BSDR LLC, Chicago Mercantile Exchange Inc., DTCC Data Repository LLC, and ICE Trade Vault, LLC. The Commission believes that most of these entities will likely register with the Commission as SDRs and that other persons may seek to register with both the CFTC and the Commission as swap data repositories and SDRs, respectively. As stated above, the Commission believes that the final SDR Rules are largely consistent with the CFTC's rules governing swap data repositories.

Efforts to regulate the swap and SBS market are underway not only in the United States, but also abroad. In 2009, leaders of the G20—whose members include the United States, 18 other countries, and the European Union—called for global improvements in the functioning, transparency, and regulatory oversight of OTC derivatives markets and agreed, among other things, that OTC derivatives contracts should be reported to trade repositories.[82] Substantial progress has been made in establishing the trade repository infrastructure to support the reporting of all contracts.[83] Currently, multiple trade repositories operate, or are undergoing approval processes to do so, in a number of different jurisdictions.[84] The requirements for trade reporting differ across jurisdictions. The result is that trade repository data is fragmented across many locations, stored in a variety of formats, and subject to many different rules for authorities' access. The data in these trade repositories will need to be aggregated in various ways if authorities are to obtain a comprehensive and accurate view of the global OTC derivatives markets and to meet the original financial stability objectives of the G20 in calling for comprehensive use of trade repositories.

III. Definition, Scope of Registration, Services, and Business Models of SDRs

The Proposing Release generally discussed the role, regulation, and business models of SDRs,[85] but it did not specifically address the applicability of the statutory definition of an SDR.[86] The Commission received several comments that addressed broad issues regarding what persons fall within the statutory definition of an SDR, what services can or must be provided by SDRs, and what business models are appropriate for SDRs. In light of these comments, the Commission believes that it is useful to provide clarity on the definition of an SDR and the services that are required or permitted to be provided by SDRs. For purposes of this release, the Commission will refer to services that are specifically included in the statutory definition of an SDR[87] as ''core'' services. All other services—both those required by the Dodd-Frank Act and the rules and regulations thereunder, and those not required, but which the Commission believes are permissible for SDRs to perform—will be referred to as ''ancillary'' services.

A. Definition of SDR: Core Services

Exchange Act Section 3(a)(75), enacted by Dodd-Frank Act Section 761, defines a ''security-based swap data repository'' to mean ''any person that collects and maintains information or records with respect to transactions or positions in, or the terms and conditions of, security-based swaps entered into by third parties for the purpose of providing a centralized recordkeeping facility for security-based swaps.''[88]

One commenter requested that ''the Commission provide clear guidance as to the scope of the entities covered within the [statutory] definition of SDR in the Dodd-Frank Act.''[89] The commenter stated as follows: ''The statutory duties required of an SDR are extensive and can form a business in their own right. The requirements of an SDR should not be imposed upon service providers looking to provide targeted solutions to specific processes, as opposed to providers looking more broadly to fulfill the role of an SDR. All third party service providers have to perform a level of recordkeeping and often retain data previously submitted by customers to offer services efficiently. This should not transform them into an SDR unless there is a corresponding policy reason for doing so. In fact, there is a strong policy reason to exclude them, the goal of countering the risk of fragmentation in data collection and dissemination on a global basis.''[90] Another commenter described an SDR's core functions as ''basic receipt and storage of [SBS] data.''[91]

The Commission believes that the statutory definition in Exchange Act Section 3(a)(75) describes the core services or functions of an SDR. Whether a person falls within the statutory definition of an SDR is fact-specific. An example of a person that would likely meet the statutory definition of an SDR is a person that provides the service of maintaining a centralized repository of records of SBSs for counterparties to SBS transactions that are intended to be relied on by counterparties for legal purposes. Providing this service would cause the person to meet the statutory definition of an SDR because the person is ''collect[ing] and maintain[ing] information or records with respect to transactions or positions in, or the terms and conditions of, [SBSs] entered into by third parties for the purpose of providing a centralized recordkeeping facility for [SBSs].''[92] In contrast, a law firm, trustee, custodian, or broker-dealer that holds SBS records likely would not meet the statutory definition of an SDR because those persons would not be doing so ''for the purpose of providing a centralized recordkeeping facility for [SBSs].''[93]

One commenter identified countering the risk of fragmentation in data collection and dissemination as a policy reason to exclude certain persons, such as certain third party service providers, from the definition of an SDR.[94] The Commission believes that while third party service providers may collect and maintain SBS data, they generally do not do so ''for the purpose of providing a centralized recordkeeping facility.'' As such, third party service providers

[80] Price-forming CDS transactions include all new transactions, assignments, modifications to increase the notional amounts of previously executed transactions, and terminations of previously executed transactions. Transactions terminated or entered into in connection with a compression exercise, and expiration of contracts at maturity are not considered price-forming and are therefore excluded, as are replacement trades and all bookkeeping-related trades.

[81] CFTC Rule 49.3(b) provides for provisional registration of a swap data repository. 17 CFR 49.3(b).

[82] *See* Leaders' Statement, The Pittsburgh Summit, September 24–25, 2009, *available at http://www.treasury.gov/resource-center/international/g7-g20/Documents/pittsburgh_summit_leaders_statement_250909.pdf.*

[83] *See* OTC Derivatives Market Reforms Eighth Progress Report on Implementation (Nov. 2014), *available at http://www.financialstabilityboard.org/wp-content/uploads/r_141107.pdf.*

[84] *Id.*

[85] *See* Proposing Release, 75 FR at 77307–77308, *supra* note 2.

[86] In the Cross-Border Proposing Release, the Commission discussed several examples of circumstances in which a person would be performing the functions of an SDR in the cross-border context. 78 FR at 31041–31043, *supra* note 3. The Commission did not receive any comments on this aspect of the Cross-Border Proposing Release.

[87] Exchange Act Section 3(a)(75), 15 U.S.C. 78c(a)(75).

[88] Exchange Act Section 3(a)(75), 15 U.S.C. 78c(a)(75).

[89] DTCC 2, *supra* note 19.

[90] DTCC 2, *supra* note 19.

[91] MarkitSERV, *supra* note 19.

[92] *See* Exchange Act Section 3(a)(75), 15 U.S.C. 78c(a)(75).

[93] *See* Exchange Act Section 3(a)(75), 15 U.S.C. 78c(a)(75).

[94] *See* DTCC 2, *supra* note 19.

generally would not fall within the statutory definition of an SDR. Thus, they do not need to be excluded from the definition of an SDR, as the commenter suggested. If, however, the third party service provider collects and maintains the SBS data ''for the purpose of providing a centralized recordkeeping facility,'' [95] it would likely fall within the definition of an SDR. The Commission does not believe that there are any policy reasons, including countering the risk of fragmentation, to warrant a broad-based exemption from registration for third party service providers that collect and maintain SBS data ''for the purpose of providing a centralized recordkeeping facility.''

B. SDRs Required To Register With the Commission

To the extent that a person falls within the statutory definition of an SDR, and makes use of the mails or any means or instrumentality of interstate commerce to perform the functions of an SDR, then that person is required to register with the Commission,[96] absent an exemption.[97] As discussed in the Cross-Border Proposing Release,[98] the Commission believes that U.S. persons [99] that perform the functions of an SDR are required to register with the Commission and comply with Exchange Act Section 13(n) [100] and the rules and regulations thereunder, as well as other requirements applicable to SDRs registered with the Commission.[101] Requiring U.S. persons that perform the functions of an SDR to be operated in a manner consistent with the Title VII regulatory framework and subject to the Commission's oversight, among other things, helps ensure that relevant authorities are able to monitor the build-up and concentration of risk exposure in the SBS market, reduce operational risk in that market, and increase operational efficiency.[102] SDRs themselves are subject to certain operational risks that may impede the ability of SDRs to meet these goals,[103] and the Title VII regulatory framework is intended to address these risks.

Also, as stated in the Cross-Border Proposing Release, the Commission believes that a non-U.S. person [104] that performs the functions of an SDR within the United States would be required to register with the Commission, absent an exemption.[105] The Commission's interpretation of the scope of SDR registration is consistent with the Commission's territorial approach to the application of Title VII, as discussed in the Cross-Border Adopting Release.[106] As noted in that release, the Commission takes the view that a territorial approach to the application of Title VII is grounded in the text of the relevant statutory provisions and is designed to help ensure that the Commission's application of the relevant provisions is consistent with the goals that the statute was intended to achieve.[107] Once the focus of the statute has been identified using this analysis, determining whether a particular application of the statute is territorial turns on whether any relevant conduct that is the focus of the statute has a sufficient territorial nexus with the United States.[108]

As stated in the Cross-Border Proposing Release, the Commission believes that ''a non-U.S. person would be performing 'the functions of a security-based swap data repository within the United States' if, for example, it enters into contracts, such as user or technical agreements, with a U.S. person to enable the U.S. person to report [SBS] data to such non-U.S. person.'' [109] As another example, ''a non-U.S. person would be performing 'the functions of a security-based swap data repository within the United States' if it has operations in the United States, such as maintaining [SBS] data on servers physically located in the United States, even if its principal place of business is not in the United States.'' [110]

One commenter submitted a comment relating to the Commission's guidance on SDR registration in the cross-border context.[111] This commenter suggested

[95] Exchange Act Section 3(a)(75), 15 U.S.C. 78c(a)(75).

[96] *See* Exchange Act Section 13(n)(1), 15 U.S.C. 78m(n)(1).

[97] *See* Section VI.K of this release discussing Rule 13n-12.

[98] Cross-Border Proposing Release, 78 FR at 31042, *supra* note 3.

[99] The term ''U.S. person'' is defined in Rule 13n–12(a), as discussed in Section VI.K.3 of this release, and cross-references to the definition of ''U.S. person'' in Exchange Act Rule 3a71–3(a)(4)(i), 17 CFR 240.3a71–3(a)(4)(i). *See* Cross-Border Adopting Release, 79 FR at 47371, *supra* note 11. Rule 3a71–3(a)(4)(i) defines ''U.S. person'' to mean ''any person that is: (A) A natural person resident in the United States; (B) A partnership, corporation, trust, investment vehicle, or other legal person organized, incorporated, or established under the laws of the United States or having its principal place of business in the United States; (C) An account (whether discretionary or non-discretionary) of a U.S. person; or (D) An estate of a decedent who was a resident of the United States at the time of death.'' *Id.* at 47371. As the Commission noted in the Cross-Border Adopting Release, the definition of ''U.S. person'' in Rule 3a71–3(a)(4)(i) ''reflect[s] a territorial approach to the application of Title VII.'' Cross-Border Adopting Release, 79 FR at 47306, *supra* note 11. The Commission believes that the territorial focus of the definition is appropriate in the context of the SDR Rules because it will enable the Commission to identify those SDRs that should be required to register with the Commission by virtue of the location of a significant portion of their commercial and legal relationships within the United States. *Cf.* Cross-Border Adopting Release, 79 FR at 47337, *supra* note 11.

[100] 15 U.S.C. 78m(n).

[101] In addition to the SDR Rules, the Commission is adopting Regulation SBSR, which imposes certain obligations on SDRs registered with the Commission. *See* Regulation SBSR Adopting Release, *supra* note 13. In a separate proposal relating to implementation of Dodd-Frank Act Section 763(i) (adding Exchange Act Section 13(n)(5)(E), 15 U.S.C. 78m(n)(5)(E)), the Commission proposed rules that would require SDRs registered with the Commission to collect data related to monitoring the compliance and frequency of end-user clearing exemption claims. *See* End-User Exception Proposing Release, *supra* note 15.

[102] *See* Proposing Release, 75 FR at 77307, *supra* note 2 (''The enhanced transparency provided by an SDR is important to help regulators and others monitor the build-up and concentration of risk exposures in the SBS market . . . . In addition, SDRs have the potential to reduce operational risk and enhance operational efficiency in the SBS market.'').

[103] *See* Proposing Release, 75 FR at 77307, *supra* note 2 (''The inability of an SDR to protect the accuracy and integrity of the data that it maintains or the inability of an SDR to make such data available to regulators, market participants, and others in a timely manner could have a significant negative impact on the SBS market. Failure to maintain privacy of such data could lead to market abuse and subsequent loss of liquidity.'').

[104] Under this interpretation, the term ''non-U.S. person'' would have the same meaning as set forth in Rule 13n–12(a), as discussed in Section VI.K.3 of this release.

[105] Cross-Border Proposing Release, 78 FR at 31042, *supra* note 3. *See also* Exchange Act Section 13(n)(1), 15 U.S.C. 78m(n)(1) (requiring persons that, directly or indirectly, make use of the mails or any means or instrumentality of interstate commerce to perform the functions of an SDR to register with the Commission). The Commission recognizes that some non-U.S. persons that perform the functions of an SDR may do so entirely outside the United States, and thus, are not required to register with the Commission. *See* Cross-Border Proposing Release, 78 FR at 31042 n.721, *supra* note 3.

[106] Cross-Border Adopting Release, 79 FR at 47287, *supra* note 11. *Accord* IIB CB, *supra* note 26 (believing that the Commission's territorial approach to registration is appropriate for market infrastructures, including SDRs, and stating that ''[t]his approach will help [ ] achieve the Commission's market oversight objectives while avoiding conflicts with foreign regulators, and it is consistent with the CFTC's approach'').

[107] Cross-Border Adopting Release, 79 FR at 47287, *supra* note 11.

[108] *See* Cross-Border Adopting Release, 79 FR at 47287, *supra* note 11.

[109] Cross-Border Proposing Release, 78 FR at 31042, *supra* note 3.

[110] Cross-Border Proposing Release, 78 FR at 31042, *supra* note 3. The Commission notes that if a person performing the functions of an SDR has operations in the United States to the extent that such operations constitute a principal place of business, then the person would fall within the definition of ''U.S. person'' in Rule 13n–12, which cross-references to Exchange Act Rule 3a71–3(a)(4)(i), 17 CFR 240.3a71–3(a)(4)(i). As adopted, the term ''U.S. person'' includes a partnership, corporation, trust, investment vehicle, or other legal person having its principal place of business in the United States. *See* Cross-Border Adopting Release, 79 FR at 47371, *supra* note 11. As a result of being a ''U.S. person,'' the person with its principal place of business in the United States would be required to register as an SDR with the Commission.

[111] *See* DTCC CB, *supra* note 26.

that ''[t]he SDR registration requirement should apply to any entity, regardless of physical location of servers, that receives [SBS] transaction data from reporting sides who are U.S. persons for the purpose of complying with the Commission's reporting regulations.'' [112] The commenter also suggested that if an SDR ''collects and maintains [SBS] transaction information or records in furtherance of these obligations, then it should be deemed to 'function' as an SDR in the United States and face the registration requirements.'' [113] The Commission agrees generally with the commenter, but notes that determination of whether or not an SDR is required to register with the Commission is based on relevant facts and circumstances, including, for example, whether the SDR performs the functions of an SDR within the United States, such as having operations within the United States, as discussed above. Thus, an SDR's registration requirements should be analyzed separately from the reporting requirements of Title VII and Regulation SBSR.

The commenter stated that ''an entity that (i) collects and maintains [non-SBS] transaction information, (ii) collects and maintains [SBS] transaction information from activity between non-U.S. persons, or (iii) collects and maintains [SBS] transaction information reported to the entity pursuant to regulatory requirements or commitments unrelated to those imposed by the Commission . . . should not be considered to function in the United States,'' and ''[a]ccordingly, such an entity would not be required to register with the Commission as an SDR.'' [114] The Commission believes that this position is overly broad. The Commission agrees that a person that collects and maintains only non-SBS transaction information would not have to register with the Commission because it would not fall within the statutory definition of an SDR.[115] However, consistent with the Commission's territorial approach to the application of Title VII, an SDR that collects and maintains data relating to SBS transactions between non-U.S. persons may still be required to register with the Commission if the SDR makes use of the mails or any means or instrumentality of interstate commerce to perform the functions of an SDR—for example by maintaining SBS data on servers physically located in the United States. Similarly, an SDR that collects and maintains SBS transaction information reported to the SDR pursuant to requirements or commitments unrelated to those imposed by the Commission may still be required to register with the Commission if the SDR makes use of the mails or any means or instrumentality of interstate commerce to perform the functions of an SDR.

Determination of whether or not an SDR is required to register with the Commission is fact-specific. As stated in the Cross-Border Proposing Release, given the constant innovation in the market and the fact-specific nature of the determination, it is not possible to provide a comprehensive discussion of every activity that would constitute a non-U.S. person performing ''the functions of a security-based swap data repository within the United States.'' [116] In order to provide legal certainty to market participants and to address commenters' concerns regarding the potential for duplicative regulatory requirements, the Commission is adopting Rule 13n–12, which exempts certain non-U.S. persons performing ''the functions of a security-based swap data repository within the United States'' from the registration and other requirements set forth in Exchange Act Section 13(n) and the rules and regulations thereunder. Rule 13n–12 is discussed in Section VI.K of this release.

C. Ancillary Services

As stated above, the Commission believes that the statutory definition of an SDR describes the core services or functions of an SDR. This release will refer to all other services or functions provided by an SDR as ''ancillary services.'' SDRs are required to provide some ancillary services under the Exchange Act and the rules and regulations thereunder (''required ancillary services''). These required ancillary services include certain duties of SDRs that are set forth in Exchange Act Section 13(n)(5) [117] and the duties imposed by the SDR Rules. SDRs also may voluntarily choose to provide other ancillary services (''voluntary ancillary services'').

Five commenters submitted comments relating to ''ancillary services.'' [118] Three commenters recommended that SDRs be allowed (but not be required) to offer ancillary services to SBS counterparties.[119] One of these commenters recommended that SDRs be allowed (but not be required) to offer ''ancillary services,'' which, according to that commenter, ''may include: Asset servicing, confirmation, verification and affirmation facilities, collateral management, settlement, trade compression and netting services, valuation, pricing and reconciliation functionalities, position limits management, dispute resolution, counterparty identity verification and others.'' [120] The commenter noted that allowing SDRs to offer such services would ''promote greater efficiencies and greater accuracy of data.'' [121] The commenter also recommended allowing an SDR's affiliates, which may not be registered with the Commission, to perform such ''ancillary services.'' [122] The second commenter recommended that life cycle event processing and legal recordkeeping services be treated as ''ancillary'' services.[123] The second commenter also recommended allowing SDRs to offer ''an asset servicing function,'' which would allow SDRs to ''assist in systemic risk monitoring by providing regulators with regular reports analyzing the data (such as position limit violations or certain identified manipulative trading practices).'' [124] With respect to bundling, both commenters agreed that an SDR should not be allowed to require counterparties to use ''ancillary services'' in order to gain access to the SDR.[125] The third commenter believed that SDRs should be able to offer ''ancillary services,'' but did not support the bundling of such services with mandatory or regulatory services.[126] The

[112] DTCC CB, *supra* note 26.

[113] DTCC CB, *supra* note 26.

[114] DTCC CB, *supra* note 26.

[115] *See* Exchange Act Section 3(a)(75), 15 U.S.C. 78c(a)(75).

[116] Cross-Border Proposing Release, 78 FR at 31042–3, *supra* note 3.

[117] 15 U.S.C. 78m(n)(5).

[118] *See* Barnard, *supra* note 19; BNY Mellon, *supra* note 19; DTCC 2, *supra* note 19; MarkitSERV, *supra* note 19; TriOptima, *supra* note 19; *see also* DTCC 1*, *supra* note 20; DTCC 3, *supra* note 19. These commenters generally did not define ''ancillary services.'' *But see* MarkitSERV, *supra* note 19 (referring to ''an array of services that are ancillary . . . to those narrowly outlined in the [SDR Rules] (*i.e.,* basic receipt and storage of [SBS] data.)'').

[119] *See* MarkitSERV, *supra* note 19; DTCC 2, *supra* note 19; Barnard, *supra* note 19; *see also* TriOptima, *supra* note 19 (contemplating that an SDR would provide ancillary services and stressing the importance of equal access to SDR data when such services are provided).

[120] MarkitSERV, *supra* note 19.

[121] MarkitSERV, *supra* note 19.

[122] MarkitSERV, *supra* note 19.

[123] DTCC 2, *supra* note 19.

[124] DTCC 1*, *supra* note 20.

[125] MarkitSERV, *supra* note 19; DTCC 3, *supra* note 19; *see also* DTCC 4, *supra* note 19 (stating that providers offering services for one asset class should not be permitted to bundle or tie these services with services for other asset classes); TriOptima, *supra* note 19 (agreeing that ''it is important that market participants have the ability to access specific services separately''). *See* Section VI.D.3.a of this release discussing bundling of services.

[126] Barnard, *supra* note 19.

fourth commenter believed that if SDRs provide ''ancillary services,'' then the SDRs should not have advantages in providing these services over competitors offering the same services.[127] This commenter noted, for example, that SDRs will maintain granular trade data that is valuable in providing post-trade services, and that other post-trade service providers should have the same access to the granular trade data as the SDR and its affiliates when providing post-trade services.[128] The fifth commenter suggested that certain functions that an SDR may perform (*e.g.,* confirmation of trades, reconciliation, valuation of transactions, life-cycle management, collateral management) should not be considered as ''processing of [SBSs]'' for the purposes of SB SEF registration.[129]

It appears that the commenters generally used the term ''ancillary services'' to mean voluntary ancillary services. The Commission, however, notes that at least two services identified by a commenter as ''ancillary services'' are considered by the Commission to be required ancillary services for an SDR. This commenter suggested that ''confirmation'' and ''dispute resolution'' are ancillary to ''those [services] narrowly outlined in the SBS SDR Regulation (*i.e.,* basic receipt and storage of swaps data).'' [130] The Commission agrees with the commenter's suggestion that these two services are not ''core'' SDR services, which would cause a person providing such core services to meet the definition of an SDR, and thus, require the person to register with the Commission as an SDR. However, SDRs are required to perform these two services or functions, and thus, they are required ancillary services; as discussed in Sections VI.E.1.c and VI.E.6.c of this release, the Exchange Act requires SDRs to ''confirm'' the accuracy of the data submitted,[131] and the final SDR Rules include a dispute resolution requirement.[132]

An SDR may delegate some of these required ancillary services to third party service providers, who do not need to register as SDRs to provide such services. The SDR will remain legally responsible for the third party service providers' activities relating to the required ancillary services and their compliance with applicable rules under the Exchange Act. For example, as discussed above, the Exchange Act requires SDRs to ''confirm'' the accuracy of the data submitted.[133] If an SDR delegates its confirmation obligation to a third party service provider, then the third party service provider that provides this required ancillary service would not need to register as an SDR, unless it otherwise falls within the definition of an SDR; however, the SDR that delegates its obligation to the third party service provider would remain responsible for compliance with the statutory requirement.[134]

The Commission agrees with the commenters' view that SDRs should be allowed to offer voluntary ancillary services.[135] The Commission believes that use of such services by market participants and market infrastructures will likely improve the quality of the data held by the SDRs.[136] The Commission believes that when the data held at an SDR is used by counterparties for their own business purposes, rather than solely for regulatory purposes, the counterparties will have additional opportunities to identify errors in the data and will likely have incentives to ensure the accuracy of the data held by the SDR.[137] Such voluntary ancillary services that an SDR could provide include, for example, collateral management, clearing and settlement, trade compression and netting services, and pricing and reconciliation functionalities. These services could also be provided by persons that are not SDRs and would not, in and of themselves, require the providers to register as SDRs.[138]

The Commission also agrees with the commenters' view that market participants should not be required to use voluntary ancillary services offered by an SDR as a condition to use the SDR's repository services,[139] and that SDRs should not be permitted to use their repository function to gain

[127] TriOptima, *supra* note 19.

[128] TriOptima, *supra* note 19.

[129] BNY Mellon, *supra* note 19. *See also* Exchange Act Section 3D(a)(1), 15 U.S.C. 78c–4(a)(1) (stating that ''[n]o person may operate a facility for the trading or processing of security-based swaps, unless the facility is registered as a security-based swap execution facility or as a national securities exchange under this section''). Subsequent to receiving this comment, the Commission issued a proposing release on the registration and regulation of SB SEFs, interpreting the Dodd-Frank Act to key the SB SEF registration obligation on the definition of an SB SEF in Exchange Act Section 3(a)(77). *See* 15 U.S.C. 78c(a)(77), as added by Dodd-Frank Act Section 761(a). *See* SB SEF Proposing Release, 76 FR at 10959 n.62, *supra* note 29. The Commission expects to address the scope of SB SEF registration when it adopts final rules relating to the registration and regulation of SB SEFs.

[130] *See* MarkitSERV, *supra* note 19.

[131] *See* Exchange Act Section 13(n)(5)(B), 15 U.S.C. 78m(n)(5)(B); Rule 13n–4(b)(3) (requiring an SDR to ''[c]onfirm, as prescribed in Rule 13n–5(§ 240.13n–5), with both counterparties to the [SBS] the accuracy of the data that was submitted''); Rule 13n–5(b)(1)(iii) (requiring an SDR to establish, maintain, and enforce written policies and procedures reasonably designed to satisfy the SDR that the transaction data that has been submitted to the SDR is complete and accurate).

[132] *See* Section VI.E.6.c of this release discussing Rule 13n–5(b)(6).

[133] *See* Exchange Act Section 13(n)(5)(B), 15 U.S.C. 78m(n)(5)(B). In a separate release, the Commission proposed rules under Exchange Act Section 15F(i)(1), which provides that SBS dealers and major SBS participants must ''conform with such standards as may be prescribed by the Commission, by rule or regulation, that relate to timely and accurate confirmation . . . of all security-based swaps.'' *See* Trade Acknowledgment and Verification of Security-Based Swap Transactions, Exchange Act Release No. 63727 (Jan. 14, 2011), 76 FR 3859 (Jan. 21, 2011) (''Trade Acknowledgment Release''). SDRs are not required to perform confirmations under Exchange Act Section 15F(i)(1) and the rules and regulations thereunder, but, in certain circumstances, SDRs may be able to rely on confirmations that are provided pursuant to Exchange Act Section 15F(i)(1). *See* Section VI.E.1.c of this release discussing the circumstances where a single confirmation could fulfill both requirements.

[134] An SDR that delegates required ancillary services to a third party service provider must have a reasonable basis for relying on the third party service provider. *See* Section VI.E.1.c of this release discussing reasonable reliance in the context of confirmations. *Cf.* Exchange Act Rule 17a–4(i), 71 CFR 240.17a–4(i) (stating that an agreement with an outside entity to maintain and preserve records for a member, broker, or dealer will not relieve the member, broker, or dealer from its responsibilities under Exchange Act Rules 17a–3 or 17a–4).

[135] *See* MarkitSERV, *supra* note 19; DTCC 2, *supra* note 19; Barnard, *supra* note 19.

[136] *See* MarkitSERV, *supra* note 19 (recommending allowing SDRs to offer ''ancillary services'' because it would ''promote greater efficiencies and greater accuracy of data'').

[137] For example, counterparties might use the data maintained by the SDR as part of their risk management activities. *See* MarkitSERV, *supra* note 19 (''[O]ne of the critical components in ensuring the accuracy of swaps data is the degree to which such data is utilized by industry participants in other processes. The existence of a number of feedback loops and distribution channels through which data will flow will enable participants to identify, test and correct inaccuracies and errors.'').

[138] The performance of some of these services, such as clearing and settlement and netting services, may cause a person to be a ''clearing agency,'' as defined in Exchange Act Section 3(a)(23), 15 U.S.C. 78c(a)(23); *see also* Clearing Agency Standards, Exchange Act Release No. 68080 (Oct. 22, 2012), 77 FR 66220, 66227–28 (Nov. 2, 2012) (''Clearing Agency Standards Release'') ([T]he definition of clearing agency in Section 3(a)(23)(A) of the Exchange Act covers any person who acts as an intermediary in making payments or deliveries or both in connection with transactions in securities and provides facilities for the comparison of data regarding the terms of settlement of securities transactions, to reduce the number of settlements of securities transactions, or for the allocation of securities settlement responsibilities. . . . The determination of whether particular activities meet the definition of a clearing agency depends on the totality of the facts and circumstances involved.''). It is unlawful for a clearing agency to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a clearing agency with respect to any security (other than exempted securities) unless it is registered with the Commission, or exempted from registration, pursuant to Exchange Act Sections 17A(b) and 19(a), and the rules and regulations thereunder.

[139] *See* MarkitSERV, *supra* note 19; DTCC 2, *supra* note 19; Barnard, *supra* note 19.

advantages in providing voluntary ancillary services over competitors offering the same services.[140] As discussed further below, the Commission is adopting Rule 13n–4(c)(1), which should address commenters' concerns.[141]

D. Business Models of SDRs

The Commission understands that SDRs might operate under a number of business models and did not intend for the proposed SDR Rules to mandate any particular business model.[142] In the Proposing Release, the Commission solicited comments on whether the SDR Rules should favor or discourage one business model over another.[143] Three commenters, including one comment submitted prior to the Proposing Release, suggested that SDRs should be required to operate on an at-cost utility model.[144]

Consistent with commenters' views, the Commission understands that an SDR operating on a for-profit, non-utility model, or commercial basis, may be presented with more conflicts of interest, including economic self-interest in pricing or bundling its services, than an SDR operating on an at-cost utility model, or non-profit basis.[145] The Commission believes, however, that if an SDR operating on an at-cost utility model has an affiliate that provides ancillary services for SBSs for profit, then that SDR may be presented with conflicts of interest similar to conflicts at an SDR operating on a for-profit, non-utility model.[146] For example, an SDR that has an affiliate that provides asset servicing for profit would most likely face similar conflicts as a for-profit SDR that provides asset servicing itself.

The Commission believes that the final SDR Rules, including rules pertaining to conflicts of interest, are sufficiently broad to address the range of conflicts of interest inherent in different SDR business models. For instance, under Rule 13n–4(c)(3), each SDR is required to identify conflicts of interest applicable to it and establish, maintain, and enforce written policies and procedures to mitigate these conflicts.[147] In addition, the Commission believes that allowing SDRs to pursue different business models will increase competition, efficiency, and innovation among SDRs. For example, by not prescribing one particular business model, new entrants may have an incentive to develop business models for SDRs that efficiently provide core services to the industry and effectively mitigate conflicts.[148] Therefore, after considering the comments, the Commission continues to believe that it is not necessary to mandate any particular business model for SDRs.

IV. Number of SDRs and Consolidation of SBS Data

The Commission received several comments relating to the issue of data fragmentation among SDRs. The Commission believes that if there are multiple SDRs in any given asset class, then it may be more difficult for regulators to monitor the SBS market because of the challenges in aggregating SBS data from multiple SDRs.[149] Some commenters suggested limiting the number of SDRs to one per asset class in order to address these concerns.[150] While such a limitation would resolve many of the challenges involved in aggregating SBS data, the Commission believes that imposing such a limitation would stymie competition among SDRs, and, consequently, may lead to increased costs to market participants.[151] The Commission believes that the better avenue at this point is to refrain from regulating the number of SDRs in an asset class to permit market forces to determine an efficient outcome. Therefore, the Commission is not adopting the commenters' suggestions to limit the number of SDRs in each asset class.

In the Proposing Release, the Commission requested comment on whether the Commission should designate one SDR as the recipient of the information from all other SDRs in order to provide the Commission and relevant authorities with a consolidated location from which to access SBS data for regulatory monitoring and oversight purposes.[152] Some commenters suggested that an SDR's duties should include reporting SBS data to a single SDR that would consolidate the data for relevant authorities or otherwise mandating the consolidation of SBS data.[153] Specifically, one commenter recommended that the Commission ''designate one SDR as the recipient of the information of other SDRs to ensure the efficient consolidation of data.'' [154] The commenter further stated that the designated SDR would need to have ''the organization and governance structure that is consistent with being a

[140] *See* TriOptima, *supra* note 19.

[141] *See* Section VI.D.3.a of this release discussing Rule 13n–4(c)(1).

[142] *See* Proposing Release, 75 FR at 77308, *supra* note 2.

[143] Proposing Release, 75 FR at 77308, *supra* note 2.

[144] *See* DTCC 2, *supra* note 19 (stating that ''there is a significant advantage to the market if SDRs are required to provide basic services on an at-cost or utility model basis, as it avoids the potential abuse or conflict of interest related to a relatively small number of service providers in the SDR industry'' and that ''SDR fee structures should reflect an at-cost operating budget''); Benchmark*, *supra* note 20 (stating that a non-profit utility structure ''helps promote innovative uses'' of SBS data ''to maximize its value to market participants''); Saul, *supra* note 19 (stating that SDRs should ''serve the entire industry as a utility'' and that ''[t]reating an SDR as a utility would also make it easier for the industry to provide the manpower and the capital to form an SDR''); *see also* DTCC 3, *supra* note 19 (''SDRs should serve an impartial, utility function.'').

[145] *See* Section VIII of this release discussing the costs and benefits of different business models.

[146] *See* Section VIII of this release for further discussion.

[147] *See* Section VI.D.3.c.iii of this release discussing Rule 13n–4(c)(3).

[148] *See* Section VIII of this release discussing the costs and benefits of different business models.

[149] *See* FINRA SBSR, *supra* note 27 (recognizing ''the Commission's acknowledgement of 'the possibility that there could emerge multiple registered SDRs in an asset class,' and, in the event this should occur that 'the Commission and the markets would be confronted with the possibility that different registered SDRs could adopt different dissemination protocols, potentially creating fragmentation in SBS market data' '') (citations omitted); DTCC 3, *supra* note 19 (''When there are multiple SDRs in any particular asset class, the [Commission] should take such action as is necessary to eliminate any overstatements of open interest or other inaccuracies that may result from having broader market data published from separate SDRs.'').

[150] *See* ISDA Temp Rule, *supra* note 28 (''[T]he designation of a single [SDR] per class of security-based swap would provide the Commission and market participants with valuable efficiencies. In particular, there would be no redundancy of platforms, no need for additional levels of data aggregation for each asset class and reduced risk of errors and greater transparency (because a single [SDR] per asset class would avoid the risk of errors associated with transmitting, aggregating and analyzing multiple sources of potentially incompatible and duplicative trade data).''); *see also* Saul, *supra* note 19 (suggesting that the Commission should seek to have only one or two SDRs to service the SBS market).

[151] *See* Section VIII.C.3.b of this release discussing the SDR Rules' potential effects on competition (''The Commission believes that by allowing multiple SDRs to provide data collection, maintenance, and recordkeeping services, the SDR Rules should promote competition among SDRs. . . . Increased competition may lower costs for users of SDR services.''). *Accord* PFMI Report, *supra* note 50 (''Competition can be an important mechanism for promoting efficiency. Where there is effective competition and participants have meaningful choices among FMIs[, including SDRs], such competition may help to ensure that FMIs are efficient.'').

[152] Proposing Release, 75 FR at 77309, *supra* note 2.

[153] *See* DTCC 1*, *supra* note 20; Better Markets 1, *supra* note 19; *see also* FINRA SBSR, *supra* note 27 (urging the Commission to mandate the consolidation of disseminated SBS data to the public).

[154] DTCC 1*, *supra* note 20; *see also* Better Markets 1, *supra* note 19 (making similar comments); *see also* DTCC 2, *supra* note 19 (''The role of an aggregating SDR is significant in that it ensures regulators efficient, streamlined access to consolidated data, reducing the strain on limited agency resources.'').

financial market utility serving a vital function to the entire marketplace.'' [155]

The Commission does not dispute the commenter's assertion that fragmentation of data among SDRs would ''leave to regulators the time consuming, complicated and expensive task of rebuilding complex data aggregation and reporting mechanisms.'' [156] However, if the Commission were to designate one SDR as the data consolidator, such an action could be deemed as the Commission's endorsement of one regulated person over another, discourage new market entrants, and interfere with competition, resulting in a perceived government-sponsored monopoly.[157] In addition, such a requirement would likely impose an additional cost on market participants to cover the SDR's cost for acting as the data consolidator.

In addition, any consolidation required by the Commission would be limited to SBS data and may not necessarily include data not required to be reported under Title VII and Regulation SBSR, such as swap data. For example, consolidated SBS data may show that a person entered into several SBSs based on individual equity securities. If the person also entered into swaps based on a broad-based security index made up of the individual equity securities, then the consolidated data would not necessarily include that information. Therefore, commenters' suggestion to designate one SDR as the data consolidator may not fully address their data fragmentation concerns unless the same SDR also consolidates swap data, which the CFTC regulates.

Therefore, after considering the comments, the Commission is not designating, at this time, one SDR as the recipient of information from other SDRs in order to provide relevant authorities with consolidated data. The Commission may revisit this issue if there is data fragmentation among SDRs that is creating substantial difficulties for relevant authorities to get a complete and accurate view of the market.[158]

V. Implementation of the SDR Rules

A. Prior Commission Action

The Commission solicited comment in the Proposing Release on whether it should adopt an incremental, phase-in approach with respect to Exchange Act Section 13(n) and the rules thereunder.[159] The Commission further sought and received comments on similar implementation issues relating to Title VII in other rulemakings and through solicitations for comments.[160]

1. Effective Date Order

In addition, as discussed above, on June 15, 2011, the Commission issued the Effective Date Order, which provided guidance on the provisions of the Exchange Act added by Title VII with which compliance would have been required as of July 16, 2011 (*i.e.,* the effective date of the provisions of Title VII). The Effective Date Order provided exemptions to SDRs from Exchange Act Sections 13(n)(5)(D)(i), 13(n)(5)(F), 13(n)(5)(G), 13(n)(5)(H), 13(n)(7)(A), 13(n)(7)(B), and 13(n)(7)(C), each of which will expire on the earlier of (1) the date the Commission grants registration to the SDR and (2) the earliest compliance date set forth in any of the final rules regarding the registration of SDRs.[161] Absent further Commission action, these exemptions will expire as of the Compliance Date (as defined below), unless the Commission has granted an SDR's registration before the Compliance Date, in which case these exemptions will expire, with respect to that SDR, as of the date the Commission grants the SDR's registration.

In addition, the Effective Date Order also provided exemptive relief from the rescission provisions of Exchange Act Section 29(b) in connection with Exchange Act Sections 13(n)(5)(D)(i), 13(n)(5)(F), 13(n)(5)(G), 13(n)(5)(H), 13(n)(7)(A), 13(n)(7)(B), and 13(n)(7)(C).[162] That relief does not expire automatically, but rather when the Commission specifies.[163] The Commission is now specifying that this exemption from Section 29(b) will expire on the Compliance Date, or for those SDRs that are registered prior to the Compliance Date, the date that the Commission grants each SDR's registration.

2. Implementation Policy Statement

As discussed above, on June 11, 2012, the Commission issued a statement of general policy on the anticipated sequencing of compliance dates of final rules to be adopted under Title VII. The Implementation Policy Statement stated that compliance with the SDR Rules ''earlier in the implementation process should facilitate the development and utilization of SDRs in a regulated manner.'' [164] Among other things, the Implementation Policy Statement requested comment on whether the Commission should adopt a phase-in of the SDR Rules and whether SDRs should be able to secure a grace period to defer compliance with some or all of the requirements of Exchange Act Section 13(n) and the SDR Rules.[165]

B. Summary of Comments

While only two commenters on implementation referred specifically to the SDR Rules, the Commission believes that other comments, particularly those related to timing with respect to implementing rules on SBS reporting, are relevant to the implementation of the SDR Rules as well. Eight commenters suggested that a phase-in approach to the SDR Rules or SBS reporting generally may be appropriate.[166] The commenters generally indicated that a phase-in would be necessary to enable existing SDRs and other market participants to make the necessary changes to their operations to comply with the new

[155] DTCC 1*, *supra* note 20.

[156] DTCC 3, *supra* note 19.

[157] *See* Section VIII of this release for further discussion.

[158] *See* Section VI.D.2.c.ii of this release discussing aggregation of data across multiple registered SDRs by the Commission.

[159] Proposing Release, 75 FR at 77314, *supra* note 2.

[160] *See* Sections I.C and I.D of this release discussing other comments and regulatory initiatives considered in this rulemaking.

[161] Effective Date Order, 76 FR at 36306, *supra* note 9.

[162] Effective Date Order, 76 FR at 36307, *supra* note 9.

[163] Effective Date Order, 76 FR at 36307, *supra* note 9.

[164] Implementation Policy Statement, 77 FR at 35631, *supra* note 10.

[165] Implementation Policy Statement, 77 FR at 35634, *supra* note 10.

[166] *See* Barclays*, *supra* note 21; DTCC 2, *supra* note 19 (''[T]he Commission [should] ensure that the registration process does not interrupt current operation of existing trade repositories who intend to register as SDRs. This can be achieved as a phase-in for existing SDRs where services will need to be amended to conform with the final rules given the compressed time period between the publication of the final rules and the effective date of the Dodd-Frank Act.''); FIA*, *supra* note 21 (''[P]hase-in is critical for a smooth implementation of the changes required under the Dodd-Frank Act.''); FSF*, *supra* note 21; FSR Implementation, *supra* note 23; MFA 2, *supra* note 19; Morgan Stanley*, *supra* note 20 (''[G]iven the market disruption that could result from the simultaneous application of these requirements across products and markets, and the potentially severe consequences to the markets and the larger economy, we believe that a phase in approach is both permitted and contemplated by Dodd-Frank, and desirable in order to maintain orderly, efficient, liquid and inclusive markets.''); SIFMA Implementation, *supra* note 22 (''Once SDRs are registered and [SBS dealers] and [major SBS participants] have connected to them, data reporting can begin. [SBS dealers] and [major SBS participants] will not be able to provide, and [SDRs] will not be able to accept, all data on Dodd-Frank Act-compliant timelines on the first day of operation. Instead, there should be a phased process to develop the procedures and connections needed to ultimately report all Dodd-Frank Act-required data in the appropriate time frame.''); *see also* DTCC 3, *supra* note 19; DTCC 5, *supra* note 19 (''[T]he final rules should include implementation and compliance dates that are unambiguous. . . . Appropriate time must be afforded to ensure that implementation can take place smoothly for all market participants.'').

regulatory requirements.[167] One of the commenters who advocated a phase-in approach also recognized the importance of reporting SBS data to SDRs as an early part of the Dodd-Frank Act implementation process.[168]

Six commenters supported a phase-in approach based on asset class.[169] Some commenters supported a phase-in based on other criteria.[170] Some commenters indicated that a phase-in period, which could be based on asset class or other SBS or market participant attributes, is important in order to avoid market disruption.[171] While one commenter indicated that connectivity concerns should not delay implementation because it is easy for an SDR and other market infrastructures to establish connectivity,[172] another commenter cautioned that market connectivity will take time to establish and test.[173] None of the commenters provided specific timeframes for a phase-in approach.[174]

In addition to the comments received above, participants in the Implementation Joint Roundtable provided input regarding the appropriateness of a phase-in period for Title VII rulemakings. Many of the participants in the Implementation Joint Roundtable advocated for a phase-in period for the SDR Rules or SBS reporting generally; however, the participants' specific approaches varied. While some participants at the Implementation Joint Roundtable advocated a phase-in by asset class,[175] other participants suggested that a phase-in should be based on other product attributes, such as the liquidity of the product,[176] or based on the development of other market infrastructures.[177] Another participant suggested that SDRs' obligations to provide reports of SBS transactions to regulators—which the Commission believes are relevant to the direct

[167] *See, e.g.,* Barclays*, *supra* note 21 (''Changes envisioned by Title VII require very significant investment into operational, IT and other infrastructure—infrastructure that will take time and resources to build, test and optimize. The ability to fund and execute the necessary infrastructure build, as well as put in place the risk management and operational processes needed to conduct business under the new regulatory regime, will vary significantly by asset class and type of market participant.''); DTCC 2, *supra* note 19 (stating that ''the final rules [should] be subject to a phase-in period to allow an adequate period for existing service providers . . . to make necessary changes to their service offerings,'' requesting that the Commission alternatively ''provide specific transitional arrangements for existing infrastructures,'' and noting that the continuation of counterparty reporting and the ability of SDRs to receive and maintain current trade information on an ongoing basis is ''imperative for effective oversight of systemic risk and the continuance of the operational services to market participants''); FSF*, *supra* note 21 (''New market infrastructure and technologies, including central clearing services, data reporting services and trading platforms, will be required to give effect to the new Swap regulatory regime. Unless sufficient time is allotted for these components of market infrastructure and technologies to adequately develop, all market participants (and particularly end users) will face interruptions in their ability to enter into Swaps to hedge their business risks or manage investments to meet client objectives.'').

[168] *See* MFA 2, *supra* note 19 (''[W]e believe the first two priorities should be: (i) Expanding the use of central clearing for liquid ('clearable') contracts; and (ii) having trade repositories receive data on both cleared and bilateral swaps. These changes would provide substantial benefits to the markets by enhancing price transparency and competition for the most liquid swap transactions. . . . Comprehensive reporting to SDRs and regulators . . . will allow regulators to monitor systemic risk and individual risk concentrations much more effectively, and intervene specifically as necessary.''); *see also* FSF*, *supra* note 21 (The Commission ''should prioritize implementation of data reporting, including registration of [SDRs], to regulators ahead of real-time reporting and other requirements, including public reporting. The [Commission] will learn much about the full range of Swap markets from the data collected by SDRs. This knowledge will be essential in developing rules that meet Dodd-Frank's requirements while still allowing for active and liquid Swap markets.'').

[169] *See* Barclays*, *supra* note 21 (''[W]e recommend that the [Commission] phase in the clearing, execution and reporting requirements gradually over time, staggered by asset class.''); DTCC 3, *supra* note 19 (''[P]hasing should focus first on the products with the greatest automation and then on products with less automation. The more widespread the automated processing, the higher quality the data reported to SDRs. As automated processing is most widely prevalent in credit derivatives . . . it should be the first asset class implemented. Interest rate derivatives, being the next most widely automated asset class, would be next, followed by FX derivatives, then commodity and equity derivatives last.''); FSF*, *supra* note 21 (''The [Commission] should phase in requirements based on the state of readiness of each particular asset class (including, where applicable, by specific products within an asset class) and market participant type.''); FSR Implementation, *supra* note 23 (''[I]mplementing regulations on a product-by-product basis would reduce the risk of significant market dislocation during a transition period. For example, certain credit default swaps that are already reported to a trade information warehouse, are highly standardized, and are being regularly submitted for central clearing . . . may be a natural choice with which to confirm that systems are operating appropriately before expanding regulatory requirements to other [asset] classes.''); AII Implementation, *supra* note 23 (''[C]learing and other requirements should come first for highly liquid, standardized instruments, such as credit default swaps'' and ''[l]ess liquid products, such as certain physical commodity instruments, should come afterward.''); SIFMA Implementation, *supra* note 22 (''Reporting should also be phased in by asset class, based on whether reporting infrastructure and data exist.'').

[170] *See* Morgan Stanley*, *supra* note 20 (''In addition to phase in based on asset class and reporting times, reporting could also be phased in based on how a product trades [*e.g.,* whether the SBS is cleared].''); FSR Implementation, *supra* note 23 (stating that ''it may be prudent to have different portions of a single rulemaking proposal take effect at different times and with due consideration of steps that are preconditions to other steps''; suggesting, as an example, that a requirement to designate a CCO should be implemented quickly, but that the CCO be given time to design, implement, and test the compliance system before any requirement to certify as to the compliance system becomes effective; and supporting a phase-in approach ''that recognizes the varying levels of sophistication, resources and scale of operations within a particular category of market participant''). *But see* Barclays*, *supra* note 21 (''Phasing by type of market participant would not be useful for reporting obligations, in [the commenter's] view, as the reported information needs to reflect the entirety of the market to be useful for the market participants and regulators.'').

[171] *See, e.g.,* DTCC 2, *supra* note 19 (''[A]ppropriate transitional arrangements [should] be made to avoid market disruption by the implementation of the Proposed Rule. . . . Restrictions to [the commenter's SDR] operation could introduce significant operational risks to market participants.''); Barclays*, *supra* note 21 (Phase-in by asset class would help ''ensure that both the industry and SDRs have sufficient time to build and test the needed infrastructure in order to prevent any potential market disruptions that could result from the implementation of new rules.''); *see also* FSR Implementation, *supra* note 23 (recommending that the Commission consider resource constraints in evaluating transition deadlines and stating that ''if there are a dozen rules that would each take about a month to implement in isolation under normal circumstances, it is unrealistic to expect all twelve rules to be implemented one month from passage of final rules'').

[172] DTCC 3, *supra* note 19 (''Connectivity between clearinghouses and [SB SEFs], as well as SDRs, is easy to establish (and, in many instances, already exists) and should not be the reason for delaying the implementation of real-time reporting rules.'').

[173] FSR Implementation, *supra* note 23 (''Although we recognize that central clearing, exchange trading and transparent reporting are core aspects of the new regulatory system, they require a web of interconnections that will take time to establish and test, and their use should not become obligatory until such establishment and testing is complete.'').

[174] *But see* Bank of Tokyo SBSR, *supra* note 27 (requesting ''that the [Commission] . . . defer compliance requirements under Title VII until December 31, 2012'' to ''facilitate coordination among national authorities in the United States, Japan and other relevant jurisdictions in order to avoid overlapping and inconsistent regulatory regimes''). Because the timeframe suggested by this commenter has passed, this aspect of the comment is now moot.

[175] *See, e.g.,* statement of Ronald Levi, GFI Group, Inc., at Implementation Joint Roundtable (''[D]epending on which asset classes go first or which asset classes are amongst the first phase will determine how long it takes us.''); statement of Larry Thompson, The Depository Trust & Clearing Corporation, at Implementation Joint Roundtable (''And right now, at least for a couple of classes, they're in a much better position to be able to see transparent into the marketplace, especially the credit default swap [marketplace] . . . .''); statement of Jamie Cawley, Javelin Capital Markets, LLC, at Implementation Joint Roundtable (''Certainly from where we sit . . . interest rate swaps, vanilla swaps clearly qualify for a day one [implementation and] index [swaps] right behind that or on the same day. And the constituents of the indices certainly as well. And then it trails off from there over time. . . .'').

[176] *See, e.g.,* statement of Chris Edmonds, ICE Trust, at Implementation Joint Roundtable (''[I]nstead of looking at it necessarily by asset class, the commissions may want to look at it by the instruments that have the greatest amount of liquidity.'').

[177] *See, e.g.,* statement of Sunil Cutinho, CME Group, at Implementation Joint Roundtable (''[W]e don't believe that . . . data should be in an SDR before clearing has to be done.'').

electronic access requirement in Rule 13n–4(b)(5) [178]—should be implemented in a prioritized manner, with daily batch snapshots provided until more real-time solutions are developed.[179] None of the Implementation Joint Roundtable participants provided specific timeframes for a phase-in approach.

C. Sequenced Effective Date and Compliance Date for the SDR Rules

After considering the issues raised by the commenters and Implementation Joint Roundtable participants, the Commission has determined to adopt, in lieu of a phase-in approach, a sequenced effective date and compliance date for the SDR Rules [180] that recognizes the practical constraints arising from the time necessary for persons to analyze and understand the final rules adopted by the Commission, to develop and test new systems required as a result of the Dodd-Frank Act's regulation of SDRs and the SDR Rules, to prepare and file a completed Form SDR, to be in a position to demonstrate their ability to meet the criteria for registration set forth in Rule 13n–1(c)(3),[181] and to register with the Commission. The Commission agrees with commenters who have suggested that the Commission require the reporting of SBS transaction information to registered SDRs early in the implementation process because the Commission will then be able to utilize the information reported to registered SDRs to inform other aspects of its Title VII rulemaking.[182] Adopting and implementing a regulatory framework for SDRs will facilitate access by the Commission and market participants to SBS information collected by SDRs.[183]

All of the SDR Rules will become effective 60 days following publication of the rules in the **Federal Register** (''Effective Date''). However, the exemptions to provisions in Exchange Act Section 13(n) that the Commission provided in the Effective Date Order will continue to be in effect following the adoption of the SDR Rules. Consistent with the Effective Date Order, the exemptive relief remains in place and will expire: (1) Upon the compliance date for the SDR Rules, or (2) for those SDRs that are registered prior to such compliance date, the date that the Commission grants each SDR's registration.[184]

SDRs must be in compliance with the SDR Rules by 365 days after publication of the rules in the **Federal Register** (''Compliance Date'').[185] Absent an exemption, SDRs must be registered with the Commission and in compliance with the federal securities laws and the rules and regulations thereunder (including the applicable Dodd-Frank Act provisions and all of the SDR Rules) by the Compliance Date, and all exemptions that the Commission provided in the Effective Date Order will expire on the Compliance Date.[186] After the Compliance Date, pursuant to Exchange Act Section 13(n)(1), it will be unlawful, absent exemptive relief,[187] (1) for a person, unless registered with the Commission as an SDR, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of an SDR or (2) for an SDR to fail to comply with all applicable statutory provisions and the SDR Rules.

The Commission believes that setting the Compliance Date for the SDR Rules at 365 days after publication of the rules in the **Federal Register** adequately addresses commenters' concerns [188] by providing SDRs with sufficient time to become compliant with the Dodd-Frank Act and the SDR Rules and for the Commission to act on SDRs' applications for registration, while also allowing SDRs to continue performing the functions of an SDR without interruption.

The Commission notes that if an SDR files its Form SDR close to the Compliance Date, it is possible that the Commission will not have sufficient time to consider the Form SDR and the SDR may not be registered with the Commission by the Compliance Date. In this case, the SDR must cease any operations that cause it to meet the statutory definition of an SDR as of the Compliance Date and not begin or resume such operations until (and unless) the Commission grants the SDR's registration or provides the SDR with an exemption. As discussed below, Rule 13n–1(c), as adopted, provides that the Commission will grant registration to an SDR or institute proceedings to determine whether registration should be granted or denied within 90 days of the date of the publication of notice of the filing of an application for registration. Accordingly, SDRs should consider that the Commission may take several months following the publication of notice of the filing of an application for registration [189] to review

[178] *See* Section VI.D.2.c.ii of this release discussing direct electronic access.

[179] Statement of Raf Pritchard, TriOptima—triResolve, at Implementation Joint Roundtable (''[W]e would observe obviously that building real-time solutions is a lot more critical and sensitive than building daily batch solutions. And so in terms of getting that first cut, it might make sense to prioritize a daily batch snapshot of the market. . . . [T]hen you could sequence the real-time—the more real-time sensitive parts of the reporting requirements subsequent to that.'').

[180] Title VII provides the Commission with the flexibility to establish effective dates beyond the minimum 60 days specified therein for Title VII provisions that require a rulemaking. *See* Dodd-Frank Act Section 774 (specifying that the effective date for a provision requiring a rulemaking is ''not less than 60 days after publication of the final rule or regulation implementing such provision''). Furthermore, as with other rulemakings under the Exchange Act, the Commission may set compliance dates (which may be later than the effective dates) for rulemakings under the Title VII amendments to the Exchange Act. Together, this provides the Commission with the ability to sequence the implementation of the various Title VII requirements in a way that effectuates the policy goals of Title VII while minimizing unnecessary disruption or costs. *See* Effective Date Order, 76 FR at 36289, *supra* note 9.

[181] *See* Section VI.A.2.c of this release discussing Rule 13n–1(c), which requires that the Commission make a finding that a ''security-based swap data repository is so organized, and has the capacity, to be able to assure the prompt, accurate, and reliable performance of its functions as a security-based swap data repository, comply with any applicable provision of the federal securities laws and the rules and regulations thereunder, and carry out its functions in a manner consistent with the purposes of section 13(n) of the [Exchange] Act . . . and the rules and regulations thereunder.''

[182] *See, e.g.,* FSF*, *supra* note 21 (noting that the Commission ''will be in a better position to adopt rules that achieve Dodd-Frank's goals while maintaining active and viable [SBS] markets'' if SDRs are required to register and data reporting is enabled).

[183] *See, e.g.,* FSF*, *supra* note 21 (''The [Commission] should prioritize implementation of data reporting, including registration of Swap data repositories ('SDRs'), to regulators ahead of real-time reporting and other requirements, including public reporting. The [Commission] will learn much about the full range of Swap markets from the data collected by SDRs. This knowledge will be essential in developing rules that meet Dodd-Frank's requirements while still allowing for active and liquid Swap markets.'').

[184] *See* Effective Date Order, 76 FR at 36306, *supra* note 9.

[185] In a separate release, the Commission is proposing a compliance schedule for portions of Regulation SBSR in which the timeframes for compliance with the reporting and public dissemination requirements would key off of the registration of SDRs. *See* Regulation SBSR Proposed Amendments Release, *supra* note 13.

[186] Any SDR that is registered with the Commission before the Compliance Date will be required, absent an exemption, to comply with Exchange Act Section 13(n); the SDR Rules; and Regulation SBSR, as applicable to registered SDRs, as of the date the Commission grants registration to the SDR. *See* Effective Date Order, 76 FR at 36306, *supra* note 9 (granting exemptions to certain provisions in Exchange Act Section 13(n) and indicated that the exemptions will expire on the earlier of (1) the date the Commission grants registration to an SDR and (2) the earliest compliance date set forth in any of the final rules regarding the registration of SDRs).

[187] *See* Section VI.K of this release discussing Rule 13n–12, which provides an exemption for certain non-U.S. persons from the SDR requirements.

[188] *See, e.g.,* DTCC 2, *supra* note 19.

[189] The Commission's review of the application for registration could extend beyond 90 days. Rule 13n–1(c) provides that the Commission will grant registration or institute proceedings to determine whether registration should be granted or denied within 90 days of the publication of notice of the

an SDR's application for registration and assess whether the SDR meets the criteria for registration set forth in Rule 13n–1(c)(3).[190]

After weighing the practical considerations with respect to SDRs' preparations for compliance with the Dodd-Frank Act and the SDR Rules, as well as the benefits to investors and regulators of adopting the SDR Rules in order to facilitate the establishment and utilization of registered SDRs, the Commission has determined not to adopt a phase-in approach, as suggested by some commenters and Implementation Joint Roundtable participants.[191] Specifically, the Commission does not believe that it is necessary or appropriate to tailor a phase-in period for the SDR Rules based on specific asset classes, type of market participant, or other SBS attributes. While a phase-in approach based on asset class, type of market participant, or other attributes may have been appropriate had the Commission adopted rules prior to the July 16, 2011 effective date of the Dodd-Frank Act,[192] the Commission believes that the passage of time has afforded ample time for the development of SDR infrastructure. This belief is based, in part, on the existence of four swap data repositories already provisionally registered with the CFTC.[193] These swap data repositories, most of which will likely register as SDRs with the Commission, have had approximately three years to implement the final swap data repository rules adopted by the CFTC on August 4, 2011 (Part 49 swap data repository rules)[194] and December 20, 2011 (Part 45 swap data recordkeeping and reporting rules).[195] The Commission believes that the CFTC's Part 49 rules [196] and Part 45 rules [197] applicable to swap data repositories are substantially similar to the final SDR Rules. Because of the substantial similarity between the Commissions' rules, to the extent that the SDRs are in compliance with the CFTC's rules, they are likely already in substantial compliance with the Commission's SDR Rules.

VI. Discussion of Rules Governing SDRs

Exchange Act Section 13(n), enacted in Dodd-Frank Act Section 763(i), makes it ''unlawful for any person, unless registered with the Commission, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce to perform the functions of a security-based swap data repository.'' [198] To be registered and maintain such registration, each SDR is required (absent an exemption) to comply with the requirements and core principles described in Exchange Act Section 13(n), as well as with any requirements that the Commission adopts by rule or regulation.[199] The Exchange Act also requires each SDR to designate an individual to serve as a CCO and specifies the CCO's duties.[200] In addition, the Exchange Act grants the Commission authority to inspect and examine any registered SDR and to prescribe data standards for SDRs.[201]

A. Registration of SDRs (Rule 13n–1 and Form SDR)

Proposed Rule 13n–1 and proposed Form SDR would establish the procedures by which a person may apply to the Commission for registration as an SDR. After considering the comments, the Commission is adopting Rule 13n–1 and Form SDR substantially as proposed, with certain modifications.[202]

1. New Form SDR; Electronic Filing

a. Proposed Form SDR

As proposed, Form SDR would require an applicant seeking to register as an SDR and a registered SDR filing an amendment (including an annual amendment) to indicate the purpose for which it is filing the form and then to provide several categories of information. As part of the application process, each SDR would be required to provide additional information to the Commission upon request. Applicants would be required to file Form SDR electronically in a tagged data format. As proposed, Form SDR would require all SDRs to provide the same information, with two related limited exceptions applicable to non-resident SDRs. First, if the applicant is a non-resident SDR, then Form SDR would require the applicant to attach as an exhibit to the form an opinion of counsel stating that the SDR can, as a matter of law, provide the Commission with prompt access to the SDR's books and records and that the SDR can, as a matter of law, submit to onsite inspection and examination by the Commission. Second, Form SDR would

filing of an application for registration ''or within such longer period as to which the applicant consents.''

[190] As provided in Rule 13n–1(c)(3), in order to grant the registration of an SDR, the Commission must make a finding that ''such security-based swap data repository is so organized, and has the capacity, to be able to assure the prompt, accurate, and reliable performance of its functions as a security-based swap data repository, comply with any applicable provision of the federal securities laws and the rules and regulations thereunder, and carry out its functions in a manner consistent with the purposes of section 13(n) of the [Exchange] Act . . . and the rules and regulations thereunder.'' In addition to the application for registration on Form SDR, Rule 13n–1(b) provides that, ''[a]s part of the application process, each [SDR] shall provide additional information to any representative of the Commission upon request.'' In determining whether an applicant meets the criteria set forth in Rule 13n–1(c), the Commission will consider the application and any additional information obtained from the SDR, which may include information obtained in connection with an inspection or examination of the SDR. If the Commission is unable to determine that the applicant meets the criteria for registration set forth in Rule 13n–1(c)(3), then the Commission may not grant registration to the applicant. *See also* Section VI.A.1 of this release discussing Form SDR and information required for registration as an SDR.

[191] *See* Section V.B of this release discussing commenters' and Implementation Joint Roundtable participants' views with respect to phase-in approaches.

[192] *See* Section V.A.1 of this release discussing the Effective Date Order.

[193] CFTC Rule 49.3(b) provides for provisional registration of a swap data repository. 17 CFR 49.3(b).

[194] *See* CFTC Part 49 Adopting Release, *supra* note 36.

[195] *See* CFTC Part 45 Adopting Release, *supra* note 37.

[196] *See* CFTC Part 49 Adopting Release, *supra* note 36.

[197] *See* CFTC Part 45 Adopting Release, *supra* note 37.

[198] 15 U.S.C. 78m(n)(1); *see also* Section III.A of this release discussing definition of ''security-based swap data repository.'' Any person that is required to be registered as an SDR under Exchange Act Section 13(n) must register with the Commission (absent an exemption), regardless of whether that person is also registered under the Commodity Exchange Act (''CEA'') as a swap data repository. Exchange Act Section 13(n)(8), 15 U.S.C. 78m(n)(8); *see also* CEA Section 21, 7 U.S.C. 24a (regarding swap data repositories). Under the Exchange Act, a clearing agency may register as an SDR. Exchange Act Section 13(m)(1)(H), 15 U.S.C. 78m(m)(1)(H). In addition, any person that is required to register as an SDR pursuant to this section must register with the Commission (absent an exemption) regardless of whether that person is also registered as an SB SEF. *See* SB SEF Proposing Release, *supra* note 29.

[199] *See* Exchange Act Section 13(n)(3), 15 U.S.C. 78m(n)(3).

[200] *See* Exchange Act Section 13(n)(6), 15 U.S.C. 78m(n)(6).

[201] *See* Exchange Act Sections 13(n)(2) and 13(n)(4), 15 U.S.C. 78m(n)(2) and 78m(n)(4). In a separate release, the Commission proposed rules prescribing the data elements that an SDR would be required to accept for each SBS in association with requirements under Dodd-Frank Act Section 763(i), adding Exchange Act Section 13(n)(4)(A) relating to standard setting and data identification. *See* Regulation SBSR Proposing Release, 75 FR at 75284–5, *supra* note 8 (proposed Rule 901); *see also* Cross-Border Proposing Release, 78 FR at 31212–3, *supra* note 3 (re-proposing Rule 901). The Commission is concurrently adopting Regulation SBSR, including rules prescribing the data elements that an SDR is required to accept. *See* Regulation SBSR Adopting Release, *supra* note 13 (Rule 901).

[202] The Commission did not receive any comments on the definitions in proposed Rule 13n–1(a) and is adopting each of them as proposed, other than revising the definition of ''tag'' to have the same meaning as set forth in Rule 11 of Regulation S–T and deleting the definition of ''EDGAR Filer Manual,'' which is no longer referenced in the revised definition of ''tag.'' *See* Rule 13n–1(a)(2). The Commission is also revising the heading of paragraph (a) of the rule by changing ''Definition'' to ''Definitions'' to reflect that there is more than one definition in the paragraph.

require an applicant that is a non-resident SDR to certify to this (*i.e.,* the SDR can, as a matter of law, provide the Commission with prompt access to the SDR's books and records and the SDR can, as a matter of law, submit to onsite inspection and examination by the Commission).[203]

b. Comments on Proposed Form SDR

Two commenters submitted comments relating to this proposal.[204] One commenter urged the Commission to ensure that the registration process does not interfere with the ongoing operation of existing SDRs.[205] This commenter also addressed the items to be provided on Form SDR and stressed the importance of gathering information regarding an applicant's information technology systems, including its ability to provide direct electronic access to the Commission.[206] In addition, the commenter supported combining new Form SDR with Form SIP and further suggested that the Commission and the CFTC publish a joint form for registration with the Commission as an SDR and SIP and with the CFTC as a swap data repository.[207] The commenter also suggested that the Commission require applicants to submit their rulebooks as part of the registration process on Form SDR.[208]

One commenter expressed concern that non-resident SDRs would be subject to a stricter regulatory regime than that applicable to resident SDRs due to the proposed opinion of counsel requirement, which is applicable only to non-resident SDRs.[209]

c. Final Form SDR

After considering the comments, the Commission is adopting Form SDR substantially as proposed with certain modifications. Form SDR includes a set of instructions for its completion and submission. These instructions are included in this release, together with Form SDR. The instructions require an SDR to indicate the purpose for which it is filing the form (*i.e.,* application for registration, interim or annual amendment to an application or to an effective registration,[210] or withdrawal from registration [211]) and to provide information in seven categories: (1) General information, (2) business organization, (3) financial information, (4) operational capability, (5) access to services and data, (6) other policies and procedures, and (7) legal opinion. As part of the application process, each SDR will be required to provide additional information to any representative of the Commission upon request.[212]

As noted in the Proposing Release, the Commission believes that permitting an SDR to provide information in narrative form in Form SDR will allow the SDR greater flexibility and opportunity for meaningful disclosure of relevant information.[213] The Commission believes that it is necessary to obtain the information requested in Form SDR to enable the Commission to determine whether to grant or deny an application for registration. Specifically, the information will assist the Commission in understanding the basis for registration as well as an SDR's overall business structure, financial condition, track record in providing access to its services and data, technological reliability, and policies and procedures to comply with its statutory and regulatory obligations. The information will also be useful to the Commission in tailoring any requests for additional information that it may ask an SDR to provide. Furthermore, the required information will assist Commission representatives in the preparation of their inspection and examination of an SDR.[214]

Form SIP.[215] In the Proposing Release, the Commission noted that proposed Regulation SBSR would require each registered SDR to register with the Commission as a SIP on Form SIP, and requested comment on whether the Commission should combine Form SDR and Form SIP, such that an SDR would register as an SDR and SIP using only one form.[216] One commenter supported combining Form SDR with Form SIP.[217] Taking into consideration this commenter's view and in an effort to minimize the burden of filing multiple registration forms, the Commission has decided to amend proposed Form SDR to accommodate SIP registration; thus, an SDR will register and amend such registration as an SDR and as a SIP using one combined form.[218] An

[203] *See* Items 12 and 46 of proposed Form SDR; *see also* Sections VI.A.1 and VI.A.5 of this release discussing legal opinion of counsel and certification by non-resident SDRs on Form SDR.

[204] *See* DTCC 2, *supra* note 19; ESMA, *supra* note 19; *see also* DTCC 3, *supra* note 19. Five commenters submitted comments to the Commission regarding registration of non-resident SDRs. *See* ESMA, *supra* note 19; DTCC 2, *supra* note 19; Foreign Banks SBSR, *supra* note 27; BofA SBSR, *supra* note 27; US & Foreign Banks, *supra* note 24. With the exception of the certification and legal opinion requirements discussed later in this section, the Commission discussed cross-border issues applicable to SDRs that were raised by Title VII in the Cross-Border Proposing Release, and is adopting an exemption from the SDR requirements for certain non-U.S. persons, as discussed in Section VI.K of this release.

[205] DTCC 2, *supra* note 19.

[206] DTCC 2, *supra* note 19 (''[I]t is essential that proposed Form SDR request information related to the SDR's operating schedule, real-time processing, existence of multiple redundant infrastructures for continuity, strong information security controls, and robust reporting operations (including direct electronic access by the Commission). Because an SDR provides important utility services to regulators and market participants, such resiliency and redundancy should be evaluated in light of the significant policies and procedures for establishing such redundancy, including several backup locations in different geographic regions.'').

[207] DTCC 2, *supra* note 19; DTCC 3, *supra* note 19 (''Harmonization in the registration process for SDRs is necessary. Requiring one SDR to complete three sets of registration forms—an SDR application to the CFTC, an SDR application to the SEC and Form SIP to the SEC—demonstrates a specific instance where the regulatory agencies should come together, determine the information necessary for registration and jointly publish a common registration application.'').

[208] DTCC 3, *supra* note 19 (''The [Commission] should require rulebooks for SDRs prior to operation and as part of the registration process. SDRs will need to complete legal agreements with clearing-houses and among the users of an SDR. These agreements generally constitute the agreement of the user to abide by published rules and/or procedures of the SDR and generally have a notice of change to permit amendments without having to re-execute with all users. These agreements should be in place before SDRs operate under the new regulatory regime.'').

[209] ESMA, *supra* note 19 (''[N]on-resident SDRs are actually subject to a stricter regime than the resident ones, as they need to provide a legal opinion certifying that they can provide the SEC with prompt access to their books and records and that they can be subject to onsite inspections and examinations by the SEC.'').

[210] *See* Section VI.A.4 of this release discussing amendments on Form SDR.

[211] *See* Section VI.B of this release discussing withdrawal from registration as an SDR.

[212] *See* Rule 13n–1(b). The Commission is revising the last sentence of proposed Rule 13n–1(b) to use the statutorily defined term ''security-based swap data repository'' rather than ''SDR'' to be consistent with the rest of the SDR Rules. The Commission is also revising the last sentence of proposed Rule 13n–1(b) to require SDRs to provide additional information upon request to ''any representative of the Commission,'' rather than ''the Commission.'' This revision is intended to clarify that such requests will be made by Commission staff.

[213] Proposing Release, 75 FR at 77310, *supra* note 2.

[214] The Commission is revising Form SDR from proposed Form SDR to include disclosure relating to the Paperwork Reduction Act. *See* Section VII of this release regarding the Paperwork Reduction Act.

[215] Today, the Commission is adopting Regulation SBSR, which includes a requirement for each registered SDR to register as a SIP, as defined in Exchange Act Section 3(a)(22), 15 U.S.C. 78c(a)(22). *See* Regulation SBSR Adopting Release, *supra* note 13 (Rule 909).

[216] Proposing Release, 75 FR at 77313, *supra* note 2. *See also* Regulation SBSR Proposing Release, 75 FR at 75287, *supra* note 8 (proposed Rule 909); Cross-Border Proposing Release, 78 FR at 31215–6, *supra* note 3 (re-proposing Rule 909).

[217] DTCC 2, *supra* note 19; *see also* DTCC 3, *supra* note 19.

[218] Form SDR will be used only by SIPs that also register as SDRs; Form SIP will continue to be used by applicants for registration as SIPs not seeking to become dually-registered as an SDR and SIP, and for interim amendments or annual amendments by registered SIPs that are not dually-registered as an SDR and SIP. In discussing Form SDR as adopted

amendment or withdrawal on Form SDR will also constitute an amendment or withdrawal of SIP registration pursuant to Exchange Act Section 11A and the rules and regulations thereunder.[219] The Commission has made certain changes to proposed Form SDR to incorporate the additional information requested on Form SIP of applicants for registration as a SIP.[220] However, there are some disclosures required in Form SIP that have not been incorporated into Form SDR because they do not appear to be relevant to SDRs.[221] The Commission notes that by requiring a registered SDR to register as a SIP, the requirements of SIP registration provided in Exchange Act Section 11A, including publication of notice of the filing of an application for registration, will apply to applications filed on Form SDR[222] and, accordingly, the Commission will publish notice of the filing of applications for registration on Form SDR in the **Federal Register**.[223] In addition, the Commission expects that it will make the filed applications available on its Web site, except for information where confidential treatment is requested by the applicant[224] and granted by the Commission.[225]

The Commission has determined not to adopt a joint form for registration with the Commission as an SDR and SIP and with the CFTC as a swap data repository, as suggested by one commenter.[226] First, the CFTC has already adopted the final registration rules and form for swap data repositories to use.[227] Adopting a joint form for registration would require the CFTC to amend its adopted Form SDR while the industry is still in the implementation phase and swap data repositories are already provisionally registered with the CFTC.[228] Second, the CFTC's registration form for swap data repositories is substantially similar to the Commission's Form SDR. Thus, the Commission does not anticipate that filing with each Commission separately will entail a significant cost for dual registrants even though the Commission and the CFTC have tailored their respective forms in order to meet the specific needs of each agency and their respective statutory mandates. For example, the Commission is revising proposed Form SDR to require an SDR to provide certain information to address Exchange Act requirements applicable to SIPs. The CFTC's Form SDR does not require information to address some of these requirements.

General Information.[229] Form SDR requires an applicant to provide contact information, information concerning any predecessor SDR (if applicable), a list of asset classes of SBSs for which the applicant is collecting and maintaining data or for which it proposes to collect and maintain data,[230] a description of the functions that it performs or proposes to perform, and general information regarding its business organization.[231] This information will assist the Commission and its staff in evaluating applications for registration and overseeing registered SDRs for purposes of determining whether the SDRs are able to comply with the federal securities laws and the rules and regulations thereunder.

An applicant is required to acknowledge and consent that any notice or service of process, pleadings, or other documents in connection with any action or proceeding against the applicant may be effectuated by certified mail to an officer or person specified by the SDR at a given U.S. address.[232] The Commission believes that such consent is important to minimize any logistical obstacles (*e.g.,* locating defendants or respondents abroad) that the Commission may encounter when attempting to provide notice to an applicant or to effect service, including service overseas.

Form SDR must be signed by a person who is duly authorized to act on behalf of the applicant.[233] The signer is

in this release, references to SDRs may, where applicable, refer to SDRs and SIPs, collectively.

[219] *See* General Instruction 2 to Form SDR.

[220] *See* Item 32(a)(1) (adding ''(or disseminate for display or other use)'' and ''(*e.g.,* number of inquiries from remote terminals)''), Item 32(a)(2) (adding ''(or disseminate for display or other use)''), new Item 33(c) (With respect to each of an applicant's ''services that involves the supply of information to a quotation board, ticker device, electronic information terminal, or other such device, [the applicant must] state the total number of devices to which information is, or will be supplied ('serviced') and any minimum and or maximum number of devices required or permitted by agreement or otherwise to be serviced by the applicant. In addition, [an applicant must] define the data elements for each service.''); and Item 36 of Form SDR (adding ''processing, preparing for distribution, and publication''); *see also* new General Instructions 2 and 3 and conforming revisions to General Instructions 7 and 9 to Form SDR and Items 16, 19, 20, 23, 25–35, and 39 of Form SDR.

[221] *See, e.g.,* Item 31 of Form SIP, 17 CFR 249.1001 (requiring applicant to state whether certain specifications or qualifications are imposed at the direction of a national securities exchange or a registered securities association).

[222] 15 U.S.C. 78k–1(b).

[223] As discussed below, the Commission is revising Rule 13n–1(c) from the proposal to reflect this publication requirement with respect to the registration process for Form SDR. *See* Section VI.A.2.c of this release discussing revision to Rule 13n–1(c) to provide that: (1) Within 90 days of the date of the publication of notice of the filing of an application for registration (or within such longer period as to which the SDR consents), the Commission shall either grant the registration by order or institute proceedings to determine whether registration should be granted or denied and (2) proceedings instituted pursuant to Rule 13n–1(c) shall be concluded not later than 180 days after the date of the publication of notice of the filing of the application for registration, absent an extension.

[224] As discussed below, the Commission is adopting technical amendments to Exchange Act Rule 24b–2 to clarify that the confidential portion of electronic filings by SDRs must be filed electronically and to require SDRs to request confidential treatment electronically. The Commission is also adopting technical amendments to Rule 101 of Regulation S–T to provide that, except as otherwise provided, all filings by SDRs, including any information with respect to which confidential treatment is requested, must be filed electronically.

[225] The instructions to Form SDR have been modified from the proposal to clarify that information supplied on the form may be made available on the Commission's Web site. *See* General Instruction 7 to Form SDR (stating that ''[e]xcept in cases where confidential treatment is requested by the applicant and granted by the Commission pursuant to the Freedom of Information Act and the rules of the Commission thereunder, information supplied on this form may be made available on the Commission's Web site, will be included routinely in the public files of the Commission, and will be available for inspection by any interested person''). The Commission expects that non-confidential information supplied on an SDR's completed application for registration will be made available on the Commission's Web site; other filings on Form SDR may be made available on the Commission's Web site.

[226] *See* DTCC 3, *supra* note 19.

[227] *See* CFTC Part 49 Adopting Release, *supra* note 36.

[228] As noted above, CFTC Rule 49.3(b) provides for provisional registration of a swap data repository. 17 CFR 49.3(b).

[229] In the General Information section of Form SDR, the Commission is adding a new item (Item 12) to implement the requirement in Rule 13n–2(b) for a registered SDR seeking to withdraw from registration to identify a custodian of its books and records, and the address(es) where the books and records will be located. *See* Section VI.B of this release discussing Rule 13n–2(b).

[230] As proposed, Item 6 of Form SDR implicitly pertained to the data that an applicant is collecting and maintaining or proposes to collect and maintain. The Commission is revising Item 6 of Form SDR from the proposal to make this explicit by adding references to ''data.''

[231] *See* Items 1–10 of Form SDR. The Commission is revising Form SDR from the proposal to remove the heading ''Business Organization'' in the ''General Information'' section because the heading is superfluous and may lead to confusion with another section entitled ''Exhibits—Business Organization.'' General information regarding business organization is requested in the ''General Information'' section, whereas detailed information regarding business organization is requested in the ''Exhibits—Business Organization'' section. As proposed, Item 10 of Form SDR requested information regarding the filing date of ''partnership articles'' and ''place where partnership agreement was filed.'' For consistency, the Commission is revising Item 10 of Form SDR from the proposal to request the filing date of the ''partnership agreement'' rather than ''partnership articles.''

[232] *See* Item 11 of Form SDR.

[233] *See* Item 13 of Form SDR.

required to certify that all information contained in the application, including the required items and exhibits, is true, current, and complete.[234] The Commission believes that this certification requirement will serve as an effective means to assure that the information filed on Form SDR with the Commission is reliable.[235] The Commission notes that this certification is consistent with the certification provisions in the registration forms for SIPs, broker-dealers, and investment advisers (*i.e.,* Forms SIP, BD, and ADV).[236]

If an applicant is a non-resident SDR, then the signer of Form SDR is also required to certify that the applicant can, as a matter of law, and will provide the Commission with prompt access to the applicant's books and records and that the applicant can, as a matter of law, and will submit to onsite inspection and examination by the Commission.[237] For purposes of the certification, Form SDR defines ''non-resident security-based swap data repository'' as (i) in the case of an individual, one who resides in or has his principal place of business in any place not in the United States; (ii) in the case of a corporation, one incorporated in or having its principal place of business in any place not in the United States; or (iii) in the case of a partnership or other unincorporated organization or association, one having its principal place of business in any place not in the United States.[238] Certain foreign jurisdictions may have laws that complicate the ability of regulated persons such as SDRs located in their jurisdictions from sharing certain information, including personal information of individuals that the regulated persons come to possess from third persons (*e.g.,* personal data relating to the identity of market participants or their customers), with the Commission.[239] In order for the Commission to fulfill its oversight responsibilities with respect to registered SDRs, it is important that Commission representatives have prompt access to the SDRs' books and records and have the ability to conduct onsite inspections and examinations.[240] As noted above, one commenter was concerned that non-resident SDRs are subject to a stricter regime than resident SDRs.[241] To the extent that the commenter's concerns pertain to the certification requirement, the Commission notes that it continues to believe that if a non-resident SDR is registered with the Commission, the SDR's certification is important to confirm that it has taken the necessary steps to be in the position to provide the Commission with prompt access to the SDR's books and records and to be subject to onsite inspection and examination by the Commission. Failure to make this certification may be a basis for the Commission to institute proceedings to consider denying an application for registration. If a registered non-resident SDR becomes unable to provide this certification, then this may be a basis for the Commission to institute proceedings to consider revoking the SDR's registration.

Business Organization. Form SDR requires each applicant to provide as exhibits detailed information regarding its business organization, including information about (1) any person that owns 10 percent or more of the applicant's stock or that, either directly or indirectly, through agreement or otherwise, in any other manner, may control or direct the applicant's management or policies;[242] (2) the business experience, qualifications, and disciplinary history of its designated CCO, officers, directors, governors, and persons performing functions similar to any of the foregoing, and the members of all standing committees;[243] (3) its

[234] *See* Item 13 of Form SDR. The Commission is revising the signature block from the proposal to be consistent with an SDR's filing requirements for interim amendments on Form SDR. *See* note *infra* 356 (discussing amendment of signature block). The Commission is also revising the signature block to state that ''[i]ntentional misstatements or omissions of fact constitute federal criminal violations (*see* 18 U.S.C. 1001 and 15 U.S.C. 78ff(a)).'' This statement was included in Instruction 5 of proposed Form SDR, and is included in Instruction 7 of Form SDR, as adopted. This statement has been added to the signature block to remind the signer of the consequences of intentional misstatements or omissions of fact. *See* 18 U.S.C. 1001 (applying to ''whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully — (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry''); 15 U.S.C. 78ff(a) (applying to, among other persons, ''any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under [the Exchange Act] or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78*o* of [Title 15 of the U.S. Code], or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact'').

[235] *Accord* Registration of Municipal Advisors, Exchange Act Release No. 70462 (Sept. 20, 2013), 78 FR 67468, 67568 (Nov. 12, 2013) (stating that the certification requirement in Form MA–W pertaining to the accuracy and completeness of information previously submitted in Form MA should serve as an effective means to assure that the information supplied is correct).

[236] *See* Form SIP, 17 CFR 249.1001, *available at http://www.sec.gov/about/forms/formsip.pdf;* Form BD, 17 CFR 249.501, *available at http://www.sec.gov/about/forms/formbd.pdf;* Form ADV, 17 CFR 279.1, *available at http://www.sec.gov/about/forms/formadv.pdf.*

[237] *See* Item 13 of Form SDR. Under Exchange Act Section 13(n)(2), an SDR is subject to inspection and examination by any representative of the Commission. *See* 15 U.S.C. 78m(n)(2); *see also* Section VI.D.2 of this release discussing Rule 13n–4(b)(1). The Commission is revising ''can, as a matter of law'' (referring to the certification regarding access to the SDR's books and records) and ''can'' (referring to the certification regarding inspection and examination) in the signature block of proposed Form SDR to ''can, as a matter of law, and will'' to track the language of Rule 13n–1(f), as discussed in Section VI.A.5 of this release.

[238] *See* Item 13 of Form SDR; *see also* Rule 13n–1(a)(1) (defining ''non-resident security-based swap data repository''). This definition is substantially similar to the definition of ''non-resident broker or dealer'' in Exchange Act Rule 17a–7(d)(3). *See* 17 CFR 240.17a–7(d)(3). Although there may be instances in which a non-resident SDR can fall within the definition of a ''U.S. person,'' the Commission believes that, as a practical matter, all non-resident SDRs would likely be non-U.S. persons given the similar distinguishing factors in the definitions of ''non-resident security-based swap data repository'' and ''non-U.S. person.'' *See supra* note 99 (discussing definition of ''U.S. person'') and Section VI.A.5 of this release discussing non-resident SDRs.

[239] *See, e.g.,* Dagong Global Credit Rating Agency, Exchange Act Release No. 62968 (Sept. 22, 2010) (denying application as an NRSRO due to applicant's inability to comply with U.S. securities laws, in part because records requests would have to be approved by a Chinese regulator); *Dominick & Dominick, Inc.,* Exchange Act Release No. 29243 (May 29, 1991) (settled administrative proceeding involving a broker-dealer's failure to furnish promptly to the Commission copies of certain records required to be kept pursuant to Exchange Act Section 17(a)(1) and Rule 17a–3 thereunder where the broker-dealer initially asserted that Swiss law prevented it from producing the required records).

[240] *See* Section VI.D.2 of this release discussing inspection and examination by Commission representatives.

[241] ESMA, *supra* note 19.

[242] *See* Item 14 of Form SDR.

[243] *See* Items 15 and 16 of Form SDR. More specifically, Form SDR requires an applicant to disclose the following information regarding its designated CCO, officers, directors, governors, and persons performing functions similar to any of the foregoing, and the members of all standing committees: (a) name; (b) title; (c) date of commencement and, if appropriate, termination of present term of position; (d) length of time such person has held the same position; (e) brief account of the business experience of such person over the last five years; (f) any other business affiliations in the securities industry or derivatives industry; and (g) details of: (1) any order of the Commission with respect to such person pursuant to Sections 15(b)(4), 15(b)(6), 19(h)(2), or 19(h)(3) of the Exchange Act, (2) any conviction or injunction of a type described in Sections l5(b)(4)(B) or (C) of the Exchange Act within the past ten years, (3) any action of an SRO with respect to such person imposing a final disciplinary sanction pursuant to Exchange Act Sections 6(b)(6), l5A(b)(7), or 17A(b)(3)(G), (4) any final action by an SRO with respect to such person constituting a denial, bar, prohibition, or limitation of membership, participation, or association with a member, or of access to services offered by such organization or a member thereof, and (5) any final action by another federal regulatory agency, including the CFTC, any state regulatory agency, or any foreign

governance arrangements;[244] (4) the applicant's constitution, articles of incorporation or association with all amendments to them, existing by-laws, rules, procedures, and instruments corresponding to them;[245] (5) the applicant's organizational structure;[246] (6) its affiliates;[247] (7) any material pending legal proceedings to which the applicant or its affiliate(s) is a party or to which any of its property is the subject;[248] (8) the applicant's material contracts with any SB SEF, clearing agency, central counterparty, and third party service provider; [249] and (9) the applicant's policies and procedures to minimize conflicts of interest in its decision-making process and to resolve any such conflicts of interest.[250] Obtaining this information will assist the Commission in, among other things, understanding an SDR's overall business structure, governance arrangements, and operations, all of which will assist the Commission in its inspection and examination of the SDR and the Commission's decision on whether to grant the SDR's registration.

The Commission is revising Form SDR from the proposal requiring disclosure of business affiliations in the ''derivatives industry'' rather than the ''OTC derivatives industry'' for an applicant's designated CCO, officers, directors, governors, and persons performing functions similar to any of the foregoing, and the members of all standing committees [251] The Commission is making this revision to clarify that the disclosure covers derivatives traded on exchanges and SB SEFs as well as those traded over-the-counter.

Financial Information. Each applicant is required to disclose as exhibits to Form SDR certain financial and related information, including (1) its statement of financial position, results of operations, statement of sources and application of revenues, and all notes or schedules thereto, as of the most recent fiscal year of the applicant, or, alternatively, a financial report, as discussed further in Section VI.J.5 of this release; [252] (2) a statement of financial position and results of operations for each affiliate of the applicant as of the end of the most recent fiscal year of each such affiliate, or, alternatively, identification of the most recently filed annual report on Form 10–K of the applicant's affiliate, if available; [253] (3) a list of all dues, fees, and other charges imposed, or to be imposed, for the applicant's services, as well as all discounts and rebates offered, or to be offered; [254] (4) a description of the basis and methods used in determining the level and structure of the applicant's services as well as its dues, fees, other charges, discounts, or rebates; [255] and (5) a description of any differentiations in such dues, fees, other charges, discounts, and rebates.[256] This information will assist the Commission in, among other things, its decision of whether to grant the SDR's registration and in its evaluation of the financial resources available to the SDR to support its operations.

Operational Capability. Form SDR requires each applicant to provide as exhibits information on its operational capability, including (1) its SDR and SIP functions and services;[257] (2) the computer hardware that it uses to perform its SDR or SIP functions;[258] (3) personnel qualifications for each category of professional, non-professional, and supervisory employees employed by the applicant or the division, subdivision, or other segregable entity within the applicant;[259] (4) the applicant's measures or procedures to provide for the security of any system employed to perform its SDR or SIP functions, including any physical and operational safeguards designed to prevent unauthorized access to the system;[260] (5) any circumstances within the past year in which such security measures or safeguards failed to prevent any such unauthorized access to the system and

financial regulatory authority resulting in: (i) a finding that such person has made a false statement or omission, or has been dishonest, unfair, or unethical; (ii) a finding that such person has been involved in a violation of any securities-related regulations or statutes; (iii) a finding that such person has been a cause of a business having its authorization to do business denied, suspended, revoked, or restricted; (iv) an order entered, in the past ten years, against such person in connection with a securities-related activity; or (v) any disciplinary sanction, including a denial, suspension, or revocation of such person's registration or license or otherwise, by order, a prevention from associating with a securities-related or a restriction of such person's activities. The Commission is correcting a typographical error in proposed Items 14(g)(4) and 15(g)(4). As proposed, the items stated ''. . . such organization of a member thereof.'' As adopted, Items 15(g)(4) and 16(g)(4) state ''. . . such organization or a member thereof.''

[244] *See* Item 17 of Form SDR. The Commission has made minor revisions to Form SDR from the proposal with regard to the disclosure of governance arrangements for the sake of clarity. *Compare* Item 16 of Form SDR, as proposed (requiring disclosure of the responsibilities ''of each of the board and such committee'' and the composition ''of each board and such committee''), *with* Item 17 of Form SDR, as adopted (requiring disclosure of the responsibilities and composition ''of the board and each such committee'').

[245] *See* Item 18 of Form SDR.

[246] *See* Item 19 of Form SDR.

[247] *See* Item 20 of Form SDR. For purposes of Form SDR, an ''affiliate'' of an SDR is defined as a person that, directly or indirectly, controls, is controlled by, or is under common control with the SDR. *See also* Rule 13n–4(a)(1); Rule 13n–9(a)(1). This definition of ''affiliate'' is designed to allow the Commission to collect comprehensive identifying information relating to an SDR. This definition is substantially similar to the definition of ''affiliate'' in Exchange Act Rule 12b–2. *See* 17 CFR 240.12b–2. *See also infra* note 621 (defining ''control'' (including the terms ''controlled by'' and ''under common control with'')). The Commission notes that it received a comment letter after the Proposing Release through the Commission's general solicitation for comments that addressed the definition of ''affiliate'' for all of Title VII. *See* letter from ABA Securities Association, American Council of Life Insurers, Financial Services Roundtable, Futures Industry Association, Institute of International Bankers, International Swaps and Derivatives Association and the Securities Industry and Financial Markets Association, available on the Commission's Web site at *http://www.sec.gov/comments/df-title-vii/swap-data-repositories/swap-data-repositories.shtml* (suggesting defining ''affiliate'' for the purposes of Title VII rulemaking generally as ''any group of entities that is under common control and that reports information or prepares its financial statements on a consolidated basis''). The commenter focused on the effect of the definition in the context of inter-affiliate transactions, such as whether inter-affiliate transactions should be counted when determining if a person is required to register as an SBS dealer. Among other things, the commenter addressed the reporting of inter-affiliate transactions to SDRs. Because Form SDR and the SDR Rules do not pertain to what transactions must be reported to an SDR, the Commission believes that the letter is not relevant to Form SDR or the SDR Rules. Additionally, the Commission believes that it is important that an applicant for registration as an SDR provide information regarding all of its affiliates, regardless of whether the SDR's and affiliates' financial statements are prepared on a consolidated basis. Among other reasons, the Commission needs to know the identity of an SDR's affiliates before it can determine whether the SDR has any material conflicts of interest based on the services provided by those affiliates or is providing favorable treatment to affiliates in accessing the SDR's services or whether the SDR is complying with other rules and core principles, such as the core principle related to access to services and data.

[248] *See* Item 21 of Form SDR.

[249] *See* Item 22 of Form SDR.

[250] *See* Item 23 of Form SDR.

[251] *Compare* Items 14(f) and 15(f) of proposed Form SDR *with* Items 15(f) and 16(f) of Form SDR, as adopted.

[252] *See* Item 24 of Form SDR. As proposed, this item referred to a ''balance sheet'' and a ''statement of income and expenses'' rather than a ''statement of financial position'' and ''results of operations.'' The Commission is making this change from the proposal for consistency with Rule 13n–11(f)(4). *See* Section VI.J.5 of this release discussing Rule 13n–11(f). This revision is not intended to substantively change the requirements of this item.

[253] *See* Item 25 of Form SDR. As proposed, this item referred to a ''balance sheet'' and a ''statement of income and expenses'' rather than a ''statement of financial position'' and ''results of operations.'' The Commission is making this change from the proposal for consistency with Rule 13n–11(f)(4). *See* Section VI.J.5 of this release discussing Rule 13n–11(f). This revision is not intended to substantively change the requirements of this item.

[254] *See* Item 26.a of Form SDR.

[255] *See* Item 26.b of Form SDR.

[256] *See* Item 26.c of Form SDR.

[257] *See* Item 27 of Form SDR.

[258] *See* Item 28 of Form SDR.

[259] *See* Item 29 of Form SDR.

[260] *See* Item 30 of Form SDR.

any measures taken to prevent a reoccurrence;[261] (6) any measures used by the applicant to satisfy itself that the information received or disseminated by the system is accurate;[262] (7) the applicant's backup systems or subsystems that are designed to prevent interruptions in the performance of any SDR or SIP functions;[263] (8) limitations on the applicant's capacity to receive (or collect), process, store, or display (or disseminate for display or other use) its data and factors that account for such limitations;[264] and (9) the priorities of assignment of capacity between functions of an SDR or SIP and any other uses and methods used or able to be used to divert capacity between such functions and other uses.[265] As stated in the Cross-Border Proposing Release, SDRs themselves are subject to certain operational risks that may impede their ability to fulfill their roles.[266] Obtaining information regarding an SDR's operational capability will assist the Commission in determining, among other things, whether an SDR's automated systems provide adequate levels of capacity, integrity, resiliency, availability, and security.

As highlighted by one commenter, it is imperative that Form SDR includes ''information related to the SDR's operating schedule, real-time processing, existence of multiple redundant infrastructures for continuity, strong information security controls, and robust reporting operations.'' [267] The Commission believes that the operational capability information requested on Form SDR sufficiently addresses the commenter's concern. In addition, Commission representatives may conduct inspections or examinations to assess a registered SDR's ongoing operational capability and compliance with the federal securities laws and the rules and regulations thereunder.[268]

Access to Services and Data. Form SDR requires an applicant to provide as exhibits information regarding access to its services and data, including (1) the number of persons who presently subscribe, or who have notified the applicant of their intention to subscribe, to its services; [269] (2) instances in which the applicant has prohibited or limited any person with respect to access to services offered or data maintained by the applicant; [270] (3) for each service that involves the supply of information to a quotation board, ticker device, electronic information terminal, or other such device, the total number of devices to which information is, or will be supplied and any minimum and or maximum number of devices required or permitted by agreement or otherwise to be serviced by the applicant; [271] (4) the storage media of any service furnished in machine-readable form and the data elements of such service; [272] (5) copies of all contracts governing the terms by which persons may subscribe to the SDR services, SIP services, and any ancillary services provided by the applicant; [273] (6) any specifications, qualifications, or other criteria that limit, are interpreted to limit, or have the effect of limiting access to or use of any SDR or SIP services offered or data maintained by the applicant; [274] (7) any specifications, qualifications, or other criteria required of persons who supply SBS information to the applicant for collection, maintenance, processing, preparing for distribution, and publication by the applicant or of persons who seek to connect to or link with the applicant; [275] (8) any specifications, qualifications, or other criteria required of any person who requests access to data maintained by the applicant; [276] and (9) the applicant's policies and procedures to review any prohibition or limitation of any person with respect to access to services offered or data maintained by the applicant and to grant such person access to such services or data if such person has been discriminated against unfairly.[277]

The information regarding access to services and data will assist the Commission in determining, among other things, whether an SDR can comply with Rule 13n–4(c)(1), which relates to the core principle for market access to services and data, as discussed further in Section VI.D.3.a of this release. With respect to Item 33 of Form SDR (requiring an SDR to provide information regarding access to services and data, including any denials of such access), the Commission further believes that, due to an SDR's role as a central recordkeeping facility for SBSs, upon which the Commission and the public will rely for market-wide SBS data, the Commission should be informed of persons who have been granted access to an SDR's services and data, as well as instances in which an SDR prohibits or limits access to its services.[278] As part of the process to amend Form SDR from the proposal to accommodate SIP registration, discussed above, the Commission is adding Item 33(c) to Form SDR so that the Commission can obtain specific information regarding an SDR's supply of information for public dissemination purposes.

Other Policies and Procedures. Form SDR requires each applicant to attach as exhibits: (1) The applicant's policies and procedures to protect the privacy of any and all SBS transaction information that the applicant receives from a market participant or any registered entity; [279] (2) a description of the applicant's safeguards, policies, and procedures to prevent the misappropriation or misuse of (a) any confidential information received by the applicant, including, but not limited to,

[261] *See* Item 30 of Form SDR.

[262] *See* Item 30 of Form SDR.

[263] *See* Item 31 of Form SDR.

[264] *See* Item 32.a of Form SDR.

[265] *See* Item 32.b of Form SDR.

[266] Cross-Border Proposing Release, 78 FR at 31042 n.719, *supra* note 3 (citing the Proposing Release, 75 FR at 77307 (''The inability of an SDR to protect the accuracy and integrity of the data that it maintains or the inability of an SDR to make such data available to regulators, market participants, and others in a timely manner could have a significant negative impact on the [security-based swap] market. Failure to maintain privacy of such data could lead to market abuse and subsequent loss of liquidity.'')).

[267] DTCC 2, *supra* note 19.

[268] *See* Section VI.A.2 of this release discussing Rule 13n–1(c) (reviews by Commission staff of the SDR's operational capacity and ability are important to determine whether the Commission should grant an SDR's application for registration or revoke the registration of a registered SDR pursuant to Rule 13n–2(e)).

[269] *See* Item 33.a of Form SDR.

[270] *See* Item 33.b of Form SDR; *see also infra* note 278 (discussing denials of access to services offered by SDRs).

[271] *See* Item 33.c of Form SDR. The Commission is including this item from Form SIP to Form SDR for purposes of combining the two forms. *See* Section VI.A.1 of this release discussing Form SIP.

[272] *See* Item 33.d of Form SDR.

[273] *See* Item 34 of Form SDR.

[274] *See* Item 35 of Form SDR.

[275] *See* Item 36 of Form SDR.

[276] *See* Item 37 of Form SDR. The Commission is correcting a typographical error in proposed Item 36 of Form SDR. As proposed, the item stated ''any person, including, but not limited to . . . third party service providers who request access. . . .'' As adopted, Item 37 states ''any person, including, but not limited to . . . third party service providers, who requests access. . . .''

[277] *See* Item 38 of Form SDR.

[278] *See* Regulation SBSR Adopting Release, *supra* note 13 (discussing Rule 909, which requires a registered SDR to also register as a SIP); Proposing Release, 75 FR at 77311 n.33, *supra* note 2 (noting that if the Commission adopts proposed Rule 909 of Regulation SBSR, then Exchange Act Section 11A(b)(5) would govern denials of access to all SDRs' services); *see also* 15 U.S.C. 78k–1(b)(5) (A registered SIP must promptly file notice with the Commission if it, directly or indirectly, prohibits or limits any person in respect of access to its services, which may be subject to review by the Commission. If the Commission finds that (a) such limitation or prohibition is not consistent with Exchange Act Section 11A and the rules and regulations thereunder and that such person has been discriminated against unfairly or (b) the prohibition or limitation imposes any burden on competition not necessary or appropriate, it may set aside the prohibition or limitation and require the SIP to permit such person access to its services.). The Commission has made certain changes to Form SDR from the proposal to accommodate SIP registration. *See supra* note 220.

[279] *See* Item 39 of Form SDR.

trade data, position data, and any nonpublic personal information about a market participant or any of its customers; (b) material, nonpublic information; and/or (c) intellectual property by the applicant or any person associated with the applicant for their personal benefit or for the benefit of others;[280] (3) the applicant's policies and procedures regarding its use of the SBS transaction information that it receives from a market participant, any registered entity, or any other person for non-commercial and/or commercial purposes;[281] (4) the applicant's procedures and a description of its facilities for resolving disputes over the accuracy of the transaction data and positions that are recorded in the SDR;[282] (5) the applicant's policies and procedures relating to its calculation of positions;[283] (6) the applicant's policies and procedures to prevent any provision in a valid SBS from being invalidated or modified through the procedures or operations of the applicant;[284] and (7) a plan to ensure that the transaction data and position data that are recorded in the SDR continue to be maintained after the applicant withdraws from registration, which shall include procedures for transferring transaction data and position data to the Commission or its designee (including another registered SDR).[285] This information will assist the Commission in determining, among other things, whether an SDR can comply with the requirements to establish, maintain, and enforce these seven policies and procedures, as discussed further in Sections VI.D, VI.E, VI.G, and VI.I of this release. In addition, Form SDR requires an applicant to attach as exhibits all of the policies and procedures set forth in Regulation SBSR.[286]

One commenter suggested that the Commission require an applicant to submit its ''rulebook.''[287] The Commission does not believe that such a requirement is necessary, but is revising Form SDR from the proposal to provide that if an applicant has a rulebook, then it may attach its rulebook as an exhibit to the form,[288] as a supplement to the policies and procedures required by Form SDR. The Commission believes that if an applicant has a rulebook, much of the information that would be contained in the rulebook likely would be filed as part of an SDR's policies and procedures.[289] To the extent that an applicant's rulebook is broader, an applicant may submit its rulebook to the Commission if, for example, the applicant believes that it would be useful for the Commission to better understand the context of the applicant's policies and procedures or how the policies and procedures relate to one another.

Legal Opinion. Form SDR requires each non-resident SDR to attach as an exhibit an opinion of counsel that the SDR can, as a matter of law, provide the Commission with prompt access to the SDR's books and records and that the SDR can, as a matter of law, submit to onsite inspection and examination by the Commission.[290]

As discussed above, one commenter suggested that the legal opinion requirement would subject non-resident SDRs to a stricter regulatory regime than resident SDRs.[291] The Commission, however, continues to believe that non-resident SDRs that are registered, or seek to register, with the Commission should be required to provide the opinion of counsel. Each jurisdiction may have a different legal framework (*e.g.,* privacy laws) that may limit or restrict the Commission's ability to access information from an SDR. Rather than create unequal regulatory obligations, the legal opinion requirement equalizes the regulatory landscape for SDRs by addressing whether a non-resident SDR is able to comply with the requirements for it to provide the Commission with prompt access to the SDR's books and records,[292] and to submit to onsite inspection and examination by the Commission,[293] similar to SDRs that reside in the United States. Failure to provide an opinion of counsel may be a basis for the Commission to institute proceedings to consider denying an application for registration.

Electronic Filing. The Commission is revising Rule 13n–1(b) from the proposal to conform the rule with General Instruction 1 to Form SDR. As revised, Rule 13n–1(b) provides that in addition to an application for registration as an SDR, all amendments thereto must be filed electronically in a tagged[294] data format on Form SDR with the Commission in accordance with the instructions contained in the form.[295] This modification to also require all amendments on Form SDR be filed electronically in a tagged data format is intended to conform with General Instruction 1 to Form SDR, which requires the form and exhibits thereto to be filed electronically in a tagged data format by an applicant for registration as an SDR and by an SDR amending its application for registration.

The Commission anticipates developing an electronic filing system through which an SDR will be able to file and update Form SDR on or about the effective date of Rule 13n–1.[296] If

[280] *See* Item 40 of Form SDR.

[281] *See* Item 41 of Form SDR.

[282] *See* Item 42 of Form SDR.

[283] *See* Item 43 of Form SDR.

[284] *See* Item 44 of Form SDR.

[285] *See* Item 45 of Form SDR.

[286] *See* Item 46 of Form SDR; Regulation SBSR Adopting Release, *supra* note 13 (Rule 907 requiring SDRs to establish and maintain certain written policies and procedures).

[287] DTCC 3, *supra* note 19.

[288] *See* Item 47 of Form SDR.

[289] The Commission notes that an SDR that is also registered with the CFTC as a swap data repository is required under CFTC Rule 49.8 to either submit its rules and amendments thereto for approval by the CFTC or self-certify that the rulebook complies with the CFTC's swap data repository rules and the CEA. *See* 17 CFR 49.8. The Dodd-Frank Act did not establish SDRs as self-regulatory organizations (''SROs'') (which, under the Exchange Act, are required to file their rules with the Commission) or create an express obligation for SDRs to file their rules with the Commission. As noted above, SDRs must provide certain policies and procedures on Form SDR. The Commission believes that this disclosure is sufficient to enable the Commission to determine whether an SDR's policies and procedures are in compliance with the Exchange Act, including Section 13(n), and the rules and regulations thereunder. The Commission recognizes, however, that reviewing a rulebook that is voluntarily submitted to the Commission may assist the Commission in understanding other items in an applicant's Form SDR.

[290] *See* Item 48 of Form SDR.

[291] ESMA, *supra* note 19.

[292] *See* Rule 13n–7(b)(3) (requiring every SDR to, upon request of any representative of the Commission, promptly furnish requested documents to the representative).

[293] *See* Exchange Act Section 13(n)(2), 15 U.S.C. 78m(n)(2) (subjecting registered SDRs to inspection and examination by any representative of the Commission)).

[294] The term ''tag'' (including the term ''tagged'') is being revised from the proposal to have the same meaning as set forth in Rule 11 of Regulation S–T (defining ''tag'' as ''an identifier that highlights specific information to EDGAR that is in the format required by the EDGAR Filer Manual''). *See* Rules 13n–1(a)(2), 13n–2(a), and 13n–11(b)(9); *see also* 17 CFR 232.11. The Commission is revising this term from the proposal to be consistent with all the other terms in the SDR Rules that cross-reference to the definitions set forth in Regulation S–T, where applicable. For example, the term ''EDGAR Filer Manual'' has the same meaning as set forth in Rule 11 of Regulation S–T (defining ''EDGAR Filer Manual'' as ''the current version of the manual prepared by the Commission setting out the technical format requirements for an electronic submission''). *See* Rule 13n–11(b)(3); *see also* 17 CFR 232.11.

[295] *See* Rule 13n–1(b).

[296] This electronic filing system for Form SDR will be through EDGAR, and thus, the electronic filing requirements of Regulation S–T will apply. *See generally* 17 CFR 232 (governing the electronic submission of documents filed with the Commission). The Commission is amending General Instruction 1 to Form SDR to clarify the applicability of Regulation S–T to Form SDR. To conform with how filings are presently made through EDGAR, the Commission has made several minor edits to Form SDR from the proposal. *See,*

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the Commission's electronic filing system is unavailable at the time an applicant seeks to file its application for registration on Form SDR, the applicant may file the form, including any amendments thereto, in paper format with the Commission's Division of Trading and Markets at the Commission's principal office in Washington, DC. However, doing so does not relieve the SDR from compliance with the requirement in Rule 13n–1(b) to file Form SDR ''electronically in a tagged data format.'' Therefore, when the Commission's electronic filing system is available, the applicant should file electronically any initial and amended Form SDRs that had been filed previously in paper format.[297] The Commission expects that the information filed will be made available on the Commission's Web site, except in cases where confidential treatment is requested by an SDR and granted by the Commission.[298] The Commission acknowledges that SDRs will likely incur additional costs and burdens, particularly in initial compliance, with the data tagging requirement, when compared with filing Form SDR in paper format. However, the Commission believes that such costs will be minimal and that this requirement will facilitate review and analysis of registration materials by Commission staff and, to the extent such materials are made public, the public. The Commission believes that the costs of completing Form SDR in tagged data format are justified by the benefits derived from the ability of investors, analysts, and Commission staff to be able to more effectively capture, review, and analyze the SDR registration materials if they are in tagged data format.[299]

Technical Amendments to Electronic Filing Requirements. The Commission is adopting technical amendments to Exchange Act Rule 24b–2 [300] and Rule 101 of Regulation S–T [301] to clarify that SDRs' electronic filings pursuant to Exchange Act Section 13(n) and the rules and regulations thereunder [302] must include any information with respect to which confidential treatment is requested (''confidential portion''). Generally speaking, Exchange Act Rule 24b–2 and Rule 101 of Regulation S–T require confidential treatment requests and the confidential portion to be submitted in paper format only. The Commission's technical amendments provide an exception from Rule 24b–2's and Rule 101's paper-only filing requirements for all SDR filings. Under this exception, the confidential portion of all SDR filings must be filed in electronic format.

The Commission is revising Rule 24b–2 in two ways. First, the Commission is revising Rule 24b–2(b) to provide an exception for persons providing materials pursuant to Rule 24b–2(h) from the general requirement to omit the confidential portion from ''the material filed.'' [303] Second, the Commission is adding Rule 24b–2(h) to provide that an SDR must not omit the confidential portion from the material filed in electronic format pursuant to Exchange Act Section 13(n) and the rules and regulations thereunder, and must request confidential treatment electronically in lieu of the procedures described in Rule 24b–2(b).

The Commission is also revising Rule 101 to add paragraph (a)(1)(xvii) to the list of mandated electronic submissions. Specifically, paragraph (a)(1)(xvii) adds to this list documents filed with the Commission pursuant to Exchange Act Section 13(n) and the rules and regulations thereunder, including Form SDR and reports filed pursuant to Exchange Act Rules 13n–11(d) and (f).[304] The Commission is also revising Rule 101(c) to provide that except as otherwise specified in Rule 101(d), confidential treatment requests and the information with respect to which confidential treatment is requested must not be submitted in electronic format. The Commission is further adding Rule 101(d) to provide as an exception to Rule 101(c)'s paper-only filing requirement all documents, including any information with respect to which confidential treatment is requested, filed pursuant to Exchange Act Section 13(n) and the rules and regulations thereunder.

Electronic filing of all materials filed by SDRs, including the confidential portion, will reduce the burden on SDRs by not requiring a separate paper submission and facilitate the Commission's review and analysis of the filings.[305]

2. Factors for Approval of Registration and Procedural Process for Review (Rule 13n–1(c))

a. Proposed Rule

Proposed Rule 13n–1(c) would establish the timeframe for Commission action on applications for registration as an SDR, as well as the Commission's procedures for reviewing applications for registration. In particular, proposed Rule 13n–1(c) provided that, within 90 days of the date of the filing of an application for registration on Form SDR (or within such longer period as to which the SDR consents), the

e.g., Instruction 10 of Form SDR (providing guidance on filing Form SDR as an amendment, other than an annual amendment); Item 3 of Form SDR (requesting mailing address, which includes state/country and mailing zip/postal code); Item 9 of Form SDR (requesting information regarding an entity's incorporation or organization); Item 13 of Form SDR (requesting date of signature in different format).

[297] *See* Proposing Release, 75 FR at 77309 n.25, *supra* note 2 (noting that SDRs might be required to file Form SDR in paper until such time as an electronic filing system is operational and capable of receiving the form and the Commission may require each SDR to promptly re-file electronically Form SDR and any amendments to the form).

[298] As discussed below, the Commission is adopting technical amendments to Exchange Act Rule 24b–2 to clarify that the confidential portion of electronic filings by SDRs must be filed electronically and to require SDRs to request confidential treatment electronically. The Commission is also adopting technical amendments to Rule 101 of Regulation S–T to provide that, except as otherwise provided, all filings by SDRs, including any information with respect to which confidential treatment is requested, must be filed electronically.

[299] As part of the Commission's longstanding efforts to increase transparency and the usefulness of information, the Commission has been implementing data tagging of information contained in electronic filings to improve the accuracy of financial information and facilitate its analysis. *See* Regulation S–T, 17 CFR 232; *see also* Securities Act Release No. 8891 (Feb. 6, 2008), 73 FR 10592 (Feb. 27, 2008); Securities Act Release No. 9002 (Jan. 30, 2009), 74 FR 6776 (Feb. 10, 2009); Securities Act Release No. 9006 (Feb. 11, 2009), 74 FR 7748 (Feb. 19, 2009); Exchange Act Release No. 61050 (Nov. 23, 2009), 74 FR 63832 (Dec. 4, 2009); Investment Company Release No. 29132 (Feb. 23, 2010), 75 FR 10060 (Mar. 4, 2010); What is Interactive Data and Who's Using It?, *http://www.sec.gov/spotlight/xbrl/what-is-idata.shtml* (last updated March 15, 2010) (link to the Commission's Office of Interactive Disclosure's discussion of the benefits of interactive data). Data becomes machine-readable when it is labeled, or tagged, using a computer markup language that can be processed by software programs for analysis. Such computer markup languages use standard sets of definitions, or ''taxonomies,'' that translate text-based information in Commission filings into structured data that can be retrieved, searched, and analyzed through automated means. Requiring the information to be tagged in a machine-readable format using a data standard that is freely available, consistent, and compatible with the tagged data formats already in use for Commission filings will enable the Commission to review and analyze more effectively Form SDR submissions.

[300] 17 CFR 240.24b–2.

[301] 17 CFR 232.101.

[302] *See, e.g.,* Rule 13n–2(b) (relating to withdrawal on Form SDR) and Rule 13n–11(d)(2) (relating to compliance reports); *see also* Rule 13n–11(f)(5) (relating to financial reports); General Instruction 1 to Form SDR (requiring Form SDR and exhibits to be filed electronically in a tagged data format, including amendments filed under Rule 13n–1(d)).

[303] Rule 24b–2(a) refers to ''any registration statement, report, application, statement, correspondence, notice or other document'' as ''the material filed.''

[304] *See* Sections VI.J.4 and VI.J.5 of this release discussing compliance reports and financial reports filed pursuant to Rules 13n–11(d) and (f).

[305] *See* Rules 13–1(b); 13n–2(b); 13n–11(d)(2); *see also* Rule 13n–11(f)(5); General Instruction 1 to Form SDR.

Commission will either grant the registration by order or institute proceedings to determine whether registration should be denied. The proposed rule set forth the time period for such proceedings. The proposed rule also set forth the standard applicable to an application for registration as an SDR.

b. Comments on the Proposed Rule

Although the Commission did not receive any comments directly relating to this proposed rule, two commenters expressed their views on the SDR registration process generally.[306]

The first commenter recommended sufficient time for an appropriate level of due diligence with respect to applications for registration.[307] While the commenter expressly referenced the proposed temporary registration rule, the Commission believes that the commenter's concern regarding the operational capability of SDRs is applicable to any applicant for registration as an SDR.[308] Additionally, the same commenter supported combining new Form SDR with Form SIP,[309] which would necessitate a revision to Rule 13n–1(c), as described below.[310]

The second commenter requested the Commission's expedited review of SDR registration.[311]

c. Final Rule

After considering the comments, the Commission is adopting Rule 13n–1(c) as proposed, with minor modifications. First, the Commission is making minor revisions from the proposal relating to the event that begins the 90-day period for Commission review and action on the application for registration as an SDR. The final rule provides that within 90 days of the date of the publication of notice of the filing of an application for registration (or within such longer period as to which the applicant consents), the Commission will either grant the registration by order or institute proceedings to determine whether registration should be granted or denied.[312] The 90-day period will not begin to run until an SDR files a complete Form SDR with the Commission,[313] and the Commission publishes notice of the filing of Form SDR to afford interested persons an opportunity to submit written comments concerning such application.[314] As discussed above, in light of the Commission's adoption of the requirement for a registered SDR to also register as a SIP in Regulation SBSR,[315] the Commission has decided to consolidate Form SIP and Form SDR in order to make the registration process for SDRs more efficient; this approach has been endorsed by one commenter.[316] The Commission's revision of Rule 13n–1(c) relating to the publication of notice makes it procedurally consistent with the registration process applicable to SIPs under Exchange Act Section 11A(b)[317] and stems from the Commission's requirement that a registered SDR register as a SIP[318] and the Commission's revision of Form SDR to accommodate SIP registration. Exchange Act Section 11A(b)(3) provides that the Commission will, upon the filing of an application for registration as a SIP, publish notice of the filing and afford interested persons an opportunity to submit written data, views, and arguments concerning such application; within 90 days of the date of the publication of such notice (or within such longer period as to which the applicant consents), the Commission will by order grant such registration or institute proceedings to determine whether registration should be denied.[319] The Commission has determined to adopt Rule 13n–1(c) with revised text from the proposal that conforms the event preceding the period for Commission action, with respect to applications for registration as an SDR, to the event set forth in Section 11A(b)(3), with respect to applications for registration as a SIP.[320]

Second, the Commission is revising Rule 13n–1(c) from the proposal to clarify that the purpose of proceedings instituted pursuant to the rule is to determine whether an applicant's registration as an SDR should be granted or denied, rather than only denied (as proposed).[321] The Commission is further revising Rule 13n–1(c) from the proposal to provide that proceedings instituted pursuant to the rule will include notice of the issues under consideration (rather than grounds for denial under consideration, as proposed) and opportunity for hearing on the record and will be concluded within 180 days after the date of the publication of notice of the filing of the application for registration.[322] These

[306] *See* DTCC 2, *supra* note 19; ICE CB, *supra* note 26.

[307] DTCC 2, *supra* note 19 (''DTCC is concerned that the SEC's proposed implementation schedule for reporting to SDRs is heavily compressed and, when coupled with the temporary registration regime, may lead to compromised solutions, including operational and security compromises. . . . [P]otential SDRs are unlikely to be able to offer fully robust or efficient solutions for early registration, given that the final rules will be available relatively shortly before the effective date. DTCC recommends that appropriate due diligence is conducted with respect to the temporary registration process and that those diligence findings are either used to support transition of existing infrastructure or used for new entrants who can demonstrate that their infrastructure supports key operational capabilities, including 24/6 operation, real-time processing, multiple redundancy, and robust information security controls.''); *see also* DTCC 3, *supra* note 19 (''SDRs must be able to demonstrate an infrastructure which supports critical operational capabilities. . . . Assessment of these core capabilities is a critical component of any registration process, including a temporary registration.'').

[308] *See* Section VI.A.3.c of this release discussing the Commission's decision not to adopt the proposed temporary registration rule.

[309] DTCC 2, *supra* note 19 (requesting that the Commission combine Form SDR and Form SIP such that an SDR would register as an SDR and a SIP using only one form or permit either Form SDR or Form SIP to be the application for registration as both an SDR and an SIP); DTCC 3, *supra* note 19.

[310] *See* Section VI.A.1 of this release discussing combining Form SDR and Form SIP.

[311] ICE CB, *supra* note 26 (suggesting that the Commission take into consideration the SDR's provisional registration with the CFTC).

[312] Rule 13n–1(c).

[313] *See* Proposing Release, 75 FR at 77313, *supra* note 2. If a Form SDR is incomplete, then it may be deemed as not acceptable for filing. General Instruction 7 to Form SDR, as adopted, provides that ''[a] form that is not prepared and executed in compliance with applicable requirements may be deemed as not acceptable for filing.'' Further, the application must include information sufficient to allow the Commission to assess the applicant's ability to comply with the federal securities laws and the rules and regulations thereunder. Form SDR consists of instructions, a list of questions, a signature page, and a list of exhibits that the Commission requires in order to be able to determine whether an applicant is able to comply with the federal securities laws and the rules and regulations thereunder. An application on Form SDR may not be considered complete unless the applicant has filed, at a minimum, responses to all the questions listed, the signature page, and exhibits as required in Form SDR, and any other materials the Commission may require, upon request, in order to assess whether an applicant is able to comply with the federal securities laws and the rules and regulations thereunder. If the application is not complete, then the application will not be deemed to have been filed for the Commission's review.

[314] If, however, an SDR files an amendment to its application for registration after the Commission has already published notice of the filing of Form SDR and the Commission finds that the amendment renders the prior filing materially incomplete, then the 90-day period will reset from the time that the Commission deems the amended application to be complete for the Commission's review.

[315] *See* Regulation SBSR Adopting Release, *supra* note 13 (Rule 909).

[316] *See* DTCC 2, *supra* note 19; DTCC 3, *supra* note 19.

[317] *See* 15 U.S.C. 78k–1(b).

[318] *See* Regulation SBSR Adopting Release, *supra* note 13 (Rule 909).

[319] *See* 15 U.S.C. 78k–1(b)(3).

[320] A publication of notice of the filing of an application for registration is required in the SIP context.

[321] *See* Rule 13n–1(c)(2).

[322] *See* Rule 13n–1(c)(2). For the reasons provided above, in conjunction with the revision from the proposal to the event that precedes the 90-day period, and for consistency within the rule, the Commission is also revising from the proposal the event that precedes the 180-day period for

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revisions from the proposal are intended to make the rule internally consistent.[323]

The Commission is adopting Rule 13n–1(c) as proposed in all other respects. Rule 13n–1(c) provides that at the conclusion of proceedings instituted pursuant to the rule, the Commission, by order, will grant or deny such registration.[324] The Commission may extend the time for conclusion of such proceedings for up to 90 days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the SDR consents.[325]

As noted in the Proposing Release, the Commission believes that the timeframes for reviewing applications for registration as an SDR are appropriate to allow Commission staff sufficient time to ask questions and, as needed, to request amendments or changes by SDRs to address legal or regulatory concerns before the Commission takes final action on an application for registration.[326] In addition, the registration process provides a mechanism for an SDR to demonstrate that it can comply with the federal securities laws and the rules and regulations thereunder.[327] One commenter requested that the Commission provide for expedited review of the commenter's application for registration as an SDR, in part because of its provisional registration with the CFTC as a swap data repository.[328] It is unclear what the commenter means by ''expedited review,'' but the Commission believes that the procedures for reviewing applications for registration as an SDR that the Commission is adopting in this release provide reasonable timeframes for the Commission's review of the applications and the Compliance Date for the SDR Rules will address the concerns of existing SDRs operating during the registration period.[329] Moreover, these procedures are consistent with the procedures for reviewing applications of other registrants by the Commission (*e.g.,* SIPs, broker-dealers, nationally recognized statistical ratings organizations, national securities exchanges, registered securities associations, and registered clearing agencies) although the timeframes for review vary.[330] Additionally, the Commission notes that its review of an SDR's application for registration is independent of the CFTC's review of a swap data repository's application for registration.[331]

The Commission will grant the registration of an SDR if the Commission finds that the SDR is so organized, and has the capacity, to be able to assure the prompt, accurate, and reliable performance of its functions as an SDR, comply with any applicable provision of the federal securities laws and the rules and regulations thereunder, and carry out its functions in a manner consistent with the purposes of Exchange Act Section 13(n) and the rules and regulations thereunder.[332] The Commission will deny the registration of an SDR if the Commission does not make such a finding.[333]

One commenter indicated that applicants for registration as an SDR should be able to ''demonstrate that their infrastructure supports key operational capabilities, including 24/6 operation, real-time processing, multiple redundancy, and robust information security controls.'' [334] Similarly, the same commenter stated that ''SDRs must be able to demonstrate an infrastructure which supports critical operational capabilities'' and ''[a]ssessment of these core capabilities is a critical component of any registration process.'' [335] The Commission generally agrees with this commenter and believes that an SDR's infrastructure and operational capabilities are important factors in determining whether to grant an SDR's application for registration.[336]

In the Proposing Release, the Commission asked whether, in order to form a more complete and informed basis on which to determine whether to grant, deny, or revoke an SDR's registration, it should adopt a requirement that an SDR file with the Commission, as a condition of registration or continued registration, a review relating to the SDR's operational capacity and ability to meet its regulatory obligations.[337] The Commission did not receive any comments directly on this issue, but upon further consideration, the Commission has determined not to require an SDR to file with the Commission a review of the SDR's operational capacity and ability to meet its regulatory obligations because it is not clear that the benefits of such a requirement would justify the costs. However, in determining whether an applicant meets the criteria set forth in Rule 13n–1(c), the Commission will consider the application and any additional information obtained from the SDR, which may include information obtained in connection with an inspection or examination of the SDR. Additionally, in connection therewith, the Commission may consider, among other things, whether an applicant can demonstrate its operational capabilities and conduct its operations in compliance with its statutory and regulatory obligations. If an applicant (rather than its affiliate) is already registered with the Commission as, for example, a clearing agency, then Commission representatives may also take into account any recent examinations in its determination pursuant to Rule 13n–1(c)(3).

The Commission will consider a registered SDR's operational capacity and ability to meet its statutory and regulatory obligations to determine

conclusion of Commission action on the application for registration as an SDR. In making this revision, the Commission is changing ''not later than 180 days'' to ''within 180 days'' for consistency within the rule.

[323] Proposed Rule 13n–1(c)(2) stated that the Commission may institute proceedings to determine whether registration should be ''denied,'' and that such proceedings include notice of the ''grounds for denial,'' but that at the conclusion of such proceedings, the Commission shall ''grant or deny'' registration. As adopted, the rule clarifies that the Commission may institute proceedings to determine whether registration should be ''granted or denied'' and that proceedings instituted pursuant to this rule must include notice of the ''issues under consideration.''

[324] Rule 13n–1(c)(2).

[325] Rule 13n–1(c)(2).

[326] Proposing Release, 75 FR at 77313, *supra* note 2. In addition to the applicant's registration on Form SDR, ''[a]s part of the application process, each SDR shall provide additional information to any representative of the Commission upon request.'' *See* Rule 13n–1(b).

[327] *See* Proposing Release, 75 FR at 77313, *supra* note 2 (discussing Rule 13n–1(c) and noting that ''the registration provides a mechanism for an SDR to demonstrate that it can comply with the federal securities laws and the rules and regulations thereunder'').

[328] *See* ICE CB, *supra* note 26.

[329] *See* Section V.C of this release discussing the Commission's efforts designed to minimize interference with ongoing operations of existing SDRs during the implementation of the SDR Rules.

[330] *See* Exchange Act Sections 11A(b)(3), 15(b), 15E(a)(2), and 19(a), 15 U.S.C. 78k–1(b)(3), 78o(b), 78o–7(a)(2), and 78s(a).

[331] *But see* ICE CB, *supra* note 26 (suggesting that the Commission take into consideration the SDR's provisional registration with the CFTC).

[332] Rule 13n–1(c)(3).

[333] *Id.*

[334] DTCC 2, *supra* note 19.

[335] DTCC 3, *supra* note 19.

[336] *See* Rule 13n–6 (requiring SDRs to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its systems provide adequate levels of capacity, integrity, resiliency, availability, and security); Rule 13n–1(c)(3) (discussing the standards for the Commission to grant registration of an SDR, including having the capacity to be able to assure the prompt, accurate, and reliable performance of its functions as an SDR, and comply with any applicable provision of the federal securities laws and the rules and regulations thereunder).

[337] Proposing Release, 75 FR at 77313, *supra* note 2.

whether the SDR should continue to operate as such or whether the Commission should take steps to revoke the SDR's registration. As provided in Exchange Act Section 13(n)(2), ''[e]ach registered security-based swap data repository shall be subject to inspection and examination by any representative of the Commission.'' [338] The results of such inspection and examination will be used to inform the Commission whether the SDR is complying with the federal securities laws and the rules and regulations thereunder. As discussed further below, under Rule 13n–2(e), if the Commission finds, on the record after notice and opportunity for hearing, that any registered SDR has, among other things, failed to comply with any provision of the federal securities laws and the rules and regulations thereunder, the Commission, by order, may revoke the SDR's registration.[339]

In considering initial applications for registration on Form SDR filed contemporaneously with the Commission, the Commission intends to process such applications for multiple SDRs accepting SBS transaction data from the same asset classes within the same period of time so as to address competition concerns that could arise if such SDRs were granted registration at different times.[340] Further, in light of the Commission's adoption of the requirement in Regulation SBSR for a registered SDR to register as a SIP,[341] the Commission is adopting Form SDR, which incorporates the requirements of Form SIP, as discussed in Section VI.A.1.c above. The Commission's review of an applicant's registration as an SDR on Form SDR will encompass review with respect to both SDR and SIP registration. The Commission contemplates that it will grant registrations to an applicant both as an SDR and as a SIP simultaneously.

3. Temporary Registration (Rule 13n–1(d))

a. Proposed Rule

As proposed, Rule 13n–1(d) provided a method for SDRs to register temporarily with the Commission. The proposed rule provided that, upon the request of an SDR, the Commission may grant temporary registration of the SDR that would expire on the earlier of: (1) The date that the Commission grants or denies (permanent) registration of the SDR, or (2) the date that the Commission rescinds the temporary registration of the SDR.[342]

b. Comments on the Proposed Rule

Two commenters submitted comments relating to this proposed rule.[343] One commenter recommended that the Commission establish clear standards and requirements for temporary registration.[344] Similarly, another commenter recommended that ''the Commission establish clearly articulated standards and requirements for temporary registration so that existing trade repositories may quickly begin to provide similar transparency to the [SBS] markets that is currently provided to the rest of the swaps market, thus facilitating the Commission's oversight of these markets.'' [345] That same commenter also expressed concern about the temporary registration provision, particularly the cumulative effect of the short time frame afforded for registration and the possibility that a temporary registration regime ''may lead to compromised solutions [at SDRs], including operational and security compromises.'' [346] Additionally, the commenter urged the Commission to ensure that the registration process does not interfere with the ongoing operation of existing SDRs.[347]

c. Final Rule

After considering the comments, the Commission has determined not to adopt proposed Rule 13n–1(d). As stated in the Proposing Release, the temporary registration provision would have enabled an SDR to comply with the Dodd-Frank Act upon its effective date (*i.e.,* the later of 360 days after the date of its enactment or 60 days after publication of the final rule implementing Exchange Act Section 13(n)) [348] regardless of any unexpected contingencies that may arise in connection with the filing of Form SDR. The proposed temporary registration would also have allowed the Commission to implement the registration requirements of the Dodd-Frank Act for SDRs while still giving the Commission sufficient time to review fully the application of an SDR after it becomes operational, but before granting a registration that is not limited in duration.

These concerns were motivated primarily by the short timeframe between when the SDR Rules were first proposed and when registration would have been required (*i.e.,* as of July 16, 2011). However, the exemptive relief provided by the Commission, which was effective on June 15, 2011,[349] addressed this primary purpose for temporary registration. Further, the Compliance Date for the SDR Rules [350] should provide sufficient time for SDRs to analyze and understand the final SDR Rules, to develop and test new systems required to comply with the Dodd-Frank Act's provisions governing SDRs and the SDR Rules, to prepare and file Form SDR, to demonstrate their ability to meet the criteria for registration set forth in Rule 13n–1(c)(3), and to obtain registration with the Commission. Therefore, the Commission believes that it has addressed commenters' concerns relating to interference with the ongoing

[338] Exchange Act Section 13(n)(2), 15 U.S.C. 78m(n)(2). *See also* Section VI.D.2 of this release discussing Rule 13n–4(b)(1), which implements Exchange Act Section 13(n)(2).

[339] *See* Section VI.B of this release discussing Rule 13n–2(e).

[340] Certain unexpected events that raise compliance concerns with respect to one applicant but not another, such as deficiencies identified in connection with the Commission's consideration of whether an applicant meets the criteria set forth in Rule 13n–1(c), may interfere with the Commission's ability to process initial applications for registration within the same period of time.

[341] *See* Regulation SBSR Adopting Release, *supra* note 13 (Rule 909).

[342] Proposed Rule 13n–1(d).

[343] *See* DTCC 2, *supra* note 19; ICE CB, *supra* note 26; *see also* DTCC 5, *supra* note 19.

[344] ICE CB, *supra* note 26.

[345] DTCC 5, *supra* note 19 (''Further clarity on the standards and process that will be utilized to grant temporary registration will also provide applicants to register as [SDRs] with a better understanding of the Commission's expectations with respect to their obligations and requirements prior to being granted full registration.'').

[346] DTCC 2, *supra* note 19 (''DTCC is concerned that the SEC's proposed implementation schedule for reporting to SDRs is heavily compressed and, when coupled with the temporary registration regime, may lead to compromised solutions, including operational and security compromises . . . . [P]otential SDRs are unlikely to be able to offer fully robust or efficient solutions for early registration, given that the final rules will be available relatively shortly before the effective date. DTCC recommends that appropriate due diligence is conducted with respect to the temporary registration process and that those diligence findings are either used to support transition of existing infrastructure or used for new entrants who can demonstrate that their infrastructure supports key operational capabilities, including 24/6 operation, real-time processing, multiple redundancy, and robust information security controls.''); *see also* DTCC 3, *supra* note 19 (''SDRs must be able to demonstrate an infrastructure which supports critical operational capabilities . . . . Assessment of these core capabilities is a critical component of any registration process, including a temporary registration.'').

[347] DTCC 2, *supra* note 19; *see also* DTCC 5, *supra* note 19 (stating the same and ''[w]hether done through a phasing-in of final [SDR] rules or the Commission's prompt issuance of temporary registration conditioned on implementation of enhancements to comply more fully with specified provisions, the Commission should ensure the continuation of counterparty reporting and the ability of the entities currently performing the functions of an [SDR] to receive and maintain current trade information on an ongoing basis'').

[348] Proposing Release, 75 FR at 77314, *supra* note 2; *see also* Dodd-Frank Act Section 774.

[349] *See* Effective Date Order, 76 FR at 36306, *supra* note 9.

[350] *See* Section V.C of this release discussing the Compliance Date.

operation of existing SDRs.[351] For these reasons, the Commission no longer believes that a temporary registration regime for SDRs is necessary or appropriate.

4. Amendment on Form SDR (Proposed Rule 13n–1(e)/Final Rule 13n–1(d))

a. Proposed Rule

As proposed, Rule 13n-1(e) would require an SDR to file promptly an amendment on Form SDR (''interim amendment'') if any information reported in Items 1 through 16, 25, and 46 [352] of Form SDR or in any amendment thereto is or becomes inaccurate for any reason. The Proposing Release indicated that an SDR would generally be required to file such an amendment within 30 days from the time such information becomes inaccurate.[353] In addition, an SDR would be required to file an annual amendment on Form SDR within 60 days after the end of its fiscal year.

b. Comments on the Proposed Rule

The Commission did not receive any comments relating to this proposed rule.

c. Final Rule

The Commission is adopting Rule 13n–1(e) as proposed, redesignated as Rule 13n–1(d). Under Rule 13n–1(d), if any information reported in Items 1 through 17, 26, and 48 of Form SDR (designated as Items 1 through 16, 25, and 46 in proposed Rule 13n–1(e)) or in any amendment thereto is or becomes inaccurate for any reason, whether before or after the registration has been granted, an SDR shall promptly file an amendment on Form SDR updating the information. An SDR should file an interim amendment as soon as practicable, and generally no later than 30 days from the time such information becomes inaccurate in order for the filing to be viewed as ''promptly'' filed. For example, an SDR should file an amendment promptly after any change in the identity of its CCO or if the biographical information provided about its CCO changes (*e.g.,* if the CCO becomes the subject of certain specified SRO actions).[354]

In addition to interim amendments, an SDR is required to file a comprehensive annual amendment on Form SDR, including all items subject to interim amendments, within 60 days after the end of its fiscal year.[355] This annual amendment must be fully restated and complete, including all pages, answers to all items, together with exhibits.[356] This annual amendment must also indicate which items have been amended since the last annual amendment, or if the SDR has not yet filed an annual amendment, since the SDR's application for registration. Rule 13n–1(d) is consistent with the Commission's requirements for other registrants (*e.g.,* national securities exchanges, broker-dealers, transfer agents, SIPs) to file updated and annual amendments to registration forms with the Commission.[357] The Commission believes that such amendments are important to obtain updated information on each SDR, which will assist the Commission in determining whether each SDR continues to be in compliance with the federal securities laws and the rules and regulations thereunder. Obtaining updated information will also assist Commission representatives in their inspection and examination of an SDR. The Commission may make filed amendments available on its Web site, except for information where confidential treatment is requested by the SDR [358] and granted by the Commission.

5. Service of Process and Non-Resident SDRs (Proposed Rules 13n–1(f) and 13n–1(g)/Final Rules 13n–1(e) and 13n–1(f))

a. Proposed Rule

As proposed, Rule 13n–1(f) would require each SDR to designate and authorize on Form SDR an agent in the United States, other than a Commission member, official, or employee, to accept any notice or service of process, pleadings, or other documents in any action or proceedings brought against the SDR to enforce the federal securities laws and the rules and regulations thereunder. Proposed Rule 13n–1(g) would require any non-resident SDR applying for registration to certify on Form SDR and provide an opinion of counsel that the SDR can, as a matter of law, provide the Commission with prompt access to the SDR's books and records and that the SDR can, as a matter of law, submit to onsite inspection and examination by the Commission.

b. Comments on the Proposed Rule

The Commission did not receive any comments relating to proposed Rule 13n–1(f). One commenter submitted a comment relating to proposed Rule 13n–1(g).[359] The commenter expressed concern that proposed Rule 13n–1(g) would subject non-resident SDRs to a stricter regime than that applicable to resident SDRs.[360]

c. Final Rule

The Commission is adopting Rule 13n–1(f) as proposed, redesignated as Rule 13n–1(e). Rule 13n–1(e) requires each SDR to designate and authorize on Form SDR an agent in the United States,

[351] *See, e.g.,* DTCC 2, *supra* note 19; DTCC 5, *supra* note 19.

[352] The Commission notes that the Proposing Release, proposed Rule 13n–1(e), and General Instruction 6 to proposed Form SDR inadvertently referred to Item 44 instead of Item 46. *See* Proposing Release, 75 FR at 77314, 77315, and 77374, *supra* note 2. However, the discussion in the Proposing Release made clear that the Commission expected a non-resident SDR to promptly amend its Form SDR after any changes in the legal and regulatory framework that would impact the SDR's ability to provide the Commission with prompt access to the SDR's books and records, and such amendment should include a revised opinion of counsel. *See* Proposing Release, 75 FR at 77314, *supra* note 2. This discussion was clearly referring to the requirements in proposed Item 46 (requiring opinion of counsel by non-resident SDRs), and not proposed Item 44 (requiring plan to ensure data is maintained after the applicant withdraws from registration).

[353] Proposing Release, 75 FR at 77314, *supra* note 2.

[354] *See* Section VI.J of this release discussing the CCO requirements in Rule 13n–11.

[355] *See* Rule 13n–1(d).

[356] The General Instructions to Form SDR have been amended from the proposal to clarify what items and exhibits need to be included when filing an amendment. Additionally, the Commission is revising Form SDR from the proposal to include separate designations on the form for an annual amendment and an amendment other than an annual amendment, rather than a single designation that covers any amendment. The signature block to Form SDR has also been amended from the proposal to clarify that an SDR that files an amendment (other than an annual amendment) need only represent that all unamended information contained in Items 1 through 17, 26, and 48 remains true, current, and complete as filed, rather than all unamended items and exhibits to Form SDR.

[357] *See* Exchange Act Rule 6a–2, 17 CFR 240.6a–2 (requiring national securities exchanges to amend some information on Form 1 within 10 days, and other information annually); Exchange Act Rule 15b3–1, 17 CFR 240.15b3–1 (requiring broker-dealers to promptly amend applications for registration); Exchange Act Rules 17Ac2–1 and 17Ac2–2, 17 CFR 240.17Ac2–1 and 240.17Ac2–2 (requiring transfer agents to amend information on Form TA–1 within 60 days, and to file an annual report); Rule 609 of Regulation NMS, 17 CFR 242.609, and Form SIP, 17 CFR 249.1001 (requiring SIPs to amend certain items on Form SIP promptly and also requiring an annual amendment).

[358] As discussed above, the Commission is adopting technical amendments to Exchange Act Rule 24b–2 to clarify that the confidential portion of electronic filings by SDRs must be filed electronically and to require SDRs to request confidential treatment electronically. The Commission is also adopting technical amendments to Rule 101 of Regulation S–T to provide that, except as otherwise provided, all filings by SDRs, including any information with respect to which confidential treatment is requested, must be filed electronically.

[359] *See* ESMA, *supra* note 19.

[360] ESMA, *supra* note 19 (''According to our reading, non-resident SDRs are actually subject to a stricter regime than the resident ones, as they need to provide a legal opinion certifying that they can provide the SEC with prompt access to their books and records and that they can be subject to onsite inspections and examinations by the SEC.'').

other than a Commission member, official, or employee, to accept any notice or service of process, pleadings, or other documents in any action or proceedings brought against the SDR to enforce the federal securities laws and the rules and regulations thereunder. If an SDR appoints a different agent to accept such notice or service of process, then the SDR will be required to file promptly an amendment on Form SDR updating this information.[361] The requirement applies equally to both SDRs within the United States and non-resident SDRs that are required to register with the Commission. Rule 13n–1(e) is intended to conserve the Commission's resources and to minimize any logistical obstacles (*e.g.,* locating defendants or respondents within the United States or abroad) that the Commission may encounter when attempting to effect service. For instance, by requiring an SDR to designate an agent for service of process in the United States, and by prohibiting an SDR from designating a Commission member, official, or employee as its agent for service of process, the rule will reduce a significant resource burden on the Commission, including resources to locate agents of registrants overseas and keep track of their whereabouts.

After considering the comment to proposed Rule 13n–1(g), the Commission is adopting Rule 13n–1(g) as proposed, redesignated as Rule 13n–1(f), with one modification. Rule 13n–1(f) requires any non-resident SDR applying for registration pursuant to this rule to certify on Form SDR that the SDR can, as a matter of law, and will provide the Commission with prompt access to the SDR's books and records and can, as a matter of law, and will submit to onsite inspection and examination by the Commission. Rule 13n–1(f) also requires any non-resident SDR applying for registration to provide an opinion of counsel that the SDR can, as a matter of law, provide the Commission with prompt access to the SDR's books and records and can, as a matter of law, submit to onsite inspection and examination by the Commission. The final rule differs from the proposed rule in that, as proposed, a non-resident SDR would be required to certify that it ''can, as a matter of law'' provide prompt access to the SDR's books and records and submit to onsite inspection and examination. As adopted, the rule requires the non-resident SDR to certify that it ''can, as a matter of law, and will'' do those things. This change from the proposal is intended to make clear to a non-resident SDR that it is making an affirmative commitment to comply with its obligation to provide the Commission with prompt access to the SDR's books and records and submit to onsite inspection and examination.[362]

While the Commission acknowledges that the rule will impose an additional requirement on non-resident SDRs, for the reasons stated in Section VI.A.1.c above relating to Form SDR's certification and legal opinion requirements, the Commission continues to believe that before granting registration to a non-resident SDR, it is appropriate to obtain a certification and opinion of counsel that such person is in a position to provide legally the Commission with prompt access to the SDR's books and records and to be subject to onsite inspection and examination by the Commission.[363]

6. Definition of ''Report'' (Proposed Rule 13n–1(h)/Final Rule 13n–1(g))

a. Proposed Rule

Proposed Rule 13n–1(h) provided that ''[a]n application for registration or any amendment thereto that is filed pursuant to this [rule] shall be considered a 'report' filed with the Commission for purposes of [Exchange Act Sections 18(a) and 32(a)] and the rules and regulations thereunder and other applicable provisions of the United States Code and the rules and regulations thereunder.''

b. Comments on the Proposed Rule

The Commission did not receive any comments relating to this proposed rule.

c. Final Rule

The Commission is adopting Rule 13n–1(h) as proposed, redesignated as Rule 13n–1(g). Rule 13n–1(g) provides that ''[a]n application for registration or any amendment thereto that is filed pursuant to this [rule] shall be considered a 'report' filed with the Commission for purposes of [Exchange Act Sections 18(a) and 32(a)] and the rules and regulations thereunder and other applicable provisions of the United States Code and the rules and regulations thereunder.'' Exchange Act Sections 18(a) and 32(a) set forth the potential liability for a person who makes, or causes to be made, any false or misleading statement in any ''report'' filed with the Commission (*e.g.,* Form SDR).[364] The Commission believes that subjecting a person to this potential liability will enhance the reliability and credibility of any ''report'' that is filed with the Commission pursuant to Rule 13n–1 because the person will have incentive to take steps to verify the accuracy of the report in order to avoid liability.

B. Withdrawal From Registration; Revocation and Cancellation (Rule 13n–2)

1. Proposed Rule

Proposed Rule 13n–2 set forth a process for a person to withdraw its registration as an SDR and for the Commission to revoke, suspend, or cancel an SDR's registration. With respect to proposed Rule 13n–2(b), a registered SDR would be required to withdraw from registration by filing a notice of withdrawal with the Commission. The proposed rule would require the SDR to designate on its notice of withdrawal a person associated with the SDR to serve as the custodian of the SDR's books and records.[365] Prior to filing a notice of withdrawal, an SDR would be required to file an amended Form SDR to update any inaccurate information.[366] If there is no inaccurate information to update, then an SDR would include a confirmation to that effect in its notice of withdrawal.

[361] *See* Rule 13n–1(d) (requiring an SDR to promptly file an amendment on Form SDR updating information in Item 11 of Form SDR).

[362] *See* Proposing Release, 75 FR at 77312, *supra* note 2 (asking whether ''the representations that would be required to be made by the person who signs Form SDR [are] appropriate and sufficiently clear,'' and whether ''the Commission [should] require any additional or alternative representations''). *See also* Exchange Act Section 13(n)(2) and Rule 13n–4(b)(1) (both requiring registered SDRs to be subject to inspection and examination by any representative of the Commission) and Rule 13n–7(b) (requiring SDRs to keep and preserve books and records and promptly furnish them to any representative of the Commission upon request).

[363] *See also* Section VI.D.2 of this release discussing inspection and examination by Commission representatives.

[364] Exchange Act Section 18(a) provides, in part, that ''[a]ny person who shall make or cause to be made any statement in any . . . report . . . which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading.'' 15 U.S.C. 78r(a). Exchange Act Section 32(a) provides, in part, that ''[a]ny person who willfully and knowingly makes, or causes to be made, any statement in any . . . report . . . which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $5,000,000, or imprisoned not more than 20 years, or both, except that when such person is a person other than a natural person, a fine not exceeding $25,000,000 may be imposed.'' 15 U.S.C. 78ff(a).

[365] Proposed Rule 13n–2(b).

[366] Proposed Rule 13n–2(b).

Proposed Rule 13n–2(c) set forth the effective date of a notice of withdrawal from registration. Proposed Rule 13n–2(d) provided that a notice of withdrawal from registration that is filed pursuant to this section shall be considered a ''report'' filed with the Commission for purposes of Exchange Act Sections 18(a) and 32(a) and the rules and regulations thereunder and other applicable provisions of the United States Code and the rules and regulations thereunder.[367] Proposed Rule 13n–2(e) set forth the basis for the Commission, by order, to revoke the registration of an SDR. Finally, proposed Rule 13n–2(f) provided that the Commission, by order, may cancel the registration of an SDR if it finds that the SDR is no longer in existence or has ceased to do business in the capacity specified in its application for registration.

2. Comments on the Proposed Rule

The Commission did not receive any comments relating to this proposed rule.

3. Final Rule

The Commission is adopting Rule 13n–2 as proposed with a few modifications.[368] The Commission is revising the proposed rule to eliminate the requirement for a registered SDR to file a separate notice of withdrawal with the Commission in order to streamline the withdrawal process and make it more efficient for SDRs and Commission staff. Instead, Rule 13n–2(b) permits a registered SDR to withdraw from registration by filing Form SDR electronically in a tagged data format;[369] when making such a filing, the SDR must indicate on Form SDR that it is filed for the purpose of withdrawing from registration.[370] The Commission is also revising the proposed rule to give an SDR more flexibility in designating the custodian of the SDR's books and records by requiring the SDR to designate a person to serve as the custodian of the SDR's books and records;[371] the person does not necessarily need to be associated with an SDR, as proposed, and thus, the SDR has the option to designate an unaffiliated entity, such as another registered SDR, as the custodian. The purpose of this requirement is to ensure that an SDR's books and records are maintained and available to the Commission and other regulators after the SDR withdraws from registration, and to assist the Commission in enforcing Rules 13n–5(b)(7)[372] and 13n–7(c).[373]

When filing a Form SDR as a withdrawal from registration, the SDR should update any inaccurate information contained in its most recently filed Form SDR.[374] This requirement is substantively the same as the proposal, which would require an SDR, prior to filing a notice of withdrawal, to file an amended Form SDR to update any inaccurate information.[375] If there is no inaccurate information to update, then an SDR should include a confirmation to that effect when filing Form SDR. The Commission may make filed withdrawals available on its Web site, except for information where confidential treatment is requested by the SDR[376] and granted by the Commission.

Rule 13n–2(c) provides that a withdrawal from registration filed by an SDR on Form SDR shall become effective for all matters (except as provided in Rule 13n–2(c)) on the 60th day after the filing thereof with the Commission, within such longer period of time as to which such SDR consents or which the Commission, by order, may determine as necessary or appropriate in the public interest or for the protection of investors, or within such shorter period of time as the Commission may determine. A withdrawal from registration filed on Form SDR that is not prepared and executed in compliance with applicable requirements may be deemed as not acceptable for filing.[377] Rule 13n–2(d) provides that a withdrawal from registration filed on Form SDR that is filed pursuant to this rule shall be considered a ''report'' filed with the Commission for purposes of Exchange Act Sections 18(a) and 32(a) and the rules and regulations thereunder and other applicable provisions of the United States Code and the rules and regulations thereunder.[378]

Under Rule 13n–2(e), if the Commission finds, on the record after notice and opportunity for hearing, that any registered SDR has obtained its registration by making any false and misleading statements with respect to any material fact or has violated or failed to comply with any provision of the federal securities laws and the rules and regulations thereunder, the Commission, by order, may revoke the registration. The rule further provides that pending final determination of whether any registration be revoked, the Commission, by order, may suspend such registration, if such suspension appears to the Commission, after notice and opportunity for hearing on the record, to be necessary or appropriate in the public interest or for the protection of investors.[379] Finally, Rule 13n–2(f) provides that if the Commission finds

[367] 15 U.S.C. 78r(a), 78ff(a).

[368] The Commission did not receive any comments on the definitions of ''control'' and ''person associated with a security-based swap data repository'' in proposed Rule 13n–2(a), but is omitting these definitions in Rule 13n–2 because the Commission's revision of the rule, as discussed in this section, no longer uses these terms.

[369] The Commission is revising proposed Rule 13n–2(a) to add the definition of ''tag'' (including the term tagged) to have the same meaning as set forth in Rule 11 of Regulation S–T (17 CFR 232.11). This definition is added in order to conform the requirements for filing Form SDR to withdraw registration with the requirements for filing Form SDR to register or amend registration pursuant to Rule 13n–1.

[370] Exchange Act Section 11A(b)(4) states that ''[a] registered securities information processor may, upon such terms and conditions as the Commission deems necessary or appropriate in the public interest or for the protection of investors, withdraw from registration by filing a written notice of withdrawal with the Commission.'' 15 U.S.C. 78k–1(b)(4). A SIP that is dually-registered as an SDR may withdraw from registration by filing Form SDR, which the Commission would deem as a written notice of withdrawal under Exchange Act Section 11A(b)(4). In addition, the Commission has modified the heading of this rule. As proposed, the heading of this rule was ''Withdrawal from registration.'' As adopted, the heading is ''Withdrawal from registration; revocation and cancellation.'' This change in the heading provides a more accurate description of the subject of the rule.

[371] Rule 13n–2(b). The Commission is amending Form SDR from the proposal to add new Item 12 to implement the requirement in Rule 13n–2(b) for an SDR to designate a custodian of its books and records if it withdraws from registration. *See* new Item 12 to Form SDR and Section VI.A.1 of this release discussing Form SDR. The Commission has also made some conforming changes to proposed Form SDR and the General Instructions to make clear that the form may be used for withdrawal of registration. For example, General Instruction 1 now indicates that Form SDR and exhibits thereto are to be filed electronically in a tagged data format in connection with withdrawing an SDR's registration. *See* General Instruction 1 to Form SDR.

[372] *See* Section VI.E.7 of this release discussing requirement that an SDR that ceases to do business preserve, maintain, and make accessible transaction data and historical positions.

[373] *See* Section VI.G.3 of this release discussing requirement that an SDR that ceases to do business preserve, maintain, and make accessible certain records relating to its business.

[374] *See* Rule 13n–2(b). The General Instructions to Form SDR have been amended from the proposal to clarify what items and exhibits need to be included when filing a withdrawal. *See* General Instruction 11 to Form SDR.

[375] Proposed Rule 13n–2(b).

[376] As discussed in Section VI.A.1.c of this release, the Commission is adopting technical amendments to Exchange Act Rule 24b–2 to clarify that the confidential portion of electronic filings by SDRs must be filed electronically and to require SDRs to request confidential treatment electronically. The Commission is also adopting technical amendments to Rule 101 of Regulation S–T to provide that, except as otherwise provided, all filings by SDRs, including any information with respect to which confidential treatment is requested, must be filed electronically.

[377] *See* General Instruction 7 to Form SDR.

[378] *See* Section VI.A.6 of this release discussing definition of ''report.''

[379] Rule 13n–2(e).

that a registered SDR is no longer in existence or has ceased to do business in the capacity specified in its application for registration, the Commission, by order, may cancel the registration.[380]

The Commission believes that it is important to set forth a process for a person to withdraw its registration as an SDR and for the Commission to be able to revoke, suspend, or cancel an SDR's registration, similar to the approach that it takes with some of its other registrants.[381]

C. Registration of Successor to Registered SDR (Rule 13n–3)

1. Proposed Rule

Proposed Rule 13n–3 would govern the registration of a successor to a registered SDR. Successor registration would be accomplished either by filing a new application on Form SDR or, in certain circumstances, by filing an amendment on Form SDR.

2. Comments on the Proposed Rule

The Commission did not receive any comments relating to this proposed rule.

3. Final Rule

The Commission is adopting Rule 13n–3 as proposed, with minor revisions to track the language of Rules 13n–1 and 13n–2 as adopted. Rule 13n–3 governs the registration of a successor to a registered SDR. Because this rule is substantially similar to Exchange Act Rule 15b1–3,[382] which governs the registration of a successor to a registered broker-dealer, the same concepts that the Commission explained when it adopted amendments to Rule 15b1–3 are applicable here.[383]

a. Succession by Application

Rule 13n–3(a) provides that in the event that an SDR succeeds to and continues the business of an SDR registered pursuant to Exchange Act Section 13(n), the registration of the predecessor shall be deemed to remain effective as the registration of the successor if, within 30 days after such succession, the successor files an application for registration on Form SDR, and the predecessor files a withdrawal from registration on Form SDR with the Commission.[384] A successor will not be permitted to ''lock in'' the 30-day window period by filing an application for registration that is incomplete in material respects.

Rule 13n–3(a) further provides that the registration of the predecessor SDR shall cease to be effective 90 days after the date of the publication of notice of the filing of an application for registration on Form SDR by the successor SDR.[385] In other words, the 90-day period will not begin to run until a complete Form SDR has been filed by the successor with the Commission and the Commission publishes notice of the filing of Form SDR to afford interested persons an opportunity to submit written comments concerning such application. This 90-day period is consistent with the time period set forth in final Rule 13n–1, pursuant to which the Commission would have 90 days to grant registration or institute proceedings to determine if registration should be granted or denied.

The following are examples of the types of successions that would be required to be completed by filing an application: (1) An acquisition, through which an unregistered person purchases or assumes substantially all of the assets and liabilities of an SDR and then operates the business of the SDR, (2) a consolidation of two or more registered SDRs, resulting in their conducting business through a new unregistered SDR, which assumes substantially all of the assets and liabilities of the predecessor SDRs, and (3) dual successions, through which one registered SDR subdivides its business into two or more new unregistered SDRs.

b. Succession by Amendment

Rule 13n–3(b) provides that notwithstanding Rule 13n–3(a), if an SDR succeeds to and continues the business of a registered predecessor SDR, and the succession is based solely on (1) a change in the predecessor's date or state of incorporation, (2) form of organization, or (3) composition of a partnership, the successor may, within 30 days after the succession, amend the registration of the predecessor SDR on Form SDR to reflect these changes. Such amendment shall be deemed an application for registration filed by the predecessor and adopted by the successor. In all three types of successions, the predecessor must cease operating as an SDR. The Commission believes that it is appropriate to allow a successor to file an amendment to the predecessor's Form SDR in these three types of successions.

c. Scope and Applicability of Rule 13n–3

The purpose of Rule 13n–3 is to enable a successor SDR to operate without an interruption of business by relying for a limited period of time on the registration of the predecessor SDR until the successor's own registration becomes effective. The rule is intended to facilitate the legitimate transfer of business between two or more SDRs and to be used only if there is a direct and substantial business nexus between the predecessor and the successor SDR. The rule cannot be used when a registered SDR sells its registration, eliminates substantial liabilities, spins off personnel, or facilitates the transfer of the registration of a ''shell'' organization that does not conduct any business. No person will be permitted to rely on Rule 13n–3 unless it is acquiring or assuming substantially all of the assets and liabilities of the predecessor's SDR business.

Rule 13n–3 does not apply to reorganizations that involve only registered SDRs. In those situations, the registered SDRs need not use the rule because they can continue to rely on their existing registrations. The rule also does not apply to situations in which the predecessor intends to continue to engage in SDR activities. Otherwise, confusion may result as to the identities and registration statuses of the parties. If a person acquires some or all of the shares of a registered SDR, or if one

[380] Where an SDR anticipates that it will cease to exist or cease to do business as an SDR, the SDR may withdraw from registration by filing a withdrawal on Form SDR pursuant to Rule 13n–2(b). Regardless of whether the SDR withdraws from registration pursuant to Rule 13n–2(b), the Commission revokes the SDR's registration pursuant to Rule 13n–2(e), or the Commission cancels the SDR's registration pursuant to Rule 13n–2(f), the SDR is obligated to comply with Rules 13n–5(b)(7) and 13n–7(c), which are discussed in Sections VI.E.7 and VI.G.3 of this release, respectively.

[381] Rule 13n–2 is similar to Exchange Act Rule 15b6–1, 17 CFR 240.15b6–1, which relates to withdrawal from registration as a broker-dealer, and includes a provision similar to a provision in Exchange Act Section 15(b)(5), 15 U.S.C. 78o(b)(5) (stating that ''[i]f the Commission finds that any registered broker or dealer is no longer in existence or has ceased to do business as a broker or dealer, the Commission, by order, shall cancel the registration of such broker or dealer'').

[382] *See* 17 CFR 240.15b1–3.

[383] *See* Registration of Successors to Broker-Dealers and Investment Advisers, Exchange Act Release No. 31661 (Dec. 28, 1992), 58 FR 7 (Jan. 4, 1993).

[384] As adopted, Rule 13n–2 differs from the proposal by requiring a ''filing a withdrawal from registration on Form SDR'' rather than ''filing a notice of withdrawal.'' The Commission is revising Rule 13n–3(a) from the proposal to track the language of Rule 13n–2.

[385] As adopted, Rule 13n–1(c) differs from the proposal by starting the 90-day period from the publication of notice of the filing of Form SDR rather than from the filing of Form SDR. The Commission is revising Rule 13n–3(a) from the proposal to track more closely the language of Rule 13n–1(c). As discussed in Section VI.A.2.c of this release, the Commission is revising Rule 13n–1(c) from the proposal to make it procedurally consistent with the registration process applicable to SIPs and the rule stems from the Commission's requirement that a registered SDR register as a SIP and the Commission's revision of Form SDR to accommodate SIP registration.

registered SDR purchases part or all of the business assets or assumes personnel of another registered SDR, then reliance on this rule would not be necessary.[386]

D. Enumerated Duties and Core Principles (Rule 13n–4)

Dodd-Frank Act Section 763(i) requires an SDR to comply with the requirements and core principles described in Exchange Act Section 13(n) as well as any requirement that the Commission prescribes by rule or regulation in order to be registered and maintain registration as an SDR with the Commission.[387] After considering comments, the Commission is adopting Rule 13n–4 as proposed, with modifications.

The Commission is not adopting proposed Rules 13n–4(b)(9) and (10), which address relevant authorities' access to SBS data maintained by SDRs. As discussed below, the Commission anticipates soliciting additional public comment regarding relevant authorities' access to SBS data maintained by SDRs.

1. Definitions (Rule 13n–4(a))

a. Proposed Rule

Proposed Rule 13n–4(a) defined the following terms: ''affiliate,'' ''board,'' ''control,'' ''director,'' ''direct electronic access,'' ''end-user,'' ''market participant,'' ''nonaffiliated third party,'' and ''person associated with a security-based swap data repository.''

b. Comments on the Proposed Rule

The Commission received one comment on the proposed definitions in the context of the SDR Rules.[388] Specifically, one commenter believed that the Commission's requirement in the definition of ''direct electronic access'' that data is ''updated at the same time as the [SDR's] data is updated'' may pose ''operational difficulties that do not outweigh the marginal benefits to the Commission.''[389] The commenter also believed that ''[t]he Commission's proposed definition provides for no latency between the moment when an [SDR's] records are updated and when the systems used by the Commission (or its designee with direct electronic access) are updated.''[390] For these reasons, the commenter suggested that the Commission ''allow time for an [SDR] to validate, process, and store the data received prior to populating the data to the environment that will be utilized to provide such direct electronic access to the Commission.''[391]

c. Final Rule

After considering the comment, the Commission is adopting Rule 13n–4(a) as proposed, with modifications related to the definition of ''end-user.''[392] Specifically, the Commission is adopting Rule 13n–4(a) without the definition of ''end-user.'' As discussed above, the Commission proposed rules that would require SDRs to collect data related to monitoring the compliance and frequency of end-user clearing exemption claims.[393] In anticipation that the Commission will consider final rules relating to end-users in a separate rulemaking, the Commission has decided not to adopt the proposed definition of ''end-user'' in this release. The Commission believes that it is better to address the issue of end-users more fully in that release than in this release.

The Commission is adopting the definition of ''direct electronic access'' as proposed to mean ''access, which shall be in a form and manner acceptable to the Commission, to data stored by [an SDR] in an electronic format and updated at the same time as the [SDR]'s data is updated so as to provide the Commission or any of its designees with the ability to query or analyze the data in the same manner that the [SDR] can query or analyze the data.'' This includes access to all transaction data and positions, as defined in Rule 13n–5(a),[394] and related identifying information, such as transaction IDs and time stamps.[395] With respect to one commenter's view that requiring SBS data to be updated at the same time as the data is updated at an SDR may pose ''operational difficulties that do not outweigh the marginal benefits to the Commission,''[396] the Commission believes that its definition of ''direct electronic access'' is necessary for the Commission's adequate oversight of the SBS market. The commenter asserted that the Commission's definition of ''direct electronic access'' ''provides for no latency between the moment when an [SDR's] records are updated and when the systems used by the Commission (or its designee with direct electronic access) are updated.''[397] The Commission understands that latency is inherent when updating systems, and that there may be some time lag between when the SDR receives and updates the data and when the updated data is available for the Commission to access. The Commission also understands that an SDR needs to check the data for errors and omissions and process the data before providing the data to the Commission or its designees. Otherwise, the Commission or its designees will not be able to query or analyze the data. Thus, by referencing to the Commission's or its designees' ability to query or analyze the data in the definition of ''direct electronic access,'' the Commission anticipates that there may be a lag time for SDRs to check and process the data before providing the data to the Commission or its designees. The Commission notes, however, that once an SDR checks and processes the data, the SDR is required to provide the Commission or its designees with the ability to access the checked and processed data at the same time as the checked and processed data is updated in the SDR's records.

2. Enumerated Duties (Rule 13n–4(b))

a. Proposed Rule

Proposed Rule 13n–4(b) would incorporate an SDR's duties that are enumerated in Exchange Act Sections 13(n)(2), 13(n)(5), and 13(n)(6),[398] which require each SDR to: (1) Subject itself to

[386] In the case of the purchase of the business assets or assumption of the personnel of one registered SDR by another SDR, the purchasing SDR would file an amendment on Form SDR to reflect any changes in its operations, while the other SDR would either file a Form SDR to withdraw its registration or file an interim amendment on the form, depending on whether the SDR remains in the SDR business.

[387] *See* Exchange Act Section 13(n)(3), 15 U.S.C. 78m(n)(3), as added by Dodd-Frank Act Section 763(i). The Dodd-Frank Act authorizes the Commission to establish additional requirements for SDRs by rule or regulation. Exchange Act Sections 13(n)(4)(B), 13(n)(7)(D), and 13(n)(9), 15 U.S.C. 78m(n)(4)(B), 78m(n)(7)(D), and 78m(n)(9), as added by Dodd-Frank Act Section 763(i).

[388] *See* DTCC 5, *supra* note 19. *See also supra* note 247 (discussing a general comment regarding the term ''affiliate'').

[389] DTCC 5, *supra* note 19.

[390] DTCC 5, *supra* note 19.

[391] DTCC 5, *supra* note 19.

[392] The Commission is also correcting a typographical error in the proposed rule. Proposed Rule 13n–4(a)(3)(ii) referred to the right to vote 25 percent ''of'' more of a class of securities. *See* Proposing Release, 75 FR at 77367, *supra* note 2. As adopted, Rule 13n–4(a)(3)(ii) refers to the right to vote 25 percent ''or'' more of a class of securities. In addition, certain definitions are being renumbered due to the removal of the definition of ''end-user.''

[393] *See* End-User Exception Proposing Release, *supra* note 15.

[394] *See* Section VI.E.1 of this release discussing the definition of ''transaction data'' and Section VI.E.2 of this release discussing the definition of ''position.''

[395] *See* Regulation SBSR Adopting Release, *supra* note 13 (Rules 901(f) and (g)).

[396] *See* DTCC 5, *supra* note 19.

[397] *See* DTCC 5, *supra* note 19 (suggesting that the Commission ''allow time for an [SDR] to validate, process, and store the data received prior to populating the data to the environment that will be utilized to provide such direct electronic access to the Commission'').

[398] Exchange Act Section 13(n), 15 U.S.C. 78m(n).

inspection and examination by the Commission; (2) accept SBS data as prescribed by Regulation SBSR;[399] (3) confirm with both counterparties to the SBS the accuracy of the data that was submitted; (4) maintain the data as prescribed by the Commission; (5) provide direct electronic access to the Commission or any of its designees; (6) provide certain information as the Commission may require to comply with Exchange Act Section 13(m);[400] (7) at such time and in such manner as may be directed by the Commission, establish automated systems for monitoring, screening, and analyzing SBS data; (8) maintain the privacy of any and all SBS transaction information that the SDR receives from an SBS dealer, counterparty, or any registered entity; (9) on a confidential basis pursuant to Exchange Act Section 24 and the rules and regulations thereunder, upon request, and after notifying the Commission of the request, make available all data obtained by the SDR to certain relevant authorities; (10) before sharing information with a relevant authority, obtain a written confidentiality agreement and obtain an agreement from the relevant authority to indemnify the SDR and the Commission; and (11) designate a CCO who must comply with specified duties.

b. Comments on the Proposed Rule

Six commenters submitted comments relating to various aspects of proposed Rule 13n–4(b).[401] These comment letters are described in more detail below, other than those that relate solely to relevant authorities' access to SBS data maintained by SDRs, which the Commission anticipates will be addressed separately. Generally speaking, one commenter believed that ''all of the substantive rule provisions proposed [as of July 22, 2013] must remain as strong as possible, irrespective of the Commission's approach to its very limited jurisdiction over cross-border transactions or the CFTC's approach to the implementation of Title VII.''[402]

i. Inspection and Examination

One commenter expressed concern regarding the potential cost to non-resident SDRs of complying with multiple regulatory regimes, including inspections and examinations by multiple regulators.[403]

ii. Direct Electronic Access

As discussed in Section IV above, two commenters suggested that the Commission designate one SDR to receive SBS data from other SDRs, through direct electronic access, in order to provide the Commission and other regulators a consolidated location from which to access SBS data.[404] Both commenters believed that such designation would ensure efficient consolidation of data.[405]

iii. Monitoring, Screening, and Analysis

In the Proposing Release, the Commission proposed taking a measured approach and not requiring SDRs to establish automated systems for monitoring, screening, and analyzing SBS data at that time.[406] One commenter disagreed with this proposal.[407] Another commenter supported ''the broad concept that an SDR should monitor, screen and analyze SBS data as input for the [Commission] to facilitate its oversight and monitoring responsibilities,'' but believed that the proposed rule is too broad and ''not clear enough on the level of detail required and on the level of responsibility imposed on SDRs.''[408] A third commenter suggested that monitoring, screening, and analysis should be performed centrally by an SDR for efficiency and that the data maintained by the SDR should then be made available to relevant authorities.[409]

iv. Other Enumerated Duties

Comments on the other enumerated duties either are discussed later in this release or addressed in the Regulation SBSR Adopting Release or the Regulation SBSR Proposed Amendments Release.[410] The Commission anticipates addressing comments regarding relevant authorities' access to SBS data maintained by SDRs in a separate release when it solicits additional public comment regarding the issue.

c. Final Rule

After considering the comments, the Commission is adopting Rule 13n–4(b) as proposed, with modifications. Specifically, each SDR is required to:

(1) subject itself to inspection and examination by any representative of the Commission;[411]

(2) accept data as prescribed in Regulation SBSR[412] for each SBS;

(3) confirm, as prescribed in Rule 13n–5, with both counterparties to the SBS the accuracy of the data that was submitted, as discussed further in Section VI.E.1 of this release;

(4) maintain, as prescribed in Rule 13n–5, the data described in Regulation SBSR in such form, in such manner, and

[399] *See supra* note 201 (discussing Regulation SBSR, which prescribes the data elements that an SDR will be required to accept for each SBS in association with requirements under Dodd-Frank Act Section 763(i)).

[400] Exchange Act Section 13(m) pertains to the public availability of SBS data. *See* 15 U.S.C. 78m(m). In a separate release relating to implementation of Dodd-Frank Act Section 763(i) (adding Exchange Act Section 13(m)), the Commission proposed rules that impose various duties on SDRs in connection with the reporting and public dissemination of SBS information. *See* Regulation SBSR Proposing Release, *supra* note 8; *see also* Cross-Border Proposing Release, 78 FR at 31210–6, *supra* note 3 (re-proposing Regulation SBSR). The Commission is adopting those rules as part of Regulation SBSR. *See* Regulation SBSR Adopting Release, *supra* note 13.

[401] *See* Barnard, *supra* note 19; Better Markets 1, *supra* note 19; DTCC 2, *supra* note 19; ESMA, *supra* note 19; MFA 1, *supra* note 19; US & Foreign Banks, *supra* note 24; *see also* DTCC 1*, *supra* note 20; DTCC 3, *supra* note 19; DTCC 5, *supra* note 19. In addition to these commenters, one commenter to the Temporary Rule Release suggested that the Commission affirmatively state that it intends to keep information furnished pursuant to the rules in that release confidential under the Freedom of Information Act (''FOIA'') or to seek a legislative solution. Deutsche Temp Rule, *supra* note 28. Although this comment does not explicitly reference to the SDR Rules, the Commission addresses this point in Section VI.D.2 of this release to the extent that the SDR Rules require SDRs to submit information to the Commission.

[402] Better Markets 2, *supra* note 19 (urging the Commission to not dilute or weaken the [p]roposed [r]ules to accommodate concerns about international regulation of the SBS markets).

[403] ESMA, *supra* note 19.

[404] DTCC 1*, *supra* note 20; Better Markets 1, *supra* note 19. Comments regarding direct electronic access in the context of substituted compliance are addressed in a separate release. *See* Regulation SBSR Adopting Release, *supra* note 13.

[405] DTCC 1*, *supra* note 20; Better Markets 1, *supra* note 19; *see also* DTCC 2, *supra* note 19 (''The role of an aggregating SDR is significant in that it ensures regulators efficient, streamlined access to consolidated data, reducing the strain on limited agency resources.''); DTCC 3, *supra* note 19 (''When there are multiple SDRs in any particular asset class, the [Commission] should take such action as is necessary to eliminate any overstatements of open interest or other inaccuracies that may result from having broader market data published from separate SDRs.'').

[406] Proposing Release, 75 FR at 77318, *supra* note 2.

[407] Better Markets 1, *supra* note 19 (''The fact that this market is in its 'infancy' is a unique opportunity for the Commission to guide its development in a way that protects the public interest, promotes competition, and prevents what has been the routine development of conflicts and predatory conduct.'').

[408] Barnard, *supra* note 19 (recommending that the Commission ''provide additional details on the anticipated requirements in order to better manage the expectations of SDRs and wider market participants concerning their duties in this area'').

[409] DTCC 2, *supra* note 19.

[410] *See* Regulation SBSR Adopting Release, *supra* note 13; Regulation SBSR Proposed Amendments Release, *supra* note 13.

[411] The Commission is revising its proposed rule by adding ''any representative of'' before ''the Commission'' to track more closely Exchange Act Section 13(n)(2), 15 U.S.C. 78m(n)(2) (''Each registered security-based swap data repository shall be subject to inspection and examination by any representative of the Commission.'').

[412] The Commission addresses this enumerated duty in further detail in Regulation SBSR. *See* Regulation SBSR Adopting Release, *supra* note 13.

for such period as provided therein and in the Exchange Act and the rules and regulations thereunder, as discussed further in Section VI.E of this release;

(5) provide direct electronic access to the Commission (or any designee of the Commission, including another registered entity);

(6) provide the information described in Regulation SBSR in such form and at such frequency as prescribed in Regulation SBSR to comply with requirements set forth in Exchange Act Section 13(m) and the rules and regulations thereunder;[413]

(7) at such time and in such manner as may be directed by the Commission, establish automated systems for monitoring, screening, and analyzing SBS data;

(8) maintain the privacy of any and all SBS transaction information that the SDR receives from an SBS dealer, counterparty, or any registered entity, as prescribed in Rule 13n–9 and as discussed further in Section VI.I.1 of this release; and

(9) [Reserved]

(10) [Reserved]

(11) designate an individual to serve as a CCO, as discussed further in Section VI.J of this release.[414]

With respect to one commenter's general recommendation that all of the Commission's substantive rules ''remain as strong as possible, irrespective of the Commission's approach to its very limited jurisdiction over cross-border transactions or the CFTC's approach to the implementation of Title VII,''[415] the Commission believes that the final SDR Rules are robust and reflect an appropriate approach to furthering the goals of the Dodd-Frank Act and minimizing an SDR's cost of compliance.[416]

Because the Commission anticipates soliciting additional public comment regarding relevant authorities' access to SBS data maintained by SDRs in a separate release, the Commission is not adopting proposed Rules 13n–4(b)(9) and (10) at this time and is marking those sections as ''Reserved.''[417] However, SDRs will have to comply with all statutory requirements, including Exchange Act Sections 13(n)(5)(G) and (H),[418] when the current exemptive relief from the statutory requirements expires.[419]

i. Inspection and Examination

Each registered SDR is statutorily required to be subject to inspection and examination by any representative of the Commission.[420] With respect to one commenter's concern regarding the potential cost to non-resident SDRs of complying with multiple regulatory regimes, including inspections and examinations by multiple regulators,[421] the Commission appreciates this concern and has discussed this concern in the Cross-Border Proposing Release.[422] To address the commenter's broader concern of duplicative regulatory regimes, the Commission is adopting Rule 13n-12 to provide an exemption from specific SDR requirements in certain circumstances, as discussed in Section VI.K of this release.[423]

ii. Direct Electronic Access

Each SDR should coordinate with the Commission to provide direct electronic access to the Commission or any of its designees. The form and manner that will be acceptable to the Commission for an SDR to provide direct electronic access may vary on a case-by-case basis and may change over time, depending on a number of factors. These factors could include the development of new types of SBSs or variations of existing SBSs that require additional data to accurately describe them. Additionally, the extent to which the Commission encounters difficulty in normalizing and aggregating SBS data across multiple registered SDRs would be a factor in considering the nature of the direct access provided by an SDR to the Commission.

As contemplated in the Proposing Release, the Commission anticipates that an SDR may be able to satisfy its duty to provide direct electronic access to the Commission by providing, for example, (1) a direct streaming of the data maintained by the SDR to the Commission or any of its designees, (2) a user interface that provides the Commission or any of its designees with direct access to the data maintained by the SDR and that provides the Commission or any of its designees with the ability to query or analyze the data in the same manner that is available to the SDR, or (3) another mechanism that provides a mirror copy of the data maintained by the SDR, which is in an electronic form that is downloadable by the Commission or any of its designees and is in a format that provides the Commission or any of its designees with the ability to query or analyze the data in the same manner that is available to the SDR.[424] The alternative ways to provide direct electronic access to the Commission are not intended to be mutually exclusive.

Additionally, the rule provides that the data must be in a form and manner acceptable to the Commission.[425] Since one of the primary purposes of an SDR is to facilitate regulatory oversight of the SBS market, a significant portion of the benefits of an SDR will not be realized if data stored at an SDR is provided to the Commission in a form or manner that cannot be easily utilized by the Commission. Furthermore, the form and manner with which an SDR provides the data to the Commission should not only permit the Commission to accurately analyze the data maintained by a single SDR, but also allow the Commission to aggregate and analyze data received from multiple SDRs.

The Commission continues to consider whether it should require the data to be provided to the Commission

[413] The Commission addresses this enumerated duty in further detail in Regulation SBSR. *See* Regulation SBSR Adopting Release, *supra* note 13.

[414] The Commission is revising proposed Rule 13n–4(b)(11) by not including the phrase ''who shall comply with the duties set forth in Exchange Act Rule 13n–11.'' This revision is being made to clarify that an SDR is only required to designate a CCO.

[415] Better Markets 2, *supra* note 19 (urging the Commission to not dilute or weaken the [p]roposed [r]ules to accommodate concerns about international regulation of the SBS markets).

[416] *See* Section VIII of this release discussing economic analysis.

[417] In the Cross-Border Proposing Release, the Commission proposed interpretive guidance to specify how SDRs may comply with the notification requirement set forth in Exchange Act Section 13(n)(5)(G) and proposed Rule 13n–4(b)(9). Cross-Border Proposing Release, 78 FR at 31046–31047, *supra* note 3. The Commission also specified how the Commission proposed to determine whether a relevant authority is appropriate for purposes of receiving SBS data from an SDR. *Id.* at 31047–31048. The Commission is not taking any action on these proposals at this time and anticipates addressing these issues in a separate release.

[418] *See* 15 U.S.C. 78m(n)(5)(G) and 78m(n)(5)(H).

[419] *See* Section V of this release discussing implementation of the SDR Rules.

[420] *See* Exchange Act Section 13(n)(2), 15 U.S.C. 78m(n)(2).

[421] *See* ESMA, *supra* note 19.

[422] *See* Cross-Border Proposing Release, 78 FR at 31043, *supra* note 3 (discussing duplicative regulatory regimes for non-U.S. persons performing the functions of an SDR, which may include non-resident SDRs).

[423] *See also* Regulation SBSR Adopting Release, *supra* note 13 (discussing substituted compliance); Exchange Act Rule 0–13, 17 CFR 240.0–13 (relating to procedures for filing applications for substituted compliance).

[424] Proposing Release, 75 FR at 77318, *supra* note 2.

[425] *See* Rule 13n–4(a)(5) (defining ''direct electronic access'' to mean ''access, which shall be in a form and manner acceptable to the Commission, to data stored by a security-based swap data repository in an electronic format and updated at the same time as the security-based swap data repository's data is updated so as to provide the Commission or any of its designees with the ability to query or analyze the data in the same manner that the security-based swap data repository can query or analyze the data''); *see also* Section VI.E.4 of this release discussing the requirement to maintain transaction data and positions in a place and format that is readily accessible to the Commission.

in a particular format.[426] The Commission anticipates that it will propose for public comment detailed specifications of acceptable formats and taxonomies that would facilitate an accurate interpretation, aggregation, and analysis of SBS data by the Commission. The Commission intends to maximize the use of any applicable current industry standards for the description of SBS data, build upon such standards to accommodate any additional data fields as may be required, and develop such formats and taxonomies in a timeframe consistent with the implementation of SBS data reporting by SDRs. The Commission recognizes that as the SBS market develops, new or different data fields may be needed to accurately represent new types of SBSs, in which case the Commission may provide updated specifications of formats and taxonomies to reflect these new developments. Until such time as the Commission adopts specific formats and taxonomies, SDRs may provide direct electronic access to the Commission to data in the form in which the SDRs maintain such data.

As stated in Section IV of this release with respect to commenters' suggestions regarding consolidation of SBS data,[427] the Commission does not believe that it is necessary to designate, at this time, an SDR or any registered entity to receive, through direct electronic access, SBS data maintained by other SDRs in order to aggregate the data. At this time, the Commission believes that it—rather than any particular registered entity—is in the best position to aggregate data across multiple registered SDRs. The Commission anticipates that its proposal on the formats and taxonomies for SBS data provided to the Commission pursuant to Rule 13n–4(b)(5) will facilitate its ability to carry out this function. The Commission may revisit this issue as the SBS market evolves.

A commenter to the Temporary Rule Release suggested that the Commission affirmatively state that it intends to keep information furnished pursuant to the rules in that release confidential under FOIA or to seek a legislative solution.[428] The Commission anticipates that it will keep reported data that it obtains from an SDR (via direct electronic access or any other means) confidential, subject to the provisions of applicable law.[429]

After considering the comments, the Commission is adopting Rule 13n-4(b)(5) as proposed.

iii. Monitoring, Screening, and Analysis

Although the Commission is adopting Rule 13n–4(b)(7) as proposed, it is not, at this time, directing SDRs to establish any automated systems for monitoring, screening, and analyzing SBS data. One commenter urged the Commission to adopt a rule to require an SDR to establish automated systems for monitoring, screening, and analyzing SBS data,[430] but the Commission continues to believe that it is better to take a measured approach in addressing this statutory requirement to minimize imposing costs on SDRs until the Commission is in a better position to determine what information it needs in addition to the information that it can obtain from SDRs through other rules applicable to SDRs, such as Rule 13n–4(b)(5).[431] For the same reasons, the Commission is not, as another commenter suggested,[432] providing additional details on what may be expected of SDRs in this area. The Commission, however, expects to consider further steps to implement this requirement as the SBS market develops and the Commission gains experience in regulating this market.[433] Because the Commission is not requiring an SDR to monitor, screen, and analyze SBS data maintained by the SDR at this time, the Commission is also not taking one commenter's suggestion to designate, at this time, an SDR to centrally monitor, screen, and analyze SBS data maintained by all SDRs.[434] The Commission believes that it is premature to do so without better understanding what additional information would be useful to the Commission. After considering the comments, the Commission is adopting Rule 13n–4(b)(7) as proposed.

3. Implementation of Core Principles (Rule 13n–4(c))

Each SDR is required, under Exchange Act Section 13(n)(7), to comply with core principles relating to (1) market access to services and data, (2) governance arrangements, and (3) conflicts of interest.[435] Specifically, unless necessary or appropriate to achieve the purposes of the Exchange Act, an SDR[436] is prohibited from adopting any rules[437] or taking any action that results in any unreasonable restraint of trade or imposing any material anticompetitive burden on the trading, clearing, or reporting of transactions.[438] In addition, each SDR must establish governance arrangements that are transparent to fulfill public interest requirements and to support the objectives of the Federal Government, owners, and participants.[439] Moreover, each SDR must establish and enforce rules to minimize conflicts of interest in the decision-making process of the SDR

[426] *Cf.* Proposing Release, 75 FR at 77319 and 77331, *supra* note 2 (asking questions about how direct electronic access could be provided, and asking whether the Commission should require information be kept in a particular format, such as FpML or another standard).

[427] *See* DTCC 1*, *supra* note 20 (recommending that the Commission designate one SDR to receive, through direct electronic access, information from other SDRs to ensure efficient consolidation of data); Better Markets 1, *supra* note 19 (recommending that ''the Commission designate one SDR as the recipient of information of other SDRs, through direct electronic access to the SBS data at the other SDRs, in order to provide the Commission and relevant authorities with a consolidated location for SBS data'').

[428] *See* Deutsche Temp Rule, *supra* note 28. It is unclear what the commenter contemplates by its suggestion that the Commission seek a ''legislative solution,'' but the Commission notes that it does not intend to affirmatively seek any legislative action to protect further such information. The commenter is not precluded from doing so on its own initiative.

[429] Pursuant to Commission rules, confidential treatment can be sought for information submitted to the Commission. *See* 17 CFR 200.83 (regarding confidential treatment procedures under FOIA).

[430] *See* Better Markets 1, *supra* note 19.

[431] *See* Proposing Release, 75 FR at 77318, *supra* note 2 (discussing reasons to take a measured approach with respect to requiring an SDR to establish automated systems for monitoring, screening, and analyzing SBS data). In a separate release, the Commission is adopting a rule requiring an SDR to provide the Commission, upon request, information or reports related to the timeliness, accuracy, and completeness of data reported to the SDR. *See* Regulation SBSR Adopting Release, *supra* note 13 (Rule 907(e)). In addition, the Commission proposed a rule that would require a counterparty to an SBS that invokes the end-user clearing exemption to deliver or cause to deliver certain information to a registered SDR, and, if adopted, then an SDR would be required to maintain this information in accordance with Rule 13n–5(b)(4). *See* End-User Exception Proposing Release, *supra* note 15.

[432] *See* Barnard, *supra* note 19 (stating that the proposed rule regarding monitoring, screening, and analysis is too broad and ''not clear enough on the level of detail required and on the level of responsibility imposed on SDRs'').

[433] The Commission may revisit these issues as the Commission becomes more familiar with the SBS market and consider requiring SDRs to monitor, screen, and analyze SBS data if, for example, it is difficult for the Commission to aggregate and analyze the data because SBS data is too fragmented among multiple SDRs or the data is maintained by multiple SDRs in different formats.

[434] *See* DTCC 2, *supra* note 19.

[435] *See* Exchange Act Section 13(n)(7), 15 U.S.C. 78m(n)(7).

[436] Although Exchange Act Section 13(n)(7)(A) refers to ''swap data repository,'' the Commission believes that the Congress intended it to refer to ''security-based swap data repository.'' *See generally Am. Petroleum Institute* v. *SEC,* 714 F.3d 1329, 1336–37 (D.C. Cir. 2013) (explaining that ''[t]he Dodd-Frank Act is an enormous and complex statute, and it contains'' a number of ''scrivener's errors'').

[437] *See* Section VI.A.1.c of this release discussing the likelihood that most of the information that would be contained in a ''rulebook'' would be filed as part of an SDR's policies and procedures that are attached to Form SDR.

[438] *See* Exchange Act Section 13(n)(7)(A), 15 U.S.C. 78m(n)(7)(A).

[439] *See* Exchange Act Section 13(n)(7)(B), 15 U.S.C. 78m(n)(7)(B).

and to establish a process for resolving any such conflicts of interest.[440] Rule 13n–4(c) incorporates and implements these three core principles.

a. First Core Principle: Market Access to Services and Data (Rule 13n–4(c)(1))

i. Proposed Rule

Proposed Rule 13n–4(c)(1) would incorporate and implement the first core principle [441] by requiring SDRs, unless necessary or appropriate to achieve the purposes of the Exchange Act and the rules and regulations thereunder, to not (i) adopt any policies and procedures or take any action that results in an unreasonable restraint of trade; or (ii) impose any material anticompetitive burden on the trading, clearing, or reporting of transactions.[442] Proposed Rule 13n–4(c)(1) would include four specific requirements. First, each SDR would be required to ensure that any dues, fees, or other charges it imposes, and any discounts or rebates it offers, are fair and reasonable and not unreasonably discriminatory; such dues, fees, other charges, discounts, or rebates would be required to apply consistently across all similarly-situated users of the SDR's services.[443] Second, each SDR would be required to permit market participants to access specific services offered by the SDR separately.[444] Third, each SDR would be required to establish, monitor on an ongoing basis, and enforce clearly stated objective criteria that would permit fair, open, and not unreasonably discriminatory access to services offered and data maintained by the SDR as well as fair, open, and not unreasonably discriminatory participation by market participants, market infrastructures, venues from which data can be submitted to the SDR, and third party service providers that seek to connect to or link with the SDR.[445] Finally, each SDR would be required to establish, maintain, and enforce written policies and procedures reasonably designed to review any prohibition or limitation of any person with respect to access to services offered, directly or indirectly, or data maintained by the SDR and to grant such person access to such services or data if such person has been discriminated against unfairly.[446]

ii. Comments on the Proposed Rule

As discussed below, eight commenters submitted comments relating to this proposed rule,[447] which were mixed.[448] Generally speaking, one commenter supported ''the Commission's stated goals of protecting market participants and maintaining a fair, orderly, and efficient [SBS] market through the promotion of competition'' and urged ''the Commission to adopt rules that preserve a competitive marketplace and forbid [ ] anti-competitive practices by all [SBS] market participants.''[449] The commenter stated that ''[i]n a global SB swap market, the anti-competitive practices of even a single market participant have potential ramifications for the entire marketplace.'' [450]

In suggesting that the Commission rely on CPSS–IOSCO's recommendations such as the PFMI Report, the commenter cited, as an example, to the Commission's concurrence, in the Proposing Release, with the CPSS–IOSCO Trade Repository Report's recommendation that ''[m]arket infrastructures and service providers that may or may not offer potentially competing services should not be subject to anticompetitive practices such as product tying, contracts with non-compete and/or exclusivity clauses, overly restrictive terms of use and anti-competitive price discrimination.'' [451]

(1) *Rule 13n–4(c)(1)(i): Fair, Reasonable, and Not Unreasonably Discriminatory Dues, Fees, Other Charges, Discounts, and Rebates*

One commenter supported the requirements in proposed Rule 13n–4(c)(1)(i) because ''they should encourage market participants to use SDRs' services.'' [452] The commenter believed that an SDR should charge different fee structures only if it relates to the SDR's ''differing costs of providing access or service to particular categories'' and that ''[a]nything else would be discrimination.'' [453] The commenter suggested that ''any preferential pricing such as volume discounts or reductions should be generally viewed as discriminatory'' and believed that ''[s]uch volume discounts or reductions tend to discriminate in favour of the large players.'' [454]

Two commenters believed that SDRs should be permitted to continue using the current ''dealer pays'' or ''sell-side pays'' model,[455] or at least to continue using that model if it is acceptable by the SDRs' market participants.[456] One of the commenters expressed particular concern about the effect that the Commission's proposed rule requiring nondiscriminatory pricing would have on the current ''dealer pays'' or ''sell-side pays'' model.[457] The commenter suggested that alternatively, the Commission's proposed rule could be amended to permit: (a) Different fee structures for different classes of participants (*e.g.,* sell-side and buy-side) to reflect the different cost of their usage of the SDR, or (b) payment of fees by only the reporting party.[458] The commenter believed that this approach would be consistent with the Commission's proposed ''not unreasonably discriminatory'' requirement because ''SDRs would be prohibited from discriminating within each class, while participants in different classes may be charged different fees.'' [459] The commenter

[440] *See* Exchange Act Section 13(n)(7)(C), 15 U.S.C. 78m(n)(7)(C).

[441] *See* Exchange Act Section 13(n)(7)(A), 15 U.S.C. 78m(n)(7)(A).

[442] Proposed Rule 13n–4(c)(1).

[443] Proposed Rule 13n–4(c)(1)(i).

[444] Proposed Rule 13n–4(c)(1)(ii).

[445] Proposed Rule 13n–4(c)(1)(iii).

[446] Proposed Rule 13n–4(c)(1)(iv).

[447] *See* Barnard, *supra* note 19; Better Markets 1, *supra* note 19; DTCC 2, *supra* note 19; MarkitServ, *supra* note 19; Tradeweb SBSR, *supra* note 27; Benchmark*, *supra* note 20; CDEU*, *supra* note 20; McLeish*, *supra* note 20; *see also* Better Markets 2, *supra* note 19; DTCC 5, *supra* note 19; DTCC CB, *supra* note 26.

[448] Three comments submitted prior to the Proposing Release agreed with the Commission on the importance of market transparency. *See* McLeish*, *supra* note 20; CDEU*, *supra* note 20 (supporting ''efforts by Congress to improve transparency, accountability and stability''); Benchmark*, *supra* note 20 (''fully support[ing] regulatory efforts to increase transparency in the OTC markets''); *see also* SIFMA*, *supra* note 20 (indicating that increased price transparency will improve the application of models used in the computation of capital requirements for purposes of complying with Exchange Act Rule 15c3–1). For example, one commenter stressed the importance of requiring market transparency for all market participants without any exceptions. McLeish*, *supra* note 20 (believing that ''there should be transparency for everyone'' and there should be ''no exceptions''). Another commenter believed that market transparency will improve liquidity in the SBS market. Benchmark*, *supra* note 20. To the extent that these commenters are broadly supporting transparency, the Commission believes that Rule 13n–4(c)(1) reflects this broad support.

[449] DTCC 5, *supra* note 19 (stating that ''the Commission correctly emphasizes that market participants offering potentially competing services should not be subject to anti-competitive practices, including product tying, overly restrictive terms of use, and anti-competitive price discrimination''). With respect to this comment, the Commission notes that the rules adopted in this release apply to only SDRs. To the extent that the Commission adopts rules prohibiting other market participants from engaging in anti-competitive practices, those rules will be addressed in separate releases.

[450] DTCC CB, *supra* note 26.

[451] DTCC CB, *supra* note 26; *see also* Proposing Release, 75 FR at 77321, *supra* note 2; CPSS–IOSCO Trade Repository Report, *supra* note 48.

[452] Barnard, *supra* note 19.

[453] Barnard, *supra* note 19.

[454] Barnard, *supra* note 19.

[455] DTCC 2, *supra* note 19 (noting the success of a model that charges dealers for services on an at-cost basis and that operates at no cost to the buy-side and end-users); MarkitSERV, *supra* note 19.

[456] MarkitSERV, *supra* note 19.

[457] MarkitSERV, *supra* note 19.

[458] MarkitSERV, *supra* note 19.

[459] MarkitSERV, *supra* note 19.

further believed that ''any other literal interpretation of 'non-discriminatory access' would have the unintended consequence of significantly increasing the costs for buy-side participants and, by doing so, generally discouraging their use of [SDRs].'' [460]

The same two commenters further believed that an SDR's fees for certain services should reflect the SDR's costs of providing related services.[461] One of these commenters believed, for example, that ''if a reporting party uses a third party service provider for trade submission, which fulfils the SDR's requirement to confirm the trade with both parties, this report would potentially be charged at a lower cost than a direct report to the SDR, requiring the SDR itself to confirm with the other party.'' [462] The commenter further noted that since small ''non-reporting counterparties will legitimately want to interact with SDRs, if only to verify what has been reported, SDRs should have the flexibility to facilitate such access by not charging, or charging only nominal amounts, for such interaction.'' [463] In addition, the commenter suggested that the Commission clarify its rules to ''prevent predatory or coercive pricing by providers engaged in any two or more trading, clearing or repository services'' and to prohibit cross-subsidies between services.[464] The other commenter suggested that SDRs should be permitted to charge different (*i.e.,* higher) fees in order to recoup costs associated with ''processing any highly non-standard, albeit eligible [(*i.e.,* within the asset class for which the SDR accepts data)], SBS transactions.'' [465]

Another commenter believed that the Commission's proposed rule, which refers to a standard of ''fair and reasonable'' and ''not unreasonably discriminatory'' and which requires consistent application across all similarly-situated users, is vague and suggested that the Commission ''establish fees, rates, or even formulas for determining rates.'' [466] The commenter suggested that in order to prevent SDRs from taking ''unfair advantage of the mandated use of their services,'' particularly ''in SBS markets where there is no effective competition, SDRs [should] be required to justify the reasonableness of price levels charged to both suppliers of data and recipients of data.'' [467]

One commenter to proposed Regulation SBSR suggested that SDRs should not be permitted to charge fees to third parties acting on behalf of counterparties for accepting SBS transaction information because such fees would increase the cost of using an SB SEF or other third party.[468] The commenter believed that SDRs would likely charge the same third parties for subsequent use of SBS data maintained by the SDRs.[469] In submitting comments to the Commission's rulemaking regarding SB SEFs, the same commenter suggested that the Commission require SDRs to (i) make available any data they collect and may properly use for commercial purposes to all market participants, including SB SEFs and clearing agencies, on reasonable terms and pricing and on a non-discriminatory basis, and (ii) share, on commercially reasonable terms, revenue that SDRs generate from redistributing such data with parties providing the data to the SDRs (*e.g.,* SB SEFs).[470] The commenter believed that without these requirements, the Commission would be effectively taking away from market participants, including SB SEFs and clearing agencies, a potentially significant and valuable component of their potential market data revenue streams.[471]

(2) Rule 13n–4(c)(1)(ii): Offering Services Separately

Three commenters supported the Commission's proposed rule requiring SDRs to permit market participants to access services offered by SDRs separately.[472] Specifically, one commenter agreed that SDRs' fees should be transparent.[473] As a corollary to this, one of the commenters suggested that third party service providers should be barred from bundling their services with an SDR's services.[474] Additionally, the same commenter believed that ''[a]ny provider offering trading[,] clearing or repository services for one asset class should not be permitted [to] bundl[e] or t[ie] when providing services for other asset classes.'' [475] The commenter suggested, however, that SDRs should be permitted to offer two or more service options, including one that fulfills the minimum regulatory reporting requirements and a suite of other services to complement the mandatory reporting function.[476]

One commenter believed that SDRs should be able to offer ancillary services, whether bundled or not.[477] The commenter, however, did not support the bundling of ancillary services with mandatory or regulatory services.[478]

Another commenter stated that the proposed rule went ''a long way to address a third party's (such as a service provider's) non-discriminatory access rights to granular [SDR] Information,'' and that such access is important so as to ''not stifle innovation and the competition in the provision of post-trade processing services'' and to ''uphold a fair, secure and efficient post-trade market.'' [479] In the context of discussing proposed Rule 13n–4(c)(1)(ii), the commenter suggested that, to further these goals, the Commission should clarify that all ''users'' of an SDR's services, including unaffiliated third party service providers, and not only market participants that submit trade data, should be permitted to access each of the SDR's services separately.[480]

[460] MarkitSERV, *supra* note 19.

[461] DTCC 2, *supra* note 19; MarkitSERV, *supra* note 19; *see also* DTCC CB, *supra* note 26 (not supporting anti-competitive price discrimination).

[462] DTCC 2, *supra* note 19.

[463] DTCC 2, *supra* note 19.

[464] DTCC 4, *supra* note 19 (''While market participants should be able to enjoy the economies of shared platforms . . . the allocations of platform operating costs between services cannot be arbitrary.'').

[465] MarkitSERV, *supra* note 19.

[466] Better Markets 1, *supra* note 19.

[467] Better Markets 1, *supra* note 19.

[468] Tradeweb SBSR, *supra* note 27.

[469] Tradeweb SBSR, *supra* note 27.

[470] Tradeweb SB SEF, *supra* note 29.

[471] Tradeweb SB SEF, *supra* note 29.

[472] DTCC 2, *supra* note 19; MarkitSERV, *supra* note 19 (''[M]arket participants' decisions to use or not use a given [SDR] or its affiliates' [a]ncillary [s]ervices should rest entirely with the market participant[s]. These decisions should not be tied to any other service provided by a regulated entity or its affiliate . . . or [an SDR] and any related [third party service provider].''); TriOptima, *supra* note 19 (''[I]t is important that market participants have the ability to access specific services offered by the [SDR] separately.''); *see also* DTCC 3, *supra* note 19 (noting that the Commission's proposed rule requiring ''each SDR to permit market participants to access specific services offered by the SDR separately'' is consistent with the CPSS–IOSCO Trade Repository Report); DTCC CB, *supra* note 26 (not supporting anti-competitive practices such as product tying).

[473] MarkitSERV, *supra* note 19.

[474] DTCC 2, *supra* note 19 (''Allowing bundling of obligations undertaken by third party service providers with an SDR will detract from the SDR's utility function and jeopardize the value of SDRs to regulators and the market.''); *see also* DTCC 4, *supra* note 19 (''[N]o provider of trading or clearing services should be permitted to simply declare itself the SDR for trades it facilitates. . . . [A]side from being anti-competitive, this type of vertical bundling would also (a) reverse the principal-agent relationship . . . and (b) add a layer of unnecessary risk to the control processes that market participants may determine are needed.'').

[475] DTCC 4, *supra* note 19.

[476] DTCC 2, *supra* note 19.

[477] Barnard, *supra* note 19.

[478] Barnard, *supra* note 19.

[479] TriOptima, *supra* note 19.

[480] TriOptima, *supra* note 19 (''[W]e would encourage the SEC to clarify that [proposed Rule 13n–4(c)(1)(ii)] should apply to all users of an [SDR], including third party service providers with Written Client Disclosure Consents seeking to access the [SDR] Information, and not just market

Continued

(3) Rule 13n–4(c)(1)(iii): Fair, Open, and Not Unreasonably Discriminatory Access

Four commenters generally supported the Commission's proposed rule regarding fair, open, and not unreasonably discriminatory access to services offered and data maintained by SDRs, but a few of these commenters also recommended additional requirements.[481] One of these commenters noted that ''all counterparties to trades reported to an SDR should, as a matter of principle, have access to all data relating to trades to which they are [counterparties]'' and that ''[t]his access should be made available to smaller, lower volume market participants, as necessary, through the reduction or waiver of certain fees.'' [482] The same commenter also noted that ''clearinghouses and [SB SEFs] should have the ability to report trades to SDRs . . . to satisfy their customers' reporting preferences.'' [483] In addition, the commenter supported ''open access to data by other service providers (based on the consent of the parties for that provider to receive the data) [because it] is critical to preserve the trading parties' control over their own data.'' [484]

Another commenter who supported the rule indicated that SDRs should be able to condition access by specifying the methods and channels that must be used in order to connect to the SDR and setting certain minimum standards.[485] This commenter also recommended that SDRs should be permitted to provide connectivity to third party service providers, without requiring any specific services from them as a condition to their gaining access to the SBS data.[486]

One commenter urged the Commission to ''clarify in the final rule that [SDRs] shall provide third party service providers, who have been authorized to access information by the counterparties to the relevant trades under Written Client Disclosure Consents, with access to [SDR] Information.'' [487] The commenter further stressed the importance of providing ''full and unrestricted'' access to SBS data to third party service providers, particularly those acting on behalf of SBS counterparties.[488] The commenter objected to the lack of an ''obligation on the [SDR] to provide full and unrestricted access to [granular trade data] to a third party service provider'' and suggested that ''this obligation should apply where the counterparties to the relevant trades have provided [written consents and authorizations] to the [SDR] to disclose granular trading data to the third party service provider.'' [489] The commenter noted that, when such third party service provider is acting pursuant to a written consent by an SBS counterparty, it is exercising that counterparty's right to access its own trade information.[490] The commenter ''stress[ed] the importance that data access rights and requirements imposed on a third party (service provider) seeking to access [SDR] Information [ ] are applied equally to the [SDR] itself when providing ancillary services and to affiliated service providers within the same group as the [SDR].'' [491] In this regard, the commenter believed that ''the [SDR] should not have discretion to offer advantages in respect of its own ancillary services or services offered by affiliated service providers vis-à-vis other third party service providers.'' [492]

One commenter recommended that the Commission require that each SDR establish and maintain effective interoperability and interconnectivity with other SDRs, market infrastructures, and venues from which data can be submitted to the SDR.[493] Additionally, the commenter suggested that market participants should have ''equal and fair access to data on SBS transactions,'' [494] and that the Commission's rules ''establish stronger and more detailed standards against discriminatory access, and they should also establish regulatory oversight of access denials.'' [495] The commenter further suggested that the Commission's proposed rules set forth the ''clearly stated objective criteria'' and permit denial of access only on risk-based grounds, *i.e.,* risks related to the security or functioning of the market.[496]

(4) Rule 13n–4(c)(1)(iv): Prohibited or Limited Access

One commenter recommended that the Commission require an SDR ''to promptly file a notice with the Commission if the SDR . . . prohibits or limits any person's access to services offered or data maintained by the SDR.'' [497]

iii. Final Rule

After considering the comments, the Commission is adopting Rule 13n–4(c)(1) as proposed, with one minor modification.[498] Rule 13n–4(c)(1), which tracks the statutory language,[499] provides that ''[u]nless necessary or appropriate to achieve the purposes of the [Exchange] Act and the rules and regulations thereunder, the security-based swap data repository shall not

participants who submit trade data. *I.e.,* users of an [SDR] should have the right to access services provided by an [SDR] separately.'').

[481] DTCC 2, *supra* note 19 (SDRs ''should demonstrate strict impartiality in making data available to, or receiving data from, other providers, including affiliates of SDRs.''); MarkitSERV, *supra* note 19; Better Markets 1, *supra* note 19; TriOptima, *supra* note 19; *see also* Better Markets 2, *supra* note 19; DTCC CB, *supra* note 26 (not supporting anti-competitive practices such as contracts with non-compete and/or exclusivity clauses and overly restrictive terms of use).

[482] DTCC 2, *supra* note 19; *see also* DTCC 3, *supra* note 19 (recommending that SDRs ''be able to accept trades in any manner consistent with the regulations, from any market participant'' and ''have appropriate communications links, to the extent feasible, with all parties to its transactions''); DTCC SBSR, *supra* note 27 (stating that SDRs ''will need to support an appropriate set of connectivity methods; the Commission should not, however, require SDRs to support all connectivity methods, as the costs to do so would be prohibitive''); *see also* TriOptima, *supra* note 19 (''[I]t is clear that an [SDR] should provide [s]wap [p]articipants with access to their own trade data.'').

[483] DTCC 3, *supra* note 19.

[484] DTCC 3, *supra* note 19; *see also* DTCC 2, *supra* note 19 (believing that open access to data by other service providers ''is an important principle for allowing development of automation and efficient operational processing in the market, while preserving the parties' control over confidential information'').

[485] MarkitSERV, *supra* note 19.

[486] MarkitSERV, *supra* note 19.

[487] TriOptima, *supra* note 19.

[488] TriOptima, *supra* note 19 (emphasizing ''the importance of enhanced non-discriminatory access rights to [SDR] Information for third party service providers in order to maintain competition and innovation within the post-trade area, especially where such third party service providers have been authorized to access [SDR] Information under Written Client Disclosure Consents'' and stating that ''[a]n explicit obligation for an [SDR] to provide such full and unrestricted access to [SDR] Information to a third party (service provider) is important in order to uphold a fair, secure and efficient post-trade market; an [SDR] should not restrict access to [SDR] Information on other grounds than integrity risks to the [SDR] Information'').

[489] TriOptima, *supra* note 19.

[490] TriOptima, *supra* note 19 (''We note that the third party service provider, for whom a Written Client Disclosure Consents is given, is actually exercising the Swap Participant's right to access their own trade information which is held by the [SDR]. An [SDR] should be required to treat a third party service provider with a disclosure consent as acting as an 'agent' for the owner of the trade information and provide the third party service provider with the same type of access which the owner of such data is entitled to, subject to any restrictions set out in the disclosure consent.'').

[491] TriOptima, *supra* note 19.

[492] TriOptima, *supra* note 19.

[493] Better Markets 1, *supra* note 19; *see also* DTCC 4, *supra* note 19 (suggesting that the Commission clarify its rules to prevent unfair or coercive linking or blocking of links between trading, clearing, or repository services).

[494] Better Markets 2, *supra* note 19.

[495] Better Markets 1, *supra* note 19.

[496] Better Markets 1, *supra* note 19.

[497] Better Markets 1, *supra* note 19.

[498] *See infra* note 500 of the release discussing a modification to proposed Rule 13n–4(c)(1).

[499] *See* Exchange Act Section 13(n)(7)(A), 15 U.S.C. 78m(n)(7)(A).

adopt any policies or procedures[500] or take any action that results in an unreasonable restraint of trade or impose any material anticompetitive burden on the trading, clearing, or reporting of transactions.'' In implementing the first core principle, this rule is intended to protect investors and to maintain a fair, orderly, and efficient SBS market.[501] The Commission believes that this rule will protect investors by, for example, fostering service transparency and promoting competition in the SBS market.[502] Generally speaking, the Commission also believes that ''[m]arket infrastructures and service providers that may or may not offer potentially competing services should not be subject to anti-competitive practices such as product tying, contracts with non-compete and/or exclusivity clauses, overly restrictive terms of use and anti-competitive price discrimination.'' [503] As discussed in the Proposing Release and more fully below, when administering this rule, the Commission generally expects to apply the principles and procedures that it has developed in other areas in which it monitors analogous services, such as clearing agencies.[504] To comply with the first core principle, an SDR is required to comply with four specific requirements.

(1) Rule 13n–4(c)(1)(i): Fair, Reasonable, and Not Unreasonably Discriminatory Dues, Fees, Other Charges, Discounts, and Rebates

Rule 13n–4(c)(1)(i) requires each SDR to ensure that any dues, fees, or other charges that it imposes, and any discounts or rebates that it offers, are fair and reasonable and not unreasonably discriminatory.[505] The rule also requires such dues, fees, other charges, discounts, or rebates to be applied consistently across all similarly-situated users of the SDR's services, including, but not limited to, market participants, market infrastructures (including central counterparties), venues from which data can be submitted to the SDR (including exchanges, SB SEFs, electronic trading venues, and matching and confirmation platforms), and third party service providers.

As discussed in the Proposing Release, the terms ''fair'' and ''reasonable'' often need standards to guide their application in practice.[506] One factor that the Commission has taken into consideration to evaluate the fairness and reasonableness of fees, particularly those of a monopolistic provider of a service, is the cost incurred to provide the service.[507] Consistent with commenters' views,[508] the Commission believes that if an SDR's fees for certain services reflect the SDR's costs of providing those services, then the fees would generally be considered fair and reasonable.

Based on the Commission's experience with other registrants, the Commission will take a flexible approach to evaluate the fairness and reasonableness of an SDR's fees and charges on a case-by-case basis. The Commission recognizes that there may be instances in which an SDR could charge different users different prices for the same or similar services. Such differences, however, cannot be unreasonably discriminatory.

The Commission continues to believe that an SDR should make reasonable accommodations, including consideration of any cost burdens, on a non-reporting counterparty to an SBS in connection with the SDR following up on the accuracy of the SBS transaction data.[509] Thus, the Commission agrees with one commenter's view that an SDR may facilitate a non-reporting counterparty's ability to verify the accuracy of a reported SBS transaction by not charging the counterparty or charging the counterparty only a nominal amount.[510]

With respect to commenters' views on the current ''dealer pays'' or ''sell-side pays'' model,[511] the Commission does not believe that such a model is unreasonably discriminatory per se. As such, the Commission believes that amending proposed Rule 13n–4(c)(1)(i) to explicitly permit different fee structures, as suggested by one commenter,[512] is not necessary. Furthermore, Rule 13n–4(c)(1)(i) is not intended to prohibit an SDR from utilizing any one particular model, including a ''dealer pays'' or ''sell-side pays'' model, a model with different fee structures for different classes of participants, or a model where only the reporting party is required to pay an SDR's fees, as long as there is a fair and reasonable basis for the fee structure and it is not unreasonably discriminatory. If, however, an SDR imposes dues, fees, or other charges to create intentionally a barrier to access the SDR without a legitimate basis, then those dues, fees, or charges may be considered unfair or unreasonable.

The Commission disagrees with three comments received. The first commenter suggested that the Commission establish fees or rates, or dictate formulas by which fees or rates are determined.[513] The Commission believes that in light of the various SDR business models and fee structures that may emerge, it is better to provide SDRs with the flexibility to establish their own fees or rates, provided that they are fair, reasonable, and not unreasonably discriminatory. The Commission is providing SDRs with such flexibility to promote competition among SDRs, thereby keeping the cost of SDRs' services to a minimum.

The second commenter believed that an SDR should charge different fee structures only if it relates to the SDR's ''differing costs of providing access or service to particular categories'' and that

[500] The Commission is making a typographical modification to proposed Rule 13n–4(c)(1), which refers to ''any policies and procedures.'' As adopted, the rule refers to ''any policies or procedures.''

[501] *See* DTCC 5, *supra* note 19 (supporting ''the Commission's stated goals of protecting market participants and maintaining a fair, orderly, and efficient [SBS] market through the promotion of competition'').

[502] *See* DTCC 5, *supra* note 19 (urging ''the Commission to adopt rules that preserve a competitive marketplace and forbid [ ] anti-competitive practices by all [SBS] market participants''); *see also* DTCC CB, *supra* note 26 (stating that ''[i]n a global [SBS] market, the anti-competitive practices of even a single market participant have potential ramifications for the entire marketplace'').

[503] Proposing Release, 75 FR at 77321, *supra* note 2; *accord* DTCC CB, *supra* note 26 (citing to the CPSS–IOSCO Trade Repository Report's recommendation that market infrastructures and service providers should not be subject to anticompetitive practices).

[504] Proposing Release, 75 FR at 77320, *supra* note 2.

[505] The Exchange Act applies a similar standard for other registrants. *See, e.g.,* Exchange Act Section 6(b)(4), 15 U.S.C. 78f(b)(4) (''The rules of the exchange [shall] provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.''); Exchange Act Section 17A(b)(3)(D), 15 U.S.C. 78q–1(b)(3)(D) (''The rules of the clearing agency [shall] provide for the equitable allocation of reasonable dues, fees and other charges among its participants.''); *see also* Exchange Act Sections 11A(c)(1)(C) and (D), 15 U.S.C. 78k–1(c)(1)(C) and (D) (providing that the Commission may prescribe rules to assure that all SIPs may, ''for purposes of distribution and publication, obtain on fair and reasonable terms such information'' and to assure that ''all other persons may obtain on terms which are not unreasonably discriminatory'' the transaction information published or distributed by SIPs).

[506] Proposing Release, 75 FR at 77320, *supra* note 2.

[507] *See* Regulation of Market Information Fees and Revenues, Exchange Act Release No. 42208 (Dec. 9, 1999), 64 FR 70613, 70619 (Dec. 17, 1999).

[508] *See* DTCC 2, *supra* note 19; MarkitSERV, *supra* note 19 (both believing that an SDR's fees for services should be allowable if such fees reflect the SDR's costs of providing such services).

[509] *See* Proposing Release, 75 FR at 77320, *supra* note 2.

[510] *See* DTCC 2, *supra* note 19.

[511] *See* DTCC 2, *supra* note 19; MarkitSERV, *supra* note 19.

[512] *See* MarkitSERV, *supra* note 19.

[513] Better Markets 1, *supra* note 19.

''any preferential pricing such as volume discounts or reductions should be generally viewed as discriminatory.''[514] Although an SDR's costs in providing its services or access to SBS data maintained by the SDR may be a factor in evaluating the SDR's fee structure, the Commission believes that it is not necessarily the only factor. There may be instances in which an SDR's fees or discounts (including volume discounts) are fair, reasonable, and not unreasonably discriminatory, even if the fees or discounts are not related to the SDR's costs in providing such services or access. In all instances, the SDR is responsible for demonstrating that its fees or discounts meet this regulatory standard.[515] As stated above, the Commission expects to evaluate the fairness and reasonableness of an SDR's fees and charges on a case-by-case basis.

The third commenter suggested that the Commission require SDRs to make available any data they collect and may properly use for commercial purposes to all market participants on reasonable terms and pricing and on a non–discriminatory basis.[516] Although the Commission agrees that fees imposed by SDRs should be ''on reasonable terms and pricing and on a non–discriminatory basis,'' the Commission notes that an SDR is not required to make SBS data available to all market participants, aside from SBS data that is publicly disseminated pursuant to Regulation SBSR.[517] As discussed below, there may be limited instances in which an SDR denies access to a market participant.[518]

With respect to cross-subsidies, the Commission believes that it is not necessary, as one commenter suggested,[519] to prohibit cross-subsidies between services provided by an SDR, but the Commission recognizes that there may be instances in which such cross-subsidies would violate Rule 13n–4(c)(1)(i). For example, cross-subsidies between an SDR's services that result in fees that are arbitrary or have no relationship to the costs of providing the service on a discrete basis may not be consistent with Rule 13n–4(c)(1)(i). This is because an arbitrary fee structure could mean that fees are not being incurred consistently by similarly-situated users of the SDR's services and because the Commission believes that, in certain instances, fee structures without some relationship to the costs of the SDR may not be fair and reasonable due to the differential impact such charges would have on market participants that may choose to use some, but not all, of the SDR's or its affiliate's services.[520] Another commenter suggested that the Commission prohibit SDRs from charging fees to third parties acting on behalf of counterparties for accepting SBS transaction information.[521] The commenter also suggested that the Commission require SDRs to share their revenue from redistributing data with parties providing the data to the SDRs.[522] Consistent with the Commission's approach with its other registrants, including exchanges and clearing agencies, the Commission does not believe that it is appropriate to dictate who an SDR can and cannot charge or with whom an SDR must share its revenue.

One commenter suggested that the Commission extend the applicability of its rule to providers engaged in two or more of trading, clearing, or repository services to prevent predatory or coercive pricing by the providers.[523] As with its other rules governing SDRs, the Commission's rule implementing the first core principle generally applies only to SDR services. To the extent that the Commission decides that predatory or coercive pricing with respect to non-SDR services needs to be addressed, the Commission will take appropriate action.

(2) Rule 13n–4(c)(1)(ii): Offering Services Separately

Rule 13n–4(c)(1)(ii) requires each SDR to permit market participants to access specific services offered by the SDR separately. As one commenter suggested,[524] an SDR may bundle its services, including any ancillary services, regardless of the asset class at issue, but this rule requires the SDR to also provide market participants with the option of using its services separately.[525] The Commission believes that it is appropriate to adopt this rule as proposed to promote competition.[526]

If an SDR or its affiliate[527] provides an ancillary service, such as a matching and confirmation service, then the SDR is prohibited by Rule 13n–4(c)(1)(ii) from requiring a market participant to use and pay for that service as a condition of using the SDR's data collection and maintenance services.[528] In such an instance, the SDR is also prohibited from requiring a market participant that uses the SDR's or affiliate's ancillary service to use the SDR's data collection and maintenance services. The Commission also believes that if an SDR enters into an oral or written agreement or arrangement with an affiliate or third party service provider that reflects a business plan in which the affiliate or third party service provider will require its customers to use the core services of that SDR, then the SDR would not be in compliance with Rule 13n–4(c)(1)(ii).[529] In evaluating the fairness and reasonableness of fees that an SDR charges for bundled and unbundled services, the Commission will take into consideration, among other things, the SDR's cost of making those services available on a bundled or unbundled basis, as the case may be, and a market participant's proportional use of the SDR's services.

With regard to one commenter's suggestion that all ''users'' of an SDR's services, including unaffiliated third party service providers, should be permitted to access the SDR's non-SDR services separately,[530] the Commission agrees, as set forth in Rule 13n–4(c)(1)(ii), that market participants that use an SDR's services should have access to specific services offered by the SDR, including any ancillary services, separately. The Commission believes that SDRs should consider giving third

[514] Barnard, *supra* note 19.

[515] *See* Item 26 of Form SDR.

[516] Tradeweb SB SEF, *supra* note 29.

[517] See Regulation SBSR Adopting Release, *supra* note 13 (Rule 902 requiring SDRs to publicly disseminate certain SBS information).

[518] *See* Section VI.D.3.a.iii(3) of this release discussing an SDR's obligation to provide fair, open, and not unreasonably discriminatory access to others.

[519] *See* DTCC 4, *supra* note 19.

[520] *Accord* Exchange Act Section 17A(b)(3)(D), 15 U.S.C. 78q–1(b)(3)(D) (requiring the rules of a clearing agency to provide for the equitable allocation of reasonable dues, fees, and other charges among its participants).

[521] Tradeweb SBSR, *supra* note 27.

[522] Tradeweb SB SEF, *supra* note 29.

[523] DTCC 4, *supra* note 19.

[524] *See* DTCC 2, *supra* note 19 (suggesting that SDRs should be permitted to offer two or more service options, including one that fulfills the minimum regulatory reporting requirements and other services to complement the mandatory reporting function). *But see* DTCC 4, *supra* note 19 (suggesting that bundling should not be permitted across asset classes).

[525] *See* Barnard, *supra* note 19 (believing that SDRs should be able to offer ancillary services, whether bundled or not, but not supporting the bundling of ancillary services with mandatory or regulatory services).

[526] *See* Exchange Act Section 13(n)(7)(A), 15 U.S.C. 78m(n)(7)(A) (regarding the first SDR core principle). *See also* Section VIII discussing economic analysis.

[527] *See supra* note 247 (defining ''affiliate'').

[528] *See* Proposing Release, 75 FR at 77320–77321, *supra* note 2.

[529] The Commission notes that under Exchange Act Section 20(b), 15 U.S.C. 78t(b), ''[i]t shall be unlawful for any person, directly or indirectly, to do any act or thing which it would be unlawful for such person to do under the provisions of [the Exchange Act] or any rule or regulation thereunder through or by means of any other person.''

[530] *See* TriOptima, *supra* note 19.

party service providers acting as agents for such market participants the same rights as the market participants to access these services separately. However, Rule 13n–4(c)(1)(ii) does not require an SDR to afford the agent access to the SDR's unbundled services outside of its agency capacity.

(3) Rule 13n–4(c)(1)(iii): Fair, Open, and Not Unreasonably Discriminatory Access

Rule 13n–4(c)(1)(iii) requires each SDR to establish, monitor on an ongoing basis, and enforce clearly stated objective criteria that would permit fair, open, and not unreasonably discriminatory access to services offered and data maintained by the SDR as well as fair, open, and not unreasonably discriminatory participation by market participants, market infrastructures, venues from which data can be submitted to the SDR, and third party service providers that seek to connect to or link with the SDR. As with Rule 13n–4(c)(1)(i), the Commission will evaluate whether such access or participation is ''fair, open, and not unreasonably discriminatory'' on a case-by-case basis. Although this rule does not explicitly require, as one commenter suggested,[531] SDRs to establish and maintain effective interoperability and interconnectivity with other SDRs,[532] market infrastructures, and venues from which data can be submitted, the rule is intended to encourage such interoperability and interconnectivity by requiring SDRs to establish criteria that would permit fair, open, and not unreasonably discriminatory participation by others, including those that seek to connect to or link with the SDR.

The Commission agrees with most of the comments on this rule. One commenter suggested that market participants should have ''equal and fair access to data on SBS transactions.'' [533] The Commission agrees with the comment to the extent that the commenter equated ''equal and fair access'' with the ''fair, reasonable and not unreasonably discriminatory'' standard in the rule. However, the Commission notes that all market participants are not required to be treated the same way in all instances. For example, if a market participant fails to pay the SDR's reasonable fees, then it may be ''fair, reasonable and not unreasonably discriminatory'' for an SDR to deny access to the market participant.

The Commission agrees that an SDR should be able to condition access to SBS data that it maintains by specifying the methods and channels that must be used to connect to the SDR and by setting certain minimum standards,[534] provided that such conditions are fair, open, and not unreasonably discriminatory. The Commission also agrees with one commenter's view that an SDR should, to the extent feasible, provide each counterparty to an SBS transaction that is reported to an SDR with reasonable access to the data relating to that transaction.[535] If an SDR provides such access to smaller, lower volume market participants at reduced or waived fees, as one commenter suggested,[536] then the discount must be fair and reasonable and not unreasonably discriminatory.[537] The Commission further agrees with commenters' views that an SDR should provide connectivity to others, including third party service providers, clearinghouses, and SB SEFs,[538] and, as one commenter suggested,[539] if the SDR delegates the function of providing connectivity to another entity, that entity cannot require anyone to use the entity's services as a condition to obtaining connectivity to the SDR. The Commission also agrees with another commenter that an SDR generally should impose similar data access rights and requirements on itself (and its affiliates) as those imposed on a third party acting as an agent on behalf of an SBS counterparty.[540]

As stated in the Proposing Release, the Commission is concerned, among other things, that an SDR, controlled or influenced by a market participant, may limit the level of access to the services offered or data maintained by the SDR as a means to impede competition from other market participants or third party service providers.[541] The Commission believes that Rule 13n–4(c)(1)(iii) addresses this concern.

One commenter recommended that the Commission permit SDRs to deny access only on risk-based grounds.[542] Although the Commission concurs that an SDR should always consider the risks that an actual or prospective market participant may pose to the SDR, the Commission does not believe that it is appropriate to explicitly limit an SDR's ability to deny access because there may be reasonable grounds for denial that may not be risk-related—*e.g.,* a counterparty to an SBS fails to pay the SDR's reasonable fees or a third party service provider breaches its contractual obligation to maintain the privacy of data received by the SDR. The same commenter suggested that the Commission should set forth ''clearly stated objective criteria'' with respect to fair access and denial of access in the final rule,[543] but the Commission does not believe that it is necessary to do so. Under Rule 13n–4(c)(1)(iii), SDRs must establish appropriate criteria to govern access to their services and data as well as participation by those seeking to connect to or link with the SDR.

The Commission does not believe that Rule 13n–1(c)(1)(iii) should require an SDR to provide ''full and unrestricted'' access to third party service providers acting pursuant to written authorizations from an SBS counterparty, as suggested by one commenter.[544] While the Commission agrees with the commenter that such a third party service provider is exercising the SBS counterparty's right to access data with respect to that counterparty's trades, the Commission believes that requiring an SDR to provide ''full and unrestricted'' access (beyond that provided to the SBS counterparty acting directly) would appear to be inconsistent with the Exchange Act. Even if the service provider has received written authorization from one SBS counterparty, the SDR nonetheless would be required to protect the privacy and confidentiality of the other

[531] *See* Better Markets 1, *supra* note 19.

[532] The Commission is not explicitly requiring SDRs to maintain effective interoperability and interconnectivity with other SDRs at this time, partly because such a requirement could hinder the developing infrastructure for SBS transactions.

[533] *See* Better Markets 2, *supra* note 19.

[534] *See* MarkitSERV, *supra* note 19. Related to this comment, another commenter suggested that market infrastructures such as clearing agencies and SB SEFs should generally have the ability to report SBS transactions to SDRs to satisfy their customers' reporting preferences. *See* DTCC 3, *supra* note 19. As stated above, the Commission intends to adopt rules relating to clearing agencies and SB SEFs in separate releases.

[535] *See* DTCC 2, *supra* note 19; *see also* DTCC 3, *supra* note 19 (noting that SDRs should be able to accept trades in any manner consistent with the regulations, from any market participant and have appropriate communication links, to the extent feasible, with all counterparties to SBS transactions reported to the SDR); DTCC SBSR, *supra* note 27 (stating that SDRs ''will need to support an appropriate set of connectivity methods'').

[536] *See* DTCC 2, *supra* note 19 (noting that in providing access to SBS data, SDRs should reduce or waive certain fees, as necessary, to smaller, lower volume market participants).

[537] *See* Rule 13n–4(c)(1)(i).

[538] *See, e.g.,* DTCC 3, *supra* note 19 (supporting open access to SBS data maintained by an SDR by other service providers); Better Markets 1, *supra* note 19.

[539] *See* MarkitSERV, *supra* note 19.

[540] *See* TriOptima, *supra* note 19 (stating that non–discriminatory access is important so as to ''not stifle innovation and the competition in the provision of post-trade processing services'').

[541] Proposing Release, 75 FR at 77321, *supra* note 2.

[542] Better Markets 1, *supra* note 19.

[543] Better Markets 1, *supra* note 19.

[544] *See* TriOptima, *supra* note 19.

counterparty;[545] thus, the SDR need only provide the third party service provider with access to such data that the SBS counterparty that has authorized disclosure would be entitled to access. As noted by the commenter, such a third party service provider is acting as the SBS counterparty's agent and should be entitled to the same level of access as provided to the SBS counterparty.[546] The Commission agrees with the commenter regarding the importance of upholding ''a fair, secure and efficient post-trade market''[547] and believes that the rule as adopted achieves this goal.

(4) Rule 13n–4(c)(1)(iv): Prohibited or Limited Access

Rule 13n–4(c)(1)(iv) requires each SDR to establish, maintain, and enforce written policies and procedures reasonably designed to review any prohibition or limitation of any person with respect to access to services offered, directly or indirectly, or data maintained by the SDR and to grant such person access to such services or data if such person has been discriminated against unfairly.

As stated in the Proposing Release, the Commission believes that, for any such policies and procedures to be reasonable, at a minimum, those at an SDR involved in the decision–making process of prohibiting or limiting a person's access to the SDR's services or data cannot be involved in the review of whether the prohibition or limitation was appropriate.[548] Otherwise, the purpose of the review process would be undermined. Additionally, an SDR may wish to consider whether its internal review process should be done by the SDR's board[549] or an executive committee.

As discussed above, one commenter suggested that the Commission require an SDR to promptly file a notice with the Commission if the SDR prohibits or limits any person's access to services offered or data maintained by the SDR.[550] Rule 909 of Regulation SBSR, which the Commission is concurrently adopting in a separate release, requires each registered SDR to register as a SIP, and, as such, Exchange Act Section 11A(b)(5) governs denials of access to services by an SDR.[551] This section provides that ''[i]f any registered securities information processor prohibits or limits any person in respect of access to services offered, directly or indirectly, by such securities information processor, the registered securities information processor shall promptly file notice thereof with the Commission.''[552] Accordingly, an SDR must promptly notify the Commission if it prohibits or limits access to any of its services to any person. In addition, the SDR is required to notify the Commission of any prohibition or limitation with respect to services offered or data maintained by the SDR in its annual amendment to its Form SDR, which will also enable the Commission to evaluate whether the prohibition or limitation is appropriate.[553] Also, pursuant to Rule 13n–7, records of the decision to prohibit or limit access are required to be maintained by the SDR, and the SDR must promptly furnish such records to any representative of the Commission upon request.[554]

b. Second Core Principle: Governance Arrangements (Rule 13n–4(c)(2))

i. Proposed Rule

Proposed Rule 13n–4(c)(2) would incorporate and implement the second core principle[555] by requiring SDRs to establish governance arrangements that are transparent (i) to fulfill public interest requirements under the Exchange Act and the rules and regulations thereunder; (ii) to carry out functions consistent with the Exchange Act, the rules and regulations thereunder, and the purposes of the Exchange Act; and (iii) to support the objectives of the Federal Government, owners, and participants.[556] The proposed rule would impose four specific requirements. First, an SDR would be required to establish governance arrangements that are well defined and include a clear organizational structure with effective internal controls.[557] Second, an SDR's governance arrangements would be required to provide for fair representation of market participants.[558] Third, an SDR would be required to provide representatives of market participants, including end-users, with the opportunity to participate in the process for nominating directors and with the right to petition for alternative candidates.[559] Finally, an SDR would be required to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that the SDR's senior management and each member of the board or committee that has the authority to act on behalf of the board possess requisite skills and expertise to fulfill their responsibilities in the management and governance of the SDR, to have a clear understanding of their responsibilities, and to exercise sound judgment about the SDR's affairs.[560]

In the Proposing Release, the Commission solicited comments on whether to impose any additional requirements, including ownership or voting limitations on SDRs and persons associated with SDRs.[561]

ii. Comments on the Proposed Rule

Four commenters submitted comments relating to this proposed rule.[562] Comments on the proposal were mixed. As a general matter, one commenter stated that the role of the Commission is to ''insure that the governing structure [of SDRs] is fair to all market participants.''[563]

In suggesting that ''ownership and voting limitations be eliminated in their entirety,''[564] another commenter noted that such limitations would be an imprecise tool to achieve the Commission's policy goals regarding conflicts of interest.[565] The commenter stated that instead, ''[t]hese policy goals can best be met by structural governance requirements'' such as governance by market participants.[566] The commenter believed that ''[i]n the specific case of an SDR, governance by market participants is appropriate, given that most potential conflicts of interest are dealt with directly in the Proposed Rule and will be overseen directly by the regulator.''[567] The commenter further believed that because the ''SDR is not

[545] *See* Exchange Act Section 13(n)(5)(F), 15 U.S.C. 78m(n)(5)(F), and Rule 13n–9 (requiring SDRs to maintain the privacy of SBS transaction information).

[546] *See* TriOptima, *supra* note 19.

[547] *See* TriOptima, *supra* note 19.

[548] Proposing Release, 75 FR at 77321, *supra* note 2.

[549] The term ''board'' is defined as ''the board of directors of the security-based swap data repository or a body performing a function similar to the board of directors of the security-based swap data repository.'' *See* Rule 13n–4(a)(2); *see also* Rule 13n–11(b)(1).

[550] *See* Better Markets 1, *supra* note 19.

[551] *See* Regulation SBSR Adopting Release, *supra* note 13.

[552] 15 U.S.C. 78k–1(b)(5).

[553] *See* Item 33 of Form SDR.

[554] *See* Section VI.G of this release discussing Rule 13n–7.

[555] *See* Exchange Act Section 13(n)(7)(B), 15 U.S.C. 78m(n)(7)(B).

[556] Proposed Rule 13n–4(c)(2).

[557] Proposed Rule 13n–4(c)(2)(i).

[558] Proposed Rule 13n–4(c)(2)(ii).

[559] Proposed Rule 13n–4(c)(2)(iii).

[560] Proposed Rule 13–4(c)(2)(iv).

[561] Proposing Release, 75 FR at 77323–77324, *supra* note 2.

[562] *See* Barnard, *supra* note 19; Better Markets 1, *supra* note 19; DTCC 2, *supra* note 19; Saul, *supra* note 19; *see also* Better Markets 2, *supra* note 19; DTCC 3, *supra* note 19.

[563] Saul, *supra* note 19.

[564] DTCC 3, *supra* note 19.

[565] DTCC 2, *supra* note 19.

[566] DTCC 2, *supra* note 19

[567] DTCC 2, *supra* note 19.

defining the reporting party, timeliness or content for public dissemination, and similarly the SDR is not defining the reporting party, content or process for regulatory access . . . the SDR does not have significant influence over the inclusion or omission of information in the reporting process, nor does it control the output of the process.'' [568] The commenter suggested that the Commission focus on ensuring open access and, to support such access, ''the SDR needs governance that has independence from its affiliates and is representative of users who are the beneficiaries of choice in service providers.'' [569] Along this line, the commenter believed that SDRs should assure that ''dealings with affiliates . . . be subject to oversight by members of the SDR's board of directors who are not engaged in the governance or oversight of either the affiliates or their competitors.'' [570] The commenter also suggested that SDRs be ''user-governed,'' including ''a board of directors that is broadly representative of market participants and that incorporates voting safeguards designed to prevent non–regulatory uses of data of a particular class of market participants that are objectionable to that class.'' [571] The commenter believed that ''[i]ndependent perspectives can provide value to a board of directors, but those who do not directly participate in markets may not have sufficient, timely, and comprehensive expertise on those issues critical to the extraordinarily complex financial operations of SDRs.'' [572]

A third commenter recommended that ''meaningful corporate governance requirements apply to [SDRs].'' [573] In this regard, the commenter recommended that the Commission's rules relating to governance arrangements ''be much more detailed and clear'' and ''require SDRs to establish boards and nominating committees that are composed of a majority of independent directors.'' [574] The commenter believed that ''[i]ndependent boards are one of the most effective tools for ensuring that an SDR will abide by the letter and spirit of the enumerated duties and core principles set forth in the Dodd-Frank Act.'' [575] The commenter also believed that as ''important safeguards against the dominant influence of some market participants over others,'' the Commission's rules should impose both individual and aggregate limitations on ownership and voting (*e.g.,* limit the aggregate ownership interest in an SDR by SDR participants and their related persons to 20%, prohibit SDR participants and their related persons from directly or indirectly exercising more than 20% of the voting power of any class of ownership interest in the SDR).[576]

Another commenter suggested that, with respect to ''board membership requirements and ownership and voting limits, there should be a level playing field between at least SDRs and other swap entities.'' [577] The commenter recommended that the Commission propose something similar to the CFTC's ''Independent Perspective'' [578] by ''requiring a registered SDR to have independent public directors on (i) its board of directors and (ii) any committee that has the authority to (A) act on behalf of the board of directors or (B) amend or constrain the action of the board of directors.'' [579]

iii. Final Rule

After considering the comments, the Commission is adopting Rule 13n–4(c)(2) as proposed, with one minor modification.[580] Under this rule, each SDR is required to establish governance arrangements that are transparent to fulfill public interest requirements under the Exchange Act and the rules and regulations thereunder; to carry out functions consistent with the Exchange Act, the rules and regulations thereunder, and the purpose of the Exchange Act; and to support the objectives of the Federal Government, owners, and participants.[581] To comply with the second core principle, each SDR is required to comply with four specific requirements: (i) Establish governance arrangements that are well defined and include a clear organizational structure with effective internal controls; [582] (ii) establish governance arrangements that provide for fair representation of market participants; [583] (iii) provide representatives of market participants, including end-users, with the opportunity to participate in the process for nominating directors and with the right to petition for alternative candidates; [584] and (iv) establish, maintain, and enforce written policies and procedures reasonably designed to ensure that the SDR's senior management and each member of the board or committee that has the authority to act on behalf of the board possess requisite skills and expertise to fulfill their responsibilities in the management and governance of the SDR, have a clear understanding of their responsibilities, and exercise sound judgment about the SDR's affairs.[585]

As proposed, Rule 13n–4(c)(2)(iv) would have required an SDR's policies and procedures be reasonably designed to ensure that its senior management and each member of the board or committee that has the authority to act on behalf of the board to ''possess requisite skills and expertise . . . to have a clear understanding of their responsibilities'' and ''possess requisite skills and expertise . . . to exercise sound judgment about the [SDR's] affairs.'' The Commission is revising the proposed rule by removing the word ''to'' from the clauses above, to provide

[568] DTCC 2, *supra* note 19 (An SDR's conflicts of interest are ''significantly different from other market infrastructures, where these infrastructures may have the ability to influence participation in a service (*e.g.* execution, clearing membership, portfolio compression), or completeness of product offering (where it is proposed that all trades in an asset class are accepted).'').

[569] DTCC 2, *supra* note 19; *see also* DTCC 3, *supra* note 19 (''[S]tructural governance requirements offer the best solution to reduce risk, increase transparency and promote market integrity within the financial system while avoiding the potential negative impact on capital, liquidity and mitigating systemic risk that could result from any ownership or voting limitations.'').

[570] DTCC 2, *supra* note 19.

[571] DTCC 2, *supra* note 19.

[572] DTCC 2, *supra* note 19.

[573] Better Markets 2, *supra* note 19.

[574] Better Markets 1, *supra* note 19; *see also* Better Markets 2, *supra* note 19 (reiterating the importance of independent boards for SDR governance).

[575] Better Markets 1, *supra* note 19.

[576] Better Markets 1, *supra* note 19; *see also* Better Markets 2, *supra* note 19 (reiterating the importance of ownership and voting restrictions for SDRs governance).

[577] Barnard, *supra* note 19.

[578] The CFTC requires each swap data repository to establish, maintain, and enforce written policies or procedures to ensure that the nomination process for its board of directors, as well as the process for assigning members of the board of directors or other person to such committees, adequately incorporates an ''Independent Perspective,'' which is defined as ''a viewpoint that is impartial regarding competitive, commercial, or industry concerns and contemplates the effect of a decision on all constituencies involved.'' *See* CFTC Rules 49.2(a)(14) and 49.20(c)(1)(i)(B), 17 CFR 49.2(a)(14) and 49.20(c)(1)(i)(B); *see also* CFTC Part 45 Adopting Release, 76 FR at 54563, *supra* note 37 (discussing a swap data repository's consideration of an Independent Perspective).

[579] Barnard, *supra* note 19.

[580] *See infra* accompanying text to note 586 of this release discussing a modification to proposed Rule 13n–4(c)(2).

[581] Rule 13n–4(c)(2).

[582] Rule 13n–4(c)(2)(i).

[583] Rule 13n–4(c)(2)(ii). *Accord* Exchange Act Section 17A(b)(3)(C), 15 U.S.C. 78q-1(b)(3)(C) (requiring the rules of a clearing agency assure a fair representation of its shareholders (or members) and participants in the selection of its directors and administration of its affairs). The term ''market participant'' is defined as ''(1) any person participating in the security-based swap market, including, but not limited to, security-based swap dealers, major security-based swap participants, and any other counterparties to a security-based swap transaction.'' *See* Rule 13n–4(a)(6); *see also* Rule 13n–9(a)(3); Rule 13n–10(a).

[584] Rule 13n–4(c)(2)(iii).

[585] Rule 13n–4(c)(2)(iv).

that an SDR's policies and procedures be reasonably designed to ensure that its senior management and each member of the board or committee that has the authority to act on behalf of the board is required to actually have a clear understanding of their responsibilities and exercise sound judgment about the SDR's affairs, rather than simply possess the skills and expertise to do so.[586] Without the revision from the proposal, the rule could have been misinterpreted to mean that an SDR's management and each member of the board or committee that has the authority to act on behalf of the board need only possess the skills and expertise to have a clear understanding of their responsibilities. With respect to sound judgment, an SDR may want to include, in its policies and procedures, a requirement that its management and each member of the board or committee that has the authority to act on behalf of the board consider fairly all relevant information and views without undue influence from others, and provide advice and recommendations that are reasonable under the relevant facts and circumstances.

Given an SDR's unique and integral role in the SBS market, the Commission believes that it is particularly important that an SDR establish a governance arrangement that is well defined and include a clear organizational structure with effective internal controls. Because the board has a role in overseeing the SDR's compliance with the SDR's statutory and regulatory obligations,[587] the Commission also believes that it is important that those who are managing and overseeing an SDR's activities are qualified to do so. An SDR's failure to comply with their obligations could affect, for example, the SDR's operational efficiency, which could, in turn, impact the SBS market as a whole.[588]

The Commission believes that Rule 13n–4(c)(2)'s requirement that SDRs establish governance arrangements that provide for fair representation of market participants is consistent with one commenter's view that governance of SDRs by market participants is appropriate.[589] With respect to one commenter's recommendation that an SDR's governance should be independent from its affiliates by, for example, ensuring that dealings with its affiliates are subject to oversight by members of the SDR's board who are not engaged in the governance or oversight of either the affiliates or their competitors,[590] the Commission believes that this is one effective way to comply with the rule and to minimize the SDR's potential conflicts of interest, as discussed further in Section VI.D.3.c of this release.

In establishing a governance arrangement that provides for fair representation of market participants, one way for an SDR to comply with Rule 13n–4(c)(2) is to provide market participants with the opportunity to participate in the process for nominating directors and with the right to petition for alternative candidates. These two requirements are interrelated. The Commission believes that if market participants have no say in an SDR's governance process, then the market participants may not be fairly represented.[591] The Commission notes, however, that having fair representation of market participants does not necessarily equate to requiring a fixed number or percentage of enumerated categories of market participants. Instead, the requirement is intended to promote a fair representation of the views and perspectives of market participants.

The Commission considered whether an SDR's potential and existing conflicts of interest would warrant prescriptive rules relating to governance (*e.g.,* ownership or voting limitations, independent directors, nominating committees composed of a majority of independent directors), as two commenters suggested,[592] but believes that the rules that are intended to minimize such conflicts and to help ensure that SDRs meet core principles are sufficient at this time.[593] If the Commission were to impose additional governance requirements and limitations, SDRs would likely incur costs in addition to the costs already imposed by the SDR Rules.[594] The Commission, however, does not believe that the additional costs are warranted at this time. Also, consistent with one comment,[595] the Commission continues to believe that it is appropriate and cost-effective to provide SDRs with flexibility in determining their ownership and governance structure. The Commission may, however, revisit the issue of whether to impose additional governance requirements and limitations as the SBS market evolves.

[586] Rule 13n–4(c)(2)(iv).

[587] *See* Rule 13n–11(e) (requiring an SDR's CCO to submit an annual compliance report to the board for its review prior to the filing of the report to with the Commission).

[588] *Accord* Proposing Release, 75 FR at 77307, *supra* note 2 (''The inability of an SDR to protect the accuracy and integrity of the data that it maintains or the inability of an SDR to make such data available to regulators, market participants, and others in a timely manner could have a significant negative impact on the SBS market. Failure to maintain privacy of such data could lead to market abuse and subsequent loss of liquidity.'').

[589] *See* DTCC 2, *supra* note 19. In discussing governance arrangements, the commenter seemed to imply that the Commission is responsible for directly overseeing an SDR's conflicts of interest. To clarify, it is the SDR itself that is statutorily required to establish and enforce policies and procedures to minimize its conflicts of interest in its decision-making process. *See* Exchange Act Section 13(n)(7)(C), 15 U.S.C. 78m(n)(7)(C).

[590] *See* DTCC 2, *supra* note 19.

[591] One commenter suggested that the Commission propose something similar to the CFTC's ''Independent Perspective.'' Barnard, *supra* note 19. The Commission believes that although Rule 13n–4(c)(2) is different from CFTC Rule 49.20 in this area, both rules may achieve the same objective of broad representation on SDRs' boards. Rule 13n–4(c)(2)(ii) requires SDRs to ''[e]stablish governance arrangements that provide for fair representation of market participants,'' and Rule 13n–4(c)(2)(iii) requires SDRs to ''[p]rovide representatives of market participants, including end-users, with the opportunity to participate in the process for nominating directors and with the right to petition for alternative candidates.'' Instead of focusing on fair representation of market participants, CFTC Rule 49.20(c) requires a swap data repository to establish, maintain, and enforce written policies and procedures to ensure that its board and other committees adequately consider an ''Independent Perspective'' in their decision-making process. *See* 17 CFR 49.20(c). *Cf.* DTCC 2, *supra* note 19 (stating that ''[i]ndependent perspectives can provide value to a board of directors, but those who do not directly participate in markets may not have sufficient, timely, and comprehensive expertise on those issues critical to the extraordinarily complex financial operations of SDRs'').

[592] *See* Barnard, *supra* note 19; Better Markets 1, *supra* note 19; *see also* Better Markets 2, *supra* note 19.

[593] *See, e.g.,* Rule 13n–4(c)(1) (implementing core principle relating to market access to SDRs' services and data), as discussed in Section VI.D.3.a of this release; Rule 13n–4(c)(3) (implementing core principle relating to conflicts of interest), as discussed in Section VI.D.3.c of this release; and Rule 13n–5 (requiring an SDR to accept all SBSs in a given asset class if it accepts any SBS in that asset class), as discussed in Section VI.E of this release; *see also* Item 32 of Form SDR (requiring disclosure of instances in which an SDR has prohibited or limited a person with respect to access to the SDR's services or data). As stated in Section VI.D.3.a.iii(4) of this release, the Commission is adopting Rule 909 of Regulation SBSR, which requires each SDR to register as a SIP; as such, Exchange Act Section 11A(b)(5) governs denials of access to all services of an SDR. *See* Regulation SBSR Adopting Release, *supra* note 13; Exchange Act Section 11A(b)(5), 15 U.S.C. 78k–1(b)(5).

[594] *See* Section VIII.D of this release (discussing SDRs' costs of complying with the SDR Rules).

[595] *See* DTCC 2, *supra* note 19 (recommending structural governance requirements instead of ownership and voting limitations); *see also* DTCC 3, *supra* note 19 (supporting the mitigation of conflicts of interest through the imposition of structural governance requirements instead of ownership and voting limitations).

c. Third Core Principle: Rules and Procedures for Minimizing and Resolving Conflicts of Interest (Rule 13n–4(c)(3))

i. Proposed Rule

Proposed Rule 13n–4(c)(3) would incorporate the third core principle [596] by requiring each SDR to establish and enforce written policies and procedures reasonably designed to minimize conflicts of interest in the decision making process of the SDR, and establish a process for resolving any such conflicts of interest.[597] The proposed rule provided general examples of conflicts of interest that should be considered by an SDR and would require each SDR to comply with the core principle by (i) establishing, maintaining, and enforcing written policies and procedures reasonably designed to identify and mitigate potential and existing conflicts of interest in the SDR's decision-making process on an ongoing basis; [598] (ii) recusing any person involved in a conflict of interest from the decision-making process for resolving such conflicts of interest; [599] and (iii) establishing, maintaining, and enforcing reasonable written policies and procedures regarding the SDR's non-commercial and/or commercial use of the SBS transaction information that it receives from a market participant, any registered entity, or any other person.[600]

ii. Comments on the Proposed Rule

Seven commenters submitted comments relating to this proposed rule.[601] One commenter agreed that the Proposing Release ''correctly highlights a number of the harmful practices that can thrive in an environment that does not adequately address conflicts of interest. . . .'' [602] These practices are discussed further in Section VI.D.3.c.iii below. Another commenter acknowledged that ''[t]he mandatory reporting regime [under the Dodd-Frank Act] creates an opportunity for [an] SDR to improperly commercialize the information it receives'' and agreed with the Commission that ''market access by service providers to an SDR could be a potential source for conflicts of interest.'' [603] This commenter expressed the view, however, that because ''[t]he reporting rules for SDRs are highly prescriptive, and the primary consumers of this data are regulators, [there is] limited room for conflicts involving regulatory or public data access.'' [604] The commenter noted that ''[i]t is important that regulators ensure that the public utility function of SDRs . . . is separated from potential commercial uses of the data.'' [605]

As noted in the Proposing Release, a few entities that presently provide or had anticipated providing trade repository services identified the following conflicts of interest that could arise at an SDR.[606] First, owners of an SDR could have commercial incentives to exert undue influence to control the level of access to the services offered and data maintained by the SDR and to implement policies and procedures that would further their self-interests to the detriment of others.[607] Specifically, owners of an SDR could exert their influence and control to prohibit or limit access to the services offered and data maintained by the SDR in order to impede competition.[608] Second, an SDR could favor certain market participants over others with respect to the SDR's services and pricing for such services.[609] Third, an SDR could require that services be purchased on a ''bundled'' basis.[610] Finally, an SDR or a person associated with the SDR could misuse or misappropriate data reported to the SDR for financial gain.[611] As one trade repository noted, ''SDR data is extremely valuable and could be sold either stand alone or enhanced with other market data and analysis. The use of this data in this manner would present competitive problems'' as well as conflicts of interest issues.[612]

Several commenters expressed their views on the ownership of SBS data maintained by SDRs. Specifically, three commenters believed that ownership of SBS data should remain with counterparties to the SBS unless specifically agreed by them.[613] One commenter to proposed Regulation SBSR stated that ownership of SBS data should be retained by the reporting party (*e.g.,* SB SEFs, counterparties to an SBS),[614] whereas a commenter to the Proposing Release believed that data ownership does not transfer to an SB SEF or any other regulated entity.[615] Three commenters, including two commenters to proposed Regulation SBSR, believed that SDRs and/or their affiliates should be prohibited from using SBS data for commercial purposes.[616] One of those commenters

[596] *See* Exchange Act Section 13(n)(7)(C), 15 U.S.C. 78m(n)(7)(C)).

[597] Proposed Rule 13n–4(c)(3).

[598] Proposed Rule 13n–4(c)(3)(i).

[599] Proposed Rule 13n–4(c)(3)(ii).

[600] Proposed Rule 13n–4(c)(3)(iii).

[601] *See* Better Markets 1, *supra* note 19; DTCC 2, *supra* note 19; Markit, *supra* note 19; MarkitSERV, *supra* note 19; MFA 1, *supra* note 19; WMBAA SBSR, *supra* note 27; Tradeweb SB SEF, *supra* note 29; *see also* DTCC SBSR, *supra* note 27.

[602] Better Markets 1, *supra* note 19.

[603] DTCC 2, *supra* note 19 (discussing an SDR's conflicts of interest identified by the Commission in the Proposing Release).

[604] DTCC 2, *supra* note 19.

[605] DTCC 2, *supra* note 19.

[606] Proposing Release, 75 FR at 77324–77325, *supra* note 2.

[607] *See, e.g.,* Reval, Responses to the CFTC's Questions on the SDR Requirements, *available at http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission9_100110-reval.pdf* (stating that an SDR with any ownership or revenue sharing arrangements directly or indirectly with a dealer would be an obvious conflict of interest) (''Reval CFTC Response Letter'').

[608] *See, e.g.,* Warehouse Trust Company, Draft Response to CFTC re: CFTC Request for Information regarding SDR Governance, *available at http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission9_100510-wt.pdf* (stating that ''ownership of an SDR could lead to access restrictions on non-owners'') (''Warehouse Trust CFTC Response Letter'').

[609] *See* Reval CFTC Response Letter, *supra* note 607 (stating that preferential treatment in services provided by an SDR could also occur).

[610] *See* Warehouse Trust CFTC Response Letter, *supra* note 608 (''The issue of vertical bundling could arise where [SB SEFs and clearing agencies] have preferred access or servicing arrangements with SDRs primarily due to ownership overlaps.'').

[611] *See* Reval CFTC Response Letter, *supra* note 607 (''[T]here would always be an underlying conflict to ensure that the position information or client activity does not get into the hands of investors or business partners of the SDR who could benefit from that information.'').

[612] Warehouse Trust CFTC Response Letter, *supra* note 608; *see also* Reval CFTC Response Letter, *supra* note 607 (''[I]f only one SDR is created for an asset class and that SDR is held by a market participant that could gain by having an edge on when the information is received, even if by a split second, it could have a trading edge.'').

[613] MarkitSERV, *supra* note 19 (''[I]n the interest of ensuring minimal intrusion on commercial activity and optimal incentives for parties to support and encourage robust and accurate reporting, and the development of valuable commercial products . . . data provided to [SDRs] should only be used as permitted by the relevant market participants in agreements between them and the [SDR].''); Markit, *supra* note 19 (stating that ''commercialization of data should only be done with the specific consent of the data owners''); DTCC 2, *supra* note 19 (''The principle of user control over the data for non-regulatory purposes must . . . be scrupulously maintained.''); *see also* DTCC 3, *supra* note 19 (''It is critical to preserve the trading parties' control over their own data.'').

[614] WMBAA SBSR, *supra* note 27.

[615] Markit, *supra* note 19.

[616] MFA 1, *supra* note 19 (suggesting that the Commission adopt a rule similar to the CFTC's proposed rule that would prohibit SDRs from using data for commercial purposes without express written consent); DTCC SBSR, *supra* note 27 (''It is good public policy that the aggregating entity not itself use the data for commercial purposes, particularly where data is required to be reported to an aggregator serving a regulatory purpose, and make such data available to value added providers on a non-discriminatory basis, consistent with restrictions placed on the data by the data contributors themselves.''); WMBAA SBSR, *supra* note 27 (''Consistent with reporting practices in other markets, the reporting of SBS transaction information to a registered SDR should not bestow the SDR with the authority to use the SBS transaction data for any purpose other than those explicitly enumerated in the Commission's regulations.'').

supported an SDR's use of aggregated data for commercial use, such as marketing.[617]

One commenter to the SB SEF Proposing Release recommended that the Commission clarify in its final rules or adopting release that its rules are not intended to impose or imply any limit on the ability of market participants, including counterparties to SBS transactions, SB SEFs, and clearing agencies, to use and/or commercialize data that they create or receive in connection with the execution or reporting of SBS data.[618] Similarly, one commenter to proposed Regulation SBSR suggested that the Commission require SDRs to adopt policies and procedures explicitly acknowledging that counterparties to SBS transactions and SB SEFs retain the ability to market and commercialize their own proprietary data.[619]

iii. Final Rule

After considering the comments, the Commission is adopting Rule 13n–4(c)(3) as proposed. Under this rule, each SDR is required to establish and enforce written policies and procedures reasonably designed to minimize conflicts of interest in the decision-making process of the SDR and to establish a process for resolving any such conflicts of interest.[620]

Rule 13n–4(c)(3) provides general examples of conflicts of interest that should be considered by an SDR, including, but not limited to: (1) Conflicts between the commercial interests of an SDR and its statutory and regulatory responsibilities, (2) conflicts in connection with the commercial interests of certain market participants or linked market infrastructures, third party service providers, and others, (3) conflicts between, among, or with persons associated with the SDR,[621] market participants, affiliates of the SDR, and nonaffiliated third parties,[622] and (4) misuse of confidential information, material, nonpublic information, and/or intellectual property. These general examples are the same as those included in proposed Rule 13n–4(c)(3) with one modification. The proposed rule provided, as an example, ''conflicts between the commercial interests of [an SDR] and its statutory responsibilities.'' Upon further consideration, the Commission is revising this example, to include potential conflicts between an SDR's commercial interests and its regulatory responsibilities. This revision is intended to clarify that an SDR's commercial interests can conflict with not only its statutory responsibilities, but also its regulatory responsibilities, which may be more prescriptive than its statutory responsibilities.

To comply with the third core principle, an SDR is required to comply with three specific requirements. First, Rule 13n–4(c)(3)(i) requires each SDR to establish, maintain, and enforce written policies and procedures reasonably designed to identify and mitigate potential and existing conflicts of interest in the SDR's decision-making process on an ongoing basis. The Commission continues to believe that requiring an SDR to conduct ongoing identification and mitigation of conflicts of interest is important because such conflicts can arise gradually over time or unexpectedly. Furthermore, a situation that is acceptable one day may present a conflict of interest the next. The Commission believes that in order to identify and address potential conflicts that may arise over time, an SDR's procedures generally should provide a means for regular review of conflicts as they impact the SDR's decision-making processes. Rather than imposing prescriptive requirements on SDRs regarding how to address conflicts, the Commission believes that SDRs should be provided the flexibility to determine how best to address and manage their conflicts.

Second, Rule 13n–4(c)(3)(ii) requires an SDR to recuse any person involved in a conflict of interest from the decision-making process for resolving that conflict of interest. As stated in the Proposing Release, the Commission believes that such recusal is necessary to eliminate an apparent conflict of interest in an SDR's decision-making process.[623] Additionally, recusal will likely increase confidence in the SDR's decision-making process and avoid an appearance of impropriety.

Finally, Rule 13n–4(c)(3)(iii) requires an SDR to establish, maintain, and enforce reasonable written policies and procedures regarding the SDR's non-commercial and/or commercial use of the SBS transaction information that it receives from a market participant, any registered entity, or any other person. The Commission recognizes that an SDR may have commercial incentives to operate as an SDR and agrees with one commenter's view that the Dodd-Frank Act's mandatory reporting regime creates an opportunity for an SDR to commercialize improperly the information that it receives.[624] To the extent that an SDR uses data that it receives from others for commercial purposes, the Commission believes that such uses should be clearly defined and disclosed to market participants.[625] If, for example, a market participant is considering waiving confidentiality of the data that it provides to an SDR, then, at the very least, such disclosure should provide the market participant with the information necessary to make a meaningful choice. One commenter suggested that an SDR should, as a way to minimize potential conflicts of interest, consider separating its utility function from its commercial use of the

[617] MFA 1, *supra* note 19; *see also* Tradeweb SB SEF, *supra* note 29 (supporting SDRs' commercial use of data with limitations).

[618] Tradeweb SB SEF, *supra* note 29 (believing that its recommendation will help ensure a robust and competitive market, as envisioned by the Dodd-Frank Act, and help limit the possibility of overreaching by SDRs due to their unique position in the data-reporting regime).

[619] WMBAA SBSR, *supra* note 27.

[620] Rule 13n–4(c)(3).

[621] Rule 13n–4(a)(8) defines ''person associated with a security-based swap data repository'' as (i) any partner, officer, or director of such SDR (or any person occupying a similar status or performing similar functions), (ii) any person directly or indirectly controlling, controlled by, or under common control with such SDR, or (iii) any employee of such SDR. *See also* Rule 13n–9(a)(7). This definition draws from the definition of ''person associated with a broker or dealer'' in the Exchange Act, and includes persons associated with an SDR whose functions are solely clerical or ministerial. *See* Exchange Act Section 3(a)(18), 15 U.S.C. 78c(a)(18). Rule 13n–4(a)(3) defines ''control'' (including the terms ''controlled by'' and ''under common control with'') as ''the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.'' Pursuant to Rule 13n–4(a)(3), ''[a] person is presumed to control another person if the person: (i) Is a director, general partner, or officer exercising executive responsibility (or having similar status or functions); (ii) directly or indirectly has the right to vote 25 percent or more of a class of voting securities or has the power to sell or direct the sale of 25 percent or more of a class of voting securities; or (iii) in the case of a partnership, has the right to receive, upon dissolution, or has contributed, 25 percent or more of the capital.'' The Commission is correcting a typographical error in the proposed definition. Proposed Rule 13n–4(a)(3)(ii) referred to the right to vote 25 percent ''of'' more of a class of securities. *See* Proposing Release, 75 FR at 77367, *supra* note 2. As adopted, Rule 13n–4(a)(3)(ii) refers to the right to vote 25 percent ''or'' more of a class of securities. *See also* Rules 13n–9(a)(2) and 13n–11(b)(2). The definition of ''control'' incorporates the definition of ''control'' in Exchange Act Rule 12b–2 and Form BD, the registration form for broker-dealers. *See* 17 CFR 240.12b–2 and Form BD, 17 CFR 249.501.

[622] The term ''nonaffiliated third party'' of an SDR is defined as any person except (1) the SDR, (2) an SDR's affiliate, or (3) a person employed by an SDR and any entity that is not the SDR's affiliate (and ''nonaffiliated third party'' includes such entity that jointly employs the person). *See* Rule 13n–4(a)(7); *see also* Rule 13n–9(a)(4). This definition draws from the definition of ''nonaffiliated third party'' in § 248.3 of Regulation S–P. *See* 17 CFR 248.3.

[623] Proposing Release, 75 FR at 77325, *supra* note 2.

[624] *See* DTCC 2, *supra* note 19.

[625] *See* Section VI.I.2 of this release discussing an SDR's disclosure requirements.

SBS transaction information that it receives.[626] The Commission agrees that this could be a way to address potential conflicts of interest, but the Commission does not believe that it necessarily mitigates or eliminates conflicts in all circumstances. Thus, while SDRs may wish to consider this approach, the Commission is not requiring them to do so at this time.

As discussed in the Proposing Release, the Commission believes that a small number of dealers could control an SDR, which may require SDR owners to balance competing interests.[627] Owners of an SDR could derive greater revenues from their non-trade repository activities in the SBS market than they would from sharing in the profits of the SDR in which they hold a financial interest; consequently, the owners of an SDR may be conflicted in making decisions that would increase the SDR's profitability, but decrease the profitability of their non-trade repository activities. In addition, there may be a tension between an SDR's statutory or regulatory obligations (*e.g.,* maintaining the privacy of data reported to the SDR) and its own commercial interests or those of its owners (*e.g.,* using data reported to the SDR for commercial purposes).[628]

An SDR's conflicts of interest that are not properly managed could limit the benefits of the SDR to the markets and regulators of SDRs as well as undermine the mandatory reporting requirement in Exchange Act Section 13(m)(1)(G), thereby impacting efficiency in the SBS market.[629] If, for instance, a market participant loses confidence in a particular SDR because the SDR fails to minimize its conflicts of interest, then the market participant may report its SBS transactions to an alternative SDR, which could lead to data fragmentation. By requiring an SDR to take specific actions to minimize its conflicts of interest, the Commission believes that Rule 13n–4(c)(3), as adopted, addresses these concerns as well as the concerns expressed in comments received on the rule proposal.

Several commenters expressed their views on whether an SDR should be permitted to use data for commercial purposes.[630] For a number of reasons, the Commission continues to believe that it is not appropriate to adopt, at this time, a rule prohibiting an SDR and its affiliates from using for commercial purposes SBS data that the SDR maintains without obtaining express written consent from both counterparties to the SBS transaction or the reporting party. First, the Commission believes that such a prohibition may limit transparency by hindering an SDR's ability to provide anonymized and aggregated reports to the public if the Commission does not specifically mandate an SDR to provide these reports to the public. Under the final rule, an SDR may provide these reports to the public, provided that it complies with the privacy requirements of Rule 13n–9, as discussed in Section VI.I.1 below.[631] Second, a rule that prohibits an SDR from using SBS data for commercial purposes seems to presume that the market participants or reporting party owns the data. As evidenced by the comment letters received,[632] the issue of who owns the data is not clear cut, particularly when value is added to it. Third, a general prohibition on an SDR's commercial use of SBS data could hinder competition and the establishment of new SDRs. As stated in Section III.D of this release, the Commission does not support any particular business model; restricting an SDR's commercial use of SBS data entirely, however, may be viewed as the Commission favoring one model over other models. Finally, the Commission believes that it is adopting adequate mechanisms to prevent or detect an SDR's misuse of SBS data.[633] If, however, such mechanisms prove to be inadequate, then the Commission may revisit this issue.

At this time, the Commission believes that the core principles and statutory requirements applicable to SDRs under the Dodd-Frank Act can be appropriately addressed under the final SDR Rules, without the need for the Commission to take a position on ownership of SBS data. In response to one commenter's request for clarification,[634] the Commission notes that Rule 13n–4(c)(3) is not intended to impose or imply any limit on the ability of market participants, including counterparties to SBS transactions, SB SEFs, and clearing agencies, to use or commercialize data that they create or receive in connection with the execution or reporting of SBS data. The Commission, however, does not believe that it is necessary, as another commenter suggested,[635] to require SDRs to adopt policies and procedures explicitly acknowledging that market participants retain the ability to market and commercialize their own proprietary data.

4. Indemnification Exemption (Rule 13n–4(d))

In the Cross-Border Proposing Release, the Commission proposed Rule 13n–4(d), pursuant to its authority under Exchange Act Section 36,[636] to provide a tailored exemption from the indemnification requirement set forth in Exchange Act Section 13(n)(5)(H)(ii)[637] and previously proposed Rule 13n–4(b)(10) thereunder.[638] The Commission received a number of comments relating to the indemnification requirement and

[626] DTCC 2, *supra* note 19.

[627] Proposing Release, 75 FR at 77324, *supra* note 2.

[628] *See* Proposing Release, 75 FR at 77324, *supra* note 2 (citing to CPSS–IOSCO Trade Repository Report (noting the conflicts of interest ''between the unique public role of the [SDR] and its own commercial interests particularly if the [SDR] offers services other than record keeping or between commercial interests relating to different participants and linked market infrastructures and service providers'')).

[629] *See* 15 U.S.C. 78m(m)(1)(G). Exchange Act Section 13(m)(1)(G) imposes a mandatory reporting requirement, which provides that ''[e]ach security-based swap (whether cleared or uncleared) shall be reported to a registered security-based swap data repository.'' *See also* Exchange Act Section 13A(a)(1), 15 U.S.C. 78m-1(a)(1) (''Each security-based swap that is not accepted for clearing by any clearing agency or derivatives clearing organization shall be reported to—(A) a security-based swap data repository . . ., or (B) in the case in which there is no security-based swap data repository that would accept the security-based swap, to the Commission . . . .'').

[630] *See Markit, supra* note 19 (stating that ''commercialization of data should only be done with the specific consent of the data owners''); MarkitSERV, *supra* note 19 (stating that ''data provided to [SDRs] should only be used as permitted by the relevant market participants in agreements between them and the [SDR]''); MFA 1, *supra* note 19 (suggesting that the Commission adopt a rule similar to the CFTC's proposed rule that would prohibit SDRs from using data for commercial purposes without express written consent); *see also* DTCC SBSR, *supra* note 27 (suggesting that an SDR should not use data for commercial purposes); WMBAA SBSR, *supra* note 27 (indicating that an SDR should not have the authority to use SBS transaction data ''for any purpose other than those explicitly enumerated in the Commission's regulations''). *See also* CFTC Rule 49.17(g), 17 CFR 49.17(g) (''Swap data accepted and maintained by the swap data repository generally may not be used for commercial or business purposes by the swap data repository or any of its affiliated entities''; however, ''[t]he swap dealer, counterparty or any other registered entity that submits the swap data maintained by the registered swap data repository may permit the commercial or business use of the data by express written consent.'').

[631] *Cf.* SBSR Adopting Release, *supra* note 13 (prohibiting public dissemination of ''non-mandatory reports,'' as defined in Regulation SBSR).

[632] *See* DTCC 2, *supra* note 19; Markit, *supra* note 19; MarkitSERV, *supra* note 19; MFA 1, *supra* note 19; DTCC SBSR, *supra* note 27; WMBAA SBSR, *supra* note 27.

[633] *See, e.g.,* Rules 13n–4(c)(1)(i) (fair and reasonable fee requirements) and 13n–9 (privacy requirements).

[634] *See* Tradeweb SB SEF, *supra* note 29.

[635] *See* WMBAA SBSR, *supra* note 27.

[636] 15 U.S.C. 78mm.

[637] 15 U.S.C. 78m(n)(5)(H)(ii).

[638] Cross-Border Proposing Release, 78 FR at 31209, *supra* note 3.

the proposed exemption.[639] While the Commission continues to believe that an exemption from the indemnification requirement should be considered, the Commission also believes that the final resolution of this issue can benefit from further consideration and public comment. Accordingly, the Commission is not adopting proposed Rule 13n–4(d) at this time. The Commission anticipates soliciting additional public comment regarding the indemnification requirement and a proposed exemption. As discussed above, SDRs will have to comply with all statutory requirements, including the indemnification requirement set forth in Exchange Act Section 13(n)(5)(H)(ii),[640] when the current exemptive relief from the statutory requirements expires.[641]

E. Data Collection and Maintenance (Rule 13n–5)

The Commission proposed Exchange Act Rule 13n–5 to specify the data collection and maintenance requirements applicable to SDRs.[642] After considering the comments received on this proposal, the Commission is adopting Rule 13n–5 as proposed, with certain modifications.[643]

1. Transaction Data (Rule 13n–5(b)(1))

a. Proposed Rule

Proposed Rule 13n–5(b)(1)(i) would require every SDR to establish, maintain, and enforce written policies and procedures reasonably designed for the reporting of transaction data to the SDR, and would require the SDR to accept all transaction data that is reported to the SDR in accordance with such policies and procedures. Proposed Rule 13n–5(a)(1) defined ''transaction data'' to mean all the information reported to an SDR pursuant to the Exchange Act and the rules and regulations thereunder.[644]

Proposed Rule 13n–5(b)(1)(ii) would require an SDR, if it accepts any SBS in a given asset class, to accept all SBSs in that asset class that are reported to it in accordance with its policies and procedures required by paragraph (b)(1) of the proposed rule. Proposed Rule 13n–5(a)(3) defined ''asset class'' as ''those security-based swaps in a particular broad category, including, but not limited to, credit derivatives, equity derivatives, and loan-based derivatives.''

Proposed Rule 13n–5(b)(1)(iii) would require every SDR to establish, maintain, and enforce written policies and procedures reasonably designed to satisfy itself by reasonable means that the transaction data that has been submitted to the SDR is accurate. This proposed rule would also require every SDR to clearly identify the source for each trade side and the pairing method (if any) for each transaction in order to identify the level of quality of that transaction data.[645]

Proposed Rule 13n–5(b)(1)(iv) would require every SDR to promptly record the transaction data it receives.[646]

b. Comments on the Proposed Rule

Three commenters submitted comments relating to this proposed rule.[647] One commenter stated that an SDR should have ''certain minimum data standards'' with regard to the transaction data that it accepts, but that ''such standards should be able to accommodate a wide variety of SBS transactions submitted per asset class.''[648] The commenter also stated that ''the regulations should be understood to permit [SDRs] to specify the methods and channels that participants need to use to connect to them, which will most commonly be provided in the form of the Application Programming Interfaces (APIs) and through setting of certain minimum standards.''[649]

Another commenter recommended revising the definition of ''asset class'' from the proposal to eliminate ''the distinction between loan-based and credit asset classes,'' and noted that ''products like CDS on loans, while loan-based, are currently reported alongside other CDS products.''[650] The commenter believed that ''[i]n general, equity and credit derivatives will be easy to classify, although it is possible that certain transactions could be mixed and more difficult to classify.''[651] The commenter stated that it considers it more likely to have classification difficulties between ''a swap and an SBS, rather than between SBS asset classes.''[652] The commenter suggested that, in order to mitigate the problem of classification between asset classes, the Commission could combine ''the loan-based asset class with credit derivatives, and [allow] an SBS to be reported to either the equity or credit SDR if there is any uncertainty of a product's asset class.''[653]

Two commenters agreed that SDRs should be required to support all trades in an asset class.[654] One commenter stated that ''[w]ithout specific requirements related to the range of products that can be reported to them, [SDRs] may be tempted to limit their operating costs by only accepting the more standardized categories of swaps [that] also tend to trade in high volumes. This would result in incomplete market coverage and an increased fragmentation of the reported data.''[655] Thus, the commenter recommended that the Commission require SDRs ''to accept all trades in a given asset class as a means of ensuring broad coverage while guarding against fragmentation that could result from inadequate [SDR]

[639] *See* DTCC 2, *supra* note 19; ESMA, *supra* note 19; US & Foreign Banks, *supra* note 24; *see also* DTCC 1*, *supra* note 20; DTCC CB, *supra* note 26.

[640] 15 U.S.C. 78m(n)(5)(H)(ii).

[641] *See* Section V of this release discussing the implementation of the SDR Rules.

[642] Rule 13n–5 is being promulgated under Exchange Act Sections 13(n)(4)(B), 13(n)(7)(D), and 13(n)(9). *See* 15 U.S.C. 78m(n)(4)(B), 78m(n)(7)(D), and 78m(n)(9). Rule 13n–5(b) does not apply to SDR records other than transaction data and positions, as defined below. Records made or kept by an SDR, other than transaction data and positions, are governed by Rule 13n–7, as discussed in Section VI.G of this release.

[643] Each definition in Rule 13n–5(a) is discussed alongside the substantive rule in which the definition is used. *See* Section VI.E.1 below discussing ''asset class'' and ''transaction data''; and Section VI.E.2 below discussing ''position.''

[644] In a separate rulemaking implementing Dodd-Frank Act Sections 763(i) and 766(a) (adding Exchange Act Sections 13(m) and 13A(a)(1) respectively), the Commission is adopting rules requiring SBS transactions to be reported to a registered SDR. *See* Regulation SBSR Adopting Release, *supra* note 13 (Rules 901 and 902). In another separate proposal relating to implementation of Dodd-Frank Act Section 763(i) (adding Exchange Act Section 13(n)(5)(E)), the Commission proposed rules that would require SDRs to receive SBS transaction data that satisfies the notice requirement for parties that elect the end-user exception to mandatory clearing of SBSs in order to aid the Commission in its responsibility to prevent abuse of the end-user exception as provided for in Exchange Act Section 3C(g). *See* End-User Exception Proposing Release, *supra* note 15 (''Using the centralized facilities of SDRs should also make it easier for the Commission to analyze how the end-user clearing exception is being used, monitor for potentially abusive practices, and take timely action to address abusive practices if they were to develop.'').

[645] Proposed Rule 13n–5(b)(1)(iii).

[646] In a separate release, the Commission is adopting rules prescribing the data elements that an SDR is required to accept for each SBS, in association with requirements under Dodd-Frank Act Section 763(i) (adding Exchange Act Section 13(n)(4)(A), relating to standard setting and data identification). *See* Regulation SBSR Adopting Release, *supra* note 13 (Rule 901).

[647] *See* DTCC 2, *supra* note 19; MarkitSERV, *supra* note 19; MFA 1, *supra* note 19; *see also* DTCC 3, *supra* note 19; DTCC 4, *supra* note 19; DTCC 5, *supra* note 19.

[648] MarkitSERV, *supra* note 19.

[649] MarkitSERV, *supra* note 19.

[650] DTCC 2, *supra* note 19.

[651] DTCC 2, *supra* note 19.

[652] DTCC 2, *supra* note 19 (giving as an example a trade constructed based on the correlation between commodities and equities).

[653] DTCC 2, *supra* note 19.

[654] MarkitSERV, *supra* note 19; DTCC 2, *supra* note 19; *see also* DTCC 3, *supra* note 19; DTCC 4, *supra* note 19.

[655] MarkitSERV, *supra* note 19 (citation omitted).

functionality.'' [656] The other commenter stated that the ''requirement for an SDR to support all trades in an asset class is . . . important to reduce the complexity for reporting parties,'' and that the ''requirement discourages an SDR from only servicing high volume products within an asset class to maximize profit, and leaving more complex (and less frequently traded) transactions to be reported by reporting parties directly to the Commission.'' [657]

Three commenters addressed the SDR's role with respect to verifying the accuracy of the transaction data submitted.[658] One commenter fully supported the requirement that SDRs confirm with both counterparties the accuracy of the data submitted.[659] Another commenter stated that ''the Commission should encourage the use and reporting of trade data that has been confirmed or verified by both counterparties via an affirmation or a matching process,'' [660] and that this should be ''connected with'' the Commission's proposed requirement that SBS dealers and major SBS participants provide trade acknowledgments and verify those trade acknowledgments.[661] This commenter suggested, however, that SDRs should be able to accept single-sided trades for real-time reporting purposes, and that any subsequently discovered discrepancies could be corrected after confirmation.[662] The third commenter recommended that ''SDRs should not have additional duties with respect to verifying the accuracy of [a] submission, as there is limited data available to the SDR. The SDR may carry out certain routine functions to identify trades which may indicate erroneous data (*e.g.* based on size), but in general, the primary responsibility for accuracy of reported information should remain with the reporting party.'' [663] This commenter also recommended that the Commission determine that an SDR has satisfied its obligation where ''(i) the [SBS] has been reported by a [SEF], clearing agency, designated contract market, or other regulated counterparty who has an independent obligation to maintain the accuracy of the transaction data; (ii) a confirmation has been submitted to the [SDR] to demonstrate that both counterparties have agreed to the accuracy of the swap information that was submitted to the [SDR]; or (iii) the [SBS] is deemed verified and the [SDR] has developed and implemented policies and procedures reasonably designed to provide the non-reporting side of the [SDR] with an opportunity to confirm the information submitted by the reporting side.'' [664] This same commenter stated that SDRs should ''process transactions in real-time.'' [665]

c. Final Rule

After considering the comments, the Commission is adopting Rule 13n–5(b)(1) and the definition of ''transaction data'' under Rule 13n–5(a)(3) as proposed, with modifications.[666] The Commission is adopting the definition of ''asset class'' under Rule 13n–5(a)(1) as proposed, with one modification.[667]

Rule 13n–5(b)(1)(i) and the definition of ''transaction data'': Rule 13n–5(b)(1)(i) requires every SDR to establish, maintain, and enforce written policies and procedures reasonably designed for the reporting of complete and accurate transaction data to the SDR, and requires the SDR to accept all transaction data that is reported to the SDR in accordance with such policies and procedures. ''Transaction data'' is defined to mean all the information reported to an SDR pursuant to the Exchange Act and the rules and regulations thereunder, except for information provided pursuant to Rule 906(b) of Regulation SBSR.[668]

As explained in the Proposing Release, a fundamental goal of Title VII is to have all SBSs reported to SDRs.[669] Therefore, ''transaction data'' includes all information, including life cycle events, required to be reported to an SDR under Rule 901 of Regulation SBSR.[670] Rule 13n–5(b)(1)(i) is intended to prevent SDRs from rejecting SBSs for arbitrary or anti-competitive reasons, minimize the number of SBSs that are not accepted by an SDR, and to the extent that an SDR's policies and procedures make clear which SBSs the SDR will accept, make it easier for market participants and market infrastructures to determine whether there is an SDR that will accept a particular SBS.[671]

The Commission is revising the rule from the proposal to clarify that an SDR's policies and procedures should be reasonably designed for the reporting of ''complete and accurate'' transaction data to the SDR.[672] For example, an SDR's policies and procedures may not be reasonable if they do not require reporting of all the data elements

[656] MarkitSERV, *supra* note 19 (noting that ''some level of data fragmentation will be unavoidable'') (citation omitted).

[657] DTCC 2, *supra* note 19; *see also* DTCC 3, *supra* note 19 (recommending that any SDR ''be able to receive and manage all swaps in any asset class for which it is registered in accordance with the requirements of the Commission'' because such requirement is ''critical . . . for assuring that the more complex and non-standard transactions, typically the higher risk creating transactions . . ., are appropriately registered in SDRs so accurate risk and market activity profiles can be maintained''); DTCC 4, *supra* note 19 (stating that ''no provider of trading or clearing services should be permitted to simply declare itself the SDR for trades it facilitates'' and that it ''strenuously objects'' to allowing SDRs accept only those SBSs that are cleared).

[658] *See* DTCC 2, *supra* note 19; MarkitSERV, *supra* note 19; MFA 1, *supra* note 19.

[659] MFA 1, *supra* note 19.

[660] MarkitSERV, *supra* note 19 (stating such an approach would motivate parties to ensure the accuracy of reported data because of the associated economic and legal consequences).

[661] *See* Trade Acknowledgment Release, *supra* note 133.

[662] MarkitSERV, *supra* note 19.

[663] DTCC 2, *supra* note 19.

[664] DTCC 5, *supra* note 19.

[665] DTCC 2, *supra* note 19.

[666] The Commission is making one technical amendment to proposed Rule 13n–5(b)(1)(ii). As proposed, the rule referenced the ''policies and procedures required by paragraph (b)(1) of this section.'' As adopted, the rule references the ''policies and procedures required by paragraph (b)(1)(i) of this section.'' Additionally, the Commission is renumbering the definition of ''transaction data'' as Rule 13n–5(a)(3) in order to alphabetize the definitions in Rule 13n–5(a). The definition of ''transaction data'' is also being revised from the proposal, as discussed below.

[667] The definition of ''asset class'' is also being renumbered as Rule 13n–5(a)(1) in order to alphabetize the definitions in Rule 13n–5(a).

[668] Rule 13n–5(a)(3). As proposed, the definition of ''transaction data'' did not include the exception for information provided pursuant to Rule 906(b) of Regulation SBSR. *See* Regulation SBSR Adopting Release, *supra* note 13 (Rule 906(b) requiring a participant to provide information related to its ultimate parent(s) and affiliates). Because the information provided pursuant to Rule 906(b) is not tied to a particular SBS, the Commission believes that it does not make sense to tie the retention of the information to the expiration of an SBS. *See* Rule 13n–5(b)(4) (requiring an SDR to maintain transaction data ''for not less than five years after the applicable [SBS] expires''). By adding the exception to the definition of ''transaction data,'' the information that an SDR receives pursuant to Rule 906(b) will instead be required to be kept and preserved for not less than five years, pursuant to Rule 13n–7(b).

[669] Proposing Release, 75 FR at 77327, *supra* note 2. *See* Exchange Act Section 13(m)(1)(G), 15 U.S.C. 78m(m)(1)(G), as added by Dodd-Frank Act Section 763(i) (requiring ''[e]ach security-based swap (whether cleared or uncleared)'' to be reported to a registered SDR).

[670] A definition of ''life cycle event'' is included in Regulation SBSR. *See* Regulation SBSR Adopting Release, *supra* note 13 (Rule 900).

[671] In a separate release relating to implementation of Dodd-Frank Act Section 763(i), the Commission is adopting additional rules requiring an SDR to have policies and procedures relating to the reporting of SBS data to the SDR. *See* Regulation SBSR Adopting Release, *supra* note 13 (Rule 907); *see also id.* (Rule 901(h) requiring information to be reported to an SDR ''in a format required by the registered [SDR]'').

[672] *See* Proposing Release, 75 FR at 77307 and 77327, *supra* note 2 (''SDRs are required to collect and maintain accurate SBS transaction data so that relevant authorities can access and analyze the data from secure, central locations to better monitor for systemic risk and potential market abuse'' and ''an SDR is useful only insofar as the data it retains is accurate''); *see also* MFA 1, *supra* note 19 (discussing the importance of SDRs maintaining accurate data).

required under Regulation SBSR and that the data reported be accurate.

The Commission agrees with one commenter's view that an SDR's policies and procedures should allow for the reporting of ''a wide variety of SBS transactions.'' [673] The Commission also agrees that SDRs should be allowed to ''specify the methods and channels that participants need to use to connect to [SDRs],'' [674] so long as such methods and channels are reasonable. Therefore, an SDR may reject SBS data that is reported in a manner that is inconsistent with its reasonable policies and procedures.

In addition, to the extent that an SDR's policies and procedures allow SBSs to be reported to it in more than one format,[675] the SDR may need to reformat or translate the data to conform to any format and taxonomy that the Commission may adopt pursuant to Rule 13n–4(b)(5) in order to satisfy the requirement of providing direct electronic access to the Commission.[676] For example, the SDR may need to reformat or translate terms of the transaction (*e.g.,* scheduled termination dates, prices, or fixed or floating rate payments). The Commission notes that an SDR is not required to make persons who report SBSs to the SDR use any of the formats and taxonomies specified by the Commission. Rather, the SDR is only required to use such formats and taxonomies when providing the Commission with direct electronic access.

Rule 13n–5(b)(1)(ii) and the definition of ''asset class'': Rule 13n–5(b)(1)(ii) requires an SDR, if it accepts any SBS in a particular asset class, to accept all SBSs in that asset class that are reported to it in accordance with its policies and procedures required by Rule 13n–5(b)(1)(i). As explained in the Proposing Release, this requirement is designed to maximize the number of SBSs that are accepted by an SDR.[677] The comments that the Commission received on this rule endorsed it.[678] The Commission believes that if certain SBSs are not accepted by any SDR and are reported to the Commission instead,[679] the purpose of the Dodd-Frank Act to have centralized data on SBSs for regulators and others to access could be undermined.[680] In addition, the Commission agrees with one commenter that this requirement will ''reduce the complexity for reporting parties.'' [681] The Commission also agrees with commenters' views that without this requirement, SDRs may be tempted to limit their services to standardized, high-volume SBSs.[682] Given these incentives, the requirement that an SDR accept all SBSs in a given asset class if it accepts any SBS in that asset class is meant to facilitate the aggregation of, and relevant authorities' and market participants' access to, SBS transaction data. This requirement prevents a provider of trading or clearing services to act as an SDR for only those SBSs that it trades or clears.[683] This requirement also prevents an SDR from accepting only SBSs that have been cleared.[684]

As explained in the Proposing Release, an SDR is required to accept only those SBSs that are reported in accordance with the SDR's policies and procedures required by Rule 13n–5(b)(1)(i).[685] For example, an SDR's policies and procedures could prescribe the necessary security and connectivity protocols that market participants and market infrastructures must have in place prior to transmitting transaction data to the SDR. The SDR is not required to accept transaction data from market participants and market infrastructures that do not comply with these protocols; otherwise the transmission of the transaction data could compromise the SDR's automated systems.[686]

In response to the comment recommending amending the definition of ''asset class'' to remove the ''the distinction between loan–based and credit asset classes,'' [687] the Commission agrees that removing such distinction will make it easier for reporting parties when classifying a transaction. Therefore, the Commission is modifying from the proposal the definition of ''asset class'' in Rule 13n–5(a)(1) to mean ''those security-based swaps in a particular broad category, including, but not limited to, credit derivatives and equity derivatives.'' [688]

Where an SBS arguably could belong to more than one asset class, for example, if it has characteristics of both credit and equity derivatives, then an SDR serving either asset class should be able to accept that SBS without then being required to accept all SBSs in the other asset class—*i.e.,* an SDR for the credit derivative asset class could accept such an SBS without then having to accept all equity SBSs, and an SDR for the equity derivative asset class could

[673] *See* MarkitSERV, *supra* note 19.

[674] *See* MarkitSERV, *supra* note 19.

[675] *See* Regulation SBSR Adopting Release, *supra* note 13 (Rule 907(a)(2) requiring a registered SDR to establish and maintain written policies and procedures that specify one or more acceptable data formats (each of which must be an open-source structured data format that is widely used by participants), connectivity requirements, and other protocols for submitting information).

[676] *See* Section VI.D.2.c.ii of this release discussing Rule 13n–4(b)(5) (requiring SDRs to provide direct electronic access to the Commission or any designee); Section VI.E.4 of this release discussing Rule 13n–5(b)(4) (requiring every SDR to maintain transaction data in a format readily accessible and usable to the Commission); and Section VI.H of this release discussing Rule 13n–8 (requiring every SDR to promptly report information to the Commission in a form and manner acceptable to the Commission).

[677] Proposing Release, 75 FR at 77327, *supra* note 2.

[678] *See* DTCC 2, *supra* note 19; MarkitSERV, *supra* note 19; DTCC 3, *supra* note 19; DTCC 4, *supra* note 19.

[679] *See* Exchange Act Section 13A(a)(1), 15 U.S.C. 78m–1(a)(1) (requiring an uncleared SBS to be reported to the Commission if there is no SDR that would accept the SBS)); *see also* Regulation SBSR Adopting Release, *supra* note 13 (Rule 901(b) requiring SBSs to be reported to the Commission if there is no SDR that would accept the SBSs).

[680] *See also* MarkitSERV, *supra* note 19 (stating that the requirement to accept all trades in an asset class is ''a means of ensuring broad coverage while guarding against fragmentation'').

[681] *See* DTCC 2, *supra* note 19.

[682] *See* DTCC 2, *supra* note 19 (stating that the requirement for an SDR to support all trades in an asset class ''discourages an SDR from only servicing high volume products within an asset class to maximize profit, and leaving more complex (and less frequently traded) transactions to be reported by reporting parties directly to the Commission''); MarkitSERV, *supra* note 19 (''Without specific requirements related to the range of products that can be reported to them, [SDRs] may be tempted to limit their operating costs by only accepting the more standardized categories of swaps [that] also tend to trade in high volumes. This would result in incomplete market coverage and an increased fragmentation of the reported data.'') (citation omitted).

[683] *See* DTCC 4, *supra* note 19 (stating that ''no provider of trading or clearing services should be permitted to simply declare itself the SDR for trades it facilitates'').

[684] *See* DTCC 4, *supra* note 19 (stating that it ''strenuously objects'' to allowing SDRs to accept only those SBSs that are cleared).

[685] Proposing Release, 75 FR at 77327, *supra* note 2. An SDR is required to disclose to market participants its criteria for providing others with access to services offered and data maintained by the SDR pursuant to Rule 13n–10(b)(1), as discussed in Section VI.I.2 of this release. Therefore, market participants will be made aware of an SDR's policies and procedures for reporting data.

[686] To the extent that an SDR already has systems in place to accept and maintain SBSs in a particular asset class, the Commission believes that Rule 13n–5(b)(1)(ii) will not add a material incremental financial or regulatory burden to SDRs. *See* Proposing Release, 75 FR at 77327, *supra* note 2.

[687] *See* DTCC 2, *supra* note 19.

[688] In a separate release relating to implementation of Dodd-Frank Act Section 763(i), the Commission is adopting the same definition of ''asset class.'' *See* Regulation SBSR Adopting Release, *supra* note 13 (Rule 900). In addition, the Commission proposed rules relating to trade acknowledgments and verifications of SBSs, which proposed a definition of ''asset class'' that is the same as the definition of ''asset class'' in the Proposing Release, 75 FR at 77369, *supra* note 2, and therefore differs from the definition of ''asset class'' being adopted in this release. *See* Trade Acknowledgment Release, *supra* note 133. The Commission expects to consider conforming the proposed definition of ''asset class'' in the Trade Acknowledgment Release with the definition being adopted today at a later time.

accept the SBS without then having to accept all credit SBSs.

One commenter expressed concern about transactions that could be considered both swaps and SBSs, such as one constructed based on the correlation between commodities and equities.[689] The Commission notes that it has adopted, jointly with the CFTC, regulations applicable to mixed swaps.[690] The Commission believes that if an SDR accepts a mixed swap, then it should not be required to accept all SBSs in all asset classes to which the mixed swap belongs. For example, if a swap data repository that accepts commodity swaps accepts a mixed swap that is based on the value of both equity and commodity prices, then that swap data repository should not be required to accept all equity SBSs.

Rule 13n–5(b)(1)(iii): Rule 13n–5(b)(1)(iii) requires every SDR to establish, maintain, and enforce written policies and procedures reasonably designed to satisfy itself that the transaction data that has been submitted to the SDR is complete and accurate.[691] Rule 13n–5(b)(1)(iii) also requires every SDR to clearly identify the source for each trade side and the pairing method (if any) for each transaction in order to identify the level of quality of that transaction data.[692] These requirements, which are intended to improve data accuracy, are based on the requirement in Exchange Act Section 13(n)(5)(B) that an SDR ''confirm with both counterparties to the security-based swap the accuracy of the data that was submitted.'' [693] As explained in the Proposing Release, the requirement is based on the premise that an SDR is useful only insofar as the data it retains is accurate.[694] Unreliable SBS data does not enhance transparency. Requiring the SDR to take steps regarding the accuracy of the transaction data submitted to it, should help ensure that the data submitted to the SDR is accurate and agreed to by both counterparties. One commenter suggested that ''SDRs should not have additional duties with respect to verifying the accuracy of submission.'' [695] But because of the statutory requirement and the likelihood that the commenter's approach would lead to less accurate information being provided to the Commission and the marketplace, the Commission is adopting Rule 13n–5(b)(1)(iii) largely as proposed.

As proposed, the rule would require an SDR's policies and procedures to address the accuracy of the transaction data. For purposes of clarification, the rule as adopted requires that an SDR's policies and procedures address both the completeness and accuracy of the transaction data. For example, an SDR's policies and procedures may not be reasonable if they allow data elements required under Regulation SBSR to be blank.

The Commission understands that with respect to certain asset classes, third party service providers currently provide an electronic affirmation or matching process prior to the SBS data reaching an SDR.[696] As explained in the Proposing Release, the Commission believes that an SDR can fulfill its responsibilities under Exchange Act Section 13(n)(5)(B), Rule 13n–4(b)(3),[697] and this Rule 13n–5(b)(1)(iii) by developing reasonable policies and procedures that rely on confirmations completed by another entity, such as an SB SEF, clearing agency, or third party vendor, as long as such reliance is reasonable.[698] In order for such policies and procedures establishing reliance on a third party to be reasonable, the SDR would need to oversee and supervise the performance of the third party confirmation provider. This could include having policies and procedures in place to monitor the third party confirmation provider's compliance with the terms of any agreements and to assess the third party confirmation provider's continued fitness and ability to perform the confirmations. It could also include having the SDR or an independent auditor inspect or test the performance of the third party confirmation provider, with the SDR retaining records of such inspections or tests.[699]

For example, if an SBS is traded on an SB SEF, that SB SEF could confirm the accuracy of the transaction data with both counterparties, and the SB SEF could then report the transaction data to an SDR.[700] The SDR would not need to further substantiate the accuracy of the transaction data, as long as the SDR has a reasonable belief that the SB SEF performed an accurate confirmation. However, the SDR would not comply with Exchange Act Section 13(n)(5)(B), Rule 13n–4(b)(3), and this Rule 13n–5(b)(1)(iii) if the confirmation proves to be inaccurate and the SDR's reliance on the SB SEF for providing accurate confirmations was unreasonable (*e.g.,* the SDR ignored a pattern of inaccuracies or red flags). In certain circumstances, such as where an SBS is transacted by two commercial end-users and is not electronically traded or cleared, and is reported to an SDR by one of those end-users, there may not be any other entity upon which the SDR can reasonably rely to perform the confirmation. In such a case, the SDR would have to contact each of the counterparties to substantiate the accuracy of the transaction data.[701]

Similarly, it would not be reasonable for an SDR to rely on a trade acknowledgment provided by one counterparty to an SBS, without verifying that the other counterparty has agreed to the trade. However, if a party to an SBS timely delivers a trade acknowledgment to both the counterparty and the SDR (or a third party confirmation provider), and the counterparty promptly sends the

[689] *See* DTCC 2, *supra* note 19.

[690] *See* Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement''; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, Exchange Act Release No. 67453 (July 18, 2012), 77 FR 48207 (Aug. 13, 2012).

[691] As proposed, Rule 13n–5(b)(1)(iii) would require the SDR's policies and procedures to be ''reasonably designed to satisfy [the SDR] by reasonable means that the transaction data that has been submitted to the SDR is accurate.'' In adopting Rule 13n–5(b)(1)(iii), the Commission is removing the phrase ''by reasonable means'' to make the rule text clearer. This revision is not intended to substantively change the meaning of the rule.

[692] With regard to this requirement, proposed Rule 13n–5(b)(1)(iii) used the phrase ''including clearly identifying.'' In adopting Rule 13n–5(b)(1)(iii), the Commission is changing ''including clearly identifying'' to ''clearly identifies'' to make the rule text clearer. This revision is not intended to substantively change the meaning of the rule.

[693] 15 U.S.C. 78m(n)(5)(B); *see also* Rule 13n–4(b)(3) (implementing same requirement).

[694] Proposing Release, 75 FR at 77327, *supra* note 2. *Accord* CPSS–IOSCO Trade Repository Report, *supra* note 48 (the primary public policy benefit of an SDR is facilitated by the integrity of the information maintained by an SDR).

[695] *See* DTCC 2, *supra* note 19; *see also* DTCC 5, *supra* note 19 (recommending that SDRs be determined to have satisfied their obligation to confirm the accuracy of data under certain circumstances).

[696] *See, e.g.,* MarkitSERV, *supra* note 19 (noting that commenter provides confirmation and matching services for post-trade SBS transactions).

[697] Rule 13n–4(b)(3) requires SDRs to ''[c]onfirm, as prescribed in Rule 13n–5 (§ 240.13n–5), with both counterparties to the security-based swap the accuracy of the data that was submitted.''

[698] Proposing Release, 75 FR at 77327–8, *supra* note 2. *See, e.g.,* MarkitSERV, *supra* note 19 (The ''Commission should encourage the use and reporting of trade data that has been confirmed or verified by both counterparties via an affirmation or a matching process.'').

[699] Such records would have to be maintained pursuant to Rule 13n–7(b). *See* Section VI.G.2 of this release discussing SDR recordkeeping.

[700] *See* Proposing Release, 75 FR at 77328, *supra* note 2.

[701] The Commission believes that an SDR should consider making reasonable accommodations, including consideration of any cost burdens, for a non–reporting counterparty of an SBS transaction in connection with any follow-up by the SDR regarding the accuracy of the counterparty's SBS transaction. These accommodations could, for example, include providing means for non–reporting counterparties to substantiate the accuracy of the transaction data without having to incur significant systems or technology costs.

verification back to both the original party and the SDR (or a third party confirmation provider), then the SDR could use the trade acknowledgment and verification to fulfill its obligations under this rule.[702]

With regard to the requirement that an SDR ''clearly identif[y] the source for each trade side and the pairing method (if any) for each transaction,'' [703] the Commission notes that transaction data may vary in terms of reliability and such source and pairing method may affect the reliability of the transaction data. As explained in the Proposing Release, some transaction data may be affirmed by counterparties to an SBS, but not confirmed.[704] Some transaction data may be confirmed informally by the back-offices of the counterparties, but the confirmation may not be considered authoritative. Other transaction data may go through an electronic confirmation process, which is considered authoritative by the counterparties. The Commission is adopting this requirement to enable relevant authorities to better determine the reliability of any particular transaction data maintained by an SDR. In order for an SDR's policies and procedures for satisfying itself that the transaction data that has been submitted to the SDR is complete and accurate to be reasonable, the SDR could consider documenting the processes used by third parties to substantiate the accuracy of the transaction data.

Rule 13n–5(b)(1)(iv): Rule 13n–5(b)(1)(iv) requires every SDR to promptly record the transaction data it receives. As explained in the Proposing Release, it is important that SDRs keep up-to-date records so that regulators and counterparties to SBSs will have access to accurate and current information.[705] One commenter recommended that SDRs process transactions in ''real-time.'' [706] The commenter did not define ''real-time.'' If, by ''real-time,'' the commenter means that SDRs should begin to record the transaction data as soon as it arrives, then the Commission believes that the rule's requirement to ''promptly record the transaction data it receives'' is consistent with the commenter's recommendation.

2. Positions (Rule 13n–5(b)(2))

a. Proposed Rule

Proposed Rule 13n–5(b)(2) would require every SDR to establish, maintain, and enforce written policies and procedures reasonably designed to calculate positions for all persons with open SBSs for which the SDR maintains records. Proposed Rule 13n–5(a)(2) defined ''position'' as the gross and net notional amounts of open SBS transactions aggregated by one or more attributes, including, but not limited to, the (i) underlying instrument, index, or reference entity; (ii) counterparty; (iii) asset class; (iv) long risk of the underlying instrument, index, or reference entity; and (v) short risk of the underlying instrument, index, or reference entity. The Commission requested comment regarding whether it should require SDRs to calculate market values of each position at least daily and provide them to the Commission.[707]

b. Comments on the Proposed Rule

Three commenters submitted comments relating to this proposed rule.[708] One commenter expressed the view that ''position data is most valuable when aggregated among all SDRs,'' and therefore suggested that ''one SDR should be given the responsibility to aggregate and maintain the consolidated position data for regulatory purposes.'' [709]

None of the commenters believed that SDRs should be required to perform valuation calculations at this time. One commenter indicated, however, that providing valuations should be a long-term goal.[710] In this commenter's view, existing SDRs do not have the capability to provide valuations and they are not currently best situated to develop this capability; the short-term goal should be for SDRs to collect, and potentially report, valuations provided by the counterparties to an SBS and/or any relevant third party entities.[711] Another commenter expressed the view that ''firms'' should provide market values because they invest considerable resources in valuing trades and it would be difficult for an SDR to replicate these activities for all trades.[712] The commenter stated that an ''SDR could contract with a market valuation service to provide some values and this would provide some independent valuation, but this will not readily extend to illiquid or structured products.'' [713] The commenter also stated that while mark-to-market values would be of some use to regulators, without collateral information ''the values would not be useful in assessing counterparty risk exposures.'' [714] A third commenter stated that valuation models for counterparty credit risks and systemic risk should include independent, third party data.[715]

c. Final Rule

After considering the comments, the Commission is adopting Rule 13n–5(b)(2) and the definition of ''position'' under Rule 13n–5(a)(2) as proposed. Rule 13n–5(b)(2) requires every SDR to establish, maintain, and enforce written policies and procedures reasonably designed to calculate positions for all persons with open SBSs for which the SDR maintains records.[716] Rule 13n–5(a)(2) defines ''position'' as the gross and net notional amounts of open SBS transactions aggregated by one or more attributes, including, but not limited to, the (i) underlying instrument, index, or reference entity; (ii) counterparty; (iii) asset class; (iv) long risk of the underlying instrument, index, or reference entity; and (v) short risk of the underlying instrument, index, or reference entity.[717]

[702] Although the Commission proposed rules requiring SBS dealers and major SBS participants to provide trade acknowledgment and verification of SBS transactions, it has not adopted any such rules. *See* Trade Acknowledgment Release, *supra* note 133. The Commission may address in a later release whether the procedure described above would comply with any such rules. *See* MarkitSERV, *supra* note 19 (stating that ''the environment envisaged by the SBS SDR Regulation would greatly benefit from being connected with the confirmation requirement (such as the verified trade acknowledgement record)'').

[703] Rule 13n–5(b)(1)(iii).

[704] Proposing Release, 75 FR at 77328, *supra* note 2.

[705] Proposing Release, 75 FR at 77328, *supra* note 2.

[706] *See* DTCC 2, *supra* note 19 (stating that SDRs should ''process transactions in real-time'').

[707] *See* Proposing Release, 75 FR at 77329, *supra* note 2.

[708] *See* DTCC 2, *supra* note 19; Markit, *supra* note 19; Ethics Metrics, *supra* note 19.

[709] DTCC 2, *supra* note 19.

[710] Markit, *supra* note 19 (''[W]e believe that the Commission should work to create a system where SBS SDRs play an important and even primary role not only in ensuring the accuracy of counterparties' swap valuations, but also in performing independent valuations for the counterparties.'').

[711] Markit, *supra* note 19 (recognizing that an SDR performing ''independent valuations may not be practical given the highly customized and bespoke nature of many swaps'').

[712] DTCC 2, *supra* note 19.

[713] DTCC 2, *supra* note 19.

[714] DTCC 2, *supra* note 19.

[715] Ethics Metrics, *supra* note 19; *see also* MarkitSERV, *supra* note 19 (describing valuations as a possible ancillary service of SDRs).

[716] Position data is required to be provided by an SDR to certain entities pursuant to Exchange Act Section 13(n)(5)(G), 15 U.S.C. 78m(n)(5)(G).

[717] As stated in the Proposing Release, for purposes of this definition, positions aggregated by long risk would be only for the aggregate notional amount of SBSs in which a market participant has long risk of the underlying instrument, index, or reference entity. Proposing Release, 75 FR at 77326 n.102, *supra* note 2. Similarly, positions aggregated by short risk would be only for the aggregate notional amount of SBSs in which a market participant has short risk of the underlying instrument, index, or reference entity. For SBSs other than credit default swaps, a counterparty has long risk where the counterparty profits from an increase in the price of the underlying instrument or index, and a counterparty has short risk where the counterparty profits from a decrease in the price

As explained in the Proposing Release, position information is important to regulators for risk, enforcement, and examination purposes.[718] In addition, having a readily available source of position information can be useful to counterparties in evaluating their own risk. As explained in the Proposing Release, in order to meet its obligation to calculate positions, an SDR could require reporting parties to report the necessary events to calculate positions, or it could have a system that will monitor for and collect such information.[719] In order for the positions to be calculated accurately, an SDR will need to promptly incorporate recently reported transaction data and collected unreported data. It is important that the SDR keep up-to-date records so that relevant authorities and parties to the SBS will have access to accurate and current information. In calculating positions, an SDR is only required to reflect SBS transactions reported to that SDR.

As explained in the Proposing Release, the definition of ''position'' is designed to be sufficiently specific so that SDRs are aware of the types of position calculations that regulators may require an SDR to provide, while at the same time, provide enough flexibility to encompass the types of position calculations that regulators and the industry will find important as new types of SBSs are developed.[720]

While one commenter suggested that ''one SDR should be given the responsibility to aggregate and maintain the consolidated position data for regulatory purposes,'' [721] the Commission is not mandating the aggregation of position data at one SDR. At this time, the Commission believes that it—rather than any particular registered entity—is in the best position to aggregate data across multiple registered SDRs. As described above, the Commission anticipates that it will propose for public comment detailed specifications of acceptable formats and taxonomies that will facilitate an accurate interpretation, aggregation, and analysis of SBS data by the Commission.[722] The Commission may revisit this issue as the SBS market evolves.[723]

With regard to valuations, the Commission agrees with commenters [724] that SDRs are not necessarily in the best position to calculate market valuations at this time. While, as one commenter pointed out, an SDR could contract with a market valuation service to provide some values,[725] it is not apparent how useful the valuation would be without collateral information,[726] and a valuation service could not readily provide valuations for illiquid or structured products.[727] Therefore, the Commission is not requiring SDRs to calculate market values of positions daily and to provide them to the Commission. The Commission notes that under Regulation SBSR, the counterparties are required to report to an SDR the ''data elements included in the agreement between the counterparties that are necessary for a person to determine the market value of the transaction.'' [728] Accordingly, if necessary, the Commission could calculate some market valuations either in–house or by hiring a third party market valuation service provider. As the market develops and SDRs develop and increase their capabilities, the Commission may revisit this issue.

3. Maintain Accurate Data (Rule 13n–5(b)(3))

a. Proposed Rule

Proposed Rule 13n–5(b)(3) would require every SDR to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that the transaction data and positions that it maintains are accurate.

b. Comments on the Proposed Rule

Both commenters that submitted comments relating to this proposed rule agreed that SDRs serve an important role in collecting and maintaining accurate SBS data.[729] One commenter stated that ''[e]nsuring the accuracy and quality of [data reported to SDRs] will be critical for the Commission's achievement of the regulatory goals of transparency, efficiency and systemic risk mitigation [and that] SDRs will play a pivotal role in ensuring the accuracy of [SBS] data both for public consumption and regulatory reporting purposes.'' [730] The commenter further noted that ''[t]he existence of a number of feedback loops and distribution channels through which data will flow will enable participants to identify, test and correct inaccuracies and errors.'' [731] This commenter also indicated that the ability to ensure data accuracy would be influenced by the degree to which such data is utilized by industry participants in other processes. Therefore, that commenter stressed that ''SDRs and their affiliates should be permitted to offer a range of ancillary services in addition to their core services of data acceptance and data storage.'' [732]

Another commenter stated that ''the multiple bilateral reconciliations performed between the parties to a trade throughout the life of a trade (and often on an ad hoc basis or only following a dispute), could be replaced by one single reconciliation framework with a shared central record, increasing both [sic] operating efficiency as well as reducing operational risks. The Commission's suggestion for portfolio reconciliation seems well aligned with this, and this would give the direct benefit of improved bilateral portfolio reconciliation processes between the parties.'' [733] The commenter also stated that ''[a]fter each recorded transaction is

of the underlying instrument or index. For credit default swaps, a counterparty has long risk where the counterparty profits from a decrease in the price of the credit risk of the underlying index or reference entity, and a counterparty has short risk where the counterparty profits from an increase in the price of the credit risk of the underlying index or reference entity. As the market develops, the Commission may consider whether to require SDRs calculate positions in another manner and provide those positions to the Commission on a confidential basis.

[718] Proposing Release, 75 FR at 77329, *supra* note 2.

[719] Proposing Release, 75 FR at 77329, *supra* note 2.

[720] Proposing Release, 75 FR at 77326, *supra* note 2. The Commission notes that Dodd-Frank Act Section 763(h) adds Exchange Act Section 10B, which provides, among other things, for the establishment of position limits for any person that holds SBSs. *See* 15 U.S.C. 78j–2. Specifically, Exchange Act Section 10B(a) provides that ''[a]s a means reasonably designed to prevent fraud and manipulation, the Commission shall, by rule or regulation, as necessary or appropriate in the public interest or for the protection of investors, establish limits (including related hedge exemption provisions) on the size of positions in any security-based swap that may be held by any person.'' *Id.* In addition, Exchange Act Section 10B(d) provides that the Commission may establish position reporting requirements for any person that effects transactions in SBSs, whether cleared or uncleared. *Id.*

[721] DTCC 2, *supra* note 19.

[722] *See* Section VI.D.2.c.ii of this release discussing anticipated Commission proposal pursuant to Rule 13n–4(b)(5).

[723] *See* Section IV of this release for further discussion of consolidating data in one SDR.

[724] *See* DTCC 2, *supra* note 19; Markit, *supra* note 19.

[725] *See* DTCC 2, *supra* note 19.

[726] *See* DTCC 2, *supra* note 19 (stating that valuations without collateral information would not be useful in assessing counterparty risk exposures).

[727] *See* DTCC 2, *supra* note 19 (stating that independent market valuations services could not readily value illiquid or structured products).

[728] *See* Regulation SBSR Adopting Release, *supra* note 13 (Rule 901).

[729] *See* DTCC 2, *supra* note 19; MarkitSERV, *supra* note 19; *see also* DTCC 1*, *supra* note 20.

[730] MarkitSERV, *supra* note 19.

[731] MarkitSERV, *supra* note 19.

[732] MarkitSERV, *supra* note 19.

[733] DTCC 2, *supra* note 19. In the Proposing Release, the Commission stated that the policies and procedures required by Rule 13n–5(b)(3) ''could include portfolio reconciliation.'' Proposing Release, 75 FR at 77330, *supra* note 2.

consummated, the SDR can maintain the validity of the data for that transaction by offering an asset servicing function.'' [734]

c. Final Rule

After considering the comments, the Commission is adopting Rule 13n–5(b)(3) as proposed, with one modification. Rule 13n–5(b)(3) requires every SDR to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that the transaction data and positions that it maintains are complete and accurate. As explained in the Proposing Release, maintaining accurate records is an integral function of an SDR.[735] As further explained in the Proposing Release, maintaining accurate records requires diligence on the part of an SDR because, among other things, SBSs can be amended, assigned, or terminated and positions change upon the occurrence of new events (such as corporate actions).[736]

As proposed, the rule would require an SDR's policies and procedures to address the accuracy of the transaction data and positions. For purposes of clarification, the rule as adopted requires that an SDR's policies and procedures address both the completeness and accuracy of the transaction data and positions. For example, an SDR's policies and procedures may not be reasonable if they allow data elements required under Regulation SBSR to be blank.

The Commission agrees with one commenter that the degree to which industry participants use the data will influence the accuracy of the data, and that the ability of participants to identify, test, and correct inaccuracies and errors should be encouraged.[737] The Commission also agrees with another commenter that offering an asset servicing function may assist an SDR in maintaining the validity of transaction data and positions.[738] Therefore, the Commission supports the provision by SDRs of voluntary ancillary services, such as asset servicing, that improve the quality of the SBS data in the SDRs.[739] With regard to the comment acknowledging the value to portfolio reconciliation,[740] while portfolio reconciliation is a voluntary ancillary service, the Commission believes, consistent with its position in the Proposing Release,[741] that it is a method that an SDR can use to ensure reasonably the accuracy of the transaction data and positions that the SDR maintains.

4. Data Retention (Rule 13n–5(b)(4))

a. Proposed Rule

Proposed Rule 13n–5(b)(4) would require every SDR to maintain transaction data for not less than five years after the applicable SBS expires and historical positions for not less than five years. Alternatively, the Commission considered, but did not propose a rule, requiring every SDR to maintain transaction data for not less than five years after the applicable SBS expires or ten years after the applicable SBS is executed, whichever is greater, and historical positions for not less than five years.[742] Under either alternative, SDRs would be required to maintain the transaction data and historical positions (i) in a place and format that is readily accessible to the Commission and other persons with authority to access or view such information; and (ii) in an electronic format that is non-rewriteable and non-erasable.[743]

b. Comments on the Proposed Rule

Four commenters submitted comments relating to this proposed rule.[744] The commenters generally agreed with the Commission's proposal that SDRs should maintain SBS data for the life of the SBS contract and a reasonable time period thereafter.[745] Commenters expressed various views on whether the Commission should require SBS data to be maintained in a particular format.[746] One commenter stated that ''[t]he Proposed Rule should require the retention of electronic records of transactions, including life cycle events. These should be maintained for the life of the contract in order to provide an audit trail to positions and for a reasonable retention period thereafter. An SDR's records should be in an electronically readable format (where available) that allows for application and analysis.'' [747] The commenter also stated that ''certain aggregate data should be maintained beyond the maturity of contracts to provide public availability of time series data.'' [748]

One commenter to the Temporary Rule Release believed that the Commission should consider requiring SBS transaction data to be recorded and reported pursuant to a single electronic data standard because ''[t]his will enable transactions to be reported in an efficient and timely manner in a form readily accessible to all concerned parties.'' [749] The commenter recommended using Financial products Markup Language (FpML) [750] as that standard.[751] Another commenter recommended that ''the Commission require that all SDRs maintain [stored SBS data] in the same format.'' [752] This commenter further recommended that ''the Commission specifically require the SDR to organize and index accurately the transaction data and positions so that the Commission and other users of such information are easily able to obtain the specific information that they require.'' [753] Another commenter stated that a ''registered SDR should have flexibility to specify acceptable data formats, connectivity requirements and other protocols for submitting information. Market practice, including structure of confirmation messages and detail of economic fields, evolve over time, and the SDR should have the capability to adopt and set new formats.'' [754]

Another commenter recommended that data be ''standardized and use a common terminology.'' [755] The commenter also recommended that records at SDRs be kept indefinitely because the commenter believed that there is ''no technological or practical reason for limiting the retention period.'' [756] The commenter further recommended that ''[a]ny original documents should be scanned.'' [757]

c. Final Rule

After considering the comments, the Commission is adopting Rule 13n–

[734] DTCC 1*, *supra* note 20.

[735] Proposing Release, 75 FR at 77307 and 77329–30, *supra* note 2.

[736] Proposing Release, 75 FR at 77330, *supra* note 2.

[737] *See* MarkitSERV, *supra* note 19.

[738] *See* DTCC 1*, *supra* note 20.

[739] *See* Section III.C of this release discussing ancillary services.

[740] *See* DTCC 2, *supra* note 19.

[741] Proposing Release, 75 FR at 77330, *supra* note 2 (stating that the policies and procedures required by proposed Rule 13n–5(b)(3) ''could include portfolio reconciliation'').

[742] *See* Proposing Release, 75 FR at 77330, *supra* note 2.

[743] Proposed Rule 13n–5(b)(4).

[744] *See* DTCC 2, *supra* note 19; Better Markets 1, *supra* note 19; ISDA Temp Rule, *supra* note 28; Barnard, *supra* note 19; *see also* Better Markets 2, *supra* note 19.

[745] *See, e.g.,* DTCC 2, *supra* note 19.

[746] *See* DTCC 2, *supra* note 19; Better Markets 1, *supra* note 19; ISDA Temp Rule, *supra* note 28.

[747] DTCC 2, *supra* note 19.

[748] DTCC 2, *supra* note 19.

[749] ISDA Temp Rule, *supra* note 28.

[750] FpML is based on XML (eXtensible Markup Language), the standard meta-language for describing data shared between applications.

[751] ISDA Temp Rule, *supra* note 28.

[752] Better Markets 1, *supra* note 19; *see also* Better Markets 2, *supra* note 19 (recommending reported data be subject to uniform formatting requirements).

[753] Better Markets 1, *supra* note 19.

[754] DTCC SBSR, *supra* note 27.

[755] Barnard, *supra* note 19.

[756] Barnard, *supra* note 19.

[757] Barnard, *supra* note 19.

5(b)(4) as proposed, with two modifications. Rule 13n–5(b)(4) requires every SDR to maintain transaction data and related identifying information for not less than five years after the applicable SBS expires and historical positions for not less than five years. Rule 13n–5(b)(4) also requires SDRs to maintain the transaction data and historical positions (i) in a place and format that is readily accessible and usable to the Commission and other persons with authority to access or view such information; and (ii) in an electronic format that is non-rewriteable and non-erasable.

Time Period: As explained in the Proposing Release, a five-year retention period is the current requirement for the records of clearing agencies and other registered entities, and is the statutory requirement for SB SEFs.[758] Because an SBS transaction creates obligations that continue for a specified period of time, the Commission believes that the transaction data should be maintained for the duration of the SBS, with the five years running after the SBS expires. This requirement applies to all transaction data, including life cycle events that are reported to an SDR pursuant to Regulation SBSR.[759] The Commission believes that transaction data and position data that are older than their respective retention periods will not be materially useful to the Commission or other relevant authorities.

There may be transaction-specific identifying information assigned or used by an SDR, such as a transaction ID [760] or a time stamp,[761] that are not included in the definition of ''transaction data.'' This identifying information should also be maintained for the same time period as the transaction data because it is necessary to understanding the transaction data. Therefore, the Commission is revising the proposed rule to require SDRs to maintain ''related identifying information'' for not less than five years after the applicable SBS expires. Positions are not tied to any particular SBS transaction; therefore, the Commission requires positions, as calculated pursuant to Rule 13n–5(b)(2), to be maintained for five years, similar to the record retention requirement for clearing agencies.[762]

The Commission is not adopting the alternative time period that was set forth in the Proposing Release. No comments supported the alternative time period. The Commission is not adopting one commenter's recommendation that data at SDRs be kept indefinitely [763] because the Commission believes that requiring transaction data to be maintained for not less than five years after the applicable SBS expires is more reasonable,[764] and this approach is consistent with the record retention period for other Commission registrants and the statutory requirement for SB SEFs.

One commenter stated that ''certain aggregate data should be maintained beyond the maturity of contracts to provide public availability of time series data.'' [765] Because the Commission is not requiring an SDR to provide the public with historic data (aggregated or otherwise) that it previously publicly disseminated, the Commission does not believe that it is appropriate to require SDRs to maintain aggregate data for public availability. However, SDRs may find it useful to maintain such data if they intend to provide the public with data sets beyond the public dissemination requirements of Regulation SBSR.[766] To the extent that the Commission requires the creation of aggregate data, such as through reports requested pursuant to Rule 13n–8, the data will be for regulatory purposes. Any aggregation of data that is created by an SDR, either at the Commission's direction or voluntarily, must be retained for five years pursuant to Rule 13n–7(b).[767]

Format: As explained in the Proposing Release, the Commission believes that transaction data, including life cycle events, and positions should be maintained in a place and format that is readily accessible to the Commission and other persons with authority to access or view such information.[768] This requirement is important to ensure that SDRs maintain the information in an organized and accessible manner so that users, including relevant authorities and counterparties, can easily obtain the data that would assist them in carrying out their appropriate functions. The Commission also believes that this requirement helps ensure that the information is maintained in a common and easily accessible language, such as a language commonly used in financial markets. The Commission agrees with one commenter's recommendation that an SDR's records should ''be in an electronically readable format (where available) that allows for application and analysis,'' [769] and therefore the Commission is modifying proposed Rule 13n–5(b)(4) to provide that the information must be in a format that is usable to (1) the Commission and (2) other persons with authority to access or view such information.[770] The Commission believes that if the information is not in a usable format, then the Commission and others would not have the ability to analyze the information as needed.

Despite comments to the contrary,[771] the Commission is not establishing a specific, prescribed format in which an SDR must maintain transaction data and positions. The Commission expects that the ''readily accessible and usable'' requirement will be sufficient to cause

[758] Proposing Release, 75 FR at 77330, *supra* note 2. *See also* Exchange Act Rule 17a–1, 17 CFR 240.17a–1 (requiring recordkeeping for national securities exchanges, national securities associations, clearing agencies, and the Municipal Securities Rulemaking Board); Exchange Act Section 3D(d)(9), 15 U.S.C. 78c–4(d)(9) (requiring recordkeeping for SB SEFs).

[759] *See* Regulation SBSR Adopting Release, *supra* note 13 (Rules 901, 905, and 906(a)); *see also* DTCC 2, *supra* note 19 (recommending requiring the retention of life cycle events).

[760] *See* Regulation SBSR Adopting Release, *supra* note 13 (Rule 901(g) requiring a registered SDR to assign a transaction ID to each SBS, or establish or endorse a methodology for transaction IDs to be assigned by third parties).

[761] *See* Regulation SBSR Adopting Release, *supra* note 13 (Rule 901(f) requiring a registered SDR to time stamp, to the second, its receipt of any information submitted to it pursuant to Rules 901(c), (d), (e), or (i)).

[762] *See* Exchange Act Rule 17a–1, 17 CFR 240.17a–1 (requiring clearing agencies to retain records for five years). *See also* Exchange Act Section 13(n)(4)(C), 15 U.S.C. 78m(n)(4)(C) (requiring ''standards prescribed by the Commission under this subsection [to] be comparable to the data standards imposed by the Commission on clearing agencies in connection with their clearing of security-based swaps''). Clearing Agency Standards Release, 77 FR at 66243 n.270, *supra* note 138 (''Clearing agencies may destroy or otherwise dispose of records at the end of five years consistent with Exchange Act Rule 17a–6.'').

[763] *See* Barnard, *supra* note 19.

[764] *See* DTCC 2, *supra* note 19 (''[E]lectronic records of transactions . . . should be maintained for the life of the contract . . . and for a reasonable retention period thereafter.'').

[765] DTCC 2, *supra* note 19.

[766] *See* Regulation SBSR Adopting Release, *supra* note 13 (Rule 902).

[767] *See* Section VI.G.2 of this release.

[768] Proposing Release, 75 FR at 77330, *supra* note 2.

[769] *See* DTCC 2, *supra* note 19 (recommending that an SDR's records ''be in an electronically readable format (where available) that allows for application and analysis'').

[770] Rule 13n–5(b)(4). The Commission notes that this change is consistent with other Commission rules. For example, Rule 605(a)(2) of Regulation NMS, 17 CFR 242.605(a)(2), requires reports be ''in a uniform, readily accessible, and usable electronic form.''

[771] *See* Better Markets 1, *supra* note 19 (recommending that the Commission require all SDRs to maintain stored SBS data in the same format); ISDA Temp Rule, *supra* note 28 (recommending that the Commission require SBS transaction data to be reported and recorded pursuant to a single electronic data standard, and using FpML as that standard); Barnard, *supra* note 19 (recommending that data be ''standardized and use a common terminology'' and that original documents be scanned); *see also* Better Markets 2, *supra* note 19 (recommending that reported data be subject to uniform formatting requirements).

the format and content of transaction data and historical positions maintained by any individual SDR to be sufficiently robust and complete for relevant persons to fully, accurately, and consistently process the data. The Commission believes that SDRs, working with market participants, will be in a better position to upgrade formats and data elements as needed. Having the Commission establish a specific format could impede the timely collection of data on new types of transactions from the SDRs.[772]

However, in order to oversee the SBS market, it will be necessary for the Commission to aggregate and analyze data across different SDRs.[773] As discussed above, the Commission anticipates that it will propose for public comment detailed specifications of acceptable formats and taxonomies for providing SBS data to the Commission in order to facilitate an accurate interpretation, aggregation, and analysis by the Commission of SBS data submitted to it by different SDRs.[774]

The requirement for transaction data and historical positions to be maintained in an electronic format that is non–rewriteable and non–erasable[775] is consistent with the record retention format applicable to electronic broker-dealer records.[776] As explained in the Proposing Release, this requirement would prevent the maintained information from being modified or removed without detection.[777]

The Commission is not specifically requiring that SDRs organize and index the transaction data and positions that they collect and maintain.[778] The Commission believes that the requirement in Rule 13n–5(b)(4) that each SDR must maintain transaction data and related identifying information for not less than five years after the applicable SBS expires and historical positions for not less than five years, in a place and format that is ''readily accessible and usable to the Commission and other persons with authority to access or view such information'' incorporates the requirement that the data must be organized in a way that allows the data to be readily obtained or accessed by the Commission and other appropriate persons—data is not readily accessible and usable if it is not organized in a way that allows the data to be obtained quickly and easily. Further, whether users of information maintained by an SDR, other than the Commission, are able to easily obtain such information is also addressed by Rule 13n–4(c)(1)(iii), which requires, among other things, an SDR to establish, monitor on an ongoing basis, and enforce clearly stated objective criteria that would permit fair, open, and not unreasonably discriminatory access to data maintained by the SDR.[779]

With respect to the Commission's ability to obtain the specific information it requires, the Commission believes that several other statutory and regulatory requirements under the Exchange Act also address this issue. For example, the Commission will have direct electronic access to the transaction data and positions pursuant to Exchange Act Section 13(n)(5)(D)[780] and Rule 13n–4(b)(5).[781] The Commission expects to be able to query and analyze the data as necessary without imposing an indexing requirement at this time.[782] In addition, Rule 13n–8, discussed below, requires each SDR to promptly report to the Commission, in a form and manner acceptable to the Commission, such information as the Commission determines to be necessary or appropriate for the Commission to perform the duties of the Commission under the Exchange Act and the rules and regulations thereunder.[783]

5. Controls to Prevent Invalidation (Rule 13n–5(b)(5))

a. Proposed Rule

Proposed Rule 13n–5(b)(5) would require every SDR to establish, maintain, and enforce written policies and procedures reasonably designed to prevent any provision in a valid SBS from being invalidated or modified through the procedures or operations of the SDR.

b. Comments on the Proposed Rule

Two commenters submitted comments relating to this proposed rule.[784] Both commenters seemed to agree with this proposal.[785] One commenter stated that an SDR ''should be able to offer life cycle event processing and asset servicing activities'' that may lead to ''an update or modification to the records in the SDR,'' with the consent of both parties.[786]

c. Final Rule

After considering the comments, the Commission is adopting Rule 13n–5(b)(5) as proposed. Rule 13n–5(b)(5) requires every SDR to establish, maintain, and enforce written policies and procedures reasonably designed to prevent any provision in a valid SBS from being invalidated or modified through the procedures or operations of the SDR. The terms of SBSs can be the result of negotiation between the counterparties, and the Commission believes that these terms should not be modified or invalidated without the full consent of the counterparties.[787]

The Commission agrees with one commenter's view that an SDR should be able to offer life cycle event processing and asset servicing activities that may lead to an updating of the records in the SDR, with the consent of

[772] *See* DTCC SBSR, *supra* note 27 (stating that SDRs ''should have flexibility to specify acceptable data formats, connectivity requirements and other protocols for submitting information,'' and that SDRs ''should have the capability to adopt and set new formats'' as market practices evolve over time).

[773] *See* Section VI.D.2.c.ii of this release discussing aggregation of data across multiple registered SDRs by the Commission.

[774] *See* Section VI.D.2.c.ii of this release discussing Rule 13n–4(b)(5) (direct electronic access).

[775] Rule 13n–5(b)(4).

[776] *See* Exchange Act Rule 17a–4(f)(2)(ii)(A), 17 CFR 240.17a–4(f)(2)(ii)(A). In Electronic Storage of Broker-Dealer Records, Exchange Act Release No. 47806 (May 7, 2003), 68 FR 25281 (May 12, 2003), the Commission stated, among other things, that a broker-dealer would not violate Exchange Act Rule 17a–4(f)(2)(ii)(A) ''if it used an electronic storage system that prevents the overwriting, erasing or otherwise altering of a record during its required retention period through the use of integrated hardware and software control codes.'' The Commission incorporates this interpretation into Rule 13n–5(b)(4).

[777] Proposing Release, 75 FR at 77330, *supra* note 2.

[778] *See* Proposing Release, 75 FR at 77331, *supra* note 2 (asking whether the Commission should adopt a requirement that SDRs organize and index transaction data and positions ''so that the Commission and other users of such information are easily able to obtain the specific information that they require''); Better Markets 1, *supra* note 19.

[779] *See* Section VI.D.3.a of this release discussing Rule 13n–4(c)(1)(iii).

[780] 15 U.S.C. 78m(n)(5)(D).

[781] *See* Sections VI.D.1 and VI.D.2 of this release discussing Rules 13n–4(a)(5) and 13n–4(b)(5). Rule 13n–4(b)(5) requires each SDR to provide direct electronic access to the Commission or its designees; ''direct electronic access'' is defined in Rule 13n–4(a)(5) to mean access, which shall be in a form and manner acceptable to the Commission, to data stored by an SDR in an electronic format and updated at the same time as the SDR's data is updated so as to provide the Commission with the ability to query or analyze the data in the same manner that the SDR can query or analyze the data.

[782] Although the Commission is not imposing an indexing requirement, SDRs are required under Regulation SBSR to utilize a transaction ID for each SBS. The transaction ID is designed to allow the Commission and other relevant persons to link related activity, such as life cycle events, to the original transaction. *See* Regulation SBSR Adopting Release, *supra* note 13 (Rule 901).

[783] *See* Section VI.H of this release discussing Rule 13n–8.

[784] *See* DTCC 2, *supra* note 19; MarkitSERV, *supra* note 19.

[785] DTCC 2, *supra* note 19 (supporting ''the approach that records are not invalidated by the actions of the SDR''); MarkitSERV, *supra* note 19.

[786] DTCC 2, *supra* note 19.

[787] *See* Proposing Release, 75 FR at 77331, *supra* note 2.

both parties.[788] In such a case, it is not the SDR that is modifying the SBS, but the parties to the SBS who are doing so (or the parties are submitting information regarding the SBS that relates to the terms of the original contract); the SDR is simply updating its records to reflect the changes to the SBS made by the parties to the SBS, or to reflect life cycle events that have occurred and the parties to the SBS agree should be reflected in the updated records of the SDR. However, whenever an SDR updates its records, it must retain the data as it existed prior to the update pursuant to Rule 13n–5(b)(4), which is discussed above.[789]

If the reporting party reports inconsistent data, such as where the reporting party reports that the SBS is a standard SBS, but also reports a non–standard provision, the SDR can correct the inconsistency if it gives appropriate notice to both parties.[790] In formulating its policies and procedures required by Rule 13n–5(b)(5), an SDR may want to consider providing the parties with notice of the inconsistency as soon as practicable.

6. Dispute Resolution Procedures (Rule 13n–5(b)(6))

a. Proposed Rule

Proposed Rule 13n–5(b)(6) would require every SDR to establish procedures and provide facilities reasonably designed to effectively resolve disputes over the accuracy of the transaction data and positions that are recorded in the SDR.[791]

b. Comments on the Proposed Rule

Two commenters submitted comments relating to this proposed rule.[792] One commenter supported this proposed rule, stating that it is a key step in the effort to have accurate data at the SDR.[793] The commenter stated that a reporting party and a non-reporting party may disagree on the terms of a reported SBS transaction and the reporting party may refuse to correct the erroneously reported transaction information.[794] The commenter urged the Commission to require the SDR to review promptly the disputed data with the parties.[795] The other commenter stated that it believed that ''an SDR should be in a position to identify disputes or unconfirmed data as part of its process to confirm the data with both parties. However, only the parties to a transaction can resolve any dispute as to the terms of the trade.'' [796] Where a trade comes through a third party service provider that ''act[s] directly as an affirmation, confirmation or verification platform and already utilizes dispute resolution workflows,'' the commenter did ''not support a Proposed Rule that would require that the SDR [build] processes to replicate these services.'' [797] The commenter stated that ''an SDR can make the quality of the data or disputed trades visible to a firm's prudential regulator and this would act as an incentive to timely resolution.'' [798]

c. Final Rule

After considering the comments, the Commission is adopting Rule 13n–5(b)(6) as proposed. Rule 13n–5(b)(6) requires every SDR to establish procedures and provide facilities reasonably designed to effectively resolve disputes over the accuracy of the transaction data and positions that are recorded in the SDR. As the Commission explained in the Proposing Release, the data maintained by an SDR will be used by relevant authorities and counterparties.[799] Parties, therefore, should have the ability to dispute the accuracy of the data maintained by an SDR regarding their SBSs. SDRs providing the means to resolve disputes should enhance data quality and integrity.

The Commission agrees with one commenter that only the parties to a dispute can resolve it,[800] but the Commission believes that SDRs can provide processes to facilitate resolution, which would improve the quality and accuracy of SBS data. The Commission does not believe that this requirement mandates that an SDR replicate the services of third party service providers, such as providing matching platforms.[801] Having both parties verify the SBS data through a third party service provider prior to submitting it to an SDR will ensure a great deal of accuracy in the data maintained by the SDR. However, there may be instances where disputes still occur, such as where a party disagrees with a position reflected in an SDR's records, where one party realizes it mistakenly verified a transaction and the other party refuses to submit or verify a correction, or where a transaction has been amended, but one party refuses to report or verify the amendment. In such instances, the Commission believes that the SDR should provide a party with the ability to raise the dispute, and have some sort of process to resolve the dispute. As with the other SDR Rules, an SDR could rely on a third party service provider to perform the SDR's obligation to provide a dispute resolution process. If it does so, in order for such a process to be ''reasonably designed,'' the SDR would have to oversee and supervise the performance of the third party service provider. The Commission agrees with one commenter [802] that to the extent that Rule 13n–5(b)(6) makes disputes visible to regulators, the rule should incentivize parties to resolve them. In any event, the Commission believes that the rule will further increase the quality and accuracy of SBS data.

7. Data Preservation After an SDR Ceases To Do Business (Rule 13n–5(b)(7))

a. Proposed Rule

Proposed Rule 13n–5(b)(7) would require an SDR, if it ceases to do business, or ceases to be registered as an SDR, to continue to preserve, maintain, and make accessible the transaction data and historical positions required to be collected, maintained, and preserved by Rule 13n–5 in the manner required by the Exchange Act and the rules and regulations thereunder for the

[788] *See* DTCC 2, *supra* note 19.

[789] *See* Section VI.E.4 of this release discussing Rule 13n–5(b)(4).

[790] The Commission believes that an SDR's policies and procedures would not necessarily be reasonable if they authorize the SDR to ''deem'' a user to have effectively consented to the SDR's changes if the user merely utilizes the SDR system after such change. At a minimum, the SDR should inform both parties of the change. The Commission notes that Rule 905 of Regulation SBSR establishes procedures for correcting errors in data reported to an SDR. *See* Regulation SBSR Adopting Release, *supra* note 13 (Rule 905). Additionally, as discussed in Section VI.E.6 of this release, Rule 13n–5(b)(6) requires SDRs to establish procedures and provide facilities reasonably designed to effectively resolve disputes over the accuracy of the transaction data and positions that are recorded in the SDR.

[791] In a separate release, the Commission is adopting rules regarding the correction of errors in SBS information maintained by an SDR in association with requirements under Dodd-Frank Act Section 763(i). *See* Regulation SBSR Adopting Release, *supra* note 13 (Rules 905 and 907(a)(3)).

[792] *See* DTCC 2, *supra* note 19; MFA 1, *supra* note 19; *see also* MFA SBSR, *supra* note 27.

[793] MFA 1, *supra* note 19; *see also* MFA SBSR, *supra* note 27.

[794] MFA SBSR, *supra* note 27.

[795] MFA SBSR, *supra* note 27.

[796] DTCC 2, *supra* note 19.

[797] DTCC 2, *supra* note 19.

[798] DTCC 2, *supra* note 19.

[799] Proposing Release, 75 FR at 77331, *supra* note 2. In some cases, the data maintained by the SDR may be considered by the counterparties to be the legal or authoritative record of the SBS. However, this is due to the consent of the counterparties. Simply reporting an SBS to an SDR does not affect the legal terms of the SBS. *See* Section III.A of this release discussing the service of maintaining legally binding records.

[800] *See* DTCC 2, *supra* note 19.

[801] *See* DTCC 2, *supra* note 19

[802] *See* DTCC 2, *supra* note 19.

remainder of the period required by this rule.[803]

b. Comments on the Proposed Rule

The Commission received no comments relating to this proposed rule.

c. Final Rule

The Commission is adopting Rule 13n–5(b)(7) as proposed. Rule 13n–5(b)(7) requires an SDR, if it ceases to do business, or ceases to be registered pursuant to Exchange Act Section 13(n) and the rules and regulations thereunder, to continue to preserve, maintain, and make accessible the transaction data and historical positions required to be collected, maintained, and preserved by Rule 13n–5 in the manner required by the Exchange Act and the rules and regulations thereunder (including in a place and format that is readily accessible and usable to the Commission and other persons with authority to access or view such information, in an electronic format that is non-rewriteable and non-erasable, and in a manner that protects confidentiality and accuracy) for the remainder of the period required by Rule 13n–5 (*i.e.,* not less than five years after the applicable SBS expires for transaction data and not less than five years for historical positions). As the Commission explained in the Proposing Release, given the importance of the records maintained by an SDR to the functioning of the SBS market, an SDR ceasing to do business could cause serious disruptions in the market should the information it maintains becomes unavailable.[804]

8. Plan for Data Preservation (Rule 13n–5(b)(8))

a. Proposed Rule

Proposed Rule 13n–5(b)(8) would require an SDR to make and keep current a plan to ensure that the transaction data and positions that are recorded in the SDR continue to be maintained in accordance with proposed Rule 13n–5(b)(7).

b. Comments on the Proposed Rule

The Commission received no comments relating to this proposed rule.

c. Final Rule

The Commission is adopting Rule 13n–5(b)(8) as proposed. Rule 13n–5(b)(8) requires an SDR to make and keep current a plan to ensure that the transaction data and positions that are recorded in the SDR continue to be maintained in accordance with Rule 13n–5(b)(7), which shall include procedures for transferring the transaction data and positions to the Commission or its designee (including another registered SDR).[805] As the Commission explained in the Proposing Release, given the importance of the records maintained by an SDR to the functioning of the SBS market, if an SDR ceases to do business, the absence of a plan to transfer information could cause serious disruptions.[806] The Commission expects that an SDR's plan would establish procedures and mechanisms so that another entity would be in the position to maintain this information after the SDR ceases to do business or ceases to be registered pursuant to Exchange Act Section 13(n)[807] and the rules and regulations thereunder.

F. Automated Systems (Rule 13n–6)

1. Proposed Rule

The Commission proposed Exchange Act Rule 13n–6 to provide standards for SDRs with regard to their automated systems' capacity, resiliency, and security. The proposed rule was designed to be comparable to the standards applicable to SROs, including exchanges and clearing agencies,[808] and market information dissemination systems, pursuant to the Commission's Automation Review Policy (''ARP'') program[809] and rules applicable to significant-volume alternative trading systems (''ATSs'').[810]

2. Comments on the Proposed Rule

Three commenters submitted comments relating to proposed Rule 13n–6.[811] One commenter ''support[ed] the Commission's intent'' behind the rule, but suggested several specific changes.[812] The commenter also stated that it ''has always placed a high priority on maintaining business resiliency,'' including having ''in place multiple fully staffed data and operations centers in diverse regions of the country, each capable of handling [the commenter's] entire business.''[813] The commenter stated that it ''performs both data center and operational failover tests every year'' and ''[d]atacenter recovery tests are performed at least six times a year in various configurations, and there are more than two dozen operational failover tests each year, ranging from a single department failover, to an operational recovery involving more than 400 staff.''[814] The commenter believed that ''[t]hese capabilities are fundamental to any registration as an SDR.''[815] The commenter further stated that ''[g]iven the importance of SDRs to the regulatory and systemic risk oversight of the financial markets and the important role they will play in providing market transparency, a lack of robust resiliency and redundancy in operations should disqualify an entity from registering as an SDR.''[816]

[803] As noted in the Proposing Release, this proposed requirement was based on Exchange Act Rule 17a–4(g), 17 CFR 240.17a–4(g), which applies to books and records of broker-dealers. Proposing Release, 75 FR at 77332 n.128, *supra* note 2.

[804] Proposing Release, 75 FR at 77332, *supra* note 2.

[805] In addition, Item 45 of Form SDR requires each SDR to attach as an exhibit to its Form SDR ''a plan to ensure that the transaction data and position data that are recorded in the applicant continue to be maintained after the applicant withdraws from registration as [an SDR], which shall include procedures for transferring the transaction data and position data to the Commission or its designee (including another registered [SDR]).'' This item implements Rule 13n–5(b)(8).

[806] Proposing Release, 75 FR at 77332, *supra* note 2.

[807] 15 U.S.C. 78m(n).

[808] *See* Automated Systems of Self-Regulatory Organizations, Exchange Act Release No. 27445 (Nov. 16, 1989), 54 FR 48703 (Nov. 24, 1989) (''ARP I Release''); Automated Systems of Self-Regulatory Organizations, Exchange Act Release No. 29185 (May 9, 1991), 56 FR 22490 (May 15, 1991) (''ARP II Release'') (collectively, ''ARP Policy Statements'').

[809] *See* ARP II Release, 56 FR at 22491 n.4, *supra* note 808 (stating that the Commission's automated review policies are intended to ''encompass SRO systems that disseminate transaction and quotation information''); *see also* ARP I Release, 54 FR at 48704, *supra* note 808 (discussing that ''the SROs have developed and continue to enhance automated systems for the dissemination of transaction and quotation information'').

[810] *See* Regulation of Exchanges and Alternative Trading Systems, Exchange Act Release No. 40760 (Dec. 8, 1998), 63 FR 70844 (Dec. 22, 1998) (adopting Rule 301(b)(6) of Regulation ATS, 17 CFR 242.301(b)(6)). Rule 301(b)(6) has since been superseded in part by Regulation SCI, 17 CFR 242.1000–1007.

[811] *See* DTCC 2, *supra* note 19; Deutsche Temp Rule, *supra* note 28; ISDA, *supra* note 19; *see also* DTCC 3, *supra* note 19; DTCC 5, *supra* note 19.

[812] *See* DTCC 2, *supra* note 19 (stating that business continuity provisions should include multiple redundant systems, supporting ''the Commission in requiring robust operational capabilities of an SDR,'' and stating that SDRs should ''maintain multiple levels of operational redundancy''); DTCC 3, *supra* note 19 (recommending that SDRs ''maintain multiple levels of operational redundancy and data security''); DTCC 5, *supra* note 19 (recommending (1) granting an SDR flexibility to make contingency and disaster recovery plans part of a parent's or affiliate's disaster recovery operations, (2) revising proposed Rule 13n–6(b)(2) to require an external audit only once every five years when the SDR's objective review is performed by an internal department rather than every year, and (3) revising proposed Rule 13n–6(b)(3) to be less prescriptive in its time frames and grant more flexibility to an SDR for reporting outages).

[813] DTCC 2, *supra* note 19.

[814] DTCC 2, *supra* note 19.

[815] DTCC 2, *supra* note 19.

[816] DTCC 2, *supra* note 19; *see also* DTCC 3, *supra* note 19 (recommending that ''a failure to

The second commenter suggested that the Commission ''take all possible steps to ensure that identifying information is protected by SDRs and the [Commission].'' [817] The third commenter believed that SDRs, among other entities, should ''have proper safeguards and barriers in place in order to ensure the security of data, prevent cyber-crime and safeguard against inappropriate access,'' and that such entities should ''make the appropriate level of investment to design, implement and continually review their information barriers . . . in order to protect markets and market participants.'' [818] The commenter also believed that ''[i]t is equally important that regulators ensure that the viability and rigor of these information barriers . . . are reviewed and audited as they are at all other market participants.'' [819]

3. Final Rule

After considering the comments received on this proposal, the Commission is not adopting the more specific requirements of proposed Rule 13n–6(b)(1),[820] but is instead adopting the core policies and procedures requirement. Thus, final Rule 13n–6 is consistent with, but is more general and flexible than, proposed Rule 13n–6. Final Rule 13n–6 provides in full that ''[e]very security-based swap data repository, with respect to those systems that support or are integrally related to the performance of its activities, shall establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its systems provide adequate levels of capacity, integrity, resiliency, availability, and security.'' [821] The Commission is not adopting proposed Rules 13n–6(b)(2), (3), and (4).[822]

The Commission is not adopting Rule 13n–6 as proposed because, after proposing Rule 13n–6, the Commission considered the need for an updated regulatory framework for certain systems of the U.S. securities trading markets and adopted Regulation Systems Compliance and Integrity (''Regulation SCI'').[823] Regulation SCI supersedes the Commission's ARP Policy Statements and Rule 301(b)(6) of Regulation ATS (with respect to significant-volume ATSs that trade NMS stocks [824] and non-NMS stocks), on which proposed Rule 13n–6 was largely based. The Regulation SCI Adopting Release includes a discussion of comment letters addressing the application of Regulation SCI to SDRs.[825]

In light of this development, the Commission believes that Rule 13n–6, as adopted, better sets an appropriate core framework for the policies and procedures of SDRs with respect to automated systems. While this framework responds to comments about the application of Regulation SCI to SDRs and is broadly consistent with Regulation SCI, Rule 13n–6 does not apply Regulation SCI and its specific obligations to SDRs.[826] In adopting Regulation SCI, the Commission explained that it will ''monitor and evaluate the implementation of Regulation SCI, the risks posed by the systems of other market participants, and the continued evolution of the securities markets, such that it may consider, in the future, extending the types of requirements in Regulation SCI to additional categories of market participants.'' [827] Consistent with this approach and in recognition of the importance of SDRs as the primary repositories of SBS trade information, the Commission may consider the application of any features of Regulation SCI to SDRs in the future. In addition, to the extent that an SDR may share systems with an SCI entity (*e.g.,* an affiliated clearing agency), such systems may meet the definition of ''indirect SCI systems'' of the SCI entity, as defined in Regulation SCI, and certain provisions of Regulation SCI may apply.[828]

Rule 13n–6 applies to ''systems that support or are integrally related to the performance of [each SDR's] activities.'' [829] This includes automated systems that support or are integrally related to performing both core and ancillary services, including functions that may be required by Regulation SBSR, such as public dissemination of SBS information.[830] To the extent that an SDR uses a third party service provider to perform the SDR's functions, the SDR's policies and procedures required by Rule 13n–6 continue to apply; an SDR cannot absolve itself of its responsibilities under this rule through the use of a third party service provider.

The Commission believes that Rule 13n–6 addresses commenters' concerns about operational capabilities and protecting information.[831] With respect to comments suggesting specific substantive requirements,[832] the Commission believes that a more measured approach is to adopt a rule that requires SDRs to adopt policies and procedures reasonably designed to ensure that they have adequate levels of

demonstrate robust resiliency, security and redundancy in operations should preclude an entity from registering as an SDR'').

[817] Deutsche Temp Rule, *supra* note 28 (stating that the Commission should use its authority under Dodd-Frank Act Section 763 to ''impose strict requirements on the handling, disclosure and use by the SDRs of identifying information and on the operational and technological measures that must be employed by SDRs to protect such information from disclosure (including by way of unauthorized access)'').

[818] ISDA, *supra* note 19 (''[T]here is a real need for [SDRs] to have robust policies, procedures and systems in place to address the information barrier and privacy issue.'').

[819] ISDA, *supra* note 19.

[820] Rule 13n–6 is being promulgated under Exchange Act Sections 13(n)(4)(B), 13(n)(7)(D), and 13(n)(9). *See* 15 U.S.C. 78m(n)(4)(B), 78m(n)(7)(D), and 78m(n)(9).

[821] Rule 13n–6 is similar to the first sentence in proposed Rule 13n–6(b)(1). As adopted, the words ''integrity'' and ''availability'' have been added. The addition is consistent with, and captures concepts in, the rule as proposed, which implicitly addressed both integrity and availability. *See* Proposing Release, 75 FR at 77370, *supra* note 2 (proposing requirement that an SDR has policies and procedures that, at a minimum, (i) establish reasonable current and future capacity estimates; (ii) conduct periodic capacity stress tests of critical systems to determine such systems' ability to process transactions in an accurate, timely, and efficient manner; (iii) develop and implement reasonable procedures to review and keep current its system development and testing methodology; (iv) review the vulnerability of its systems and data center computer operations to internal and external threats, physical hazards, and natural disasters; and (v) establish adequate contingency and disaster recovery plans). These edits also make Rule 13n–6 more consistent with Rule 1001(a)(1) of Regulation SCI, 17 CFR 242.1000(a)(1) (requiring each SCI entity to ''establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its SCI systems and, for purposes of security standards, indirect SCI systems, have levels of capacity, integrity, resiliency, availability, and security, adequate to maintain the SCI entity's operational capability and promote the maintenance of fair and orderly markets'').

[822] In addition, the Commission is not adopting proposed Rules 13n–6(a), (c), and (d) because they are not applicable without proposed Rules 13n–6(b)(2), (3), and (4).

[823] *See* Regulation Systems Compliance and Integrity, Exchange Act Release No. 73639 (Nov. 19, 2014), 79 FR 72252 (Dec. 5, 2014) (''Regulation SCI Adopting Release'').

[824] *See* 17 CFR 242.600 (defining ''NMS stock'').

[825] Regulation SCI Adopting Release, 79 FR at 72363–4, *supra* note 823.

[826] In preparing their policies and procedures, SDRs may consider whether to incorporate aspects of Regulation SCI that may be appropriate for their particular implementation of Rule 13n–6, including where an SDR is related by virtue of its corporate structure to an entity subject to Regulation SCI.

[827] Regulation SCI Adopting Release, 79 FR at 72259, *supra* note 823.

[828] *See* Regulation SCI, 17 CFR 242.1000–1007. Rule 1000 of Regulation SCI defines ''indirect SCI systems'' as ''any systems of, or operated by or on behalf of, an SCI entity that, if breached, would be reasonably likely to pose a security threat to SCI systems.''

[829] Rule 13n–6.

[830] *See* Regulation SBSR Adopting Release, *supra* note 13; *see also* ARP II Release, 56 FR at 22491 n.4, *supra* note 808 (stating that ARP standards encompass ''systems that disseminate transaction and quotation information'').

[831] *See* DTCC 2, *supra* note 19; Deutsche Temp Rule, *supra* note 28; ISDA, *supra* note 19.

[832] *See* DTCC 2, *supra* note 19; DTCC 3, *supra* note 19; Deutsche Temp Rule, *supra* note 28.

capacity, integrity, resiliency, availability, and security. Consistent with the comments,[833] an SDR may want to consider, in developing its policies and procedures required by Rule 13n–6, whether to include the establishment and maintenance of multiple redundant systems and data and operations centers in diverse regions of the country,[834] periodic data center and operational failover tests,[835] robust operational capabilities,[836] and multiple levels of operational redundancy and data security.[837] The Commission also believes that an SDR's policies and procedures required by Rule 13n–6 can be ''a part of or consistent with a parent or affiliate entity's disaster recovery operations.'' [838] The Commission further believes that Rule 13n–6 is consistent with one commenter's recommendation that SDRs should ''have proper safeguards and barriers in place in order to ensure the security of data, prevent cyber-crime and safeguard against inappropriate access.'' [839] Additionally, the Commission believes that to comply with Rule 13n–6, SDRs will likely need to ''make the appropriate level of investment to design, implement and continually review their information barriers . . . in order to protect markets and market participants.'' [840]

G. SDR Recordkeeping (Rule 13n–7)

The Commission proposed Rule 13n–7 to specify the books and records requirements applicable to SDRs. After receiving no comments on this proposal, the Commission is adopting Rule 13n–7 as proposed, with some technical modifications.

1. Records To Be Made by SDRs (Rule 13n–7(a))

a. Proposed Rule

Proposed Rule 13n–7(a) would require every SDR to make and keep current certain books and records relating to its business.

b. Comments on the Proposed Rule

The Commission received no comments relating to this proposed rule.

c. Final Rule

The Commission is adopting Rule 13n–7(a)(1) as proposed. Rule 13n–7(a)(1) requires every SDR to make and keep current ''a record for each office listing, by name or title, each person at that office who, without delay, can explain the types of records the security-based swap data repository maintains at that office and the information contained in those records.'' The Commission continues to believe that SDR recordkeeping practices may vary in ways ranging from format and presentation to the name of a record.[841] Therefore, as explained in the Proposing Release, the Commission believes that each SDR must be able to promptly explain how it makes, keeps, and titles its records.[842] To comply with this rule, an SDR may identify more than one person and list which records each person is able to explain. Because it may be burdensome for an SDR to keep this record current if it lists each person by name, an SDR may satisfy this requirement by recording the persons capable of explaining the SDR's records by either name or title.

The Commission is also adopting Rule 13n–7(a)(2) as proposed. Rule 13n–7(a)(2) requires every SDR to make and keep current ''a record listing each officer, manager, or person performing similar functions of the security-based swap data repository responsible for establishing policies and procedures that are reasonably designed to ensure compliance with the [Exchange] Act and the rules and regulations thereunder.'' This rule is intended to assist securities regulators by identifying individuals responsible for designing an SDR's compliance policies and procedures.

The purpose of both Rules 13n–7(a)(1) and 13n–7(a)(2) is to assist the Commission in its inspection and examination function.[843] These two requirements are based on Exchange Act Rules 17a–3(a)(21) and (22), respectively, which are applicable to broker-dealers.[844] It is important for the Commission's examiners to have the ability to find quickly what records are maintained in a particular office and who is responsible for establishing particular policies and procedures of an SDR.

2. Records To Be Preserved by SDRs (Rule 13n–7(b))

a. Proposed Rule

Proposed Rule 13n–7(b) would require every SDR to keep and preserve copies of its documents, keep such documents for a period of not less than five years, the first two in a place that is immediately available to Commission staff, and promptly furnish such documents to Commission staff upon request.

b. Comments on the Proposed Rule

The Commission received no comments relating to this proposed rule.

c. Final Rule

The Commission is adopting Rule 13n–7(b) as proposed, with one technical modification. Rule 13n–7(b)(1) requires every SDR to ''keep and preserve at least one copy of all documents, including all documents and policies and procedures required by the [Exchange] Act and the rules and regulations thereunder, correspondence, memoranda, papers, books, notices, accounts, and other such records as shall be made or received by it in the course of its business as such.'' Rule 13n–7(b)(2) requires every SDR to ''keep all such documents for a period of not less than five years, the first two years in a place that is immediately available to representatives of the Commission for inspection and examination.'' [845] Rule 13n–7(b)(3) requires every SDR to, ''upon request of any representative of the Commission, promptly furnish [846] to the possession of such representative copies of any documents required to be

[833] *See* DTCC 2, *supra* note 19; DTCC 3, *supra* note 19; Deutsche Temp Rule, *supra* note 28.

[834] *See* DTCC 2, *supra* note 19.

[835] *See* DTCC 2, *supra* note 19.

[836] *See* DTCC 2, *supra* note 19; Deutsche Temp Rule, *supra* note 28 (commenting on the need for ''strict requirements . . . on the operational and technological measures . . . employed by SDRs to protect [reported data] from disclosure (including by way of unauthorized access)'').

[837] *See* DTCC 2, *supra* note 19; DTCC 3, *supra* note 19.

[838] DTCC 5, *supra* note 19.

[839] ISDA, *supra* note 19.

[840] ISDA, *supra* note 19.

[841] *See* Proposing Release, 75 FR at 77337, *supra* note 2.

[842] Proposing Release, 75 FR at 77337, *supra* note 2.

[843] *See* Exchange Act Section 13(n)(2), 15 U.S.C. 78m(n)(2) (stating that ''[e]ach registered security-based swap data repository shall be subject to inspection and examination by any representative of the Commission''); *see also* Rule 13n–4(b)(1) (implementing same requirement).

[844] 17 CFR 240.17a–3(a)(21) and (22).

[845] The Commission is making a technical modification to Rule 13n–7(b)(2) from the proposal. As proposed, the rule referred to ''the staff of the Commission.'' As adopted, the rule instead refers to ''representatives of the Commission'' for consistency with other rules being adopted in this release. *See* Rule 13n–4(b)(1) and Rule 13n–7(b)(3) (both referring to ''any representative of the Commission'').

[846] For purposes of Rule 13n–7(b)(3), the Commission interprets the term ''promptly'' to mean making reasonable efforts to produce records that are requested by Commission representatives during an examination without delay. The Commission believes that in many cases, an SDR could, and therefore will be required to, furnish records immediately or within a few hours of a request. The Commission expects that only in unusual circumstances would an SDR be permitted to delay furnishing records for more than 24 hours. *Accord* Registration of Municipal Advisors, Exchange Act Release No. 70462 (Sept. 20, 2013), 78 FR 67468, 67578–67579 n.1347 (Nov. 12, 2013) (interpreting the term ''prompt'' in the context of Exchange Act Rule 15Ba1–8(d)).

kept and preserved by it pursuant to paragraphs (a) and (b) of this [rule].''

Rule 13n–7(b) is based on Exchange Act Rule 17a–1, which is the recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies, and the Municipal Securities Rulemaking Board.[847] As explained in the Proposing Release, Rule 13n–7(b) is intended to set forth the recordkeeping obligation of SDRs and thereby facilitate implementation of the broad inspection authority given to the Commission in Exchange Act Section 13(n)(2).[848] This rule includes all electronic documents and correspondence, such as data dictionaries, emails and instant messages, which should be furnished in their original electronic format.

3. Recordkeeping After an SDR Ceases To Do Business (Rule 13n–7(c))

a. Proposed Rule

Proposed Rule 13n–7(c) would require an SDR that ceases doing business, or ceases to be registered as an SDR, to continue to preserve, maintain, and make accessible the records/data required to be collected, maintained, and preserved by Rule 13n–7 in the manner required by this rule and for the remainder of the period required by this rule.[849]

b. Comments on the Proposed Rule

The Commission received no comments relating to this proposed rule.

c. Final Rule

The Commission is adopting Rule 13n–7(c) as proposed, with a technical modification. Rule 13n–7(c) requires an SDR that ceases doing business, or ceases to be registered pursuant to Exchange Act Section 13(n) and the rules and regulations thereunder, to continue to preserve, maintain, and make accessible the records and data[850] required to be collected, maintained, and preserved by Rule 13n–7 in the manner required by this rule and for the remainder of the period required by this rule. This requirement is intended to allow Commission representatives to perform effective inspections and examinations of an SDR pursuant to Exchange Act Section 13(n)(2).[851] In addition, the Commission notes that, as discussed in Section VI.B of this release regarding Rule 13n–2, an SDR that ceases to exist or do business as an SDR is required to file a withdrawal from registration on Form SDR pursuant to Rule 13n–2(b) and designate on Item 12 of Form SDR a custodian of books and records.

An SDR may wish to consider establishing contingency plans so that another entity will be in the position to maintain the SDR's records and data after the SDR ceases to do business. The Commission notes that the requirement in Rule 13n–5(b)(8) for an SDR to make and keep current a plan to ensure that the SDR's transaction data and positions are maintained after it ceases doing business or ceases to be registered[852] does not expressly extend to a plan for maintaining all of the records and data required to be maintained pursuant to Rule 13n–7, but that plan could also include such records and data.

4. Applicability (Rule 13n–7(d))

a. Proposed Rule

Proposed Rule 13n–7(d) provided that Rule 13n–7 ''does not apply to data collected and maintained pursuant to Rule 13n–5.''

b. Comments on the Proposed Rule

The Commission received no comments relating to this proposed rule.

c. Final Rule

The Commission is adopting Rule 13n–7(d) as proposed, with a technical modification. Rule 13n–7(d) states that Rule 13n–7 ''does not apply to transaction data and positions collected and maintained pursuant to Rule 13n–5 (§ 240.13n–5).''[853] As explained in the Proposing Release, the purpose of this rule is to clarify that the requirements in Rule 13n–7 are designed to capture those records of an SDR other than the transaction data, positions, and market data that would be required to be maintained in accordance with Rule 13n–5, as discussed in Section VI.E of this release.[854] The requirements of Rule 13n–7 do apply to records that an SDR creates using the data required to be maintained in accordance with Rule 13n–5, such as aggregate reports.

H. Reports To Be Provided to the Commission (Rule 13n–8)

The Commission proposed Rule 13n–8 to specify certain reports that an SDR would be required to provide to the Commission. After considering the two comments received on this proposal, the Commission is adopting Rule 13n–8 as proposed.

1. Proposed Rule

Proposed Rule 13n–8 would require every SDR to ''promptly report to the Commission, in a form and manner acceptable to the Commission, such information as the Commission determines to be necessary or appropriate for the Commission to perform the duties of the Commission under the [Exchange] Act and the rules and regulations thereunder.'' This proposed rule was designed to provide the Commission with the necessary information for it to fulfill its regulatory duties.

2. Comments on the Proposed Rule

Two commenters submitted comments relating to this proposed rule.[855] One commenter stated that it ''currently makes information available directly to regulators, having created a web portal for access to scheduled reports, and providing extracts from [the trade repository's] database based on parameters set by regulators . . . . Through this system, [the commenter] expects to be able to offer acceptable access to the Commission.''[856] The other commenter recommended that reports ''be standardized and use a common terminology.''[857]

[847] 17 CFR 240.17a–1.

[848] 15 U.S.C. 78m(n)(2); *see also* Rule 13n–4(b)(1) (implementing same requirement); Proposing Release, 75 FR at 77338, *supra* note 2.

[849] This requirement is based on Exchange Act Rule 17a–4(g), 17 CFR 240.17a–4(g), which applies to books and records of broker-dealers.

[850] The Commission is making a technical amendment to Rule 13n–7(c) from the proposal. As proposed, the rule referred to ''records/data.'' The rule being adopted refers to ''records and data'' for clarity.

[851] 15 U.S.C. 78m(n)(2); *see also* Rule 13n–4(b)(1) (implementing same requirement).

[852] *See* Section VI.E.8 of this release discussing Rule 13n–5(b)(8).

[853] The Commission is making a technical modification to Rule 13n–7(d) from the proposal, changing ''data'' to ''transaction data and positions.'' This is to clarify that the data that Rule 13n–7 does not apply to is limited to transaction data and positions, both of which are required to be maintained in accordance with Rule 13n–5(b)(4). Rule 13n–7 applies to other information that may be created pursuant to Rule 13n–5, but which is not required to be maintained pursuant to Rule 13n–5(b)(4). For example, in order to assure itself of compliance with Rule 13n–5(b)(1)(iv), an SDR could run tests to determine how long it takes for it to record transaction data that it receives. Data from such test would be required to be retained pursuant to Rule 13n–7, not Rule 13n–5(b)(4). The Commission clearly contemplated this distinction in the Proposing Release when it stated that Rule 13n–7(d) was proposed to clarify that Rule 13n–7 was designed to capture those records other than the data required to be maintained in accordance with proposed Rule 13n–5. *See* Proposing Release, 75 FR at 77338, *supra* note 2.

[854] Proposing Release, 75 FR at 77338, *supra* note 2.

[855] *See* DTCC 2, *supra* note 19; Barnard, *supra* note 19. In addition, one commenter to the Temporary Rule Release suggested that the Commission affirmatively state that it intends to keep information furnished to the Commission pursuant to the rules in that release, which could be information similar to that reported to the Commission under Rule 13n–8, confidential under FOIA or to seek a legislative solution. *See* Deutsche Temp Rule, *supra* note 28.

[856] DTCC 2, *supra* note 19.

[857] Barnard, *supra* note 19.

3. Final Rule

After considering the comments, the Commission is adopting Rule 13n–8 as proposed. Rule 13n–8 requires every SDR to ''promptly report to the Commission, in a form and manner acceptable to the Commission, such information as the Commission determines to be necessary or appropriate for the Commission to perform the duties of the Commission under the [Exchange] Act and the rules and regulations thereunder.'' This requirement provides flexibility to the Commission to obtain information on a case-by-case basis and in connection with fulfilling its examination function.[858]

Under Rule 13n–8, the Commission may request specific reports related to the final SDR Rules.[859] For example, in the Proposing Release, the Commission stated that it may request a report on the number of complaints an SDR has received pertaining to data integrity.[860] In addition, the Commission may request other reports in the future based upon, for example, developments in the SBS markets or a newly identified need for particular SBS information. The Commission expects that an SDR will be able to promptly report any information in its possession to the Commission pursuant to Rule 13n–8. If the report involves provision of SBS data, then the Commission could require an SDR to adhere to any formats and taxonomies required pursuant to Rule 13n–4(b)(5).[861] This approach is consistent with one commenter's recommendation that reports ''be standardized and use common terminology.''[862]

I. Privacy of SBS Transaction Information and Disclosure to Market Participants (Rules 13n–9 and 13n–10)

1. Privacy Requirements (Rule 13n–9)

Proposed Rule 13n–9 set forth requirements to implement an SDR's statutory duty to ''maintain the privacy of any and all security-based swap transaction information that the [SDR] receives from a security-based swap dealer, counterparty, or any other registered entity.''[863] After considering the comments received on the proposal, the Commission is adopting the rule as proposed.

a. Proposed Rule

Proposed Rule 13n–9 would require each SDR to establish, maintain, and enforce written policies and procedures reasonably designed to protect the privacy of any and all SBS transaction information that the SDR receives from an SBS dealer, counterparty, or any registered entity. Such policies and procedures would be required to include, but not be limited to, policies and procedures to protect the privacy of any and all SBS transaction information that the SDR shares with affiliates and nonaffiliated third parties.[864] The proposed rule would also require each SDR to establish and maintain safeguards, policies, and procedures reasonably designed to prevent the misappropriation or misuse of (i) any confidential information received by the SDR; (ii) material, nonpublic information; and/or (iii) intellectual property, by the SDR or any person associated with the SDR for their personal benefit or the benefit of others.[865] Such safeguards, policies, and procedures would be required to address, without limitation, (1) limiting access to such confidential information, material, nonpublic information, and intellectual property, (2) standards pertaining to the trading by persons associated with the SDR for their personal benefit or the benefit of others, and (3) adequate oversight to ensure compliance of this provision.[866]

b. Comments on the Proposed Rule

Five commenters submitted comments relating to this proposed rule.[867] Two of the commenters supported the proposal.[868] One commenter ''fully support[ed] the Commission's efforts to protect the privacy of any and all SBS transaction information received by an SDR'' and believed that ''no communication of data (other than to, or as required by, applicable regulators) that could have the result of disclosing the actual positions or specific business or trading activity of a counterparty should be permitted without the consent of that counterparty.''[869] The commenter suggested that the definition of ''personally identifiable information'' in proposed Rule 13n-9(a)(6) be limited to information that is not otherwise disclosed or made available to the public.[870] In making its suggestion, the commenter stated that ''[b]ecause much of the information utilized to on-board participants or to identify counterparties to an [SBS] will be publicly available through Web sites issuing legal entity identifiers or similar identifiers, this information should not be considered confidential simply because it is required by an [SDR].''[871]

Another commenter also ''agree[d] with the Commission's concerns about privacy of SBS data'' and ''strongly support[ed] imposing privacy requirements on [SDRs].''[872] Specifically, the commenter supported the Commission's proposed requirements related to policies and procedures reasonably designed to protect the privacy of SBS transaction information and noted that ''such privacy protections will ensure that market participants utilize the services of registered [SDRs] with confidence.''[873] The commenter made a number of suggestions. First, the commenter suggested that the Commission add safeguards related to ''confidentiality of trading positions'' to

[858] One commenter describes its approach to addressing the proposed rule's requirements. *See* DTCC 2, *supra* note 19. With respect to the commenter to the Temporary Rule Release suggesting that the Commission affirmatively state that it intends to keep information furnished pursuant to the rules in that release confidential under FOIA or to seek a legislative solution, the Commission anticipates that it will keep reported data that SDRs submit to the Commission (via Rule 13n–8 or any other means) confidential, subject to the provisions of applicable law. *See* Deutsche Temp Rule, *supra* note 28. Pursuant to Commission rules, confidential treatment can be sought for information submitted to the Commission. *See* 17 CFR 200.83 (regarding confidential treatment procedures under FOIA). The Commission does not intend to affirmatively seek any legislative action to protect further such information. The commenter is not precluded from doing so on its own initiative.

[859] In a separate release, the Commission is adopting a rule requiring an SDR to provide the Commission, upon request, information or reports related to the timeliness, accuracy, and completeness of data reported to the SDR. *See* Regulation SBSR Adopting Release, *supra* note 13 (Rule 907(e)).

[860] Proposing Release, 75 FR at 77339, *supra* note 2.

[861] *See* Section VI.D.2.c.ii of this release discussing anticipated Commission proposal pursuant to Rule 13n–4(b)(5). With regard to other types of reports, the Commission will seek to work with SDRs to develop the form and the manner for the SDRs to provide the Commission with the information it needs, while seeking to minimize the SDRs' burdens.

[862] *See* Barnard, *supra* note 19.

[863] *See* Exchange Act Section 13(n)(5)(F), 15 U.S.C. 78m(n)(5)(F).

[864] Proposed Rule 13n–9(b)(1).

[865] Proposed Rule 13n–9(b)(2).

[866] *Id.*

[867] *See* DTCC 2, *supra* note 19; MFA 1, *supra* note 19; TriOptima, *supra* note 19; Deutsche Temp Rule, *supra* note 28; ISDA, *supra* note 19; *see also* DTCC 5, *supra* note 19.

[868] *See* DTCC 2, *supra* note 19; MFA 1, *supra* note 19. The Commission received no comments on proposed Rule 13n–9(a), which set forth the definitions applicable to the rule, and is adopting each of them as proposed. *See supra* note 247 (discussing a general comment regarding the term ''affiliate'').

[869] DTCC 2, *supra* note 19; *see also* DTCC 5, *supra* note 19.

[870] DTCC 5, *supra* note 19.

[871] DTCC 5, *supra* note 19.

[872] MFA 1, *supra* note 19.

[873] MFA 1, *supra* note 19 (''Specifically, we recommend adding to the information covered under [proposed Rule] 13n–9(b): (i) information related to transactions of a market participant, including the size and volume of such transactions; (ii) the identity of each market participant; and (iii) the details of any master agreement (to the extent provided) governing the relevant SBS.'').

the Commission's proposed rule because disclosure of position information could reveal market participants' customized and proprietary investment strategies in which they invest heavily and ''which form the foundation of their businesses.'' [874] Second, the commenter suggested that the Commission expand its proposed rules to include a standard of care that would require SDRs to adopt policies and procedures to ensure that any confidential information received will be used solely for the purpose of fulfilling regulatory obligations.[875] Third, the commenter suggested that the Commission require SDRs to adopt policies and procedures to limit access to confidential information to directors, officers, employees, agents, and representatives who need to know such information in order to fulfill regulatory obligations.[876] The commenter noted that ''[t]hose policies and procedures should also have a mechanism in place for all [SDR representatives] to be informed of, and required to follow, the [SDR's] policies and procedures related to privacy of information received.'' [877] The commenter believed that such persons should be liable for any breach of an SDR's policies and procedures related to privacy of information.[878]

Another commenter suggested that ''where trading counterparties have given [written authorizations] in favor of a third party service provider to access their [SBS transaction information], there is no need to have the third party service provider observe the [SDR's] privacy policies and procedures.'' [879] The commenter stated that ''if the counterparties to a trade authorize the third party service provider to use their information, an [SDR] should not be able to restrict or limit such use through privacy policies and procedures when the owners of the information have provided appropriate consents and authorizations.'' [880]

Consistent with the commenters supporting proposed Rule 13n–9, a commenter to the Temporary Rule Release stated that ''market participants have legitimate interests in the protection of their confidential and identifying financial information.'' [881] In this regard, the commenter suggested that the Commission ''take all possible steps to ensure that identifying information is protected by SDRs and the [Commission]'' and that the Commission use its statutory authority under Dodd-Frank Act Section 763 to ''impose strict requirements on the handling, disclosure and use by the SDRs of identifying information and on the operational and technological measures that must be employed by SDRs to protect such information from disclosure (including by way of unauthorized access).'' [882]

Another commenter believed that ''non–bank entities,'' including SDRs, should ''make the appropriate level of investment to design, implement and continually review their . . . data privacy policies and procedures in order to protect markets and market participants.'' [883] The commenter also believed that ''[i]t is equally important that regulators ensure that the viability and rigor of these . . . privacy policies are reviewed and audited as they are at all other market participants.'' [884]

c. Final Rule

After considering the comments, the Commission is adopting Rule 13n–9 as proposed, with two minor modifications.[885] Specifically, Rule 13n–9(b)(1) requires each SDR to establish, maintain, and enforce written policies and procedures reasonably designed to protect the privacy of any and all SBS transaction information that the SDR receives from an SBS dealer, counterparty, or any registered entity. The rule further provides that such policies and procedures shall include, but are not limited to, policies and procedures to protect the privacy of any and all SBS transaction information that the SDR shares with affiliates [886] and nonaffiliated third parties.[887] As mentioned above, the Exchange Act [888] requires, and commenters supported, the Commission's imposition of privacy requirements on SDRs.[889]

Additionally, Rule 13n–9(b)(2) requires each SDR to establish and maintain safeguards, policies, and procedures reasonably designed to prevent the misappropriation or misuse, directly or indirectly, of: (1) Any confidential information received by the SDR, including, but not limited to, trade data, position data, and any nonpublic personal information [890] about a market participant [891] or any of its customers; (2) material, nonpublic information; and/or (3) intellectual property, such as trading strategies or portfolio positions, by the SDR or any person associated

[874] MFA 1, *supra* note 19.

[875] MFA 1, *supra* note 19.

[876] MFA 1, *supra* note 19.

[877] MFA 1, *supra* note 19.

[878] MFA 1, *supra* note 19.

[879] TriOptima, *supra* note 19 (stating that ''establishment of clear rights and obligations governing access to [SDR] Information'' is an important element in establishing ''fair, secure and efficient market functioning for market participants,'' and believing that it would ''be appropriate and helpful to the market if the SEC can clarify in the final rule that [SDRs] shall provide third party service providers, who have been authorized to access information by the counterparties to the relevant trades under Written Client Disclosure Consents, with access to [SDR] Information'').

[880] TriOptima, *supra* note 19 (asking the Commission to ''treat a third party service provider with a disclosure consent as acting as an 'agent' for the owner of the trade information and provide the third party service provider with the same type of access which the owner of such data is entitled to, subject to any restrictions set out in the disclosure consent'').

[881] Deutsche Temp Rule, *supra* note 28.

[882] Deutsche Temp Rule, *supra* note 28.

[883] ISDA, *supra* note 19 (''[T]here is a real need for [SDRs] to have robust policies, procedures and systems in place to address the information barrier and privacy issue.'').

[884] ISDA, *supra* note 19.

[885] *See infra* note 886 (discussing revised definition of ''control'') and note 890 (discussing revised definition of ''nonpublic personal information'').

[886] *See supra* notes 247 and 621 (defining ''affiliate'' and ''control''). The Commission is correcting a typographical error in the proposed definition of ''control.'' Proposed Rule 13n–9(a)(2)(ii) referred to the right to vote 25 percent ''of'' more of a class of securities. *See* Proposing Release, 75 FR at 77371, *supra* note 2. As adopted, Rule 13n–9(a)(2)(ii) refers to the right to vote 25 percent ''or'' more of a class of securities. *See also* Rule 13n–4(a)(3).

[887] Rule 13n–9(b)(1); *see also supra* note 622 (defining ''nonaffiliated third party'').

[888] *See* Exchange Act Section 13(n)(5), 15 U.S.C. 78m(n)(5).

[889] *See* DTCC 2, *supra* note 19; MFA 1, *supra* note 19 (noting that an SDR's protection of the privacy of SBS transaction information ''will ensure that market participants utilize the services of [a] registered [SDR] with confidence'').

[890] In response to one commenter's suggestion, the Commission is revising the definition of ''nonpublic personal information'' from the proposal to mean (1) personally identifiable information that is not publicly available information and (2) any list, description, or other grouping of market participants (and publicly available information pertaining to them) that is derived using personally identifiable information that is not publicly available information. *See* Rule 13n–9(a)(5); DTCC 5, *supra* note 19 (suggesting limiting the applicability of Rule 13n–9 to ''personally identifiable information'' that is not otherwise disclosed or made available to the public ''[b]ecause much of the information utilized to on–board participants or to identify counterparties to an [SBS] will be publicly available through Web sites issuing legal entity identifiers or similar identifiers, this information should not be considered confidential simply because it is required by an [SDR]''). This revision, which limits personally identifiable information to not publicly available information, is consistent with the definition of ''nonpublic personal information'' in Regulation SP, 17 CFR 248.3(t). The term ''personally identifiable information'' is defined as any information (i) a market participant provides to an SDR to obtain service from the SDR, (ii) about a market participant resulting from any transaction involving a service between the SDR and the market participant, or (iii) the SDR obtains about a market participant in connection with providing a service to that market participant. *See* Rule 13n–9(a)(6).

[891] *See supra* note 583 (defining ''market participant'').

with the SDR[892] for their personal benefit or the benefit of others. Such safeguards, policies, and procedures shall address, without limitation, (1) limiting access to such confidential information, material, nonpublic information, and intellectual property, (2) standards pertaining to the trading by persons associated with the SDR for their personal benefit or the benefit of others, and (3) adequate oversight to ensure compliance with Rule 13n–9(b)(2).[893] As stated in the Proposing Release, Rule 13n–9(b)(2) incorporates current requirements regarding the treatment of proprietary information of clearing members, which are contained in exemptive orders issued to SBS clearing agencies,[894] and draws from Exchange Act Section 15(g), which requires broker-dealers to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the misuse of material, nonpublic information by such broker or dealer or any person associated with such broker or dealer.[895]

The Commission anticipates that as a central recordkeeper of SBS transactions, each SDR will receive proprietary and highly sensitive information, which could disclose, for instance, a market participant's trade information, trading strategy, or nonpublic personal information.[896] Rule 13n–9 is designed to ensure that an SDR has reasonable safeguards, policies, and procedures in place to protect such information from being misappropriated or misused by the SDR or any person associated with the SDR. The Commission agrees with one commenter's view that ''market participants have legitimate interests in the protection of their confidential and identifying financial information,'' and Rule 13n–9 sets forth requirements sufficient to protect such information from disclosure, as the commenter suggested.[897]

The Commission also believes that as part of an SDR's responsibility to have adequate oversight to ensure compliance with Rule 13n–9, an SDR's governance arrangements and organizational structure should have adequate internal controls to protect against misappropriation or misuse of a market participant's trade information, trading strategy, or nonpublic personal information.[898] For instance, an SDR could limit access to the proprietary and sensitive information by creating informational, technological, and physical barriers. Consistent with one commenter's suggestion,[899] an SDR could also limit access to the data that it maintains to only those officers, directors, employees, and agents who need to know the data to perform their job responsibilities, including responsibilities to fulfill the SDR's regulatory obligations. An SDR may want to consider limiting such access to data only to the extent that such access is justified based on the particular job responsibilities of the officers, directors, employees, or agents. In preventing the misappropriation or misuse of confidential information, material, nonpublic information, and intellectual property pursuant to Rule 13n–9(b)(2), an SDR could have controls to prevent unauthorized or unintentional access to its data. An SDR may want to consider holding its officers, directors, employees, and agents contractually liable for a breach of its privacy policies and procedures, as suggested by one commenter.[900] In order for an SDR to enforce effectively its written policies and procedures to protect the privacy of SBS transaction information, it is reasonable to expect that the SDR must, as one commenter noted,[901] properly convey these policies and procedures to all those subject to its privacy requirements.

Additionally, in establishing standards pertaining to the trading by persons associated with an SDR in accordance with Rule 13n–9(b)(2), the SDR should consider restricting the trading activities of individuals who have access to proprietary or sensitive information maintained by the SDR or implementing firm-wide restrictions on trading certain SBSs, as well as underlying or related investment instruments.[902] Such restrictions could include, for example, a pre-trade clearance requirement. An SDR should also have systems in place to prevent and detect insider trading by the SDR or persons associated with the SDR. Such systems could include a mechanism to monitor such persons' access to the SDR's data, their trading activities, and their emails.[903]

The Commission believes that to the extent that an SDR or any person associated with the SDR shares information with the SDR's affiliate or a nonaffiliated third party, the SDR's policies and procedures pursuant to Rule 13n–9(b)(1) should be reasonably designed to protect the privacy of the information shared.[904] One option that an SDR could choose to comply with this requirement would be to require the affiliate or nonaffiliated party to consent to being subject to the SDR's privacy policies and procedures as a condition of receiving any sensitive information from the SDR.[905]

[892] *See supra* note 621 (defining ''person associated with a security-based swap data repository'').

[893] *Id.*

[894] *See, e.g.,* Order Extending and Modifying Temporary Exemptions Under the Securities Exchange Act of 1934 in Connection with Request of ICE Trust U.S. LLC Related to Central Clearing of Credit Default Swaps and Request for Comment, Exchange Act Release No. 63387 (Nov. 29, 2010), 75 FR 75502 (Dec. 3, 2010) (''ICE Trust shall establish and maintain adequate safeguards and procedures to protect clearing members' confidential trading information. Such safeguards and procedures shall include: (A) limiting access to the confidential trading information of clearing members to those employees of ICE Trust who are operating the system or responsible for its compliance with this exemption or any other applicable rules; and (B) establishing and maintaining standards controlling employees of ICE Trust trading for their own accounts. ICE Trust must establish and maintain adequate oversight procedures to ensure that the safeguards and procedures established pursuant to this condition are followed . . . .''); Exchange Act Release No. 61973 (Apr. 23, 2010), 75 FR 22656 (Apr. 29, 2010), and Exchange Act Release No. 63389 (Nov. 29, 2010), 75 FR 75520 (Dec. 3, 2010) (temporary exemptions in connection with CDS clearing by ICE Clear Europe, Limited). *See also* Proposing Release, 75 FR at 77339 n.171, *supra* note 2.

[895] *See* 15 U.S.C. 78o(g); *see also* Exchange Act Section 15F(j)(5), 15 U.S.C. 78o-10(j)(5) (requiring SBS dealers and major SBS participants to ''establish structural and institutional safeguards to ensure that the activities of any person within the firm relating to research or analysis of the price or market for any security-based swap or acting in a role of providing clearing activities or making determinations as to accepting clearing customers are separated by appropriate informational partitions within the firm from the review, pressure, or oversight of persons whose involvement in pricing, trading, or clearing activities might potentially bias their judgment or supervision and contravene the [enumerated] core principles of open access and the business conduct standards'').

[896] *See* Proposing Release, 75 FR at 77339, *supra* note 2.

[897] *See* Deutsche Temp Rule, *supra* note 28.

[898] *See* Proposing Release, 75 FR at 77339, *supra* note 2.

[899] *See* MFA 1, *supra* note 19.

[900] *See* MFA 1, *supra* note 19.

[901] *See* MFA 1, *supra* note 19.

[902] *See* Proposing Release, 75 FR at 77339–77340, *supra* note 2.

[903] *Cf., e.g., Janney Montgomery Scott LLC,* Exchange Act Release No. 64855, 2011 SEC LEXIS 3166 (July 11, 2011) (finding, in a settled action, Exchange Act Section 15(g) violation where broker-dealer failed to monitor its proprietary trading and employee trading); *Merrill Lynch, Pierce, Fenner & Smith, Inc.,* Exchange Act Release No. 59555, 2009 SEC LEXIS 660 (Mar. 11, 2009) (finding, in a settled action, Exchange Act Section 15(f) [subsequently renumbered as Section 15(g)] violation where broker-dealer failed to limit or monitor traders' access to the equity squawk box that broadcasts material, nonpublic information).

[904] *See* Proposing Release, 75 FR at 77340, *supra* note 2.

[905] The Commission notes that CFTC Rule 49.17(e) permits a third party service provider to access swap data maintained by a swap data repository on the condition that both the swap data repository and the provider have strict confidentiality procedures that protect data and information from proper disclosure and that they execute a ''confidentiality agreement.'' *See* 17 CFR 49.17(e).

Consistent with one commenter's view, the Commission agrees that an SDR will likely need to make an appropriate level of investment to design, implement, and periodically review its privacy policies and procedures ''in order to protect markets and market participants,'' [906] but that an SDR should have some flexibility to develop reasonable policies and procedures to protect the privacy of the SBS transaction information that the SDR receives. One approach, as one commenter suggested,[907] may be for an SDR's policies and procedures to require consent of counterparties prior to communication of the SBS transaction information to an SDR's affiliate or a nonaffiliated third party.[908] An SDR may, however, develop other reasonable policies and procedures to protect the privacy of the SBS transaction information.

With respect to one commenter's suggestion that the Commission add safeguards related to ''confidentiality of trading positions,'' [909] the Commission believes that its final rule broadly covers such safeguards. Although not explicitly stated in Rule 13n–9, the Commission also believes that its definitions of ''nonpublic personal information'' [910] and ''personally identifiable information'' [911] overlap significantly with the information that the commenter recommended the rule to explicitly cover.[912] Certain information, however, will be subject to public dissemination under Regulation SBSR.[913] The commenter further suggested that SDRs should be permitted to use confidential information solely to fulfill their regulatory obligations,[914] but the Commission does not believe that it is necessary or appropriate to impose such a narrow restriction on SDRs. It could, for example, be in the public interest for SDRs to use transaction-specific confidential SBS data to generate aggregated reports for the public even though such reports are not mandated. However, any such reports must be sufficiently anonymized so that the trading positions or identities of market participants, or group of market participants, cannot be derived from the reports.

One commenter suggested that a third party service provider should not be required to observe an SDR's privacy policies and procedures if such third party service provider has received written authorization from an SBS counterparty to access its SBS transaction information.[915] The Commission believes that an SDR's obligation to provide fair, open, and not unreasonably discriminatory participation to third party service providers [916] would prohibit an SDR from unreasonably imposing its privacy policies and procedures on third party service providers. The Commission also believes that, generally, a third party service provider, acting as an agent for a counterparty, should be given the same rights to access SBS transaction information as the counterparty for which it is acting as an agent. To the extent that the counterparties to a transaction reach a confidentiality agreement between themselves limiting the information that can be provided to their agents, it is up to the parties to ensure that the authorizations they provide to the SDR are appropriately limited.[917]

With respect to one commenter's view that regulators should ''ensure that the viability and rigor of [an SDR's] privacy policies are reviewed and audited as they are at all other market participants,'' [918] the Commission contemplates that its review of an SDR's privacy policies and procedures will be sufficient.[919] As a general matter, the Commission will review an SDR's privacy policies and procedures for compliance with the law in a manner similar to reviews of other registrants' privacy policies and procedures. For example, an SDR is required to file, as exhibits to Form SDR, its policies and procedures to protect the privacy of any and all SBS transaction information that the SDR receives from a market participant or any registered entity.[920] These policies and procedures are subject to the Commission's review. As discussed in Section VI.A.2 of this release, the Commission will review an SDR's application for registration on Form SDR in determining whether the SDR is able to comply with the federal securities laws and the rules and regulations thereunder. The Commission will also review an SDR's comprehensive annual amendment on Form SDR in determining whether the SDR continues to be in compliance with the federal securities laws and the rules and regulations thereunder. Additionally, an SDR (including its privacy policies and procedures) are subject to inspection and examination by any representative of the Commission.[921] In addition, an SDR's CCO is required to review the compliance of its policies and procedures at least on an annual basis and include a description of such compliance as well as the SDR's enforcement of its policies and procedures in the SDR's annual compliance report that is filed with the Commission.[922]

2. Disclosure Requirements (Rule 13n–10)

a. Proposed Rule

Proposed Rule 13n–10 would require each SDR to provide a disclosure document to each market participant prior to accepting any SBS data from the market participant or upon the market participant's request. The disclosure document would include specific information designed to enable a market participant to identify and evaluate the risks and costs associated with using the SDR's services.

[906] *See* ISDA, *supra* note 19.

[907] *See* DTCC 2, *supra* note 19 (''[N]o communication of data (other than to, or as required by, applicable regulators) that could have the result of disclosing the actual positions or specific business or trading activity of a counterparty should be permitted without the consent of that counterparty.'').

[908] The Commission notes that CFTC Rule 49.17(g) requires a swap data repository to obtain express written consent from the swap dealer, counterparty, or any other registered entity that submits the swap data maintained by the swap data repository before using that swap data for commercial or business purposes. *See* 17 CFR 49.17(g).

[909] *See* MFA 1, *supra* note 19.

[910] *See* Rule 13n–9(a)(5).

[911] *See* Rule 13n–9(a)(6).

[912] *See* MFA 1, *supra* note 19 (recommending adding to proposed Rule 13n–9(b): (i) information related to transactions of a market participant (including a market participant's trading positions), (ii) the identity of each market participant, and (iii) details of any master agreement governing the relevant SBS that are provided to an SDR).

[913] *See* Regulation SBSR Adopting Release, *supra* note 13 (Rule 902).

[914] *See* MFA 1, *supra* note 19.

[915] *See* TriOptima, *supra* note 19 (stating that ''if the counterparties to a trade authorize the third party service provider to use their information, an [SDR] should not be able to restrict or limit such use through privacy policies and procedures when the owners of the information have provided appropriate consents and authorizations'').

[916] *See* Section VI.D.3.a of this release discussing fair, open, and not unreasonably discriminatory access.

[917] To the extent that a transaction is executed anonymously on an SB SEF or exchange, when the counterparties do not know each other's identity or other reported information (*e.g.,* the trader ID), the SDR's policies and procedures under Rule 13n–9(b) must not allow either counterparty to access this information relating to the other counterparty.

[918] ISDA, *supra* note 19.

[919] To the extent that the Commission addresses other market participants' privacy policies and procedures, it will do so in separate releases pertaining specifically to those market participants.

[920] *See* Item 39 of Form SDR.

[921] Exchange Act Section 13(n)(2), 15 U.S.C. 78m(n)(2) (stating that ''[e]ach registered security-based swap data repository shall be subject to inspection and examination by any representative of the Commission'').

[922] *See* Rules 13n–11(c)(2) and 13n–11(d)(1).

b. Comments on the Proposed Rule

Two commenters submitted comments relating to this proposed rule.[923] One commenter agreed with proposed Rule 13n–10(b)(8), which would require disclosure of an SDR's updated schedule of any dues; unbundled prices, rates, or other fees for all of its services, including any ancillary services; any discounts or rebates offered; and the criteria to benefit from such discounts or rebates.[924] In supporting the Commission's proposed rule, another commenter ''recognize[d] the importance of providing market participants with disclosure documents outlining the SDR's policies regarding member participant criteria and the safeguarding and privacy of data submitted to the SDR.'' [925]

c. Final Rule

After considering the comments, the Commission is adopting Rule 13n–10 as proposed. The Commission is adopting the rule to enhance transparency in the SBS market, bolster market efficiency, promote standardization, and foster competition.[926] Specifically, the rule provides that before accepting any SBS data from a market participant [927] or upon a market participant's request, each SDR must furnish to the market participant a disclosure document that contains the following written information, which must reasonably enable the market participant to identify and evaluate accurately the risks and costs associated with using the SDR's services: (1) The SDR's criteria for providing others with access to services offered and data maintained by the SDR, (2) the SDR's criteria for those seeking to connect to or link with the SDR, (3) a description of the SDR's policies and procedures regarding its safeguarding of data and operational reliability, as described in Rule 13n–6, (4) a description of the SDR's policies and procedures reasonably designed to protect the privacy of any and all SBS transaction information that the SDR receives from an SBS dealer, counterparty, or any registered entity, as described in Rule 13n–9(b)(1), (5) a description of the SDR's policies and procedures regarding its non-commercial and/or commercial use of the SBS transaction information that it receives from a market participant, any registered entity, or any other person, (6) a description of the SDR's dispute resolution procedures involving market participants, as described in Rule 13n–5(b)(6), (7) a description of all the SDR's services, including any ancillary services, (8) the SDR's updated schedule of any dues; unbundled prices, rates, or other fees for all of its services, including any ancillary services; any discounts or rebates offered; and the criteria to benefit from such discounts or rebates, and (9) a description of the SDR's governance arrangements.[928]

As stated in the Proposing Release, these disclosure requirements are intended to promote competition and foster transparency regarding SDRs' services by enabling market participants to identify the range of services that each SDR offers and to evaluate the risks and costs associated with using such services.[929] The Commission also believes that transparency regarding SDRs' services is particularly important in light of the complexity of OTC derivatives products and their markets, and that greater service transparency could improve market participants' confidence in an SDR and result in greater use of the SDR, which would ultimately increase market efficiency.

J. Chief Compliance Officer of Each SDR; Compliance Reports and Financial Reports (Rule 13n–11)

Proposed Rule 13n–11 set forth the requirements for an SDR's CCO, annual compliance reports, and financial reports. The Commission is adopting the rule substantially as proposed with changes in response to comments.

1. In General (Rule 13n–11(a))

a. Proposed Rule

To implement the statutory requirement for each SDR to designate an individual to serve as a CCO,[930] the Commission proposed Rule 13n–11(a), which would require each SDR to identify on Form SDR a person who has been designated by the board to serve as a CCO of the SDR. In addition, to promote the independence and effectiveness of the CCO, the proposed rule would require that the compensation and removal of the CCO be approved by a majority of the SDR's board.[931]

b. Comments on the Proposed Rule

Two commenters submitted comments relating to this proposed rule.[932] Specifically, one commenter agreed that ''[w]ith respect to compensation and termination of the CCO, the Proposed Rules appropriately assign authority over those matters to the board, rather than management,'' but believed that ''[t]he rules should go one step further and confer that authority upon the *independent* board members.'' [933] Additionally, the commenter suggested that ''the [SDR Rules] should preclude the General Counsel or a member of that office from serving as CCO, since those attorneys owe a duty of loyalty to the SDR itself that may not be compatible with the watchdog function of the CCO.'' [934] The commenter also suggested ''[c]ompetency standards to ensure that CCOs have the background and skills necessary to fulfill their responsibilities.'' [935] The commenter further suggested requiring a group of affiliated or controlled entities to appoint the CCO.[936]

Another commenter fully supported the intent of proposed Rule 13n–11, but also suggested that the Commission ''restrict the CCO from serving as the General Counsel or other attorney within the legal department of the SDR.'' [937] The commenter stated that the CCO's remuneration must be designed so as to avoid potential conflicts of interest with his compliance role.[938] The commenter further suggested that the Commission amend the rule so that ''the authority and sole responsibility to appoint or remove the CCO, or to materially change its duties and responsibilities[ ] only vests with the independent public directors or 'Independent Perspective' . . . and not the full board.'' [939]

[923] *See* Barnard, *supra* note 19; DTCC 2, *supra* note 19. The Commission received no comments on proposed Rule 13n–10(a), which set forth the definition applicable to the rule, and is adopting it as proposed.

[924] *See* Barnard, *supra* note 19.

[925] DTCC 2, *supra* note 19.

[926] Rule 13n–10 is being promulgated under Exchange Act Sections 13(n)(3), 13(n)(7)(D)(i), and 13(n)(9). *See* 15 U.S.C. 78m(n)(3), 78m(n)(7)(D)(i), and 78m(n)(9).

[927] *See supra* note 583 (defining ''market participant'').

[928] Rule 13n–10(b).

[929] Proposing Release, 75 FR at 77340, *supra* note 2. *See also* Barnard, *supra* note 19 (believing that the disclosure requirement in Rule 13n–10(b)(8) would formalize ''the market practice and ensure that informed decisions were being made'').

[930] *See* Exchange Act Section 13(n)(6)(A), 15 U.S.C. 78m(n)(6)(A).

[931] Proposed Rule 13n–11(a).

[932] *See* Better Markets 1, *supra* note 19; Barnard, *supra* note 19; *see also* Better Markets 3, *supra* note 19.

[933] Better Markets 1, *supra* note 19 (emphasis in the original); *see also* Better Markets 3 *supra* note 19 (suggesting ''[t]he vesting of authority in the independent board members to oversee the hiring, compensation, and termination of the CCO'').

[934] Better Markets 1, *supra* note 19.

[935] Better Markets 3, *supra* note 19.

[936] Better Markets 3, *supra* note 19.

[937] Barnard, *supra* note 19 (''[T]he CCO should have a single compliance role and no other competing role or responsibility that could create conflicts of interest or threaten [his] independence . . . .'').

[938] Barnard, *supra* note 19.

[939] Barnard, *supra* note 19 (believing that the suggested amendment would help ensure the CCO's

c. Final Rule

After considering the comments, the Commission is adopting Rule 13n–11(a) as proposed, with one modification. Rule 13n–11(a) requires that (1) each SDR identify on Form SDR a person who has been designated by the board to serve as a CCO of the SDR and (2) the compensation and removal of the CCO be approved by a majority of the SDR's board.[940] The Commission is revising the rule from the proposal to require the appointment of the CCO to be approved by the majority of the SDR's board.[941]

In the Proposing Release, the Commission asked whether there are other measures that would further enhance a CCO's independence and effectiveness that should be prescribed in a rule.[942] Two commenters suggested that the Commission require the CCO's appointment, removal, or compensation be approved by independent board members or ''independent public directors.'' [943] The Commission has determined not to adopt such a requirement at this time because, as discussed in Section VI.D.3.b.iii of this release, the Commission is not requiring SDRs to have independent directors.[944] Based in part on these comments, however, the Commission believes that requiring the appointment of the CCO to be approved by a majority of the SDR's board would be another measure to enhance the CCO's independence and effectiveness. The Commission notes that the requirement that the appointment of the CCO must be approved by a majority of the SDR's board is consistent with the requirement that the designation of CCOs at investment companies must be approved by the board of directors.[945] One commenter suggested requiring a group of affiliated or controlled entities to appoint the CCO.[946] The Commission believes that this suggestion contravenes an SDR's statutory requirement to designate the CCO.[947]

The Commission is concerned that an SDR's commercial interests might discourage its CCO from making forthright disclosure to the board or senior officer about any compliance failures.[948] The Commission believes that to mitigate this potential conflict of interest, an SDR's CCO should be independent from its management so as not to be conflicted in reporting or addressing any compliance failures. Accordingly, as discussed in Section VI.J.3 below, each CCO of an SDR is required to report directly to the board or its senior officer,[949] but only the board is able to approve the CCO's appointment, remove the CCO from his or her responsibilities, and approve the CCO's compensation.

Rule 13n–11(a) is intended to promote a CCO's independence and effectiveness. The Commission is not extending the applicability of this rule to an SDR's senior officer because the Commission believes that this may unnecessarily create conflicts of interest for the CCO, particularly if the CCO is subsequently responsible for reviewing the senior officer's compliance with the Exchange Act and the rules and regulations thereunder.

In promoting a CCO's independence and effectiveness, the Commission does not believe that it is necessary to adopt, as two commenters suggested,[950] a rule prohibiting a CCO from being a member of the SDR's legal department or from serving as the SDR's general counsel. To the extent that this poses a potential or existing conflict of interest, the Commission believes that an SDR's written policies and procedures can be designed to adequately identify and mitigate any associated costs.[951]

With respect to one commenter's suggestion that there should be ''[c]ompetency standards to ensure that CCOs have the background and skills necessary to fulfill their responsibilities,'' [952] the Commission notes that while it is not requiring such standards, Form SDR requires an SDR to provide a brief account of the CCO's prior business experience and business affiliations in the securities industry or derivatives industry.[953] In addition, as discussed above, the Commission is adopting Rule 13n–4(c)(2)(iv) to require an SDR to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that the SDR's senior management and each member of the board or committee that has the authority to act on behalf of the board possess requisite skills and expertise to fulfill their responsibilities in the management and governance of the SDR, have a clear understanding of their responsibilities, and exercise sound judgment about the SDR's affairs.[954] To the extent that a CCO is considered to be in senior management of an SDR, Rule 13n–4(c)(2)(iv) applies to the CCO, but even if the CCO is not in senior management, the Commission does not believe that it is necessary to prescribe competency standards for CCOs by rule, in part because it is most likely that an SDR already has business incentives to retain a competent CCO in light of the SDR's exposure to liability if its CCO fails to comply with his or her statutory and regulatory responsibilities. Additionally, the Commission believes that an SDR will be in a better position to determine what its own requirements and specific needs are with respect to a CCO's background and skills, both of which may change as the SBS market evolves.

2. Definitions (Rule 13n–11(b))

a. Proposed Rule

Proposed Rule 13n–11(b) defined the following terms: ''affiliate,'' ''board,'' ''director,'' ''EDGAR Filer Manual,'' ''material change,'' ''material compliance matter,'' and ''tag.''

independence and possibly mitigate the Commission's need to promulgate additional measures to adequately protect CCOs from undue influence or coercion).

[940] *See* Barnard, *supra* note 19 (supporting the CCO's compensation to be specifically designed to avoid potential conflicts of interest with the CCO's compliance role).

[941] The Commission is also revising the heading of Rule 13n–11 from the proposal to describe the scope of the rule more accurately. The proposed heading was ''Designation of chief compliance officer of security-based swap data repository.'' As revised, the heading is broader: ''Chief compliance officer of security-based swap data repository; compliance reports and financial reports.''

[942] Proposing Release, 75 FR at 77341, *supra* note 2.

[943] *See* Better Markets 1, *supra* note 19 (discussing independent board members); Barnard, *supra* note 19 (discussing independent public directors); *see also* Better Markets 3, *supra* note 19.

[944] To the extent that an SDR has independent board members or independent public directors, the SDR may want to consider requiring the appointment, removal, or compensation of the CCO be approved by the majority of independent board members or independent public directors in addition to the majority of the board.

[945] *See* Rule 38a–1(a)(4)(i) under the Investment Company Act of 1940 (''Investment Company Act''), 17 CFR 270.38a–1(a)(4)(i). The Commission also notes that CFTC Rule 49.22(c) requires the appointment, compensation, and removal of a CCO to be approved by either a swap data repository's board or senior officer. *See* 17 CFR 49.22(c).

[946] Better Markets 3, *supra* note 19.

[947] *See* Exchange Act Section 13(n)(6)(A), 15 U.S.C. 78m(n)(6)(A).

[948] *See* Proposing Release, 75 FR at 77341, *supra* note 2.

[949] *See* Exchange Act Section 13(n)(6)(B)(i), 15 U.S.C. 78m(n)(6)(B)(i).

[950] *See* Barnard, *supra* note 19 (suggesting that the Commission ''restrict the CCO from serving as the General Counsel or other attorney within the legal department of the SDR''); Better Markets 1, *supra* note 19 (suggesting that ''the [SDR Rules] should preclude the General Counsel or a member of that office from serving as CCO, since those attorneys owe a duty of loyalty to the SDR itself that may not be compatible with the watchdog function of the CCO'').

[951] As discussed in Section VI.D.3.c of this release, Rule 13n–4(c)(3)(i) requires each SDR to establish, maintain, and enforce written policies and procedures reasonably designed to identify and mitigate potential and existing conflicts of interest in the SDR's decision-making process on an ongoing basis.

[952] *See* Better Markets 3, *supra* note 19.

[953] *See* Item 15 of Form SDR.

[954] *See* Section VI.D.3.b of the release discussing Rule 13n–4(c)(2)(iv).

b. Comments on the Proposed Rule

The Commission received no comments relating to the proposed definitions.

c. Final Rule

The Commission is adopting Rule 13n 11(b) substantially as proposed, with several modifications. Specifically, the Commission is adopting the definitions of ''board,'' ''director,'' ''EDGAR Filer Manual,'' ''material change,'' and ''material compliance matter'' as proposed. However, the Commission is not adopting the definition of ''affiliate'' because the term is not used in the final rule. To conform with adopted Rule 13n–11(f), as discussed below, the Commission is adding the definitions of ''Interactive Data Financial Report'' and ''official filing,'' both of which have the same meaning as set forth in Rule 11 of Regulation S–T, which sets forth the standards for electronic filing with the Commission.[955] For consistency, the Commission is revising the definition of ''tag'' (including the term ''tagged'') from the proposal to have the same meaning as set forth in Rule 11 of Regulation S–T.[956]

Moreover, the Commission is adopting the definition of ''senior officer'' to mean ''the chief executive officer or other equivalent officer.'' [957] Proposed Rule 13n–11 referenced the ''chief executive officer'' in lieu of the statutory references to the ''senior officer.'' [958] As adopted, Rule 13n–11 tracks the statutory references to ''senior officer'' and defines ''senior officer'' to include an SDR's CEO.

3. Enumerated Duties of Chief Compliance Officer (Rule 13n–11(c))

a. Proposed Rule

Proposed Rule 13n–11(c) incorporated the CCO's duties that are set forth in Exchange Act Section 13(n)(6).[959] Proposed Rule 13n–11(c) would require a CCO to (1) report directly to the board or to the SDR's CEO, (2) review the SDR's compliance with respect to its statutory and regulatory requirements and core principles, (3) in consultation with the board or the SDR's CEO, resolve any conflicts of interest that may arise, (4) be responsible for administering each policy and procedure that is required to be established pursuant to Exchange Act Section 13 and the rules and regulations thereunder, (5) ensure compliance with the Exchange Act and the rules and regulations thereunder relating to SBSs, (6) establish procedures for the remediation of noncompliance issues identified by the CCO through certain specified means, and (7) establish and follow appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.

b. Comments on the Proposed Rule

Two commenters submitted comments relating to this proposed rule, expressing differing views.[960] As discussed below, one commenter suggested a more prescriptive approach [961] while the other suggested a less prescriptive approach, but with certain clarifications.[962]

Specifically, one commenter suggested that the Commission ''establish a meaningful role for'' an SDR's CCO.[963] The commenter believed that ''the rules should preclude the [g]eneral [c]ounsel or a member of that office from serving as CCO, since those attorneys owe a duty of loyalty to the SDR itself that may not be compatible with the watchdog function of the CCO.'' [964] The commenter also believed that ''the CCO should have a direct reporting line to the independent board members and should be required to meet with those independent members at least quarterly'' in order for ''independent members of the board to become effective partners with the CCO in promoting a culture of compliance within the SDR.'' [965]

The other commenter believed that as a general matter, ''SDRs should have some flexibility to implement the required compliance procedures in ways consistent with their structure and business.'' [966] The commenter ''agree[d] with the Commission that a robust internal compliance function[, including a CCO,] plays an important role in facilitating an SDR's monitoring of, and compliance with, the requirements of the Exchange Act (and rules thereunder) applicable to SDRs.'' [967] The commenter also ''fully support[ed] Commission efforts to require the highest standards of regulatory compliance at SDRs, and believe[d that] requiring each SDR to have a CCO is an effective way to ensure compliance.'' [968]

The commenter, however, believed that ''some of the enumerated responsibilities of [a CCO] require clarification in order to avoid an overly broad reading of those duties.'' [969] Specifically, the commenter suggested that the CCO's responsibilities should not, for instance, ''be read to encompass responsibilities beyond those traditionally understood to be part of a compliance function (*i.e.,* those issues that can as a matter of competence, and typically would be, handled by a compliance department).'' [970] The commenter further believed that ''the CCO should be responsible for establishing relevant compliance procedures, and monitoring compliance with those procedures and other applicable legal requirements'' and that ''the CCO should also participate in other aspects of the SDR's activities that implicate compliance or regulatory issues.'' [971] The commenter believed, however, that ''the CCO cannot be, and should not be, required to be responsible for the overall operation of the SDR's business.'' [972] The commenter stated that the Commission ''should recognize that oversight of certain aspects of SDR activities are principally (and, as a practical matter, need to be) within the purview of risk management and operations personnel. Although there may be a regulatory component to whether an SDR is meeting its operational readiness, service level or data security responsibilities for example, oversight of those aspects of the SDR business should remain with

[955] *See* Rules 13n–11(b)(4) and (b)(7). The terms ''Interactive Data Financial Report'' and ''official filing'' are used in new Rule 407 of Regulation S–T, as discussed in Section VI.J.5.c of this release.

[956] *See* Rule 13n–11(b)(9).

[957] *See* Rule 13n–11(b)(8). The term ''senior officer'' is used in Rules 13n–1(c)(1) and (c)(3), as discussed in Section VI.J.3 of this release. This definition is consistent with the definition proposed in the CCO rules for SBS dealers, major SBS participants, and clearing agencies. *See* Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants, Exchange Act Release No. 64766 (June 29, 2011), 76 FR 42396 (July 18, 2011) (proposing Rule 15Fk–1(e)); Clearing Agency Standards for Operations and Governance, Exchange Act Release No. 64017 (Mar. 3, 2011), 76 FR 14472 (Mar. 16, 2011) (proposing Rule 3Cj–1).

[958] *See* Exchange Act Section 13(n)(6)(B), 15 U.S.C. 78m(n)(6)(B).

[959] *See* 15 U.S.C. 78m(n)(6).

[960] *See* Better Markets 1, *supra* note 19; DTCC 2, *supra* note 19; *see also* Better Markets 2, *supra* note 19; Better Markets 3, *supra* note 19.

[961] *See* Better Markets 1, *supra* note 19.

[962] *See* DTCC 2, *supra* note 19.

[963] Better Markets 2, *supra* note 19; *see also* Better Markets 3, *supra* note 19 (''Ensuring that market participants have CCOs with real authority and autonomy to police a firm from within is one of the most efficient and effective tools available to regulators.'').

[964] Better Markets 1, *supra* note 19.

[965] Better Markets 1, *supra* note 19; *see also* Better Markets 3, *supra* note 19 (suggesting requirements that the CCO have direct access to the board and the CCO ''meet quarterly with the Audit Committee (if there is one or non-management members of the [b]oard if there is not), in addition to annual meetings with the board and senior management'').

[966] DTCC 2, *supra* note 19.

[967] DTCC 2, *supra* note 19.

[968] DTCC 2, *supra* note 19.

[969] DTCC 2, *supra* note 19.

[970] DTCC 2, *supra* note 19.

[971] DTCC 2, *supra* note 19.

[972] DTCC 2, *supra* note 19.

the relevant business areas, subject of course to oversight by senior management and ultimately the board of directors. While a CCO may have an important role to play in overall oversight and remediation of any problems, the Commission's rules should not be interpreted to impose on CCOs responsibility outside of their traditional core competencies.'' [973]

In suggesting that the Commission ''clarify what types of conflict of interest should be within the CCO's purview,'' the commenter noted that ''[s]ome issues, such as permissibility of dealings with related parties or entities, are properly within the CCO's functions. Other issues, such as restrictions on ownership and access, may be fundamental for the board of directors and senior management to address.'' [974] Additionally, the commenter stated that to the extent that the Commission's rule requires consultation with the board or senior management, ''some materiality threshold would be appropriate, as not every potential conflict of interest that might be addressed by a CCO (or his or her subordinates) would need such consultation.'' [975]

The commenter further suggested that the Commission ''clarify that the CCO's specific responsibilities related to conflicts are limited to compliance with the provisions of Exchange Act Section 13(n) and the final rules thereunder as they relate to the SBS operations of an SDR.'' [976] The commenter believed that ''[t]he Commission should not mandate compliance responsibilities with respect to other regulatory requirements to which an SDR may be subject; those responsibilities should be specified by the regulator imposing the other requirements.'' [977]

c. Final Rule

After considering the comments, the Commission is adopting Rule 13n–11(c) as proposed, with modifications. The final rule incorporates the duties of an SDR's CCO that are set forth in Exchange Act Section 13(n)(6) [978] and imposes additional requirements. Specifically, each CCO is required to comply with the following requirements: (1) Report directly to the board [979] or to the SDR's senior officer,[980] (2) review the compliance of the SDR with respect to the requirements and core principles described in Exchange Act Section 13(n) and the rules and regulations thereunder, (3) in consultation with the board or the SDR's senior officer,[981] take reasonable steps to resolve any material conflicts of interest that may arise, (4) be responsible for administering each policy and procedure that is required to be established pursuant to Exchange Act Section 13 and the rules and regulations thereunder, (5) take reasonable steps to ensure compliance with the Exchange Act and the rules and regulations thereunder relating to SBSs, including each rule prescribed by the Commission under Exchange Act Section 13, (6) establish procedures for the remediation of noncompliance issues identified by the CCO through any (a) compliance office review, (b) look-back, (c) internal or external audit finding, (d) self-reported error, or (e) validated complaint, and (7) establish and follow appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues. Consistent with one commenter's suggestion, the Commission believes that Rule 13n–11(c) establishes a meaningful role for CCOs.[982] However, because the Commission is not requiring SDRs to have independent directors, Rule 13n–11(c) does not, as the commenter suggested,[983] require a CCO to report directly to independent directors or meet with independent directors at least quarterly. To provide CCOs with greater flexibility in fulfilling their duties, the Commission is also not requiring, as the commenter suggested, CCOs to ''meet quarterly with the Audit Committee (if there is one or non-management members of the [b]oard if there is not), in addition to annual meetings with the board and senior management.'' [984] The Commission expects CCOs to meet with the board, the senior officer, and others, whenever necessary to fulfill their duties.

The Commission agrees with one commenter that, in general, SDRs should have flexibility to implement the required compliance procedures in ways consistent with their structure and business.[985] In response to a commenter's request for clarification,[986] the Commission notes that generally, an SDR's CCO is not responsible for the SDR's overall or day-to-day business operation, for example, with respect to risk management and operations; nor is the CCO responsible for the decisions and actions of every director, officer, and employee of the SDR. Instead, the CCO's statutory and regulatory responsibilities generally entail, among other things, administering the SDR's policies and procedures required under Exchange Act Section 13 and the rules and regulations thereunder, keeping the SDR's board or senior officer apprised of significant compliance issues, advising the board or senior officer of needed changes in the SDR's policies and procedures, generally overseeing compliance with the Exchange Act and the rules and regulations thereunder, as well as remediating noncompliance at the SDR. If, in the course of administering policies and procedures required under Exchange Act Section 13 and the rules and regulations thereunder, the CCO believes that operations or risk management personnel are not in compliance with such policies and procedures or the Exchange Act and the rules and regulations thereunder relating to SBSs (*e.g.,* with Rule 13n–9, which prohibits the misappropriation or misuse of material nonpublic information by employees), then the CCO is responsible for establishing and following procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.

In the Proposing Release, the Commission stated that ''a CCO should review, on an ongoing basis, the SDR's service levels, costs, pricing, and operational reliability, with the view to preventing anticompetitive practices and discrimination, and encouraging innovation and the use of the SDR.'' [987] With respect to one commenter's remarks regarding the scope of the CCO's responsibilities,[988] the Commission continues to believe that the CCO's administration of an SDR's policies and procedures should include, among other things, a review of the SDR's service levels, costs, pricing, and operational reliability and a

[973] DTCC 2, *supra* note 19.

[974] DTCC 2, *supra* note 19.

[975] DTCC 2, *supra* note 19.

[976] DTCC 2, *supra* note 19.

[977] DTCC 2, *supra* note 19.

[978] *See* 15 U.S.C. 78m(n)(6).

[979] *See supra* note 549 (defining ''board'').

[980] The Commission is amending proposed Rule 13n–11(c)(1) by replacing ''chief executive officer'' with ''senior officer'' to track the language of Exchange Act Section 13(n)(6)(B)(i)), 15 U.S.C. 78m(n)(6)(B)(i).

[981] The Commission is amending proposed Rule 13n–11(c)(3) by replacing ''chief executive officer'' with ''senior officer'' to track the language of Exchange Act Section 13(n)(6)(B)(i)), 15 U.S.C. 78m(n)(6)(B)(i).

[982] *See* Better Markets 2, *supra* note 19; *see also* Better Markets 3, *supra* note 19 (''Ensuring that market participants have CCOs with real authority and autonomy to police a firm from within is one of the most efficient and effective tools available to regulators.'').

[983] *See* Better Markets 1, *supra* note 19.

[984] *See* Better Markets 3, *supra* note 19.

[985] *See* DTCC 2, *supra* note 19.

[986] *See* DTCC 2, *supra* note 19.

[987] Proposing Release, 75 FR at 77342, *supra* note 2.

[988] *See* DTCC 2, *supra* note 19 (stating that ''the CCO cannot be, and should not be, required to be responsible for the overall operation of the SDR's business.'').

determination that such service levels, costs, pricing, and operational reliability are reasonable.[989] The Commission recognizes, however, that oversight of certain aspects of an SDR's activities may overlap with or be within the purview of the SDR's risk management and operations personnel or other business personnel.[990] In that situation, the CCO may need to consult with business personnel to assess whether they have an appropriate justification for the reasonableness of such service levels, costs, pricing, and operational reliability.

As the Commission also noted in the Proposing Release, an SDR is not required to hire an additional person to serve as its CCO.[991] Instead, an SDR can designate an individual already employed with the SDR as its CCO. Given the critical role that a CCO is intended to play in ensuring an SDR's compliance with the Exchange Act and the rules and regulations thereunder,[992] the Commission believes that an SDR's CCO should be competent and knowledgeable regarding the federal securities laws, should be empowered with full responsibility and authority to develop and enforce appropriate policies and procedures for the SDR, as necessary, and should be responsible for monitoring compliance with the SDR's policies and procedures adopted pursuant to rules under the Exchange Act. However, the Commission will not substantively review a CCO's competency, and is not requiring any particular level of competency or business experience for a CCO.

To address a concern raised by one commenter,[993] the Commission is revising Rule 13n–11(c)(3) from the proposal to clarify that the CCO must, in consultation with the board or the senior officer of the SDR, take reasonable steps to resolve any material conflicts of interest (as opposed to all conflicts of interest) that may arise.[994] Recognizing that a CCO may not be in a position to resolve certain material conflicts of interest, as suggested by the commenter,[995] the Commission is revising the rule from the proposal to specify that CCOs must take reasonable steps to resolve such conflicts, which is intended to clarify that CCOs are not required to actually resolve such conflicts. These conflicts of interest may include, for example, general conflicts of interest identified in the Commission's Rule 13n–4(c)(3), as discussed in Section VI.D.3.c of this release.

Recognizing that a CCO cannot guarantee an SDR's statutory compliance, the Commission is also revising Rule 13n–11(c)(5) from the proposal to clarify that CCOs are not required to ensure compliance with the relevant Exchange Act provisions and the rules and regulations thereunder relating to SBSs, but rather to take reasonable steps to ensure such compliance. With respect to the comment that the CCO's specific responsibilities related to conflicts should be limited to compliance with the provisions of Exchange Act Section 13(n) and the final rules thereunder as they relate to the SBS operations of an SDR,[996] the Commission notes that the CCO's responsibilities go beyond the provisions of Exchange Act Section 13(n), as required by the Dodd-Frank Act.[997] For example, the CCO should take reasonable steps to ensure compliance with Exchange Act Section 10(b)'s antifraud requirements.[998] However, the CCO is required to take only reasonable steps to ensure compliance with relevant Exchange Act provisions and the rules and regulations thereunder ''relating to'' SBSs.

4. Compliance Reports (Rules 13n–11(d) and 13n–11(e))

a. Proposed Rule

An SDR's CCO is required, under Exchange Act Section 13(n)(6)(C)(i), to annually prepare and sign a report that contains a description of the SDR's compliance with respect to the Exchange Act and the rules and regulations thereunder and each policy and procedure of the SDR (including the SDR's code of ethics and conflicts of interest policies).[999] The Commission proposed Rule 13n–11(d)(1) to incorporate this requirement and to set forth minimum requirements for what must be included in each annual compliance report.

Under proposed Rule 13n–11(d)(2), an SDR would be required to file with the Commission a financial report, as discussed further in Section VI.J.5 of this release, along with a compliance report, which must include a certification that, under penalty of law, the compliance report is accurate and complete.[1000] The compliance report would also be required to be filed in a tagged data format in accordance with instructions contained in the EDGAR Filer Manual, as described in Rule 301 of Regulation S–T.[1001]

In addition, proposed Rule 13n–11(e) would require a CCO to submit the annual compliance report to an SDR's board for its review prior to the submission of the report to the Commission under proposed Rule 13n–11(d)(2).

b. Comments on the Proposed Rule

Two commenters submitted comments relating to this proposed rule.[1002] One commenter believed that an annual compliance report ''should be limited to compliance with the requirements of the Exchange Act and the policies and procedures of the SDR that relate to its activities as such with respect to SBSs (as opposed to policies and procedures that may address other regulatory requirements).'' [1003] Additionally, the commenter did ''not believe [that] it is appropriate to require the report to include a discussion of recommendations for material changes to the policies and procedures of the SDR as a result of the annual review (as well as the rationale for such recommendations and whether the policies or procedures will be modified as a result of such recommendations).'' [1004] The commenter believed that ''the inclusion of a description of any material changes to the SDR's policies and procedures, and any material compliance matters identified both since the date of the

[989] *See* Section VI.D.3.a of this release discussing an SDR's obligation to ensure that its fees are fair and reasonable and not unreasonably discriminatory.

[990] *See* DTCC 2, *supra* note 19 (stating that the Commission ''should recognize that oversight of certain aspects of SDR activities are principally (and, as a practical matter, need to be) within the purview of risk management and operations personnel'' and that ''[a]lthough there may be a regulatory component to whether an SDR is meeting its operational readiness, service level or data security responsibilities for example, oversight of those aspects of the SDR business should remain with the relevant business areas, subject of course to oversight by senior management and ultimately the board of directors'').

[991] Proposing Release, 75 FR at 77341, *supra* note 2.

[992] *See* Rules 13n–11(c)(4) and (5).

[993] *See* DTCC 2, *supra* note 19 (noting that some conflicts of interest are within a CCO's purview while other issues (*e.g.,* restrictions on ownership and access) may be fundamental for an SDR's board or senior management to address and that a CCO would not need to consult with the board every potential conflict of interest that might be addressed by a CCO).

[994] *See* Rule 13n–11(c)(3).

[995] *See* DTCC 2, *supra* note 19.

[996] *See* DTCC 2, *supra* note 19.

[997] *See* Exchange Act Section 13(n)(6)(B)(v), 15 U.S.C. 78m(n)(6)(B)(v), as added by Dodd-Frank Act Section 763(i) (requiring an SDR's CCO to ''ensure compliance with [the Exchange Act] (including regulations) relating to agreements, contracts, or transactions, including each rule prescribed by the Commission under [Section 13(n)]'').

[998] 15 U.S.C. 78j(b).

[999] *See* 15 U.S.C. 78m(n)(6)(C)(i).

[1000] *See* proposed Rule 13n–11(d)(2).

[1001] *See id.; see also* 17 CFR 232.301.

[1002] *See* DTCC 2, *supra* note 19; Better Markets 1, *supra* note 19; *see also* Better Markets 3, *supra* note 19.

[1003] DTCC 2, *supra* note 19.

[1004] DTCC 2, *supra* note 19.

preceding compliance report, provide comprehensive information,'' and that ''requiring the CCO to detail every recommendation (whether or not accepted) may chill open communication between the CCO and other SDR management.'' [1005] The commenter ''firmly believe[d that] the annual report should be kept confidential by the Commission'' and explained that ''[g]iven the level of disclosure expected to be required . . . the report will likely contain confidential and proprietary business information.'' [1006]

The other commenter recommended that ''the review and reporting should be more frequent, at least semiannually or quarterly,'' and that ''the rules should expressly prohibit the board of an SDR from requiring the CCO to make any changes to the compliance reports.'' [1007] The commenter suggested that ''[a]ny edits or supplements to the report sought by the board may be submitted to the Commission along with—but not as part of—the CCO's report.'' [1008]

c. Final Rule

After considering the comments, the Commission is adopting Rules 13n–11(d) and 13n–11(e) as proposed, each with two modifications.[1009] Specifically, Rule 13n–11(d)(1) requires that an SDR's CCO annually prepare and sign a report that contains a description of the SDR's compliance with respect to the Exchange Act and the rules and regulations thereunder and each of the SDR's policies and procedures (including the SDR's code of ethics and conflicts of interest policies). One commenter suggested that the Commission limit the applicability of this rule to an SDR's activities relating to SBSs, but did not provide a rationale for such a limit.[1010] The Commission does not believe that there is a rationale for such a limit and has concluded that it is appropriate to adopt this rule, which essentially reiterates the statutory language.[1011] In addition, compliance issues at an SDR that are not related to SBSs may impact the SDR as a whole, of which the Commission should be kept apprised.

Additionally, Rule 13n–11(d)(1) requires each annual compliance report to contain, at a minimum, a description of: (1) The SDR's enforcement of its policies and procedures, (2) any material changes [1012] to the policies and procedures since the date of the preceding compliance report, (3) any recommendation for material changes to the policies and procedures as a result of the annual review, the rationale for such recommendation, and whether such policies and procedures were or will be modified by the SDR to incorporate such recommendation, and (4) any material compliance matters [1013] identified since the date of the preceding compliance report. These minimum disclosure requirements are substantially similar to the Commission's requirements for annual reports filed by CCOs of investment companies.[1014] Further, these disclosure requirements will provide important information to Commission staff regarding any material compliance issues at an SDR and material changes or recommendations for material changes to the SDR's policies and procedures. Among other things, such information will be useful to assist Commission staff in monitoring compliance by SDRs with the relevant provisions of the Exchange Act and the rules and regulations thereunder. Thus, the Commission believes that the minimum disclosure requirements are appropriate and disagrees with one commenter's remark that it is not appropriate to require a compliance report to include a description of any recommendation for material changes to an SDR's policies and procedures as a result of an annual review, the rationale for such recommendation, and whether such policies and procedures were or will be modified by the SDR to incorporate such recommendation.[1015]

To address a concern raised by the same commenter,[1016] the Commission notes that it is not ''requiring the CCO to detail every recommendation.'' [1017] The rule is limited to ''recommendations for material changes.'' [1018] The Commission believes that limiting the description required in an annual compliance report to recommendations for material changes to the SDR's policies and procedures appropriately addresses the commenter's concern. The Commission notes, however, that individual compliance matters may not be material when viewed in isolation, but may collectively suggest a material compliance matter. In addition, the Commission recognizes that this rule may ''chill open communication between the CCO and other SDR management,'' as one commenter suggested,[1019] but the Commission believes that the usefulness of the information in an SDR's annual compliance reports to the Commission, as discussed above, would justify any potential chilling of communications.

Consistent with the relevant statutory provision,[1020] the rule requires annual compliance reports. The Commission does not believe that it is necessary to require more frequent reports, as one commenter suggested, in order to assess an SDR's financial stability.[1021] CCOs, however, should consider the need for interim reviews of compliance at SDRs in response to significant compliance events, changes in business arrangements, and regulatory developments. For example, if there is an organizational restructuring of an SDR, then its CCO should consider evaluating whether its policies and procedures are adequate to guard against potential conflicts of interest. Additionally, if a new rule regarding SDRs is adopted by the Commission, then a CCO would need to take reasonable steps to ensure compliance with the rule, including reviewing the SDR's policies and procedures.

Under Rule 13n–11(d)(2), an SDR is required to file with the Commission a financial report along with the annual

[1005] DTCC 2, *supra* note 19.

[1006] DTCC 2, *supra* note 19.

[1007] Better Markets 1, *supra* note 19; *see also* Better Markets 3, *supra* note 19 (suggesting that the Commission require ''the board to review and comment on, but not edit, the CCO's annual report to the Commission'').

[1008] Better Markets 1, *supra* note 19.

[1009] To conform with Rule 13n–11's heading, as adopted, the Commission is revising the heading of paragraph (d) of the rule to specify that the paragraph pertains to ''[c]ompliance reports'' rather than ''[a]nnual reports.'' *See supra* note 941.

[1010] *See* DTCC 2, *supra* note 19.

[1011] *See* Exchange Act Section 13(n)(6)(C)(i), 15 U.S.C. 78m(n)(6)(C)(i).

[1012] The term ''material change'' is defined as a change that a CCO would reasonably need to know in order to oversee compliance of the SDR. *See* Rule 13n–11(b)(5).

[1013] The term ''material compliance matter'' is defined as any compliance matter that the board would reasonably need to know to oversee the compliance of the SDR and that involves, without limitation: (1) A violation of the federal securities laws by the SDR, its officers, directors, employees, or agents; (2) a violation of the policies and procedures of the SDR, by the SDR, its officers, directors, employees, or agents; or (3) a weakness in the design or implementation of the SDR's policies and procedures. *See* Rule 13n–11(b)(6).

[1014] *See* Investment Company Act Rule 38a–1(a)(4)(iii), 17 CFR 270.38a–1(a)(4)(iii).

[1015] *See* DTCC 2, *supra* note 19.

[1016] *See* DTCC 2, *supra* note 19 (stating that ''requiring the CCO to detail every recommendation (whether or not accepted) may chill open communication between the CCO and other SDR management'').

[1017] *But see* DTCC 2, *supra* note 19 (believing that it is not appropriate to require compliance reports to include a discussion of recommendations for material changes to an SDR's policies and procedures).

[1018] Rule 13n–11(d)(1)(iii).

[1019] *See* DTCC 2, *supra* note 19.

[1020] *See* Exchange Act Section 13(n)(6)(C)(i), 15 U.S.C. 78m(n)(6)(C)(i).

[1021] *See* Better Markets 1, *supra* note 19.

compliance report, and the compliance report must include a certification by the CCO that, to the best of his or her knowledge and reasonable belief,[1022] and under penalty of law, the compliance report is accurate and complete. The compliance report is also required to be filed in a tagged [1023] data format in accordance with instructions contained in the EDGAR Filer Manual,[1024] as described in Rule 301 of Regulation S–T.[1025]

Rule 13n–11(e) requires a CCO to submit the annual compliance report to the board for its review prior to the filing of the report with the Commission under Rule 13n–11(d)(2).[1026] Although the rule requires the compliance report to be submitted to the board once a year, a CCO should promptly bring serious compliance issues to the board's attention rather than wait until an annual compliance report is prepared. One commenter suggested that the Commission permit an SDR's board to submit edits or supplements to a CCO's annual compliance report, but not as part of the report.[1027] Rule 13n–11 does not prohibit a CCO from editing an annual compliance report to reflect the board's comments because the Commission believes that the CCO and the board should be working toward the same compliance goals and that prohibiting the CCO from taking the board's edits could create an adversarial atmosphere between them. As discussed above, however, an SDR could, pursuant to the conflicts of interest requirements set forth in Rule 13n–4(c)(3), consider prohibiting a board from requiring the CCO to make any changes to the report.[1028]

One commenter suggested that the Commission keep the annual compliance report confidential.[1029] The Commission is not providing, by rule, that the annual compliance reports are automatically granted confidential treatment, but an SDR may seek confidential treatment pursuant to Exchange Act Rule 24b–2. This approach is consistent with how the Commission generally treats the filings that it receives from its regulated entities, including exchanges and clearing agencies. The Commission may make filed annual compliance reports available on its Web site, except for information where confidential treatment is requested by the SDR and granted by the Commission.[1030]

5. Financial Reports and Filing of Reports (Exchange Act Rules 13n–11(f) and (g)/Rules 11, 305, and 407 of Regulation S–T)

a. Proposed Rule

Proposed Rule 13n–11(f) set forth a number of requirements relating to an SDR's financial report. First, the proposed rule would require each financial report to be a complete set of the SDR's financial statements that are prepared in conformity with U.S. generally accepted accounting principles (''GAAP'') for the SDR's most recent two fiscal years.[1031] Second, the proposed rule would provide that each financial report shall be audited in accordance with the standards of the Public Company Accounting Oversight Board (''PCAOB'') by a registered public accounting firm that is qualified and independent in accordance with Rule 2–01 of Regulation S–X.[1032] Third, each financial report would be required to include a report of the registered public accounting firm that complies with paragraphs (a) through (d) of Rule 2–02 of Regulation S–X.[1033] Fourth, if an SDR's financial statements contain consolidated information of a subsidiary of the SDR, then the SDR's financial statements must provide condensed financial information as prescribed by the Commission.[1034] Fifth, an SDR's financial reports would be required to be provided in XBRL consistent with Rules 405(a)(1), (a)(3), (b), (c), (d), and (e) of Regulation S–T.[1035]

Proposed Rule 13n–11(g) would further require that annual compliance reports and financial reports be filed within 60 days after the end of the fiscal year covered by such reports.

b. Comments on the Proposed Rule

The Commission received one comment relating to this proposed rule.[1036] Specifically, one commenter suggested harmonizing Rule 13n–11(f) with the CFTC's rule by eliminating proposed Rule 13n–11(f)(2)'s requirement that each financial report be audited in accordance with the PCAOB's standards by a registered public accounting firm that is qualified and independent unless the SDR is under a separate obligation to provide financial statements.[1037] The commenter believed that ''[t]his requirement imposes an additional burden for an [SDR] and is not justified in relation to the risks that an [SDR] would pose to its members.'' [1038] The commenter further suggested that the Commission ''consider adopting the CFTC's approach in its final [swap data repository] rules, which require [a swap data repository's] financial statements be prepared in conformity with . . . GAAP.'' [1039]

c. Final Rules

The Commission is adopting proposed Rules 13n–11(f) and (g) with modifications.[1040] Specifically, Rule 13n–11(f)(1) requires each financial report to be a complete set of the SDR's financial statements that are prepared in conformity with U.S. GAAP for the SDR's most recent two fiscal years.[1041]

[1022] The Commission is revising Rule 13n–11(d)(2) from the proposal to clarify that the certification must be made by the CCO and permit the certification to be based on the best of the CCO's knowledge and reasonable belief. *Accord* General Rule of Practice 153(b)(1)(ii), 17 CFR 201.153(b)(1)(ii) (requiring an attorney who signs a filing with the Commission to certify that ''to the best of his or her knowledge, information, and belief, formed after reasonable inquiry, the filing is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law'').

[1023] *See supra* note 294 (defining ''tag'' (including the term ''tagged'')).

[1024] *See supra* note 294 (defining ''EDGAR Filer Manual'').

[1025] Rule 13n–11(d)(2); *see also* 17 CFR 232.301. The information in each compliance report will be tagged using an appropriate machine-readable, tagged data format to enable the efficient analysis and review of the information contained in the report.

[1026] The Commission is revising Rule 13n–11(e) from the proposal to refer to the ''submission'' of the annual compliance report ''to'' the Commission as the ''filing'' of the report ''with'' the Commission. The Commission believes that using the term ''filing'' is more precise than the term ''submission'' in this context.

[1027] Better Markets 1, *supra* note 19.

[1028] *Accord* Better Markets 3, *supra* note 19 (suggesting that the Commission require ''the board to review and comment on, but not edit, the CCO's annual report to the Commission'').

[1029] DTCC 2, *supra* note 19.

[1030] As discussed in Section VI.A.1.c of this release, the Commission is adopting technical amendments to Exchange Act Rule 24b–2 to clarify that the confidential portion of electronic filings by SDRs must be filed electronically and to require SDRs to request confidential treatment electronically. The Commission is also adopting technical amendments to Rule 101 of Regulation S–T to provide that, except as otherwise provided, all filings by SDRs, including any information with respect to which confidential treatment is requested, must be filed electronically.

[1031] Proposed Rule 13n–11(f)(1).

[1032] Proposed Rule 13n–11(f)(2).

[1033] Proposed Rule 13n–11(f)(3).

[1034] Proposed Rule 13n–11(f)(4).

[1035] Proposed Rule 13n–11(f)(5); *see also* 17 CFR 232.405 (imposing content, format, submission, and Web site posting requirements for an interactive data file, as defined in Rule 11 of Regulation S–T).

[1036] *See* DTCC 5, *supra* note 19.

[1037] DTCC 5, *supra* note 19.

[1038] DTCC 5, *supra* note 19 (noting that ''[u]nlike clearing agencies or other entities supervised by the Commission, an [SDR] does not have financial exposure to its users or participants that would justify the imposition of this requirement'').

[1039] DTCC 5, *supra* note 19.

[1040] To conform with the headings of Rule 13n–11 and paragraph (d) of the rule, as adopted, the Commission is revising the heading of paragraph (f) of the rule to refer to ''financial reports'' in a plural form.

[1041] This is generally consistent with CFTC Rule 49.25(f). *See* 17 CFR 49.25(f); DTCC 5, *supra* note

Rule 13n–11(f)(2) provides that each financial report must be audited in accordance with the PCAOB's standards by a registered public accounting firm [1042] that is qualified and independent in accordance with Rule 2–01 of Regulation S–X.[1043] Pursuant to Rule 13n–11(f)(3), each financial report is required to include a report of the registered public accounting firm that complies with paragraphs (a) through (d) of Rule 2–02 of Regulation S–X.[1044]

Rule 13n–11(f)(4) further provides that if an SDR's financial statements contain consolidated information of a subsidiary of the SDR, then the SDR's financial statements must provide condensed financial information, in a financial statement footnote, as to the financial position, changes in financial position and results of operations of the SDR, as of the same dates and for the same periods for which audited consolidated financial statements are required. Such financial information need not be presented in greater detail than is required for condensed statements by Rules 10–01(a)(2), (3), and (4) of Regulation S–X.[1045] Detailed footnote disclosure that would normally be included with complete financial statements may be omitted with the exception of disclosures regarding material contingencies, long-term obligations, and guarantees.[1046] Descriptions of significant provisions of the SDR's long-term obligations, mandatory dividend or redemption requirements of redeemable stocks, and guarantees of the SDR shall be provided along with a five-year schedule of maturities of debt.[1047] If the material contingencies, long-term obligations, redeemable stock requirements, and guarantees of the SDR have been separately disclosed in the consolidated statements, then they need not be repeated in this schedule.[1048] Rule 13n–11(f)(4) is substantially similar to Rule 12–04 of Regulation S–X, which pertains to condensed financial information of registrants.[1049]

The Commission is revising proposed Rule 13n–11(f)(5) to require an SDR's financial reports to be provided as an official filing [1050] in accordance with the EDGAR Filer Manual and include, as part of the official filing, an Interactive Data Financial Report [1051] filed in accordance with new Rule 407 of Regulation S–T. Finally, Rule 13n–11(g) provides that annual compliance reports and financial reports filed pursuant to Rules 13n–11(d) and (f) are required to be filed within 60 days after the end of the fiscal year covered by such reports.

Rule 407 of Regulation S–T

In conjunction with Rule 13n–11(f)(5), the Commission is adopting new Rule 407 of Regulation S–T, which stems from provisions in proposed Rule 13n–11(f). Rule 407 sets forth the requirements equivalent to those in Rules 405(a)(1) (except as to the requirement for Web site posting), (a)(2) (with modifications), (a)(3), (b), (c), (d)(1), and (e)(1) of Regulation S–T. With the exception of Rule 405(a)(2), these provisions were cross-referenced in proposed Rule 13n–11(f)(5). Thus, substantively, the requirements in new Rule 407 are the same as those proposed under proposed Rule 13n–11(f)(5), except as detailed below. The text of Rule 407 is also substantially the same as those provisions of Rule 405 that pertain to the content, format, and filing requirements of XBRL-formatted financial statements. Rule 407, however, applies to Interactive Data Financial Reports, whereas Rule 405 applies to Interactive Data Files. The Commission is adopting new Rule 407 to specify the content, format, and filing requirements for Interactive Data Financial Reports.

Although substantially similar, there are several differences between the provisions of Rule 405 that proposed Rule 13n–11(f) cross-referenced and the provisions of Rule 405 that are included in new Rule 407. As a general matter, these differences relate to modifications from the proposal that address the unique aspects of SDRs and the applicability of certain filing requirements to them.

Upon further consideration, the Commission is not adopting, in Rule 407, several provisions that the Commission had initially proposed applying to SDRs' financial reports. Rule 405(a)(1), which was cross-referenced in proposed Rule 13n–11(f)(5), requires compliance with the Web site posting requirements found elsewhere in Rule 405. As adopted, Rule 407 does not have Web site posting requirements because the Commission believes that it is not necessary to impose such requirements on SDRs in this context. No commenters have suggested otherwise. Additionally, this is consistent with the SDR Rules not imposing any Web site posting requirements on any other filings by SDRs. Rule 407 also does not require an SDR to file its financial reports consistent with Rules 405(d)(2), (3), and (4), all of which require detailed tagging of footnotes in financial statements. Additionally, Rule 407 does not require an SDR to file its financial reports consistent with Rule 405(e)(2), which requires detailed tagging of financial statement schedules. The Commission believes that block-text tags of complete footnotes and schedules in an SDR's financial reports [1052] will provide sufficient data structure for the Commission to assess and analyze effectively the SDR's financial and operational condition. Thus, the Commission believes that it is not necessary to impose additional costs on SDRs to provide detailed tagged footnotes and schedules in SDRs' financial reports. For these reasons, the Commission is not requiring SDRs to detail tag footnotes and schedules in their financial reports.

In addition, the provisions of Rule 405 that proposed Rule 13n–11(f) cross-referenced and the provisions of Rule 405 that are included in new Rule 407 differ in another way. New Rule 407(a)(2) specifies that Rule 407 applies only to SDRs filing financial reports.[1053]

19 (suggesting that the Commission adopt the CFTC's rule requiring a swap data repository's financial statements to be prepared in conformity with GAAP).

[1042] The term ''registered public accounting firm'' is defined in Exchange Act Section 3(a)(59) to have the same meaning as in Section 2 of the Sarbanes-Oxley Act of 2002. *See* 15 U.S.C. 78c(a)(59). Section 2 of the Sarbanes-Oxley Act defines ''registered public accounting firm'' as a public accounting firm registered with the PCAOB in accordance with the Sarbanes-Oxley Act.

[1043] Rule 13n–11(f)(2).

[1044] Rule 13n–11(f)(3).

[1045] Rule 13n–11(f)(4).

[1046] *Id.*

[1047] *Id.*

[1048] *Id.*

[1049] *See* 17 CFR 210.12–04.

[1050] ''Official filing'' has the same meaning as set forth in Rule 11 of Regulation S–T. Rule 13n–11(b)(7). Specifically, Rule 11 of Regulation S–T defines ''official filing'' as ''any filing that is received and accepted by the Commission, regardless of filing medium and exclusive of header information, tags and any other technical information required in an electronic filing; except that electronic identification of investment company type and inclusion of identifiers for series and class (or contract, in the case of separate accounts of insurance companies) as required by [R]ule 313 of Regulation S–T (§ 232.313) are deemed part of the official filing.''

[1051] ''Interactive Data Financial Report'' has the same meaning as set forth in Rule 11 of Regulation S–T. Rule 13n–11(b)(4). Specifically, the Commission is adding the definition of ''Interactive Data Financial Report'' in Rule 11 of Regulation S–T to mean ''the machine-readable computer code that presents information in eXtensible Business Reporting Language (XBRL) electronic format pursuant to § 232.407.'' This definition is substantially the same as the definition of ''Interactive Data File'' in Rule 11 of Regulation S–T. However, Interactive Data Financial Reports are not considered Interactive Data Files for purposes of Rule 405 or for other rules and regulations that reference to Rule 405.

[1052] *See* Rules 407(d) and (e) of Regulation S–T (requiring complete footnotes and schedules in financial statements to be block-text tagged).

[1053] Rule 405(a)(2), on the other hand, applies to other electronic filers either required or permitted to submit an Interactive Data File.

Specifically, new Rule 407(a)(2) states that an Interactive Data Financial Report must be filed only by an electronic filer that is required to file an Interactive Data Financial Report pursuant to Rule 13n–11(f)(5) as an exhibit to a filing of an SDR's financial report. Consistent with other documents required to be filed in a tagged data, or interactive, format,[1054] an SDR's financial report is required to be filed with the Commission in two formats. The first part of the official filing is the Related Official Financial Report Filing,[1055] which is in ASCII or HTML format. The second part of the official filing, the Interactive Data Financial Report, is an exhibit to the filing, which is required to be in XBRL format.[1056]

In addition to adopting new Rule 407 of Regulation S–T, the Commission is making a conforming amendment to Rule 305 of Regulation S–T to include Interactive Data Financial Reports among the list of filings to which Rule 305(a) does not apply.[1057] Rule 305(a) limits the number of characters and positions of tabular or columnar information of electronic filings with the Commission. By amending Rule 305, the Commission is treating Interactive Data Financial Reports in the same manner as it treats other XBRL filings in this context.

As mentioned above, Rule 13n–11(g) provides that annual compliance reports and financial reports are required to be filed within 60 days after the end of the fiscal year covered by such reports. The Commission anticipates developing an electronic filing system through which an SDR will be able to file annual compliance reports and financial reports shortly after the effective date of Rule 13n–11. The Commission anticipates that this electronic filing system will be through EDGAR and that it will be the same portal for SDRs to file Form SDR. If an SDR needs to file an annual compliance report and financial report prior to such time as the electronic filing system is available, then the SDR may file the reports in paper format with the Commission's Division of Trading and Markets at the Commission's principal office in Washington, DC. However, doing so does not relieve the SDR from compliance with the requirement in Rule 13n–11(d)(2) to file the annual compliance report ''in a tagged data format in accordance with the instructions contained in the EDGAR Filer Manual,'' or the requirement in Rule 13n–11(f)(5) to provide the financial report ''as part of an official filing in accordance with the EDGAR Filer Manual.'' Therefore, when the Commission's electronic filing system is available, the SDR should file electronically any such reports that previously had been filed in paper format.

The Commission is not providing, by rule, that the financial reports are automatically granted confidential treatment, but an SDR may seek confidential treatment of certain information pursuant to Exchange Act Rule 24b–2. As stated above, this approach is consistent with how the Commission generally treats the filings that it receives from its regulated entities, including exchanges. The Commission may make filed financial reports available on its Web site except for information where confidential treatment is requested by the SDR and granted by the Commission.[1058]

The Commission notes that with respect to its other filers, the Commission has required, at a minimum, the financial information discussed above[1059] and, in some instances, significantly more information.[1060] Additionally, as discussed in the Proposing Release, the Commission believes that it is necessary to obtain an audited annual financial report from each registered SDR to understand the SDR's financial and operational condition. It is particularly important for the Commission to have this understanding because SDRs are intended to play a pivotal role in improving the transparency and efficiency of the SBS market and because SBSs (whether cleared or uncleared) are required to be reported to a registered SDR.[1061] In its role as central recordkeeper, an SDR serves an important role as a source of data for regulators to monitor exposures, risks, and compliance with the Exchange Act and for market participants to access position information. Among other things, the Commission will need to know whether an SDR has adequate financial resources to comply with its statutory obligations or is having financial difficulties. If an SDR ultimately ceases doing business, then it could create a significant disruption in the OTC derivatives market.

With respect to one commenter's suggested deletion of the auditing requirement in Rule 13n–11(f)(2), the Commission disagrees with the commenter's view that the requirement imposes an additional burden for an SDR that is not justified in relation to the risks that an SDR would pose to its members.[1062] The Commission believes that the audit requirement will serve as an effective means to assure the reliability of the information in an SDR's financial report that is filed with the Commission. The Commission also believes that the filing of audited financial statements (as opposed to unaudited financial statements) is important because it would bolster market participants' confidence in the SDR and provide greater credibility to the accuracy of the information that the SDR files with the Commission.[1063] The Commission recognizes that because of the audit requirement in Rule 13n–11(f)(2), the rule may, in some instances, be more costly than the CFTC's requirement of quarterly unaudited financial statements.[1064] The Commission believes, however, that the additional burden, where it exists, is

[1054] *See* Rule 405 of Regulation S–T, 17 CFR 232.405.

[1055] The Commission is adding the definition of ''Related Official Financial Report Filing'' in Rule 11 of Regulation S–T to mean ''the ASCII or HTML format part of the official filing with which an Interactive Data Financial Report appears as an exhibit.''

[1056] The Commission's proposed Rule 13n–11(f) stated that an SDR's financial report must be provided in XBRL consistent with certain provisions in Rule 405. As adopted, Rule 407 is intended to clarify that it is only the exhibit to the filing of an SDR's financial report that must be in XBRL.

[1057] The Commission notes that Rule 305(a) of Regulation S–T does not apply to HTML documents. If a Related Official Financial Report Filing is filed in HTML format, then Rule 305(a) will not apply to that filing.

[1058] As discussed in Section VI.A.1.c of this release, the Commission is adopting technical amendments to Exchange Act Rule 24b–2 to clarify that the confidential portion of electronic filings by SDRs must be filed electronically and to require SDRs to request confidential treatment electronically. The Commission is also adopting technical amendments to Rule 101 of Regulation S–T to provide that, except as otherwise provided, all filings by SDRs, including any information with respect to which confidential treatment is requested, must be filed electronically.

[1059] *See, e.g.,* Exchange Act Rule 17a–5(d), 17 CFR 240.17a–5(d) (requiring broker-dealers to file annually audited financial statements); Article 3 of Regulation S–X, 17 CFR 210.3–01 *et seq.* (requiring certain financial statements to be audited by independent accountants).

[1060] *See, e.g.,* Exchange Act Rule 17a–5(a), 17 CFR 240.17a–5(a) (requiring broker-dealers to file monthly and quarterly Financial and Operational Combined Uniform Single (FOCUS) reports); Article 10–01(d) of Regulation S–X, 17 CFR 210.10–01(d) (requiring public companies to have their quarterly reports reviewed by independent public accountants).

[1061] Proposing Release, 75 FR at 77343, *supra* note 2; *see also* Exchange Act Section 13(m)(1)(G), 15 U.S.C. 78m(m)(1)(G).

[1062] *See* DTCC 5, *supra* note 19.

[1063] *See* Revision of the Commission's Auditor Independence Requirements, Securities Act Release No. 7919 (Nov. 21, 2000), 65 FR 76008 (Dec. 5, 2000) (discussing importance of auditor independence and audited financial statements).

[1064] *See* CFTC Rule 49.25, 17 CFR 49.25; DTCC 5, *supra* note 19 (suggesting that the Commission ''consider adopting the CFTC's approach in its final [swap data repository] rules,'' regarding financial statements).

justified by the aforementioned benefits of requiring audited financial statements.

6. Additional Rule Regarding Chief Compliance Officer (Rule 13n–11(h))

In the Proposing Release, the Commission asked whether it should prohibit any officers, directors, or employees of an SDR from, directly or indirectly, taking any action to coerce, manipulate, mislead, or fraudulently influence the SDR's CCO in the performance of his responsibilities.[1065] In response, one commenter recommended that the Commission adopt such a prohibition.[1066] After considering the commenter's recommendation, the Commission has decided to adopt Rule 13n–11(h), which states that ''[n]o officer, director, or employee of a security-based swap data repository may directly or indirectly take any action to coerce, manipulate, mislead, or fraudulently influence the security-based swap data repository's chief compliance officer in the performance of his or her duties under [Rule 13n–11].'' This rule is intended to advance the goals of the statute's requirements by preventing others at the SDR from seeking to improperly affect the SDR's CCO in the performance of his or her responsibilities. This rule is also intended to promote the independence of an SDR's CCO while maintaining the CCO's effectiveness by mitigating the potential conflicts of interest between the CCO and the SDR's officers, directors, and employees.

K. Exemption From Requirements Governing SDRs for Certain Non-U.S. Persons (Rule 13n–12)

1. Proposed Rule

In the Cross-Border Proposing Release, the Commission proposed, pursuant to its authority under Exchange Act Section 36,[1067] an exemption from Exchange Act Section 13(n)[1068] and the rules and regulations thereunder (collectively, the ''SDR Requirements'') for non-U.S. persons that perform the functions of an SDR within the United States, subject to a condition.[1069] Specifically, the Commission proposed Rule 13n–12 (''SDR Exemption''), which provides: ''A non-U.S. person[1070] that performs the functions of a security-based swap data repository within the United States shall be exempt from the registration and other requirements set forth in Section 13(n) of the [Exchange] Act . . . and the rules and regulations thereunder, provided that each regulator with supervisory authority over such non-U.S. person has entered into a supervisory and enforcement memorandum of understanding or other arrangement with the Commission that addresses the confidentiality of data collected and maintained by such non-U.S. person, access by the Commission to such data, and any other matters determined by the Commission.''[1071]

2. Comments on the Proposed Rule

The Commission received several comment letters concerning the registration and regulation of SDRs in the cross-border context, most of which were submitted prior to the Commission's proposal of Rule 13n–12. As a general matter, commenters suggested that the Commission should apply principles of international comity.[1072]

One commenter expressed concern that ''the current asymmetry in the [proposed SDR Rules], when compared to existing international standards, will lead to fragmentation along regional lines and prohibit global services and global data provision, which will weaken the introduction of trade repositories as a financial markets reform measure.''[1073] The commenter stated that ''because of the onerous standards imposed on SDRs compared to the regulatory framework of other competitive jurisdictions, the U.S. will be less attractive than other locations for the purpose of storing full global data where SDRs are actively looking to service the global regulatory community.''[1074]

In addition, two commenters expressed concern about the potential impact of duplicative registration requirements imposed on SDRs.[1075] Specifically, one of these commenters remarked that the Commission's proposed rules governing SDRs ''would seem to force a non-resident SDR to be subject to multiple regimes and to the jurisdiction of several authorities'' and that the Proposing Release made no ''reference to equivalency of regulatory regimes or cooperation with the authorities of the country of establishment of the non-resident SDRs.''[1076] To address this concern, the commenter suggested that the Commission adopt a regime under which foreign SDRs would be deemed to comply with the SDR Requirements if the laws and regulations of the relevant foreign jurisdiction were equivalent to those of the Commission and an MOU has been entered into between the Commission and the relevant foreign authority.[1077] The commenter noted that the recommended ''regime would have the following advantages: i) Facilitating cooperation among authorities from different jurisdictions; ii) ensuring the mutual recognition of [SDRs]; and iii) establishing convergent regulatory and supervisory regimes which is necessary in a global market such as the OTC derivatives one.''[1078]

[1065] Proposing Release, 75 FR at 77341, *supra* note 2.

[1066] Better Markets 1, *supra* note 19; *see also* Better Markets 3, *supra* note 19 (suggesting ''[e]xplicit prohibitions against attempts by officers, directors, or employees to coerce, mislead, or otherwise interfere with the CCO'').

[1067] Exchange Act Section 36 authorizes the Commission to conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from certain provisions of the Exchange Act or certain rules or regulations thereunder, by rule, regulation, or order, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors. 15 U.S.C. 78mm.

[1068] 15 U.S.C. 78m(n).

[1069] Cross-Border Proposing Release, 78 FR at 31209, *supra* note 3.

[1070] Proposed Rule 13n–12(a)(1) defines ''non-U.S. person'' to mean any person that is not a U.S. person. Proposed Rule 13n–12(a)(2) defines ''U.S. person'' by cross-reference to the definition of ''U.S. person'' in proposed Rule 3a71–3(a)(7). *See* Cross-Border Proposing Release, 78 FR at 31209, *supra* note 3.

[1071] Proposed Rule 13n–12(b).

[1072] *See* DTCC 2, *supra* note 19 (urging the Commission, in its regulation of SDRs, to aim for regulatory comity as it has already been agreed to by ODRF and other international bodies such as CPSS and IOSCO); Foreign Banks SBSR, *supra* note 27 (recommending that the Commission work with foreign authorities to permit SDRs in all major jurisdictions to register with the appropriate regulators in each jurisdiction); *see also* Société Générale SBSR, *supra* note 27 (suggesting that the Commission consider international comity and public policy goals of derivatives regulation to limit its regulation of swap business and requesting that the Commission coordinate with its foreign counterparts, especially those based in Europe, to work toward an MOU on the jurisdictional reach of the derivatives rules of the U.S./European Market Infrastructure Regulation); ISDA SIFMA SBSR, *supra* note 27 (''The Commission should consult with foreign regulators before establishing the extra-territorial scope of the rules promulgated under Title VII.''). *See also* DTCC CB, *supra* note 26 (''Given the global nature of OTC swaps and SB swaps markets, the United States should continue to promote an approach to the regulation of the swaps markets that adheres to international comity and mitigates the risk of regulatory arbitrage in market decisions. Regulations among jurisdictions must be coordinated in a manner that promotes competition, transparency, and protects the safety and soundness of these global markets. At the same time, the Commission should remain vigilant that the international framework is efficient and does not unfairly disadvantage or concentrate systemic risk in the United States.'').

[1073] DTCC 2, *supra* note 19.

[1074] DTCC 2, *supra* note 19.

[1075] *See* US & Foreign Banks, *supra* note 24; ESMA, *supra* note 19.

[1076] ESMA, *supra* note 19.

[1077] ESMA, *supra* note 19.

[1078] ESMA, *supra* note 19 (noting that a similar regulatory regime is delineated in the ''European Commission's proposal for a Regulation on OTC

Continued

Recognizing that some SDRs would function solely outside of the United States and, therefore, would be regulated by an authority in another jurisdiction, commenters suggested possible approaches to the SDR registration regime. One commenter, for example, suggested that ''a non-U.S. SDR should not be subject to U.S. registration so long as it collects and maintains information from outside the U.S., even if such information is collected from non-U.S. swap dealer or [major security-based swap participant] registrants.'' [1079] Two commenters supported ''cross-registration'' of SDRs, whereby SDRs in all major jurisdictions may register with the appropriate regulators in each jurisdiction.[1080]

3. Final Rule

As stated above,[1081] the Commission believes that a non-U.S. person that performs the functions of an SDR within the United States is required to register with the Commission, absent an exemption.[1082] After considering comments, including those urging the Commission to take into consideration the principles of international comity and mitigate the risk of regulatory arbitrage in market decisions,[1083] the Commission is adopting Rule 13n–12 as proposed, with two modifications,[1084] to provide an exemption from the SDR Requirements for certain non-U.S. persons. This rule is intended to provide legal certainty to market participants and to address commenters' concerns regarding the potential for duplicative regulatory requirements.[1085] Specifically, Rule 13n–12 states as follows: ''A non-U.S. person [1086] that performs the functions of a security-based swap data repository within the United States shall be exempt from the registration and other requirements set forth in section 13(n) of the [Exchange] Act . . . and the rules and regulations thereunder, provided that each regulator with supervisory authority over such non-U.S. person has entered into a memorandum of understanding [1087] or other arrangement with the Commission that addresses the confidentiality of data collected and maintained by such non-U.S. person, access by the Commission to such data, and any other matters determined by the Commission.''

The Commission continues to believe that the SDR Exemption is necessary or appropriate in the public interest, and consistent with the protection of investors.[1088] Because the reporting requirements of Title VII and Regulation SBSR can be satisfied only if an SBS transaction is reported to an SDR that is registered with the Commission,[1089] the Commission continues to believe that the primary reason for a person subject to the reporting requirements of Title VII and Regulation SBSR to report an SBS transaction to an SDR that is not registered with the Commission would likely be to satisfy reporting obligations that it or its counterparty has under foreign law.[1090] Such person would still be required to fulfill its reporting obligations under Title VII and Regulation SBSR by reporting its SBS transaction to an SDR that is registered with the Commission, absent other relief from the Commission,[1091] even if the transaction were also reported to a non-U.S. person that is not registered with the Commission because it is relying on the SDR Exemption. The Commission believes that this approach to the SDR Requirements appropriately balances the Commission's interest in having access to data about SBS transactions involving U.S. persons, while addressing commenters' concerns regarding the potential for duplicative regulatory requirements [1092] as well as furthering the goals of the Dodd-Frank Act.

The SDR Exemption includes a condition that each regulator with supervisory authority over the non-U.S. person that performs the functions of an SDR within the United States enters into an MOU or other arrangement with the Commission, as specified in Exchange Act Rule 13n–12(b). The Commission anticipates that in determining whether to enter into such an MOU or other

derivatives, central counterparties and trade repositories'').

[1079] *See* US & Foreign Banks, *supra* note 24.

[1080] Foreign Banks SBSR, *supra* note 27 (''Cross-registration of SDRs is not only necessary given the global nature of the swaps market, it also reduces duplicative data reporting. Cross-registration would also facilitate the creation of uniform reporting rules and procedures that would enable easy comparison of transaction data from different jurisdictions. Cross-border information sharing and cross-registration, coupled with the new standard identification codes that will be required for reporting to SDRs, would provide regulators and market participants with a comprehensive picture, thus enabling more robust surveillance and supervision of the global swaps market.''); BofA SBSR, *supra* note 27 (noting that the Commission can ensure that it retains access to data reported to foreign SDRs by establishing a regime for cross-registration of SDRs in multiple jurisdictions).

[1081] *See* Section III.B of this release discussing persons performing the functions of an SDR within the United States that must register with the Commission.

[1082] *See* Cross-Border Proposing Release, 78 FR at 31042, *supra* note 3. *See also* Exchange Act Section 13(n)(1), 15 U.S.C. 78m(n)(1) (requiring persons that, directly or indirectly, make use of the mails or any means or instrumentality of interstate commerce to perform the functions of an SDR, to register with the Commission). The Commission recognizes that some non-U.S. persons that perform the functions of an SDR may do so entirely outside the United States, and thus, are not required to register with the Commission.

[1083] *See* DTCC 2, *supra* note 19; DTCC CB, *supra* note 26; Foreign Banks SBSR, *supra* note 27; Société Générale SBSR, *supra* note 27; and ISDA SIFMA SBSR, *supra* note 27.

[1084] *See infra* note 1086 (discussing technical revision) and *infra* note 1087 (discussing MOU requirement).

[1085] *See* US & Foreign Banks, *supra* note 24; ESMA, *supra* note 19.

[1086] Exchange Act Rule 13n–12(a)(1), as adopted, defines ''non-U.S. person'' to mean any person that is not a U.S. person. Exchange Act Rule 13n–12(a)(2) defines ''U.S. person'' by cross-reference to the definition of ''U.S. person'' in Exchange Act Rule 3a71–3(a)(4)(i), 17 CFR 240.3a71–3(a)(4)(i). *See* Cross-Border Adopting Release, 79 FR at 47371, *supra* note 11 (adopting Exchange Act Rule 3a71–3(a)(4)(i)). As proposed, Rule 13n–12(a)(2) cross-referenced to ''§ 240.3a71–3(a)(7).'' For consistency in how cross-references are formatted in the SDR Rules, the Commission is revising from the proposal the format of the cross-reference to ''Rule 3a71–3(a)(4)(i) (§ 240.3a71–3(a)(4)(i)).''

[1087] Upon further consideration, the Commission is revising the proposed rule to require an MOU rather than a more specific ''supervisory and enforcement'' MOU. Requiring an MOU provides the Commission with the flexibility to negotiate a broad range of terms, conditions, and circumstances under which information can be shared with other relevant authorities.

[1088] *See* Cross-Border Proposing Release, 78 FR at 31043, *supra* note 3.

[1089] The Commission believes that the SDR Exemption addresses one commenter's view that ''a non-U.S. SDR should not be subject to U.S. registration so long as it collects and maintains information from outside the U.S.'' *See* US & Foreign Banks, *supra* note 24; *see also* Section III.B of this release (discussing when SDRs that are non-U.S. persons must register with the Commission). The Commission notes, however, that a non-U.S. person that performs the functions of an SDR outside the United States may choose to register with the Commission as an SDR to enable that person to accept data from persons that are reporting an SBS pursuant to the reporting requirements of Title VII and Regulation SBSR. *See* Exchange Act Sections 13(m)(1)(G) and 13A(a)(1), 15 U.S.C. 78m(m)(1)(G) and 78m–1(a)(1), as added by Dodd-Frank Act Sections 763(i) and 766(a); Regulation SBSR Adopting Release, *supra* note 13 (Rule 901 requiring all SBSs to be reported to a registered SDR or, if no SDR will accept the SBSs, the Commission). This approach is consistent with commenters' views supporting cross-registration of SDRs. *See* Foreign Banks SBSR, *supra* note 27 (suggesting cross-registration of SDRs); BofA SBSR, *supra* note 27 (suggesting cross-registration of SDRs). The Commission may consider also granting, pursuant to its authority under Exchange Act Section 36, 15 U.S.C. 78mm, exemptions to such non-U.S. person that registers with the Commission from certain of the SDR Requirements on a case-by-case basis. In determining whether to grant such an exemption, the Commission may consider, among other things, whether there are overlapping requirements in the Exchange Act and applicable foreign law.

[1090] *See* Cross-Border Proposing Release, 78 FR at 31043, *supra* note 3.

[1091] *See* Cross-Border Proposing Release, 78 FR at 31043, *supra* note 3 (discussing Regulation SBSR and substituted compliance); *see also* Regulation SBSR Adopting Release, *supra* note 13 (adopting Rule 908(c) allowing for the possibility of substituted compliance).

[1092] *See* US & Foreign Banks, *supra* note 24; ESMA, *supra* note 19.

arrangement with a relevant authority, the Commission will consider whether the relevant authority can keep confidential requested data that is collected and maintained by the non-U.S. person that performs the functions of an SDR within the United States [1093] and whether the Commission will have access to data collected and maintained by such non-U.S. person.[1094] The Commission anticipates that it will consider other matters, including, for example, whether the relevant authority agrees to provide the Commission with reciprocal assistance in securities matters within the Commission's jurisdiction and whether an MOU or other arrangement would be in the public interest.[1095] The Commission believes that, in lieu of requiring every non-U.S. person that performs the functions of an SDR within the United States to register with the Commission, the condition in the SDR Exemption is appropriate to address the Commission's interest in having access to SBS data involving U.S. persons and U.S. market participants that is maintained by non-U.S. persons that perform the functions of an SDR within the United States and protecting the confidentiality of such SBS data involving U.S. persons and U.S. market participants.[1096]

With respect to one commenter's concern about ''the current asymmetry in the [proposed SDR Rules] when compared to existing international standards'' and ''onerous standards imposed on SDRs compared to regulatory framework of other competitive jurisdictions,'' the Commission believes that the SDR Exemption is intended to encourage international cooperation, and thereby mitigate to some extent the concern of data fragmentation and regulatory arbitrage.[1097] The commenter, which was submitted prior to the Commission's proposal of Rule 13n–12, did not provide specific examples of international standards or regulatory frameworks for comparison with the SDR Rules, but, as discussed in Section I.D above, the Commission has taken into consideration recommendations by international bodies; Commission staff also has consulted and coordinated with foreign regulators through bilateral and multilaterial discussions.[1098]

VII. Paperwork Reduction Act

Certain provisions of the SDR Rules[1099] and Form SDR impose new ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[1100] In accordance with 44 U.S.C. 3507 and 5 CFR 1320.11, the Commission submitted the provisions to the Office of Management and Budget (''OMB'') for review when it issued the Proposing Release. The title of the new collection of information is ''Form SDR and Security-Based Swap Data Repository Registration, Duties, and Core Principles.'' An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB assigned control number 3235–0719 to the new collection of information.

In the Proposing Release, the Commission solicited comment on the collection of information requirements and the accuracy of the Commission's statements.[1101] The Commission received three comments noting the importance of confidentiality.[1102] The Commission received one comment generally discussing the burden of Rule 13n–11(f)(2), which is discussed below.[1103]

The Commission also received one comment recommending that ''the Commission should generally seek to avoid any divergence from the CFTC's and international regulators' frameworks that is likely to give rise to undue costs or burdens.''[1104] The commenter believed that ''divergence is generally warranted only if the rule adopted by the Commission is more flexible than those adopted by others (and therefore would not preclude the voluntary adoption of consistent practices by market participants).''[1105]

None of the commenters specifically addressed the burden estimates in the Proposing Release related to the collection of information. The Commission has, however, revised the burden associated with completing Form SDR to reflect some additional material incorporated from Form SIP to accommodate SDRs' registration as SIPs and to reflect a revision to the disclosure of business affiliations.[1106] The Commission has also made a change to correct a calculation error.[1107] Other than these changes, the Commission's estimates remain unchanged from the Proposing Release.

A. Summary of Collection of Information

1. Registration Requirements, Form SDR, and Withdrawal From Registration

Rule 13n–1(b) requires an SDR to apply for registration with the

[1093] The Commission contemplates that the relevant authority will keep requested data that is collected and maintained by such non-U.S. person confidential in a manner that is consistent with Exchange Act Section 24 and Rule 24c–1 thereunder. *See* 15 U.S.C. 78x and 17 CFR 240.24c–1.

[1094] The Commission contemplates that the Commission's access to data collected and maintained by such non-U.S. person will be in a manner that is consistent with Exchange Act Section 13(n)(5)(D) and Rule 13n–4(b)(5) thereunder. *See* Exchange Act Section 13(n)(5)(D), 15 U.S.C. 78m(n)(5)(D).

[1095] The Commission has entered numerous cooperative agreements with foreign authorities. *See* Cooperative Arrangements with Foreign Regulators, *available at http://www.sec.gov/about/offices/oia/oia_cooparrangements.shtml.* Based on the Commission's experience with negotiating MOUs and other agreements with foreign authorities, the Commission believes that the MOU or agreement described in Rule 13n–12(b) could, in many cases, be negotiated in a timely manner so that the exemption provided under Rule 13n–12(b) should be available before the registration of an SDR seeking to claim the exemption would otherwise be required.

[1096] *Accord* Société Générale SBSR, *supra* note 27 (requesting that the Commission coordinate with its foreign counterparts, especially those based in Europe, to work toward an MOU on the jurisdictional reach of the derivatives rules of the U.S./European Market Infrastructure Regulation).

[1097] *See* DTCC 2, *supra* note 19.

[1098] Senior representatives of authorities with responsibility for regulation of OTC derivatives have met on a number of occasions to discuss international coordination of OTC derivatives regulations. *See, e.g.,* Report of the OTC Derivatives Regulators Group (ODRG) on Cross-Border Implementation Issues (Mar. 31, 2014), *available at http://www.cftc.gov/ucm/groups/public/@internationalaffairs/documents/file/odrgreport033114.pdf.*

[1099] As noted above, ''SDR Rules'' means, collectively, Rules 13n–1 to 13n–12.

[1100] 44 U.S.C. 3501 *et seq.*

[1101] *See* Proposing Release, 75 FR at 77354, *supra* note 2.

[1102] One commenter emphasized that regulators should provide confidential treatment to the annual compliance reports that SDRs provide to the Commission. DTCC 2, *supra* note 19. Consistent with its treatment of filings that it receives from other registrants, the Commission is not providing, by rule, that annual compliance reports are automatically granted confidential treatment, but SDRs may request confidential treatment. *See* Section VI.J.4.c of this release. One commenter to the Temporary Rule Release emphasized the importance of the Commission protecting information furnished to it under the rules in that release. Deutsche Temp Rule, *supra* note 28. A second commenter reiterated that regulators should provide confidential treatment to SBS data provided by SDRs. ESMA, *supra* note 19. The Commission anticipates that it will keep reported data that SDRs submit to the Commission confidential, subject to the provisions of applicable law. Pursuant to Commission rules, confidential treatment can be sought for information submitted to the Commission. *See* 17 CFR 200.83 (regarding confidential treatment procedures under FOIA).

[1103] *See* Section VIII.D.6.c of this release discussing economic alternatives to Rule 13n–11(f)(2).

[1104] IIB CB, *supra* note 26.

[1105] IIB CB, *supra* note 26.

[1106] *See* Section VII.D.1 of this release discussing the burdens associated with SDRs' registration requirements.

[1107] The calculation of the burden on non-resident SDRs under Rule 13n–1(f) has been revised to correct a calculation error, which slightly reduces the burden hours incurred by non-resident SDRs. *See infra* note 1136 and the accompanying text.

Commission by filing Form SDR electronically in tagged data format in accordance with the instructions contained on the form. Under Rule 13n–1(e), each SDR is required to both designate and authorize on Form SDR an agent in the United States, other than a Commission member, official, or employee, to accept notice or service of process, pleadings, or other documents in any action or proceedings brought against the SDR to enforce the federal securities laws and the rules and regulations thereunder. Rule 13n–1(f) requires a non-resident SDR to (i) certify on Form SDR that the SDR can, as a matter of law, and will provide the Commission with prompt access to the SDR's books and records and can, as a matter of law, and will submit to onsite inspection and examination by the Commission and (ii) provide an opinion of counsel that the SDR can, as a matter of law, provide the Commission with prompt access to the SDR's books and records and can, as a matter of law, submit to onsite inspection and examination by the Commission. Under Rule 13n–3(a), in the event that an SDR succeeds to and continues the business of a registered SDR, the successor SDR may file an application for registration on Form SDR (and the predecessor SDR is required to file a withdrawal from registration with the Commission) within 30 days after the succession in order for the registration of the predecessor to be deemed to remain effective as the registration of the successor. Also, under Rule 13n–11(a), an SDR is required to identify on Form SDR a person who has been designated by the board to serve as a CCO of the SDR.

Rule 13n–1(d) requires SDRs to file an amendment on Form SDR annually as well as when any information provided in items 1 through 17, 26, and 48 on Form SDR is or becomes inaccurate for any reason. Under Rule 13n–3(b), if an SDR succeeds to and continues the business of a registered SDR and the succession is based solely on a change in the predecessor's date or state of incorporation, form of organization, or composition of a partnership, the successor SDR is permitted, within 30 days after the succession, to amend the registration of the predecessor SDR on Form SDR to reflect these changes.

Rule 13n–2(b) permits a registered SDR to withdraw from registration by filing a withdrawal from registration on Form SDR electronically in a tagged data format. The SDR must designate on Form SDR a person to serve as custodian of its books and records. When filing a withdrawal from registration on Form SDR, the SDR must update any inaccurate information.

2. SDR Duties, Data Collection and Maintenance, and Direct Electronic Access

Rule 13n–4(b) sets out a number of duties for SDRs. Under Rules 13n–4(b)(2) and (4), SDRs are required to accept data as prescribed in Regulation SBSR [1108] and maintain that data, as required in Rule 13n–5, for each SBS reported to the SDRs. SDRs are required, pursuant to Rule 13n–4(b)(5), to provide direct electronic access to the Commission or its designees.[1109] SDRs are required, pursuant to Rule 13n–4(b)(6), to provide information in such form and at such frequency as required by Regulation SBSR. The Commission anticipates that it will propose for public comment detailed specifications of acceptable formats and taxonomies for the purposes of direct electronic access. Until such time as the Commission adopts any format or taxonomy, SDRs may provide direct electronic access to the Commission to data in the form in which SDRs maintain such data.

SDRs have an obligation under Rule 13n–4(b)(3) to confirm, as prescribed in Rule 13n–5, with both counterparties the accuracy of the information submitted to the SDRs. Under Rule 13n–4(b)(7), at such time and in such manner as may be directed by the Commission, an SDR is required to establish automated systems for monitoring, screening, and analyzing SBS data.[1110]

Rule 13n–5 establishes rules regarding SDR data collection and maintenance. Rule 13n–5(b)(1) requires every SDR to (1) establish, maintain, and enforce written policies and procedures reasonably designed for the reporting of complete and accurate transaction data to the SDR;[1111] (2) accept all transaction data reported to it in accordance with those policies and procedures; (3) accept all data provided to it regarding all SBSs in an asset class if the SDR accepts data on any SBS in that particular asset class; and (4) establish, maintain, and enforce written policies and procedures reasonably designed to satisfy itself that the transaction data that has been submitted to the SDR is complete and accurate, and clearly identifies the source for each trade side, and the pairing method (if any) for each transaction in order to identify the level of quality of the transaction data. An SDR is also required under Rule 13n–5(b)(1)(iv) to promptly record transaction data it receives.

In addition, Rule 13n–5(b) requires every SDR to establish, maintain, and enforce written policies and procedures reasonably designed: (1) to calculate positions [1112] for all persons with open SBSs for which the SDR maintains records; (2) to ensure that the transaction data and positions that it maintains are complete and accurate; and (3) to prevent any provision in a valid SBS from being invalidated or modified through the procedures or operations of the SDR.

Rule 13n–5(b)(4) requires that every SDR maintain the transaction data and related identifying information for not less than five years after the applicable SBS expires and historical positions for not less than five years. This data is required to be maintained in a place and format that is readily accessible and usable to the Commission and other persons with authority to access or view the information. SDRs must also maintain this data in an electronic format that is non–rewritable and non–erasable. Under Rule 13n–5(b)(7), the SDR's obligation to preserve, maintain, and make accessible the transaction data and historical positions extends to the periods required under Rule 13n–5 even if the SDR ceases to do business or to be registered pursuant to Exchange Act Section 13(n). Rule 13n–5(b)(8) requires every SDR to make and keep current a plan to ensure that the transaction data and positions that are recorded in the SDR continue to be maintained in accordance with Rule 13n–5(b)(7), including procedures for transferring the transaction data and positions to the Commission or its designee (including another registered SDR).

Rule 13n–6 establishes rules regarding SDR automated systems. Rule 13n–6 requires that every SDR, with respect to those systems that support or are integrally related to the performance of its activities, establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its systems provide adequate levels of capacity, integrity, resiliency, availability, and security.

3. Recordkeeping

Rule 13n–7 requires every SDR to make and keep records, in addition to those required under Rules 13n–4(b)(4) and 13n–5. Specifically, every SDR is

[1108] *See* Regulation SBSR Adopting Release, *supra* note 13.

[1109] *See also* Rule 13n–4(a)(5) (defining ''direct electronic access'').

[1110] The Commission is not requiring SDRs to monitor, screen, and analyze SBS data maintained by the SDR at this time. *See* Section VI.D.2.c.iii of this release.

[1111] ''Transaction data'' is defined in Rule 13n–5(a)(3).

[1112] ''Position'' is defined in Rule 13n–5(a)(2).

required, under Rule 13n–7(a)(1), to make and keep current a record for each office listing, by name or title, each person at that office who, without delay, can explain the types of records the SDR maintains at that office and the information contained in those records. Every SDR is also required, under Rule 13n–7(a)(2), to make and keep current a record listing each officer, manager, or person performing similar functions of the SDR responsible for establishing policies and procedures that are reasonably designed to ensure compliance with the Exchange Act and the rules and regulations thereunder. Rule 13n–7(b) requires every SDR to keep and preserve at least one copy of all documents made or received by it in the course of its business as such. These records are required to be kept for a period of not less than five years, the first two years in a place that is immediately available to representatives of the Commission for inspection and examination. Upon the request of any representative of the Commission, pursuant to Rule 13n–7(b)(3), an SDR is required to furnish promptly to such representative copies of any documents required to be kept and preserved by the SDR pursuant to Rules 13n–7(a) and (b). Under Rule 13n–7(c), the SDR's recordkeeping obligation is extended to the periods required under Rule 13n–7 even if the SDR ceases to do business or to be registered pursuant to Exchange Act Section 13(n).

SDRs are also required to make available the books and records required by Rules 13n–1 through 13n–11 upon request by Commission representatives for inspection and examination.[1113]

4. Reports

Under Rule 13n–8, SDRs are required to promptly report to the Commission, in a form and manner acceptable to the Commission, such information as the Commission determines necessary or appropriate for the Commission to perform its duties.

5. Disclosure

Rule 13n–10 describes disclosures that SDRs are required to provide to a market participant before accepting any SBS data from that market participant or upon a market participant's request. The information required in the disclosure document includes: (1) the SDR's criteria for providing others with access to services offered and data maintained by the SDR, (2) the SDR's criteria for those seeking to connect to or link with the SDR, (3) a description of the SDR's policies and procedures regarding its safeguarding of data and operational reliability, as described in Rule 13n–6, (4) a description of the SDR's policies and procedures reasonably designed to protect the privacy of any and all SBS transaction information that the SDR receives from an SBS dealer, counterparty, or any registered entity, as described in Rule 13n–9(b)(1), (5) a description of the SDR's policies and procedures regarding its non–commercial and/or commercial use of the SBS transaction information that it receives from a market participant, any registered entity, or any other person, (6) a description of the SDR's dispute resolution procedures involving market participants, as described in Rule 13n–5(b)(6), (7) a description of all the SDR's services, including any ancillary services, (8) the SDR's updated schedule of any dues; unbundled prices, rates, or other fees for all of its services, including any ancillary services; any discounts or rebates offered; and the criteria to benefit from such discounts or rebates, and (9) a description of the SDR's governance arrangements.

6. Chief Compliance Officer; Compliance Reports and Financial Reports

Rule 13n–4(b)(11) requires an SDR and Rule 13n–11(a) requires the board of an SDR to designate a CCO to perform the duties identified in Rule 13n–11. Under Rules 13n–11(c)(6) and (7), the CCO is responsible for, among other things, establishing procedures for the remediation of noncompliance issues identified by the CCO and establishing and following appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.

The CCO is also required under Rules 13n–11(d), (e), and (g) to prepare and submit annual compliance reports to the SDR's board for review before they are filed with the Commission. The annual compliance reports must contain, at a minimum, a description of the SDR's enforcement of its policies and procedures, any material changes to the policies and procedures since the date of the preceding compliance report, any recommendation for material changes to the policies and procedures, and any material compliance matters identified since the date of the preceding compliance report. The compliance reports must be filed in a tagged data format in accordance with the instructions contained in the EDGAR Filer Manual.[1114]

Rules 13n–11(f) and (g) require that financial reports be prepared and filed annually with the Commission. These financial reports must, among other things, be prepared in conformity with GAAP for the most recent two fiscal years of the SDR, audited by a registered public accounting firm that is qualified and independent in accordance with Rule 2–01 of Regulation S–X, and audited in accordance with standards of the Public Company Accounting Oversight Board. The financial reports must be provided as an official filing in accordance with the EDGAR Filer Manual and include, as part of the official filing, an Interactive Data Financial Report filed in accordance with Rule 407 of Regulation S–T.[1115]

7. Other Provisions Relevant to the Collection of Information

Rule 13n–4(c)(1) sets forth the requirements for SDRs related to market access to services and data. Among other things, an SDR must: (1) establish, monitor on an ongoing basis, and enforce clearly stated objective criteria that would permit fair, open, and not unreasonably discriminatory access to services offered and data maintained by the SDR, as well as fair, open, and not unreasonably discriminatory participation by market participants, market infrastructures, venues from which data can be submitted to the SDR, and third party service providers that seek to connect to or link with the SDR; and (2) establish, maintain, and enforce written policies and procedures reasonably designed to review any prohibition or limitation of any person with respect to services offered or data maintained by the SDR and to grant that person access to those services or data if the person has been discriminated against unfairly.

Rule 13n–4(c)(2)(iv) requires each SDR to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that the SDR's senior management and each member of the board or committee that has the authority to act on behalf of the board possesses requisite skills and expertise to fulfill their responsibilities in the management and governance of the SDR, have a clear understanding of their responsibilities, and exercise sound judgment about the SDR's affairs.

Rule 13n–4(c)(3) sets forth the conflicts of interest controls required of SDRs. In particular, SDRs must establish and enforce written policies and procedures reasonably designed to minimize conflicts of interest, including establishing, maintaining, and enforcing written policies and procedures

[1113] *See, e.g.,* Rules 13n–4(b)(1) and 13n–7(b)(3).

[1114] *See* 17 CFR 232.301.

[1115] *See* Section VI.J.5.c of this release discussing Rule 407 of Regulation S–T.

reasonably designed to identify and mitigate potential and existing conflicts of interest in the SDR's decision–making process on an ongoing basis and written policies and procedures regarding the SDR's non–commercial and commercial use of the SBS transaction information that it receives.

Rule 13n–5(b)(6) requires SDRs to establish procedures and provide facilities reasonably designed to effectively resolve disputes over the accuracy of the transaction data and positions that are recorded in the SDR.

Rules 13n–4(b)(8) and 13n–9 relate to the privacy requirements for SDRs. Rule 13n–4(b)(8) requires SDRs to maintain the privacy of any and all SBS transaction information that the SDR receives from a SBS dealer, counterparty, or any registered entity as prescribed in Rule 13n–9. Rule 13n–9(b)(1) requires each SDR to establish, maintain, and enforce written policies and procedures reasonably designed to protect the privacy of any and all SBS transaction information that the SDR receives from any SBS dealer, counterparty, or any registered entity. Rule 13n–9(b)(2) requires each SDR to establish and maintain safeguards, policies, and procedures reasonably designed to prevent the misappropriation or misuse of any confidential information received by the SDR, material, nonpublic information, and/or intellectual property. At a minimum, these policies and procedures must address limiting access to such information and intellectual property, standards pertaining to the trading by persons associated with the SDR for their personal benefit or the benefit of others, and adequate oversight.

B. Use of Information

1. Registration Requirements, Form SDR, and Withdrawal From Registration

As discussed above, Rules 13n–1 and 13n–3 generally require SDRs to register on Form SDR and make amendments on Form SDR when specified information on the form becomes inaccurate, as well as annually. The information collected in Form SDR is used to enhance the ability of the Commission to monitor SDRs and oversee their compliance with the federal securities laws and the rules and regulations thereunder, as well as understand their operations and organizational structure. The information will also be used to make determinations of whether to grant or institute proceedings to determine whether registration should be granted or denied.

As discussed above, Rule 13n–2 generally permits a registered SDR to withdraw from registration by filing Form SDR electronically in a tagged data format, designating a custodian of its books and records, and updating any inaccurate information contained in its most recently filed Form SDR. The information collected from an SDR withdrawing from registration is used by the Commission to monitor and oversee SDRs by ensuring that the Commission has an accurate record of registered SDRs and access to an SDR's books and records after the SDR withdraws from registration.

Also, under Rule 13n–11(a), an SDR is required to identify on Form SDR a person who has been designated by the board to serve as a CCO of the SDR. This information will help the Commission identify SDRs' CCOs.

2. SDR Duties, Data Collection and Maintenance, and Direct Electronic Access

As discussed above, Rules 13n–4(b), 13n–5, and 13n–6 specify the duties of SDRs, require SDRs to collect and maintain specific data and provide that data to certain entities.[1116] The information that is collected under these provisions will help ensure an orderly and transparent SBS market as well as provide the Commission and other relevant authorities with tools to help oversee this market.

3. Recordkeeping

As discussed above, Rule 13n–7 requires an SDR to make and keep books and records relating to its business (except for the transaction data and positions collected and maintained pursuant to Rule 13n–5) for a prescribed period.[1117] The information collected under these provisions is necessary for Commission representatives to inspect and examine an SDR and to facilitate the Commission's efforts to evaluate the SDR's compliance with the federal securities laws and the rules and regulations thereunder.

4. Reports

As discussed above, Rule 13n–8 requires SDRs to provide certain reports to the Commission.[1118] The Commission will use the information collected under this provision to assist in its oversight of SDRs, which will help ensure an orderly and transparent SBS market.

5. Disclosure

As discussed above, Rule 13n–10 requires SDRs to provide certain specific disclosures to a market participant before accepting any data from that market participant or upon a market participant's request.[1119] These disclosures will help market participants understand the potential risks and costs associated with using an SDR's services, as well as the protections and services available to them.

6. Chief Compliance Officer; Compliance Reports and Financial Reports

As discussed above, Rule 13n–11 requires an SDR's CCO to establish certain procedures relating to the remediation of noncompliance issues as well as prepare and sign an annual compliance report, which is filed with the Commission.[1120] Rule 13n–11 also requires that a financial report be prepared and filed with the Commission as an official filing in accordance with the EDGAR Filer Manual and include, as part of the official filing, an Interactive Data Financial Report filed in accordance with Rule 407 of Regulation S–T. The information collected under this rule will help ensure compliance by SDRs with the federal securities laws and the rules and regulations thereunder as well as assist the Commission in overseeing SDRs.

7. Other Provisions Relevant to the Collection of Information

As discussed above, Rule 13n–4(c)(1) requires SDRs to comply with certain requirements relating to market access to services and data, including establishment of certain policies and procedures and clearly stated objective criteria. Rule 13n–4(c)(2)(iv) requires SDRs to establish, maintain, and enforce policies and procedures regarding the skills and expertise, understanding of responsibilities, and sound judgment of the SDRs' senior management and members of the board or committee that has the authority to act on behalf of the board. Rule 13n–4(c)(3) requires SDRs to establish and enforce written conflicts of interest policies and procedures; to establish, maintain, and enforce written policies and procedures reasonably designed to identify and mitigate conflicts of interest on an ongoing basis; and to establish, maintain, and enforce

[1116] *See* Sections VI.D.2.c, VI.E, and VI.F.3 of this release discussing Rules 13n–4(b), 13n–5, and 13n–6, respectively.

[1117] *See* Section VI.G of this release discussing Rule 13n–7.

[1118] *See* Section VI.H.3 of this release discussing Rule 13n–8.

[1119] *See* Section VI.I.2.c of this release discussing Rule 13n–10.

[1120] *See* Section VI.J of this release discussing Rule 13n–11.

written policies and procedures regarding their noncommercial and commercial use of transaction information. Rule 13n–5(b)(6) requires SDRs to establish procedures and provide facilities reasonably designed to effectively resolve disputes regarding the accuracy of the transaction data and positions that are recorded in the SDRs. Rules 13n–4(b)(8) and 13n–9 require SDRs to establish, maintain, and enforce policies, procedures, and safeguards regarding privacy and misappropriation or misuse of certain information.[1121] The information collected pursuant to these provisions will help ensure a transparent and orderly SBS market, protect market participants' privacy, and facilitate Commission oversight of SDRs.

C. Respondents

1. Registration Requirements, Form SDR, and Withdrawal From Registration

As discussed above, the registration requirements of Rules 13n–1, 13n–2, 13n–3, 13n–11(a), and Form SDR apply to every U.S. person performing the functions of an SDR and every non–U.S. person performing the functions of an SDR within the United States, absent an exemption.[1122] Commission staff is aware of seven persons that have, to date, filed applications for registration with the CFTC as swap data repositories, three of which have withdrawn their applications and four of which are provisionally registered with the CFTC. It is reasonable to estimate that a similar number of persons provisionally registered with the CFTC may seek to register with the Commission as SDRs. Therefore, the Commission continues to estimate, for PRA purposes, that ten persons may register with the Commission as SDRs. The Commission also continues to estimate, for PRA purposes, that three of the ten respondents may be non–resident SDRs subject to the additional requirements of Rule 13n–1(f). The Commission received no comments on its estimate of the number of non–resident SDRs and continues to believe that this estimate is reasonable. Although non–resident SDRs may be able to take advantage of the SDR Exemption, the Commission conservatively estimates for PRA purposes that none of the three would rely on the exemption.

2. SDR Duties, Data Collection and Maintenance, and Direct Electronic Access

The duties, data collection and maintenance, and direct electronic access requirements of Rules 13n–4(b), 13n–5, and 13n–6 as a general matter, apply to all SDRs, absent an exemption. Thus, for these provisions, the Commission estimates that there will be 10 respondents.

3. Recordkeeping

The recordkeeping requirements of Rule 13n–7 apply to all SDRs, absent an exemption. Thus, for this rule, the Commission estimates that there will be 10 respondents.

4. Reports

The report requirement of Rule 13n–8 applies to all SDRs, absent an exemption. Thus, for this rule, the Commission estimates that there will be 10 respondents.

5. Disclosure

The disclosure requirements of Rule 13n–10 apply to all SDRs, absent an exemption. Thus, for this rule, the Commission estimates that there will be 10 respondents.

6. Chief Compliance Officer; Compliance Reports and Financial Reports

The provisions regarding CCOs set forth in Rule 13n–11 apply to all SDRs, absent an exemption. Thus, for this rule, the Commission estimates that there will be 10 respondents.

7. Other Provisions Relevant to the Collection of Information

The remaining requirements of the SDR Rules [1123] relevant to the collection of information, specifically Rules 13n–4(c), 13n–5(b)(6), and 13n–4(b)(8) and 13n–9, apply to all SDRs, absent an exemption. Thus, for these provisions, the Commission estimates that there will be 10 respondents.

As stated above, no commenters addressed any of these estimates.[1124]

D. Total Annual Reporting and Recordkeeping Burden

The Commission received no comments on any of the estimates provided in the Proposing Release. The Commission has, however, revised the burden associated with completing Form SDR to reflect some additional material incorporated from Form SIP to accommodate SDRs' registration as SIPs and to reflect a revision to the disclosure of business affiliations. The Commission has also made a change to correct a calculation error.[1125] Other than these changes, the Commission's estimates remain unchanged from the Proposing Release.

1. Registration Requirements, Form SDR, and Withdrawal From Registration

Rule 13n–1(b) and Rule 13n–3(a) (which relates to successor SDRs as described above) require SDRs to apply for registration using Form SDR and file the form electronically in tagged data format with the Commission in accordance with the instructions to the form.[1126] Further, Rule 13n–1(e) requires SDRs to designate an agent for service of process on Form SDR, and Rule 13n–11(a) requires SDRs to identify their CCOs on Form SDR. For purposes of the PRA, the Commission initially estimated that it would take an SDR approximately 400 hours to complete the initial Form SDR with the information required, including all exhibits to Form SDR.[1127] The Commission based this estimate on the number of hours necessary to complete Form SIP because Form SDR was based on Form SIP and incorporated many of the provisions of Form SIP.[1128] The Commission continues to estimate, based on Form SIP, that it will initially take an SDR 400 hours to complete the proposed portions of Form SDR with the information required, including all exhibits thereto,[1129] and now estimates that it will take an SDR an additional 81 hours to complete Form SDR to reflect the additional burden hours discussed below.

As noted above, the Commission has revised Form SDR to incorporate certain provisions from Form SIP to allow SDRs to register as both SDRs and SIPs using

[1121] *See* Section VI.I.1.c of this release discussing Rule 13n–9.

[1122] *See* Section VI.K of this release discussing Rule 13n–12 (''SDR Exemption'').

[1123] As noted above, ''SDR Rules'' means Rules 13n–1 to 13n-12.

[1124] *See* Section VII of this release discussing comments related to the collection of information.

[1125] In one minor respect, the calculation of the burden on non-resident SDRs under Rule 13n–1(f) has been revised to correct a calculation error, which slightly reduces the burden hours incurred by non-resident SDRs. *See infra* note 1136 and the accompanying text.

[1126] *See* Sections VI.A and VI.C.3 of this release discussing Rule 13n–1(b) and Rule 13n–3(a), respectively.

[1127] *See* Proposing Release, 75 FR at 77348, *supra* note 2.

[1128] *See* Proposing Release, 75 FR at 77348, *supra* note 2.

[1129] The Commission calculated in 2011 that Form SIP would take 400 hours to complete. *See* Submission for OMB Review; Comment Request, 76 FR 30984 (May 27, 2011) (outlining the Commission's most recent calculations regarding the PRA burdens for Form SIP) (''SIP PRA Filing''). While the requirements of Form SIP and Form SDR are not identical, the Commission believes that there is sufficient similarity for PRA purposes that the burden will be roughly equivalent.

Form SDR.[1130] The Commission believes that the burden of filing Form SDR should be adjusted to reflect these revisions. Because of the overlap between Form SDR and Form SIP, the Commission initially estimated that SDRs would need only one-quarter of the time to complete Form SIP, or 100 hours, when registering with the Commission as SIPs separately on Form SIP.[1131] The Commission believes that this estimate of the burden of an SDR to register as a SIP using Form SDR should be reduced to 80 hours because (1) SDRs will not have to process and file two separate forms; (2) SDRs will not have to provide duplicate information in two forms; and (3) SDRs will not have to prepare and file duplicate exhibits to two forms. The Commission believes that 80 hours represents a reasonable estimate of the additional burden hours that SDRs will incur in responding to the provisions incorporated from Form SIP into Form SDR.

Moreover, as discussed above, the Commission is revising Form SDR from the proposal by requiring disclosure of business affiliations in the ''derivatives industry'' rather than the ''OTC derivatives industry'' for an applicant's designated CCO, officers, directors, governors, and persons performing functions similar to any of the foregoing, and the members of all standing committees.[1132] The Commission believes that SDRs will incur an additional burden in replying to this disclosure, which may require disclosure of more business affiliations than would have been disclosed under Form SDR, as proposed. The Commission believes that 1 hour represents a reasonable estimate of the additional burden hours that each SDR will incur in responding to the revised disclosure requirement.

As noted above, the Commission estimates that 10 respondents will be subject to this burden.[1133] Accordingly, the Commission estimates that the one-time initial registration burden for all SDRs is approximately 4810 burden hours.[1134] The Commission believes that SDRs will, as a general matter, prepare Form SDR internally, except as otherwise discussed below. In the Proposing Release, the Commission solicited comments as to whether SDRs would outsource this requirement, but the Commission did not receive any comments in this regard.[1135]

Under Rule 13n–1(f), a non-resident SDR must (i) certify that the SDR can, as a matter of law, and will provide the Commission with prompt access to the SDR's books and records and can, as a matter of law, and will submit to onsite inspection and examination by the Commission and (ii) provide an opinion of counsel that the SDR can, as a matter of law, provide the Commission with access to the books and records of such SDR and can, as a matter of law, submit to onsite inspection and examination by the Commission. This creates an additional burden for non-resident SDRs. The Commission estimates, based on similar requirements of Form 20–F, that this additional burden will add 1 hour and $900 in outside legal costs per respondent.[1136] As stated above, the Commission believes that there will be three respondents to this collection, for a total additional burden of 3 hours and $2,700 for non-resident SDRs to comply with Rule 13n–1(f).[1137]

SDRs are also required to amend Form SDR pursuant to Rule 13n–1(d) annually as well as when information in certain items is or becomes inaccurate. Amendments are also permitted in certain situations involving successor SDRs pursuant to Rule 13n–3(b).[1138] The Commission believes that these amendments represent the ongoing annual burdens of Form SDR and Rules 13n–1(d) and 13n–3(b).[1139] The Commission estimates that the ongoing annualized burden for complying with these registration amendment requirements will be approximately 12 burden hours for each SDR per amendment[1140] and approximately 120 burden hours for all SDRs per amendment. Rule 13n–1(d) requires one annual amendment on Form SDR as well as interim amendments on Form SDR when certain reported information therein is or becomes inaccurate or, under Rule 13n–3(b), in certain circumstances involving successor

[1130] *See* Section VI.A.1.c of this release discussing Form SDR. *See also supra* note 220 discussing changes to proposed Form SDR to incorporate the additional information requested on Form SIP of applicants for registration as a SIP.

[1131] *See* Regulation SBSR Proposing Release, 75 FR at 75260, *supra* note 8 (''Any entity that is required to complete proposed Form SDR also would have to complete Form SIP. Because of the substantial overlap in the forms, much of the burden for completing Form SIP would be subsumed in completing proposed Form SDR. Therefore, the Commission preliminarily estimates that, having completed a proposed Form SDR, an entity would need only one-quarter of the time to then complete Form SIP, or 100 hours (specifically, 37.5 hours of legal compliance work and 62.5 hours of clerical compliance work).'').

[1132] *See* Section VI.A.1.c of this release discussing Form SDR.

[1133] *See* Section VII.C.1 of this release discussing respondents to the registration requirements and Form SDR.

[1134] The Commission derived its estimate from the following: (400 hours for the burden of Form SDR, as proposed) + (80 hours for the burden of responding to additional provisions incorporated from Form SIP) + (1 hour for the burden of responding to the revised disclosure of business affiliations) × 10 SDRs = 4810.

[1135] *See* Proposing Release, 75 FR at 77348, *supra* note 2.

[1136] Foreign Bank Exemption from the Insider Lending Prohibition of Exchange Act Section 13(k), Exchange Act Release No. 49616 (Apr. 26, 2004), 69 FR 24016, 24022 (Apr. 30, 2004) (outlining the Commission's calculations regarding the PRA burdens resulting from having to provide a legal opinion and additional disclosure required by Instruction 3 to Item 7.B to Form 20–F). The Commission calculates that the certification and opinion of counsel would result in an additional burden to non-resident SDRs of 3.25 hours, of which approximately 1 hour would be incurred by the non-resident SDRs themselves and 2.25 hours would be incurred by outside legal counsel, which would cost approximately $900 ($900 = 2.25 hours (portion of estimated burden incurred by outside legal counsel) × $400 (hourly rate for an outside attorney)). The Commission continues to estimate the hourly rate for an outside attorney at $400 per hour, based on industry sources. *See* Registration of Municipal Advisors, Exchange Act Release No. 70462 (Sep. 20, 2013), 78 FR 67468, 67593 n.1538 (Nov. 12, 2013) (estimating the cost of an outside attorney to be $400 per hour). In the Proposing Release, the Commission mistakenly estimated the burden to be 3 hours incurred by each non-resident SDR (in addition to $900 incurred by each SDR in connection with hiring outside legal counsel). Proposing Release, 75 FR at 77348, *supra* note 2.

[1137] *See* Section VII.C.1 of this release discussing respondents to the registration requirements and Form SDR. The base burden of 4,000 hours includes resident and non-resident SDRs. The 3 hour and $2700 figures are the additional costs as a result of Rule 13n–1(f) for non-resident SDRs not already accounted for in the 4,000 hour figure.

[1138] *See* Section VI.C.3 of this release discussing Rule 13n–3(b).

[1139] When estimating the burden associated with Form SIP, the Commission did not separately estimate the burden associated with amendments on Form SIP because the Commission believed that the annual burden of Form SIP encompassed the burden of amending Form SIP. SIP PRA Filing, 76 FR 30984, *supra* note 1129 (''This annual reporting and recordkeeping burden does not include the burden hours or cost of amending a Form SIP because the Commission has already overstated the compliance burdens by assuming that the Commission will receive one initial registration pursuant to Rule 609 on Form SIP a year.'') Although the Commission is basing its estimate of the burden of Form SDR on its estimate of the burden of Form SIP, the Commission is separately estimating the burden of amendments on Form SDR.

[1140] When amendments to Form ADV were proposed in 2008, the Commission estimated the hour burden for amendments to be roughly 3% of the initial burden. Amendments to Form ADV, Investment Advisers Act Release No. 2711 (Mar. 3, 2008), 73 FR 13958, 13979 (Mar. 14, 2008). In that proposal, the initial burden was calculated to be 22.25 hours per respondent and 0.75 hours per respondent for amendments. The Commission believes that a similar ratio will apply to filers of Form SDR because filers of Form ADV, like filers of Form SDR, are required to file amendments annually as well as when certain information on Form ADV becomes inaccurate. *See* Form ADV: General Instructions, *available at http://www.sec.gov/about/forms/formadv-instructions.pdf*. Thus, the Commission estimates that the annual burden of filing one amendment on Form SDR will be 3% of the 400 hour initial burden, or 12 hours.

SDRs, as discussed above.[1141] When Form ADV was amended in 2010, the Commission estimated that there were 2 amendments per year for that form.[1142] The Commission believes that 2 amendments will be a reasonable estimate for the number of amendments per year to correct inaccurate information or in situations involving successor SDRs because amendments on Form ADV, like amendments on Form SDR, are required annually as well as when certain information on Form ADV becomes inaccurate.[1143] Thus, the Commission estimates that respondents will be required to file on average a total of 3 amendments per year, 2 amendments plus the required annual amendment. Therefore, the Commission estimates that each respondent will have an average annual burden of 36 hours for a total estimated average annual burden of 360 hours.[1144] The Commission believes that SDRs will conduct this work internally.

SDRs may withdraw from registration by filing a withdrawal from registration on Form SDR electronically in a tagged data format. An SDR withdrawing from registration must designate on Form SDR a person to serve as the custodian of the SDR's books and records. An SDR must also update any inaccurate information. The Commission believes that an SDR's withdrawal from registration on Form SDR will be substantially similar to its most recently filed Form SDR. The Form SDR being filed in this circumstance will therefore already be substantially complete and as a result, the burden will not be as great as the burden of filing an application for registration on Form SDR. Rather, the Commission believes that the burden of filing a withdrawal from registration on Form SDR will be akin to filing an amendment on Form SDR. Thus, the Commission estimates that the one-time burden of filing a Form SDR to withdraw from registration will be approximately 12 burden hours for each SDR and approximately 120 burden hours for all SDRs.

2. *SDR Duties, Data Collection and Maintenance, and Direct Electronic Access*

As discussed above, Rules 13n–4(b)(2) and (4), and 13n–5 require SDRs to accept and maintain data, including transaction data, received from third parties and to calculate and maintain positions.[1145] Rule 13n–4(b)(5) requires SDRs to provide direct electronic access to the Commission or its designees. Rules 13n–4(b)(3) and 13n–5(b)(1)(iii) require SDRs to confirm the accuracy of the data submitted and to establish, maintain, and enforce written policies and procedures reasonably designed to satisfy themselves that the transaction data that has been submitted to the SDRs is complete and accurate. In addition, Rule 13n–5(b)(4) requires SDRs to maintain the transaction data and related identifying information for not less than five years after the applicable SBS expires and historical positions for not less than five years.[1146] This obligation would continue even if an SDR ceases to be registered or ceases doing business.[1147] SDRs are required to make and keep current a plan to ensure compliance with this requirement.[1148]

The Commission estimates that the average one-time start-up burden per SDR of establishing systems compliant with all of the requirements described in this section, including the SBS data maintenance requirements of Rules 13n–5(b)(4), (7), and (8), will be 42,000 hours and $10 million in information technology costs. Based on the expected number of respondents, the Commission estimates a total start-up cost of 420,000 hours and $100 million in information technology costs. The Commission further estimates that the average ongoing annual costs of these systems to be 25,200 hours and $6 million per respondent or a total of 252,000 hours and $60 million for a total ongoing annual burden.

Each SDR is also required to establish, maintain, and enforce written policies and procedures, reasonably designed: (1) Under Rule 13n–5(b)(1), for the reporting of complete and accurate transaction data to the SDR and to satisfy itself that such information is complete and accurate; (2) under Rule 13n–5(b)(2), to calculate positions for all persons with open SBSs for which the SDR maintains records; (3) under Rule 13n–5(b)(3), to ensure transaction data and positions that the SDR maintains are complete and accurate; (4) under Rule 13n–5(b)(5), to prevent any provision in a valid SBS from being invalidated or modified through the procedures or operations of the SDR; and (5) under Rule 13n–6, with respect to those systems that support or are integrally related to the performance of the SDR's activities, to ensure that those systems provide adequate levels of capacity, integrity, resiliency, availability, and security. While these policies and procedures will vary in exact cost, the Commission estimates that they will require an average of 210 hours per respondent per policy and procedure to prepare and implement. The Commission further estimates that these policies and procedures will require a total of $100,000 for outside legal costs per SDR.[1149] In sum, the Commission estimates the initial burden for all respondents to be 10,500 hours and $1,000,000 for outside legal costs.[1150] The Commission based these estimates upon those estimates the Commission used with regards to establishing policies and procedures regarding Regulation NMS.[1151] Once these policies and procedures are established, the Commission estimates that it will take, on average, 60 hours annually to maintain each of these policies and procedures per respondent, with a total estimated average annual burden of 3,000 hours for all respondents.[1152] The Commission

[1141] *See* Sections VI.A.4.c and VI.C.3 of this release discussing Rule 13n–1(d) and Rule 13n–3(b), respectively.

[1142] Amendments to Form ADV, Investment Advisers Act Release No. 3060 (July 28, 2010), 75 FR 49234, 49257 (Aug. 12, 2010). Although this information is based upon investment adviser statistics, the Commission believes that, for PRA purposes, the differences between investment advisers and SDRs are minimal.

[1143] *See* Form ADV: General Instructions, *available at http://www.sec.gov/about/forms/formadv-instructions.pdf.*

[1144] The 36 hour figure is the result of the estimated burden hour per SDR per amendment (12) times the estimated number of amendments per year (3). The 360 hour figure is the result of the estimated burden per SDR (36) times the number of SDRs (10).

[1145] *See* Sections VI.D.2.c, VI.E, and VI.F.3 of this release discussing Rules 13n–4(b)(2) and (4), 13n–5, and 13n–6, respectively.

[1146] This data is required to be maintained in a place and format that is readily accessible and usable to the Commission and other persons with authority to access or view the information and is also required to be maintained in an electronic format that is non-rewritable and non-erasable.

[1147] Rule 13n–5(b)(7).

[1148] Rule 13n–5(b)(8).

[1149] This figure is the result of an estimated $400 an hour cost for outside legal services (as discussed in *supra* note 1136) times 50 hours of outside legal consulting per policy and procedure, times 5 policies and procedures.

[1150] The 10,500 hour figure is the result of the number of hours per policy and procedure (210) times the number of policies and procedures required by these provisions (5), times the number of respondents (10). The $1,000,000 figure is the result of the outside dollar cost per respondent ($100,000) times the number of respondents (10).

[1151] Regulation NMS, Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37577 (June 29, 2005) (''Regulation NMS Adopting Release''). The Commission based these estimates on those for non-SRO trading centers rather than for SRO trading centers because the Commission believes that, for PRA purposes, non-SRO trading centers' burdens are more like those that SDRs will face under the SDR Rules. Like non-SRO trading centers, SDRs are not SROs and handle data regarding trades.

[1152] The 3,000 hour figure is the result of the estimated average hourly burden to maintain each policy and procedure (60), times the total number of policies and procedures required under this requirement (5), times the total number of SDRs (10).

believes that SDRs will conduct this maintenance work internally.

As discussed above, the Commission is not adopting the more specific requirements of proposed Rule 13n–6(b)(1), but is instead adopting the core policies and procedures requirement.[1153] The Commission continues to believe, however, that the 210 hour per respondent estimate for adopting policies and procedures is applicable because Rule 13n–6 continues to require SDRs to adopt policies and procedures. The Commission believes that the 210 hour estimate is a reasonable estimate because the estimate is used in other contexts to estimate the burdens of creating policies and procedures and the Commission expects that the policies and procedures required by Rule 13n–6 would result in a comparable burden to SDRs.[1154] Also as discussed above, the Commission is not adopting proposed Rules 13n–6(b)(3) and (4).[1155] Thus, the Commission is no longer including the estimated burden of those proposed rules in the overall burdens discussed in this release.

3. Recordkeeping

Every SDR is required, under Rule 13n–7(a)(1), to make and keep current a record for each office listing, by name or title, each person who, without delay, can explain the types of records the SDR maintains at that office. Also, under Rule 13n–7(a)(2), every SDR is required to make and keep current a record listing officers, managers, or persons performing similar functions with responsibility for establishing the policies and procedures of the SDR that are reasonably designed to ensure compliance with the Exchange Act and the rules and regulations thereunder. The Commission estimates that these records will create an initial burden, at a maximum, of 1 hour per respondent, for a total initial burden of 10 hours. The Commission estimates that the ongoing annual burden will be 0.17 hours (10 minutes) per respondent to keep these records current and to store these documents based on the Commission's estimates for similar requirements for broker-dealers.[1156] This results in a total ongoing annual burden of 1.7 hours. The Commission believes that SDRs will conduct this work internally.

Rule 13n–7(b) requires each SDR to keep and preserve at least one copy of all documents made or received by it in the course of its business as such, other than the transaction data and positions collected and maintained pursuant to Rule 13n–5. These records are required to be kept for a period of not less than five years, the first two years in a place that is immediately available to representatives of the Commission for inspection and examination.[1157] Upon the request of any representative of the Commission, an SDR is required to furnish promptly documents required to be kept and preserved by it pursuant to Rules 13n–7(a) or (b) to such a representative. As discussed above, Rule 13n–7(b) is intended to set forth the recordkeeping obligations of SDRs and thereby facilitate implementation of the inspection and examination of SDRs by representatives of the Commission.[1158] Based on the Commission's experience with recordkeeping costs and consistent with prior burden estimates for similar provisions,[1159] the Commission estimates that this requirement will create an initial burden of 345 hours and $1800 in information technology costs per respondent, for a total initial burden of 3450 hours and $18,000 for all respondents. The Commission further estimates that the ongoing annual burden will be 279 hours per respondent and a total ongoing annual burden of 2790 hours for all respondents.

4. Reports

Under Rule 13n–8, SDRs are required to report promptly to the Commission, in a form and manner acceptable to the Commission, such information as the Commission determines necessary or appropriate for the Commission to perform the duties of the Commission. For PRA purposes only, the Commission estimates that it will request these reports a maximum of once per year, per respondent. For PRA purposes only, the Commission estimates that these reports will be limited to information that will have been already compiled under the SDR Rules and thus require only 1 hour per response to compile and transmit. Thus, the Commission estimates, for PRA purposes only, that the total annual burden for these reports to be 10 hours for all respondents. The Commission believes that SDRs will conduct this work internally.

As discussed above, the Commission is not adopting proposed Rule 13n–6(b)(2).[1160] Thus, the Commission is no longer including the estimated burden of that proposed rule in the overall burdens discussed in this release.

5. Disclosure

As discussed above, pursuant to Rule 13n–10, SDRs are required to provide certain disclosures to certain market participants.[1161] The Commission estimates that the average one-time start-up burden per SDR of preparing this disclosure document is 97.5 hours and $4,400 of external legal costs and $5,000 of external compliance consulting costs, resulting in a total initial burden of 975 hours and $94,000 for all respondents. This estimate reflects the Commission's experience with and burden estimates for similar disclosure document requirements applied to investment advisers with 1000 or fewer employees and as a result of its discussions with market participants.[1162] Because the Commission expects that SDRs will be able to provide this disclosure document electronically, the Commission expects that this requirement will result in an average annual burden, after the initial creation of the disclosure document, of 1 hour per respondent, with a total annual burden of 10 hours for all respondents. The Commission believes that SDRs will conduct this ongoing annual work internally.

6. Chief Compliance Officer; Compliance Reports and Financial Reports

Under Rules 13n–11(c)(6) and (7), an SDR's CCO is responsible for, among other things, establishing procedures for the remediation of noncompliance issues identified by the CCO, and establishing and following appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues. Based on the Commission's estimates regarding Regulation

[1153] *See* Section VI.F.3 of this release discussing Rule 13n–6.

[1154] *See supra* note 1151 discussing Regulation NMS.

[1155] *See* Section VI.F.3 of this release discussing Rule 13n–6.

[1156] *See* Books and Records Requirements for Brokers and Dealers Under the Securities Exchange Act of 1934, Exchange Act Release No. 44992 (Oct. 26, 2001), 66 FR 55818, 55836 (Nov. 2, 2001) (regarding the collection of information pursuant to Rules 17a–3(a)(21) and (22)).

[1157] This obligation will continue even if an SDR withdraws from registration or ceases doing business. *See* Rule 13n–7(c).

[1158] *See* Section VI.G.2.c of this release discussing Rule 13n–7(b).

[1159] *See* Amendments to Rules for Nationally Recognized Statistical Rating Organizations, Exchange Act Release No. 59342 (Feb. 2, 2009), 74 FR 6456, 6472 (Feb. 9, 2009).

[1160] *See* Section VI.F.3 of this release discussing Rule 13n–6.

[1161] *See* Section VI.I.2.c of this release discussing Rule 13n–10.

[1162] *See* Amendments to Form ADV, Investment Advisers Act Release No. 3060 (July 28, 2010), 75 FR 49234, 49255–49256 (Aug. 12, 2010) (finding that average initial annual burden associated with Form ADV for each medium-sized investment adviser, meaning an adviser with between 11 and 1,000 employees, to be 97.5 hours).

NMS,[1163] it estimates that on average these two provisions will require 420 hours to implement and 120 hours to administer per year per respondent, for a total burden of 4200 hours initially and, on average, 1200 hours annually for all respondents.[1164] Also based on the estimates regarding Regulation NMS, the Commission estimates that SDRs will incur a total of $40,000 in initial outside legal costs to establish the required procedures as a result of this burden per respondent, for a total outside cost burden of $400,000 for all respondents.[1165]

A CCO is also required under Rules 13n–11(d), (e), and (g) to prepare and submit annual compliance reports to the SDR's board for review before the annual compliance reports are filed with the Commission. Based upon the Commission's estimates for similar annual reviews by CCOs of investment companies,[1166] the Commission estimates that these reports will require on average 5 hours per respondent per year. Thus, the Commission estimates a total annual burden of 50 hours for all respondents. The Commission believes that these costs will be internal costs.

Rules 13n–11(f) and (g) require that financial reports be prepared and filed with the Commission as an official filing in accordance with the EDGAR Filer Manual and include, as part of the official filing, an Interactive Data Financial Report filed in accordance with Rule 407 of Regulation S–T. The Commission estimates, based on its experience with entities of similar size to the respondents to this collection, that preparing and filing the financial reports will generally require on average 500 hours per respondent and cost $500,000 for independent public accounting services. Thus, the Commission estimates a total annual burden of 5000 hours and $5,000,000 for all respondents.

One commenter suggested that ''[i]n an attempt to harmonize final [SDR] rules with the CFTC's final [swap data repository] rules, the Commission should consider removing Proposed Rule 240.13n–11(f)(2)'s requirement that each financial report filed with a compliance report is audited in accordance with the standards of the Public Company Accounting Oversight Board by a registered public accounting firm that is qualified and independent unless the [SDR] is under a separate obligation to provide financial statements.'' [1167] The commenter believed that ''[t]his requirement imposes an additional burden for an [SDR] and is not justified in relation to the risks that an [SDR] would pose to its members'' and that ''[u]nlike clearing agencies or other entities supervised by the Commission, an [SDR] does not have financial exposure to its users or participants that would justify the imposition of this requirement.'' [1168] The commenter suggested that the Commission consider ''adopting [instead] the CFTC's approach in its final [swap data repository] rules, which require [a swap data repository's] financial statements be prepared in conformity with generally accepted accounting principles. . . .'' [1169]

As discussed further below, although the Commission understands that SDRs will incur costs in hiring and retaining qualified public accounting firms, the Commission believes that obtaining audited financial reports from SDRs is important given the significant role the Commission believes that SDRs will play in the SBS market.[1170] Given this significant role, the Commission believes that it is important to obtain audited financial reports from SDRs in order to determine whether or not they have sufficient financial resources to continue operations. While the Commission recognizes that Rule 13n–11(f)(2) may, in some cases, be more costly than the CFTC's requirement of quarterly unaudited financial statements, the Commission believes that the additional burden, where it exists, is justified by the benefits of requiring audited financial statements.

The compliance reports and financial reports filed with the Commission are required to be filed in a tagged data format. The compliance reports must be filed in a tagged data format in accordance with the instructions contained in the EDGAR Filer Manual,[1171] and the financial reports must be provided as an official filing in accordance with the EDGAR Filer Manual and include, as part of the official filing, an Interactive Data Financial Report filed in accordance with Rule 407 of Regulation S–T.[1172] These requirements will create an additional burden on respondents beyond the preparation of these reports. The Commission estimates, based on its experience with other tagged data initiatives, that these requirements will add a burden of an average of 54 hours and $22,772 in outside software and other costs per respondent per year, creating an estimated total annual burden of 540 hours and $227,720 for all respondents to tag the data for both the compliance reports and financial reports that are required under Rule 13n–11.

7. Other Provisions Relevant to the Collection of Information

Rule 13n–4(c)(1)(iii) requires an SDR to establish, monitor on an ongoing basis, and enforce clearly stated objective criteria that would permit fair, open, and not unreasonably discriminatory access to services offered and data maintained by the SDR as well as fair, open, and not unreasonably discriminatory participation by market participants and others that seek to connect to or link with the SDRs. For PRA purposes only, the Commission believes that this should be a lesser burden than for written policies and procedures because such criteria may not need to be as detailed or intricate as written policies and procedures. Thus, the Commission estimates that this provision will require 157.5 hours to implement, with an associated outside legal cost of $15,000 per respondent.[1173] This results in an estimate of an initial burden for this requirement for all respondents of 1575 hours and

[1163] *See* Regulation NMS Adopting Release, *supra* note 1151.

[1164] The 420 hour figure is the result of the estimated average burden hours to create one policy and procedure (210) times the 2 policies and procedures required by these provisions. The 120 hour figure is the result of the estimated average burden hours to administer one policy and procedure (60) times the 2 policies and procedures required by these provisions. The 4200 hour figure is the result of the estimated average burden hours per respondent to create these policies and procedures (420) times the number of SDRs (10). The 1200 hour figure is the result of the estimated average burden hours per respondent to maintain these policies and procedures (120) times the number of SDRs (10).

[1165] $400,000 figure is the result of an estimated $400 an hour cost for outside legal services (as discussed in *supra* note 1136) times 50 hours per policy and procedure, times 2 policies and procedures, times the number of SDRs (10).

[1166] *See* Compliance Programs of Investment Companies and Investment Advisers, Investment Company Act Release No. 25925 (Feb. 5, 2003), 68 FR 7038, 7047 (Feb. 11, 2003).

[1167] DTCC 5, *supra* note 19.

[1168] DTCC 5, *supra* note 19.

[1169] DTCC 5, *supra* note 19.

[1170] *See* Section VIII.D.6.c of this release discussing economic alternatives to Rule 13n–11(f)(2).

[1171] *See* 17 CFR 232.301.

[1172] *See* Section VI.J.5.c of this release discussing Rule 407 of Regulation S–T.

[1173] These numbers are based on 75% of the 210 hour and $20,000 (50 hours of outside legal costs at $400 an hour) estimates to create one set of written policies and procedures under Regulation NMS for non-SRO trading centers. *See* Regulation NMS Adopting Release, *supra* note 1151. This is based on an estimate that this requirement will create 75% of the burden of creating written policies and procedures under Regulation NMS. The Commission believes that the 75% assumption is appropriate because the Commission believes that Rule 13n–4(c)(1)(iii) imposes a lesser burden than the written policies and procedures required by other SDR Rules because it requires only written criteria and not full policies and procedures.

$150,000. The Commission estimates that the average annual burden will be 45 hours per respondent, for a total estimated average annual burden of 450 hours for all respondents.[1174] The Commission believes that SDRs will conduct this work internally.

Rule 13n–4(c)(1)(iv) requires an SDR to establish, maintain, and enforce written policies and procedures reasonably designed to review any prohibition or limitation of any person with respect to access to services offered, directly or indirectly, or data maintained by the SDR and to grant such person access to such services or data if such person has been discriminated against unfairly. Based on the Commission's estimates regarding Regulation NMS,[1175] it estimates that, on average, this provision will require 210 hours to implement and 60 hours to administer per year per respondent, for a total burden of 2100 hours initially and 600 hours on average, annually. The Commission also estimates, based on this earlier estimate, that SDRs will incur a total of $20,000 in initial outside legal costs to establish the required policies and procedures as a result of this provision per respondent for a total outside cost burden of $200,000 for all respondents.[1176]

Rule 13n–4(c)(2)(iv) requires an SDR to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that the SDR's senior management and each member of the board or committee that has the authority to act on behalf of the board possess requisite skills and expertise to fulfill their responsibilities in the management and governance of the SDR, to have a clear understanding of their responsibilities, and to exercise sound judgment about the SDR's affairs. Based on the Commission's estimates regarding similar requirements in Regulation NMS,[1177] it estimates that, on average, this provision will require 210 hours to implement and 60 hours to administer per year per respondent, for a total burden of 2100 hours initially and 600 hours on average, annually. The Commission also estimates, based on this earlier estimate, that SDRs will initially incur a total of $20,000 in outside legal costs to establish the required policies and procedures as a result of this provision per respondent for a total outside cost burden of $200,000 for all respondents.[1178] The Commission believes that SDRs will conduct the ongoing administration of this provision internally.

Rule 13n–4(c)(3) addresses the conflict of interest requirements governing SDRs. In particular, each SDR is required to establish and enforce written policies and procedures reasonably designed to minimize conflicts of interest. This includes establishing, maintaining, and enforcing written policies and procedures reasonably designed to identify and mitigate potential and existing conflicts of interest in the SDR's decision-making process on an ongoing basis. It also includes establishing, maintaining, and enforcing written policies and procedures regarding the SDR's non-commercial and commercial use of the SBS transaction information that it receives. Based on the Commission's estimates regarding Regulation NMS,[1179] it estimates that on average these two requirements will require 420 hours to implement and 120 hours to administer per year per respondent, for a total burden of 4200 hours initially and 1200 hours on average annually.[1180] Also based on the Regulation NMS estimates regarding policies and procedures, the Commission estimates that SDRs will incur a total of $40,000 in initial outside legal costs to establish the required policies and procedures as a result of this provision per respondent for a total outside cost burden of $400,000 for all respondents.[1181]

Rule 13n–5(b)(6) requires that every SDR establish procedures and provide facilities reasonably designed to effectively resolve disputes over the accuracy of the transaction data and positions that are recorded in the SDR. For PRA purposes only, the Commission believes that this is a greater burden than that for written policies and procedures alone because SDRs will also be required to provide facilities. Thus, the Commission estimates that Rule 13n–5(b)(6) will require 315 hours for each respondent to implement.[1182] There will likely be a need for a respondent to consult with outside legal counsel, which the Commission estimates will cost $30,000 per respondent.[1183] Thus, the Commission estimates a total initial burden for all respondents of 3150 hours and $300,000 in outside costs. The Commission estimates the ongoing average annual burden of this requirement to be 90 hours per respondent for a total of 900 hours for the estimated total annual burden for all respondents.[1184] The

[1174] These numbers are 75% of the 60 hour estimates of the ongoing burden regarding one set of written policies and procedures under Regulation NMS for non-SRO trading centers. *See* Regulation NMS Adopting Release, *supra* note 1151. This is based on an estimate that this requirement will create 75% of the ongoing burden of written policies and procedures under Regulation NMS. The Commission believes that the 75% assumption is appropriate because the Commission believes that Rule 13n–4(c)(1)(iii) imposes a lesser burden than the written policies and procedures required by other SDR Rules because it requires only written criteria and not full policies and procedures.

[1175] *See* Regulation NMS Adopting Release, *supra* note 1151. These estimates are based on 100% of the 210 hour estimate to create one set of written policies and procedures and 100% of the 60 hour estimate of the ongoing burden regarding one set of written policies and procedures under Regulation NMS for non-SRO trading centers. The Commission believes that the 100% assumption is appropriate because Rule 13n–4(c)(1)(iv) requires written policies and procedures.

[1176] This figure is the result of an estimated $400 an hour cost for outside legal services (as discussed in *supra* note 1136) times 50 hours per policy and procedure, times 1 policy and procedure, times the number of SDRs (10). The Commission believes that SDRs will use outside counsel to initially create these policies and procedures because SDRs just beginning operations may not have sufficient in-house legal staff.

[1177] *See* Regulation NMS Adopting Release, *supra* note 1151.

[1178] This figure is the result of an estimated $400 an hour cost for outside legal services (as noted in *supra* note 1136) times 50 hours per policy and procedure, times 1 policy and procedure, times the number of SDRs (10).

[1179] *See* Regulation NMS Adopting Release, *supra* note 1151.

[1180] The 420 hour figure is the result of the estimated average burden hours to create one policy and procedure (210) times the 2 policies and procedures required by these provisions. The 120 hour figure is the result of the estimated average burden hours to administer one policy and procedure (60) times the 2 policies and procedures required by these provisions. The 4200 hour figure is the result of the estimated average burden hours per respondent to create these policies and procedures (420) times the number of SDRs (10). The 1200 hour figure is the result of the estimated average burden hours per respondent to maintain these policies and procedures (120) times the number of SDRs (10).

[1181] This $400,000 figure is the result of an estimated $400 an hour cost for outside legal services (as discussed in *supra* note 1136) times 50 hours, times 2 policies and procedures, times the number of SDRs (10).

[1182] This number is 150% of the 210 hour estimate to create one set of written policies and procedures under Regulation NMS for non-SRO trading centers. *See* Regulation NMS Adopting Release, *supra* note 1151. This is based on an estimate that Rule 13n–5(b)(6) will create 150% of the burden of creating written policies and procedures under Regulation NMS because, in addition to establishing procedures, SDRs will also be required to provide facilities reasonably designed to effectively resolve disputes over the accuracy of the transaction data and positions that are recorded in the SDR.

[1183] This number is 150% of the estimate of outside legal costs (50 hours) to create one set of written policies and procedures under Regulation NMS for non-SRO trading centers, at an estimate of $400 per hour. *See* Regulation NMS Adopting Release, *supra* note 1151. This is based on an estimate that Rule 13n–5(b)(6) will create 150% of the burden of creating written policies and procedures under Regulation NMS because, in addition to establishing procedures, SDRs will also be required to provide facilities reasonably designed to effectively resolve disputes over the accuracy of the transaction data and positions that are recorded in the SDR.

[1184] These numbers are based on 150% of the 60 hour estimate of the ongoing burden regarding one set of written policies and procedures under Regulation NMS for non-SRO trading centers. *See*

Commission believes that SDRs will conduct this ongoing work internally.

Rules 13n–4(b)(8) and 13n–9 address privacy requirements for SDRs. Rule 13n–4(b)(8) requires SDRs to maintain the privacy of any and all SBS transaction information that the SDR receives from a SBS dealer, counterparty, or any registered entity as prescribed in Rule 13n–9. Rule 13n–9(b)(1) requires each SDR to establish, maintain, and enforce written policies and procedures reasonably designed to protect the privacy of any and all SBS transaction information that the SDR receives from any SBS dealer, counterparty, or any registered entity. Based on the Commission's estimates regarding Regulation NMS,[1185] it estimates that, on average, these provisions will require 420 hours to implement and 120 hours to administer per year per respondent, for a total burden of 4200 hours initially and 1200 hours on average, annually.[1186] Also based on the Regulation NMS estimates,[1187] the Commission estimates that SDRs will incur a total of $40,000 in initial outside legal costs to establish the required policies and procedures as a result of these provisions per respondent for a total outside cost burden of $400,000 for all respondents.[1188]

Rule 13n–9(b)(2) requires each SDR to establish and maintain safeguards, policies, and procedures reasonably designed to prevent the misappropriation or misuse, directly or indirectly, of (1) any confidential information received by the SDR, (2) material, nonpublic information, and/or (3) intellectual property. At a minimum, these safeguards, policies and procedures must address limiting access to that information and intellectual property, standards pertaining to the trading by persons associated with the SDR for their personal benefit or the benefit of others, and adequate oversight. Based on the Commission's estimates regarding Regulation NMS,[1189] it estimates that on average this provision will require 210 hours to implement and 60 hours to administer per year per respondent, for a total burden of 2100 hours initially and 600 hours on average, annually. Also based on the Regulation NMS estimates,[1190] the Commission estimates that SDRs will incur a total of $20,000 in initial outside legal costs to establish the required policies and procedures as a result of this provision per respondent for a total outside cost burden of $200,000 for all respondents.[1191]

E. Collection of Information Is Mandatory

1. Registration Requirements, Form SDR, and Withdrawal From Registration

The collection of information relating to registration requirements, Form SDR, and withdrawal from registration is mandatory for all SDRs when registering with the Commission, amending their applications for registration, or withdrawing from registration.

2. SDR Duties, Data Collection and Maintenance, and Direct Electronic Access

The collection of information relating to SDR duties, data collection and maintenance, and direct electronic access is mandatory for all SDRs, absent an exemption.[1192]

3. Recordkeeping

The collection of information relating to recordkeeping is mandatory for all SDRs, absent an exemption.

4. Reports

The collection of information relating to reports is mandatory for all SDRs, absent an exemption.

5. Disclosure

The collection of information relating to disclosure is mandatory for all SDRs, absent an exemption.

6. Chief Compliance Officer; Compliance Reports and Financial Reports

The collection of information relating to CCOs is mandatory for all SDRs, absent an exemption.

7. Other Provisions Relevant to the Collection of Information

The collection of information relating to other relevant provisions is mandatory for all SDRs, absent an exemption.

F. Confidentiality

As discussed above, the Commission expects that it will make any information filed on, or in an exhibit or attachment to, an application for registration on Form SDR available on its Web site, except in cases where confidential treatment is requested by the applicant and granted by the Commission.[1193]

As discussed above, the Commission may make any information filed on, or in an exhibit or attachment to, an amendment on Form SDR available on its Web site, except in cases where confidential treatment is requested by the applicant and granted by the Commission.[1194]

As discussed above, the Commission may make any information filed on, or in an exhibit or attachment to, withdrawals on Form SDR available on its Web site, except in cases where confidential treatment is requested by the applicant and granted by the Commission.[1195]

Pursuant to Rules 13n–11(d), (f), and (g), SDRs must file an annual compliance report and financial report with the Commission. One commenter believed that the Commission should keep the annual compliance report confidential.[1196] As discussed above, the Commission is not providing, by rule, that the annual compliance reports and financial reports are automatically granted confidential treatment, but an SDR may seek confidential treatment

Regulation NMS Adopting Release, *supra* note 1151. This is based on an estimate that Rule 13n–5(b)(6) will create 150% of the ongoing burden of written policies and procedures under Regulation NMS because, in addition to establishing procedures, SDRs will also be required to provide facilities reasonably designed to effectively resolve disputes over the accuracy of the transaction data and positions that are recorded in the SDR.

[1185] *See* Regulation NMS Adopting Release, *supra* note 1151.

[1186] The 420 hour figure is the result of the estimated average burden hours to create one policy and procedure (210) times the 2 policies and procedures required by these provisions. The 120 hour figure is the result of the estimated average burden hours to administer one policy and procedure (60) times the 2 policies and procedures required by these provisions. The 4200 hour figure is the result of the estimated average burden hours per respondent to create these policies and procedures (420) times the number of SDRs (10). The 1200 hour figure is the result of the estimated average burden hours per respondent to maintain these policies and procedures (120) times the number of SDRs (10).

[1187] *See* Regulation NMS Adopting Release, *supra* note 1151.

[1188] This $400,000 figure is the result of an estimated $400 an hour cost for outside legal services (as discussed in *supra* note 1136) times 50 hours per policy and procedure, times 2 policies and procedures, times the number of SDRs (10).

[1189] *See* Regulation NMS Adopting Release, *supra* note 1151.

[1190] *See* Regulation NMS Adopting Release, *supra* note 1151.

[1191] This figure is the result of an estimated $400 an hour cost for outside legal services (as discussed in *supra* note 1136) times 50 hours per policy and procedure, times 1 policy and procedure, times the number of SDRs (10).

[1192] *See* Section VI.K of this release discussing the SDR Exemption.

[1193] *See* Section VI.A.1.c of this release discussing Form SDR.

[1194] *See* Section VI.A.4.c of this release discussing amendments on Form SDR.

[1195] *See* Section VI.B.3 of this release discussing withdrawal from registration.

[1196] DTCC 2, *supra* note 19 (''DTCC firmly believes [that] the annual [compliance] report should be kept confidential by the Commission'' and explained that ''[g]iven the level of disclosure expected to be required . . . the report will likely contain confidential and proprietary business information.'').

pursuant to Exchange Act Rule 24b–2.[1197] The Commission may make filed annual compliance reports and financial reports available on its Web site, except in cases where confidential treatment is requested by the SDR and granted by the Commission.

G. Retention Period of Recordkeeping Requirements

Rule 13n–5(b)(4) requires that SDRs maintain the transaction data and related identifying information for not less than five years after the applicable SBS expires and historical positions for not less than five years. This data is required to be maintained in a place and format that is readily accessible and usable to the Commission and other persons with authority to access or view the information and is also required to be maintained in an electronic format that is non-rewritable and non-erasable.

Pursuant to Rule 13n–7(b), an SDR is required to preserve at least one copy of all documents as shall be made or received by it in the course of its business as such, including all records required under the Exchange Act and the rules and regulations thereunder, other than the transaction data and positions collected and maintained pursuant to Rule 13n–5. These records are required to be kept for a period of not less than five years, the first two years in a place that is immediately available to representatives of the Commission for inspection and examination.

VIII. Economic Analysis

A. Introduction

The Commission has considered the economic implications of the SDR Rules and Form SDR as well as comments regarding the costs and benefits of the SDR Rules and Form SDR.[1198] The Commission is sensitive to the economic consequences and effects of the SDR Rules and Form SDR, including their costs and benefits. In adopting the SDR Rules and Form SDR, the Commission has analyzed their costs and benefits, as set forth below, and has been mindful of the economic consequences of its policy choices. The SDR Rules and Form SDR fulfill the mandate of the Dodd-Frank Act that the Commission adopt rules governing the registration, duties, and core principles of SDRs.

As discussed above, the SBS market developed as an opaque OTC market without centralized trading venues or dissemination of pre- or post-trade pricing and volume information.[1199] SBS dealers, as intermediaries in SBS transactions, observe order flow and have access to pricing and volume information that is generally not available to other market participants. With such access, SBS dealers generally have an informational and competitive advantage over non-dealer counterparties, granting SBS dealers some degree of market power, which may enable them to extract economic rents in transactions with those counterparties. This informational advantage may result in increased transaction costs for less-informed counterparties relative to a market where all participants have competitive access to information.

In addition to the advantages that an opaque SBS market may give to SBS dealers, the opacity of the SBS market as described above may also affect current participation levels in the SBS market.[1200] Certain market participants, including speculative traders who rely on proprietary trading strategies, may wish to keep their trades anonymous and may prefer to operate in an opaque SBS market. Hedgers and other market participants that do not benefit from opacity, however, may be dissuaded from participating in the SBS market by higher transaction costs and their disadvantageous informational position.

Opacity in the SBS market also limits the ability of market participants to form broad views of financial market conditions. In capital markets, pricing and volume information provide signals about liquidity and the quality of investments, including investments in reference entities underlying derivatives. In the SBS market, where pricing and volume information is not readily available, market participants may have difficulty assessing investment opportunities as well as the state of the broader market, or must form assessments with a narrower set of information than SBS dealers. In an opaque SBS market, difficulty in assessing investment opportunities and the state of the SBS market may inhibit participation in the SBS market.

While opacity may generally confer a competitive advantage to SBS dealers who observe the largest share of order flow and limit participation in the SBS market, some features of the market and market participants may offset these effects. For example, large market participants that often transact with many SBS dealers are aware of the potential information asymmetries in the market. Furthermore, by virtue of their high trading volume, these participants may also observe a large share of the market, reducing the information advantage afforded to SBS dealers. SBS dealers may wish to compete for SBS business with the largest counterparties, and these participants may be able to obtain access to competitive pricing.[1201] Nevertheless, the Commission generally expects that market participants with proprietary access to information—in the case of SBS markets, SBS dealers who observe order flow—can benefit from opacity and earn economic rents from their less-informed counterparties.[1202]

It is in this context that the Commission analyzes the economic effects of the SDR Rules and Form SDR. The Commission envisions that registered SDRs will become an essential part of the infrastructure of the SBS market. Persons that meet the definition of an SDR will be required by the SDR Rules to maintain policies and procedures relating to data accuracy and maintenance, and will be further required by Regulation SBSR to publicly disseminate transaction-level data, thereby promoting post-trade transparency in the SBS market. Transparency stemming from the SDR Rules and Regulation SBSR should reduce the informational advantage of SBS dealers and promote competition among SBS dealers and other market participants.[1203] This could reduce implicit transaction costs and attract liquidity from those market participants that do not benefit from opacity, providing more opportunities for market participants with hedging needs to manage their risks and providing more opportunities for market participants to

[1197] *See* Section VI.J.4.c of this release discussing compliance reports.

[1198] *See* Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement''; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, Securities Act Release No. 9338 (July 18, 2012), 77 FR 48208, 48332 (Aug. 13, 2012) (noting that ''[t]he programmatic costs and benefits associated with substantive rules applicable to [SBSs] under Title VII are being addressed in more detail in connection with the applicable rulemakings implementing Title VII'').

[1199] *See* Section II.A of this release discussing limited information currently available to market participants.

[1200] *See* Section II.B of this release.

[1201] As described in the Cross-Border Proposing Release, the non-dealer market participants transact with four counterparties on average. Cross Border Proposing Release, 78 FR at 31126 n.1329, *supra* note 3. However, the largest market participants transact with as many as 50 counterparties, suggesting that dealers compete for business with these participants.

[1202] *See, e.g.*, Richard C. Green, Burton Hollifield, and Norman Schurhoff, *Financial Intermediation and the Costs of Trading in an Opaque Market*, 20 Review of Financial Studies 275 (2007) (estimating that, prior to the introduction of transparency measures in the municipal bond market, dealers exercised substantial market power, but that market power decreases with the size of the trade).

[1203] *See* Section II.A of this release.

access liquidity. Similarly, public dissemination of SBS pricing and volume information by SDRs pursuant to Regulation SBSR may allow market participants to incorporate information from the SBS market into their assessments of SBS and non-SBS investment opportunities, thereby promoting price efficiency and efficient capital allocation.

At the same time, increased quality and quantity of pricing and volume information and other information available to the Commission about the SBS market may enhance the Commission's ability to respond to market developments. As discussed above, DTCC–TIW voluntarily provides to the Commission data on individual CDS transactions in accordance with an agreement between the DTCC–TIW and the ODRF. In conjunction with Regulation SBSR, the SDR Rules should assist the Commission in fulfilling its regulatory mandates and legal responsibilities such as detecting market manipulation, fraud, and other market abuses by providing it with greater access to SBS information than that provided under the voluntary reporting regime. In particular, without an SDR, data on SBS transactions could be dispersed and might not be readily available to the Commission and others. SDRs may be especially critical during times of market turmoil, both by giving the Commission information to monitor risk exposures taken by individual entities or to particular referenced entities, and by promoting stability through enhanced transparency. Additionally, more available data about the SBS market should give the Commission better insight into how regulations are affecting, or may affect, the SBS market, which may allow the Commission to better craft regulations to achieve desired goals, and therefore, increase regulatory effectiveness.

In adopting the SDR Rules and Form SDR, the Commission has attempted to balance different goals. For example, data fragmentation resulting from multiple SDRs may make it more difficult for the Commission and to the extent that SBS data is made public, the public, to aggregate SBS data from multiple SDRs. The Commission could have resolved issues related to data fragmentation by designating one SDR as the recipient of the information from all other SDRs in order to provide the Commission with a consolidated location from which to access SBS data for regulatory monitoring and oversight purposes. Designating one SDR as the data consolidator, however, could discourage new market entrants, and interfere with competition. Designating one SDR as data consolidator may also impose an additional cost on market participants to cover the SDR's cost for acting as the data consolidator. Similarly, the SDR Exemption,[1204] which allows certain non-U.S. persons to perform the functions of an SDR within the United States without registering with the Commission, may reduce potentially duplicative registration and operating costs by allowing these persons to continue to receive data reported pursuant to the reporting requirements of a foreign jurisdiction. The SDR Exemption, however, also increases the risk of data fragmentation to the extent that reporting requirements differ across jurisdictions and relevant authorities have difficulty accessing data across jurisdictions. The Commission has attempted to balance the considerations of competition, data fragmentation, and avoidance of potentially duplicative registration and operating costs in adopting the SDR Rules.

In assessing the economic impact of the SDR Rules and Form SDR, the Commission refers to the broader costs and benefits associated with the application of the rules and interpretations as ''programmatic'' costs and benefits. These include the costs and benefits of applying the substantive Title VII requirements to the reporting of transactions by market participants, as well as to the functions performed by market infrastructures, including SDRs, in the global SBS market. The Commission's analysis also takes into consideration ''assessment costs,'' which arise from current and future market participants expending effort to determine whether they are subject to the SDR Rules. Current and future market participants could incur expenses in making this determination even if they ultimately are not subject to the SDR Rules. Finally, the Commission's analysis considers ''compliance costs,'' which are the costs that SDRs will incur in registering and complying with the SDR Rules.

B. General Comments on the Costs and Benefits of the SDR Rules

The Commission received two comments regarding the general costs and benefits of the SDR Rules.[1205]

One commenter offered general observations about the application of the SDR Rules to non-resident SDRs, maintaining that the costs of an extraterritorial application of U.S. law would be significant and not estimable beforehand, and that the Commission should consider comity and conflict with non-U.S. regulatory requirements when weighing the costs and benefits of the SDR Rules.[1206] The Commission agrees that determining the costs and benefits of the application of the SDR Rules to non-resident SDRs is difficult; nevertheless, the Commission has analyzed the economic effects of the SDR Rules below.

A second commenter recommended that ''the Commission should generally seek to avoid any divergence from the CFTC's and international regulators' frameworks that is likely to give rise to undue costs or burdens.'' [1207] The commenter believed that ''divergence is generally warranted only if the rule adopted by the Commission is more flexible than those adopted by others (and therefore would not preclude the voluntary adoption of consistent practices by market participants).'' [1208] The Commission acknowledges that there are concerns regarding divergent regulatory frameworks. The economic effects that could result from divergent regulatory frameworks, as well as other comments regarding the costs and benefits of specific rules, are discussed below. The Commission notes, however, that the SDR Rules are largely consistent with the CFTC's rules. Furthermore, the Commission has consulted and coordinated with foreign regulators through bilateral and multilateral discussions and has taken these discussions into consideration in developing the SDR Rules and Form SDR.

C. Consideration of Benefits, Costs, and the Effect on Efficiency, Competition, and Capital Formation

The potential economic effects stemming from the SDR Rules can be grouped into several categories. In this section, the Commission first discusses assessment costs relating to the SDR Rules. The Commission then discusses the SDR Rules' programmatic costs and benefits, highlighting broader and more comprehensive economic effects that result when the SDR Rules are considered as a part of other rules resulting from Title VII of the Dodd Frank Act. Next, the Commission discusses the effects of the SDR Rules on efficiency, competition, and capital formation. In the next section, the Commission discusses the compliance costs relating to certain of the SDR Rules.

[1204] *See* Section VI.K of this release discussing Rule 13n–12.

[1205] *See* US & Foreign Banks, *supra* note 24; IIB CB, *supra* note 26.

[1206] *See* US & Foreign Banks, *supra* note 24.

[1207] IIB CB, *supra* note 26.

[1208] IIB CB, *supra* note 26.

1. Assessment Costs

The Commission believes that persons will incur assessment costs in determining whether they fall within the statutory definition of an SDR. The Commission believes that the statutory definition in Exchange Act Section 3(a)(75) describes the core services or functions of an SDR. Whether a person falls within the statutory definition of an SDR is fact-specific. The Commission believes that at least 10 persons [1209] will make the assessment of whether they fall within the statutory definition of an SDR, which may result in a cost of $15,200 per person, for a total cost of $152,000 for all persons.[1210]

The Commission believes that certain non-U.S. persons may incur assessment costs in determining whether they can rely on the SDR Exemption. Under the Commission's approach, certain non-U.S. persons that perform the functions of an SDR may incur certain assessment costs in determining whether they fall within the statutory definition of an SDR, and, if so, whether they perform the functions of an SDR within the United States. If so, they may incur certain assessment costs in determining whether they can rely on the SDR Exemption.[1211]

With respect to determining the availability of the SDR Exemption for a non-U.S. person performing the function of an SDR within the United States, the Commission believes that costs would arise from confirming whether the Commission and each regulator with supervisory authority over such non-U.S. person have entered into an MOU or other arrangement. The Commission believes that because this information generally should be readily available,[1212] the cost involved in making such assessment should not exceed one hour of in-house legal or compliance staff's time or $380 per person,[1213] for an aggregate one-time cost of $7,600.[1214]

Assessment costs may also result from determining whether existing policies and procedures will satisfy the requirements of the SDR Rules. An SDR may have existing policies and procedures that it may use to comply with the SDR Rules. In order to use such policies and procedures to comply with the SDR Rules, the SDR will first have to assess whether the policies and procedures will result in compliance with the SDR Rules.

2. Programmatic Costs and Benefits

a. SDR Registration, Duties, and Core Principles

Rules 13n–1 through 13n–3 and Form SDR establish the mechanism by which SDRs must register as such pursuant to Exchange Act Section 13(n), absent an exemption. Rules 13n–4 through 13n–10 set forth the duties and core principles of SDRs. Rule 13n–11 sets forth the requirements for an SDR's CCO, annual compliance reports, and financial reports. Finally, Rule 13n–12 provides an exemption from registration and other requirements in certain circumstances.

The Commission believes that it and market participants will enjoy a number of programmatic benefits from the SDR Rules. For example, because the final SDR Rules require SDRs to register with and provide data to the Commission and require SDRs to take steps to facilitate accurate data collection and retention with respect to SBSs, the SDR Rules will increase the availability of SBS data relative to that in the existing voluntary disclosure system.[1215] The data provided by SDRs will provide a window into SBS transactions and allow the Commission to oversee the SBS market beyond that which is currently available. Further, the SDR Rules requiring SDRs to provide information to market participants about the nature and costs of SDRs' services are intended to provide transparency about the costs of reporting, thereby enabling market participants to make informed choices among competing SDRs. Finally, by requiring SDRs to register with the Commission, provide the Commission with access to their books and records, and submit to inspections and examinations by representatives of the Commission, the SDR Rules will allow the Commission to evaluate SDRs' compliance with the Exchange Act and the rules and regulations thereunder.

Persons that meet the definition of an SDR will also be required to comply with the public dissemination requirements of Regulation SBSR. Public dissemination is a core component of post-trade transparency in the SBS market. As discussed below, enhanced transparency should produce market-wide benefits in terms of a reduction in SBS dealers' market power. Enhanced transparency could also lead to reduced trading costs if competitive access to information and reduced SBS dealers' market power reduce the premium that SBS dealers are able to charge for intermediating SBS transactions.[1216] Indeed, post-trade transparency has been shown to reduce implicit trading costs (*i.e.,* the difference between the price at which a market participant can trade a security and the fundamental value of that security) in other securities markets. For example, post-trade transparency that followed the introduction of TRACE and trade reporting in the corporate bond market has been shown to lower implicit costs of trading corporate bonds.[1217] While there are differences between SBSs and corporate bonds, there are similarities to how the markets are structured—both markets evolved as dealer-centric OTC markets with limited pre- or post-trade transparency. Thus, the Commission expects that some of the benefits that result from transparency in the corporate bond market may extend to SBS markets as well.

[1209] At a minimum, the Commission estimates that the same persons who will register with the Commission as SDRs will make an assessment as to whether they fall within the statutory definition of an SDR. Therefore, the Commission estimates that at least 10 persons will make this assessment. *See* Section VII.C.1 of this release discussing the number of respondents to the registration requirements and Form SDR.

[1210] This estimate is based on an estimated 40 hours of in-house legal or compliance staff's time to assess whether a person falls within the statutory definition of an SDR. The Commission estimates that a person will assign these responsibilities to an Attorney. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2013,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of an Attorney is $380 per hour. Thus, the total one-time estimated dollar cost is $15,200 per person and $152,000 for all persons, calculated as follows: (Compliance Attorney at $380 per hour for 40 hours) × 10 persons = $152,000.

[1211] The Commission recognizes that some non-U.S. persons that perform the functions of an SDR may do so entirely outside the United States, and thus, may determine that they do not need to incur any assessment costs related to the Commission's approach.

[1212] The Commission provides a list of MOUs and other arrangements on its public Web site, which are available at this link: *http://www.sec.gov/about/offices/oia/oia_cooparrangements.shtml.*

[1213] This estimate is based on an estimated one hour of in-house legal or compliance staff's time to confirm whether the Commission and each regulator with supervisory authority over such non-U.S. person have entered into an MOU or other arrangement. The Commission estimates that an SDR will assign these responsibilities to an Attorney. Thus, the total one-time estimated dollar cost is $380 per person, calculated as follows: (Attorney at $380 per hour for 1 hour) = $380.

[1214] This total is based on the assumption that as many as 20 non-U.S. persons that perform the functions of an SDR would use in-house legal or compliance staff, specifically, an Attorney, to determine whether an applicable MOU or other arrangement is in place. Thus, the total one-time estimated dollar cost for all 20 non-U.S. persons is $7,600, calculated as follows: (Attorney at $380 per hour for 1 hour) × 20 non-U.S. persons = $7,600.

[1215] *See* Section II.B of this release discussing data that is currently available to regulators and market participants.

[1216] *See* Section VIII.C.3 of this release discussing the potential effects on competition, efficiency, and capital formation.

[1217] *See supra* note 58.

Nevertheless, the extent to which trading cost reductions are realized could be mitigated by additional factors. Trade reporting, public dissemination, and providing direct electronic access are costly in terms of establishing and maintaining infrastructure necessary to report and store large volumes of trade-level transaction data. SDRs may be able to pass the costs of complying with the SDR Rules and public dissemination requirements onto reporting parties—*e.g.,* SBS dealers—who, in turn, may be able to pass costs on to their customers. Therefore, the infrastructure costs associated with transparency may partially offset the trade cost benefits that could accrue through the reduction in asymmetric information and SBS dealers' market power.

Enhanced transparency could produce additional market-wide benefits by promoting stability in the SBS market, particularly during periods of market turmoil,[1218] and it should indirectly contribute to improved stability in related financial markets, including equity and bond markets.[1219] In conjunction with Regulation SBSR, the SDR Rules should assist the Commission in fulfilling its regulatory mandates and legal responsibilities such as detecting market manipulation, fraud, and other market abuses by providing it with greater access to SBS information.[1220] In particular, without an SDR, data on SBS transactions would be dispersed and would not be readily available to the Commission and others. SDRs may be especially critical during times of market turmoil, both by giving the Commission information to monitor risk exposures taken by individual entities or to particular referenced entities, and by promoting stability through enhanced transparency. Additionally, more available data about the SBS market should give the Commission a better idea of how regulations are affecting, or may affect, the SBS market, which may allow the Commission to better craft regulation to achieve desired goals, and therefore, increase regulatory effectiveness.

The Commission believes that U.S. persons performing the functions of an SDR will play a key role in collecting and maintaining information regarding SBS transactions, and making available such information to the Commission and the public, all of which may affect the transparency of the SBS market within the United States.[1221] Requiring such U.S. persons to comply with the SDR Requirements will help ensure that they maintain data and make it available in a manner that advances the benefits that the requirements are intended to produce.

The information provided by SDRs to the Commission pursuant to the SDR Rules may assist it in advancing the goals of the Dodd-Frank Act. The Dodd-Frank Act was designed, among other things, to promote the financial stability of the United States by improving accountability and transparency in the financial system and the SDR Rules, which implement the statute, are a necessary and important component of implementing this goal.[1222] As discussed above, an SBS transaction involves ongoing financial obligations between counterparties during the life of the transaction, which can typically span several years, and counterparties bear credit and market risk until the transaction is terminated or expires. Because large market participants may have ongoing obligations with many different counterparties, financial markets may be particularly vulnerable to instability resulting from the financial distress of a large market participant being transmitted to counterparties and others through connections in the SBS market. In extreme cases, the default of a large market participant could lead to financial distress among the counterparties to SBSs, which could introduce the potential for sequential counterparty failure and create uncertainty in the SBS market, thereby reducing the willingness of market participants to extend credit. A reduction in credit may result in liquidity and valuation difficulties that could spill over into the broader financial market.

Thus, disruptions in the SBS market could potentially affect other parts of the financial system. Increasing the availability and reliability of information about the SBS market will improve the Commission's ability to oversee and regulate this market. A more complete understanding of activity in the SBS market, including information on risk and connections between counterparties, should help the Commission assess the risk in these markets and evaluate appropriate regulatory responses to market developments. Appropriate and timely regulatory responses to market developments could enhance investor protection and confidence, which may encourage greater investor participation in the SBS market.[1223]

b. Registration Requirements in the Cross-Border Context

The Commission believes that there are a number of programmatic benefits to requiring non-U.S. persons that perform the functions of an SDR within the United States to register with the Commission and to comply with the SDR Requirements. These requirements are intended to help ensure that all persons that perform the functions of an SDR within the United States function in a manner that will increase the transparency and further other goals of the Dodd-Frank Act.[1224] The SDR Requirements, including requirements that SDRs register with the Commission, retain complete records of SBS transactions, maintain the integrity and confidentiality of those records, and disseminate appropriate information to the public are intended to help ensure that the data held by SDRs is reliable and that the SDRs provide information that contributes to the transparency of the SBS market while protecting the confidentiality of information provided by market participants.[1225]

[1218] *See* Proposing Release, 75 FR at 77307, *supra* note 2 (''SDRs may be especially critical during times of market turmoil, both by giving relevant authorities information to help limit systemic risk and by promoting stability through enhanced transparency. By enhancing stability in the SBS market, SDRs may also indirectly enhance stability across markets, including equities and bond markets.'').

[1219] *See* Darrell Duffie, Ada Li, and Theo Lubke, *Policy Perspectives of OTC Derivatives Market Infrastructure,* Federal Reserve Bank of New York Staff Report No. 424 (Jan. 2010, as revised Mar. 2010) (''Transparency can have a calming influence on trading patterns at the onset of a potential financial crisis, and thus act as a source of market stability to a wider range of markets, including those for equities and bonds.'').

[1220] *See* Proposing Release, 75 FR at 77307, *supra* note 2 (''The enhanced transparency provided by an SDR is important to help regulators and others monitor the build-up and concentration of risk exposures in the SBS market.''); *see also* DTCC 1*, *supra* note 20 (''A registered SDR should be able to provide (i) enforcement agents with necessary information on trading activity; (ii) regulatory agencies with counterparty-specific information about systemic risk based on trading activity; (iii) aggregate trade information for publication on market-wide activity; and (iv) a framework for real-time reporting from swap execution facilities and derivatives clearinghouses.'').

[1221] *See* Proposing Release, 75 FR at 77356, *supra* note 2; Cross-Border Proposing Release, 78 FR at 31184, *supra* note 3.

[1222] *See* Dodd-Frank Act, Public Law 111–203 at Preamble.

[1223] *See* Section II.A of this release discussing broad economic considerations.

[1224] *See* Proposing Release, 75 FR at 77354, *supra* note 2 (noting that ''the proposed SDR rules will lead to a more robust, transparent environment for the market for SBSs''); Cross-Border Proposing Release, 78 FR at 31183, *supra* note 3 (discussing programmatic benefits to requiring non-U.S. persons that perform the functions of an SDR within the United States to register with the Commission and to comply with the SDR Requirements). *See also* Dodd-Frank Act, Public Law 111–203 at Preamble.

[1225] *See* Proposing Release, 75 FR at 77307, *supra* note 2 (noting that SDRs ''are intended to play a key role in enhancing transparency in the SBS market''

Continued

Non-U.S. persons performing the functions of an SDR within the United States also may affect the transparency of the SBS market within the United States, even if transactions involving U.S. persons or U.S. market participants are being reported to such non-U.S. persons in order to satisfy the reporting requirements of a foreign jurisdiction (and not those of Title VII). The Commission believes that, to the extent that non-U.S. persons are performing the functions of an SDR within the United States, they will likely receive data relating to transactions involving U.S. persons and other U.S. market participants. Ensuring that such data is maintained and made available in a manner consistent with the SDR Requirements would likely contribute to the transparency of the U.S. market and reduce potential confusion that may arise from discrepancies in transaction data due to, among other things, differences in the operational standards governing persons that perform the functions of an SDR in other jurisdictions (or the absence of such standards for any such persons that are not subject to any regulatory regime). Moreover, given the sensitivity of reported SBS data and the potential for market abuse and subsequent loss of liquidity in the event that a person performing the function of an SDR within the United States fails to maintain the privacy of such data,[1226] the Commission believes that requiring non-U.S. persons that perform the functions of an SDR within the United States to register with the Commission will help ensure that data relating to transactions involving U.S. persons or U.S. market participants is handled in a manner consistent with the confidentiality protections applicable to such data, thereby reducing the risk of the loss or disclosure of proprietary or other sensitive data and of market abuse arising from the misuse of such data.

As noted above, the Commission is adopting Exchange Act Rule 13n–12 to provide an exemption from the SDR Requirements for non-U.S. persons that perform the functions of an SDR within the United States, provided that each regulator with supervisory authority over any such non-U.S. person has entered into an MOU or other arrangement with the Commission that addresses the confidentiality of data collected and maintained by such non-U.S. person, access by the Commission to such data, and any other matters determined by the Commission.

The Commission believes that this SDR Exemption will not significantly reduce the programmatic benefits associated with the SDR Requirements. Although the approach could potentially reduce the number of persons performing the functions of an SDR that are registered with the Commission,[1227] the Commission believes that there will be little impact on reporting of transactions involving U.S. persons because data relating to transactions involving U.S. persons and U.S. market participants would still be required to be reported, pursuant to Regulation SBSR, to an SDR registered with the Commission and subject to all SDR Requirements, absent other exemptive relief from the Commission.[1228] Moreover, the SDR Exemption may have the benefit of reducing the incentive for non-U.S. persons performing the functions of an SDR within the United States to restructure their operations to avoid registration with the Commission.

Moreover, the SDR Exemption is conditioned on an MOU or other arrangement with each regulator with supervisory authority over the non-U.S. person that seeks to rely on the SDR Exemption. This MOU or arrangement will address the Commission's interest in having access to SBS data involving U.S. persons and other U.S. market participants that is maintained by non-U.S. persons that perform the functions of an SDR within the United States and in protecting the confidentiality of such data. Further, Rule 13n–12 should not impair the integrity and accessibility of SBS data. The Commission, therefore, believes that exempting certain non-U.S. persons performing the functions of an SDR within the United States, subject to the condition described above, will likely not significantly affect the programmatic benefits that the SDR Requirements are intended to achieve.[1229]

Registering with the Commission and complying with the SDR Requirements will impose certain costs on an SDR.[1230] The Commission believes that the SDR Exemption is likely to reduce the costs for certain non-U.S. persons performing the functions of an SDR within the United States without reducing the expected benefits of the SDR Requirements.[1231] As discussed in Section VI.K.3 of this release, the Commission believes that such persons will likely be performing the functions of an SDR in order to permit persons to satisfy reporting requirements under foreign law. The exemption, if available, will allow these non-U.S. persons to continue to perform this function within the United States without incurring the costs of compliance with the SDR Rules; such non-U.S. persons may pass along their cost savings to U.S. market participants that report to the non-U.S. persons pursuant to the market participants' reporting obligations under foreign law. Additionally, the exemption may reduce the incentive for non-U.S. persons performing the functions of an SDR within the United States to restructure their operations to avoid registration with the Commission.

The Commission recognizes that conditioning the SDR Exemption may delay the availability of the SDR Exemption to certain non-U.S. persons. In some cases, the Commission may be unable to enter into an MOU or other arrangement with each regulator with supervisory authority over a non-U.S. person performing the functions of an SDR within the United States. The

and thus ''it is important that SDRs are well-run and effectively regulated'').

[1226] *See* Proposing Release, 75 FR at 77307, *supra* note 2 (''The inability of an SDR to protect the accuracy and integrity of the data that it maintains or the inability of an SDR to make such data available to regulators, market participants, and others in a timely manner could have a significant negative impact on the SBS market.'').

[1227] As of November 2014, there were several non-U.S. persons performing the functions of an SDR or intending to do so in the future. *See* OTC Derivatives Market Reforms Eighth Progress Report on Implementation, Financial Stability Board (Nov. 2014), *available at http://www.financialstabilityboard.org/wp-content/uploads/r_141107.pdf.* The Commission, however, does not possess data regarding how many, if any, of these persons perform the functions of an SDR within the United States.

[1228] *See* Regulation SBSR Adopting Release, *supra* note 13 (Rule 908(c) setting forth ''substituted compliance'' regime).

[1229] The Commission also anticipates that non-U.S. persons that avail themselves of the SDR Exemption will be subject to the regulatory requirements of one or more foreign jurisdictions. The SDR Exemption will help ensure that such persons do not incur costs of compliance with duplicative regulatory regimes while also ensuring, through the condition that each regulator with supervisory authority enter into an MOU or other arrangement with the Commission, that they are subject to regulatory requirements that will prevent them from undermining the transparency and other purposes of the SDR Requirements by, for example, failing to protect the confidentiality of data relating to U.S. persons and other U.S. market participants.

[1230] *See* Cross-Border Proposing Release, 78 FR at 31184–31185, *supra* note 3 (discussing programmatic costs of SDRs registering with the Commission and complying with the SDR Requirements).

[1231] As noted above, the data currently available to the Commission does not indicate how many non-U.S. persons performing the functions of an SDR perform such functions within the United States. *See supra* note 1227. However, even if persons with reporting obligations under Regulation SBSR report their transactions to a non-U.S. person that performs the functions of an SDR within the United States, but is exempt from registration, they will still be required to report transactions under Regulation SBSR to an SDR registered with the Commission, absent other exemptive relief from the Commission. *See* Regulation SBSR Adopting Release, *supra* note 13 (Rule 908(c) setting forth ''substituted compliance'' regime).

resulting delay or unavailability of the SDR Exemption may lead some of these non-U.S. persons to exit the U.S. market by, for example, restructuring their business so that they perform the functions of an SDR entirely outside the United States, potentially resulting in business disruptions in the SBS market. Despite the potential business disruptions in the SBS market that could result from the delay or unavailability of the SDR Exemption, the Commission believes that conditioning the SDR Exemption on an MOU or other arrangement with each regulator with supervisory authority over the non-U.S. person that seeks to rely on the exemption is important because it will help ensure the Commission's access to SBS data involving U.S. persons and other U.S. market participants that may be maintained by such non-U.S. person.

Finally, in developing its approach to the application of the SDR Requirements to non-U.S. persons that perform the functions of an SDR within the United States, the Commission considered, as an alternative to Rule 13n–12, requiring such non-U.S. persons to comply with the SDR Requirements, including registering with the Commission, as well as other requirements applicable to SDRs registered with the Commission.[1232] In such a scenario, a non-U.S. person performing the functions of an SDR within the United States would be required to register as an SDR and incur the costs associated with the SDR Requirements, as well as other requirements applicable to SDRs registered with the Commission.[1233] The Commission believes that the benefit of requiring all non-U.S. persons that perform the functions of an SDR within the United States to register with the Commission, even where similar objectives could be achieved through an exemption conditioned on an MOU or other arrangement with each regulatory authority with supervisory authority over such non-U.S. persons, would be marginal, particularly in light of the costs that such non-U.S. persons would incur in complying with the SDR Requirements, as well as other requirements applicable to SDRs registered with the Commission.[1234]

3. Consideration of Burden on Competition and Promotion of Efficiency, Competition, and Capital Formation

In developing its approach to the registration, duties, and implementation of the core principles of SDRs, the Commission has focused on meeting the goals of Title VII, including promoting financial stability and transparency in the United States financial system.[1235] The Commission has also considered the effects of its policy choices on competition, efficiency, and capital formation as mandated under Exchange Act Section 3(f).[1236] That section requires the Commission, whenever it engages in rulemaking pursuant to the Exchange Act and is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. In addition, Exchange Act Section 23(a)(2) requires the Commission, when making rules under the Exchange Act, to consider the impact such rules would have on competition.[1237] Section 23(a)(2) also prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[1238]

In Section II of this release, the Commission described the baseline used to evaluate the economic impact of the SDR Rules, including the impact on efficiency, competition, and capital formation. In particular, the Commission noted that the current SBS market is characterized by information asymmetries that confer a competitive advantage on SBS dealers relative to their non-dealer counterparties who may be less informed. The Commission also noted that the opacity of the SBS market may lead to certain inefficiencies in the market relative to a transparent market, including higher transaction costs and wider spreads. Finally, the Commission noted that some of the effects described below, such as the effects on capital formation, are measured relative to a world without public dissemination requirements. That is, in evaluating the effect of the SDR Rules on capital formation, the Commission discusses how the final SDR Rules may enhance or diminish capital formation relative to the current opaque SBS market environment.

a. Potential Effects on Efficiency

Two important economic characteristics of SDRs are the high fixed costs and increasing economies of scale. Compliance with the SDR Rules necessitates large investments in information technology infrastructure, including storage infrastructure and technology for electronic reporting and access to data, which results in high fixed costs for SDRs. The Commission believes, however, that once the infrastructure for operating as an SDR and compliance with the SDR Rules is in place, the SDR's costs of accepting transactions are minimal. Consequently, an SDR exhibits increasing economies of scale in that the average total cost to the SDR per transaction reported, which includes fixed costs, diminishes with the increase in volume of trades reported as high fixed costs are spread over a larger number of trades.

As a result, viewed in terms of minimizing the average SDR-related cost per transaction, it may be efficient to limit the total number of SDRs to one per asset class. In such a case, the SDR chosen for each asset class would receive reports of all transactions in that asset class, reducing inefficient duplication of fixed costs and potentially giving that SDR a large number of transactions over which the SDR could spread its high fixed costs. Furthermore, limiting the number of SDRs to one per asset class would reduce the potential difficulties that may arise when consolidating and aggregating data from multiple SDRs.[1239] While such a limitation would resolve many of the challenges involved in aggregating SBS data, the Commission is not limiting the number of SDRs.[1240] There are competitive benefits to having multiple SDRs, as discussed below. Furthermore, the existence of multiple SDRs may reduce operational risks, such as the risk that a catastrophic event or the failure of an SDR leaves no registered SDR to which transactions can be reported, impeding the functioning of the SBS market.

Nevertheless, the Commission believes that multiple SDRs may result in certain inefficiencies relative to a market with a single SDR per asset class,

[1232] *See* Cross-Border Proposing Release, 78 FR at 31185–31186, *supra* note 3 (discussing alternatives to proposed SDR Exemption).

[1233] *See* Cross-Border Proposing Release, 78 FR at 31185–31186, *supra* note 3.

[1234] *See* Cross-Border Proposing Release, 78 FR at 31185–31186, *supra* note 3.

[1235] Dodd-Frank Act, Public Law 111–203 at Title VII.

[1236] 15 U.S.C. 78c(f).

[1237] Exchange Act Section 23(a)(2), 15 U.S.C. 78w(a)(2).

[1238] Exchange Act Section 23(a)(2), 15 U.S.C. 78w(a)(2).

[1239] As discussed above, some commenters suggested limiting the number of SDRs to one per asset class. However, their suggestions concerning average total cost and data fragmentation extend to one SDR that serves the entire SBS market. *See* Section IV of this release discussing number of SDRs.

[1240] *See* Section IV of this release discussing number of SDRs.

as explained above.[1241] In particular, the potential reporting of transaction data to multiple SDRs may create a need to aggregate that data by the Commission and other interested parties. If aggregation of data is made difficult because identifiers or data field definitions used by different SDRs are not compatible, then the cost and time required by the Commission or any other interested party to aggregate the data would increase, and the Commission's oversight of the SBS market would be less efficient. The complications associated with aggregation could be particularly costly when aggregation is required across the same asset class and related transactions reside in different SDRs.

On the other hand, by allowing the creation of multiple SDRs, Exchange Act Section 13(n) [1242] and the SDR Rules may result in positive effects for market participants. Competition among SDRs may lead to better services and may reduce the costs of those services for market participants. As discussed above, there are currently four swap data repositories for equity or credit swaps that are provisionally registered with the CFTC and that may choose to register with the Commission as SDRs. While some swap data repositories may ultimately choose not to register and operate as an SDR, either because of regulatory requirements that govern SDRs or for other reasons, the Commission is not limiting the number of SDRs per asset class.

Furthermore, the Commission believes that the SDR Exemption may have positive effects on operational efficiency for SDRs, in terms of cost savings relative to a scenario where the SDR Exemption does not exist. The Commission believes that the exemption will allow certain non-U.S. persons to continue to receive data reported pursuant to the reporting requirements of a foreign jurisdiction without registering with the Commission as an SDR, subject to a condition that helps ensure that the privacy of the data and the Commission's access to the data is maintained. The SDR Exemption may also reduce the incentives for SDRs to restructure their operations to avoid triggering registration requirements, thereby reducing potentially negative effects on efficiency.[1243] In particular, some persons may restructure solely for the purposes of avoiding registration; in such restructurings, persons expend resources that could potentially be put to more productive uses.

Viewed in the context of the broader transparency goals of Title VII, the SDR Rules may provide additional informational (or price) efficiency benefits in terms of asset valuation.[1244] That is, by improving the flow of information about SBSs and the reference entities underlying SBSs, the SDR Rules may result in a market where prices of SBSs and their underlying reference entities more accurately reflect their fundamental value. The SDR Rules, together with the reporting and public dissemination requirements of Regulation SBSR, should also promote the process by which market participants seek the best available price. Increased availability of information may lead to a reduction in the spread between the price at which market participants can enter into an SBS and the fundamental value of that SBS (referred to as implicit trading costs in this release).[1245] Real-time transaction pricing and volume information provide signals to market participants about the value of their investments. Market participants may use these signals to update their assessment of the value of an investment opportunity. In contrast to an opaque market, information revealed through trades that are reported and publicly disseminated allows market participants to make more-informed assessments of asset valuations, promoting informational efficiency. This should be true for the underlying assets or reference entities as well. That is, information from SBS transactions provides signals not only about SBS valuation, but also about the value of reference assets underlying SBSs.

b. Potential Effects on Competition

The Commission believes that by allowing multiple SDRs to provide data collection, maintenance, and recordkeeping services, the SDR Rules should promote competition among SDRs. The Commission notes that, in an analogous setting, there are currently four swap data repositories provisionally registered with the CFTC, suggesting that multiple SDRs competing in the SBS market is a likely outcome.[1246] Increased competition may lower costs for users of SDR services.

The Commission believes that because the SDR Rules do not preclude an SDR from registering with the Commission and other foreign relevant authorities, non-resident SDRs generally can take steps to comply with both their home country requirements and the SDR Rules, and therefore can register with the Commission. The Commission recognizes that a non-resident SDR will incur additional burdens in making the certification or providing the opinion of counsel required by Exchange Act Rule 13n–1(f), and that these burdens may place non-resident SDRs at a competitive disadvantage relative to resident SDRs.[1247] The Commission believes that by subjecting non-resident SDRs to the same requirements as resident SDRs in all other respects—*e.g.,* requiring all SDRs to provide prompt access to books and records and submit to onsite inspection and examination—the SDR Rules do not give a significant competitive advantage to either resident or non-resident SDRs. As a result, the Commission believes that the SDR Rules should promote competition among SDRs both domestically and internationally.

The Commission recognizes that there may be competitive effects due to the jurisdictional divide between the CFTC and the Commission with respect to swaps and SBSs. Swap data repositories that are registered only with the CFTC may compete against SDRs that are registered only with the Commission, and vice versa, for acceptance of mixed swaps. As noted by commenters, divergent regulatory frameworks could lead to ''undue costs or burdens'' for SDRs and SBS market participants.[1248] To the extent that the SDR Rules contain provisions that are more burdensome than the CFTC's rules, the SDR Rules could hinder (1) an SDR registered with only the Commission from competing against a swap data repository registered with only the CFTC for acceptance of mixed swaps, and (2) an SDR registered with both the Commission and the CFTC from competing against a swap data repository registered with only the CFTC for acceptance of CFTC-regulated swaps. On the other hand, if the SDR Rules are less burdensome than the CFTC's rules, then an SDR registered with only the Commission may enjoy a competitive advantage relative to (1) a swap data repository registered with only the CFTC for acceptance of mixed swaps, and (2) an SDR registered with both the Commission and the CFTC for acceptance of SBSs.

[1241] *See* Sections II.A and IV of this release.

[1242] 15 U.S.C. 78m(n).

[1243] *See* Section VI.K of this release discussing the SDR Exemption.

[1244] Informational or price efficiency refers to the degree to which asset prices reflect available information about the value of the asset. *See, e.g.,* Eugene Fama, *Efficient Capital Market II,* 46(5) Journal of Finance 1575 (1991).

[1245] *See* Section II.A of this release.

[1246] *See* Section II.B of this release.

[1247] *See* Section VIII.D.1.b of the release discussing cost of certification and opinion of counsel.

[1248] *See* IIB CB, *supra* note 26.

As stated above, the Commission believes that the SDR Rules and the CFTC's final rules governing swap data repositories' registration, duties, and core principles are largely consistent.[1249] Indeed, the Commission believes that, on the whole, the SDR Rules are substantially similar to those adopted by the CFTC for swaps, and that any differences are not significant enough to reduce the ability of SEC-registered SDRs to compete against CFTC-registered swap data repositories for acceptance of mixed swaps.[1250] Thus, the Commission does not believe that the SDR Rules, as a result of the jurisdictional divide between the Commission and the CFTC, will negatively affect competition in the market for acceptance of mixed swaps.

Finally, in addition to affecting competition among SDRs, the SDR Rules have implications for competition among market participants. As discussed above, by observing order flow, SBS dealers may have access to information not available to the broader market, and therefore may enjoy a competitive advantage over their non-dealer counterparties.[1251] Because price and volume information (revealed to SBS dealers through their observation of order flow) contains signals about the value of investment opportunities, SBS dealers are able to use private information about order flow to derive more-informed assessments of current market values, allowing them to extract economic rents from less-informed counterparties.[1252] Impartial access to pricing and volume information should allow market participants to derive more-informed assessments of asset valuations, reducing SBS dealers' market power over other market participants. Additionally, price transparency should also promote competition among SBS dealers. The Commission expects that, as in other securities markets, quoted bids and offers should form and adjust according to reported, executed trades.

c. Potential Effects on Capital Formation

The Commission believes that compliance with the SDR Rules will promote data collection, maintenance, and recordkeeping. In conjunction with Regulation SBSR, including its public dissemination requirements, the SDR Rules will likely have a positive effect on transparency in credit markets by increasing information about the SBS market. In particular, the definition of an SDR, which identifies persons that may be required to register with the Commission and thereby required to comply with the public dissemination requirements of Regulation SBSR, and the data accuracy and maintenance requirements in the SDR Rules, should have a positive effect by making comprehensive, accurate information available to all market participants. The increased availability of information should enable persons that rely on the SBS market to meet their hedging objectives to make better decisions about capital formation in general, which may positively affect capital formation in the broader capital market. In particular, improved transparency in the SBS market should improve the quality and quantity of price information available in the SBS market, so that SBS prices more accurately reflect fundamental value and risk. Improved insight into the relationship between price and risk could attract hedgers and other market participants that do not benefit from opacity, improving liquidity and increasing opportunities for market participants to diversify and share risks through trading SBS.[1253]

Similarly, the Commission expects increased transparency in the SBS market to benefit the broader economy. Similar to the derivatives markets providing signals about the valuation of underlying reference entities, transparent SBS prices provide signals about the quality of a reference entity's business investment opportunities. Because market prices incorporate information about the value of underlying investment opportunities, market participants can use their observations of price and volume to derive assessments of the profitability of a reference entity's business and investment opportunities. Furthermore, business owners and managers can use information gleaned from the SBS market—both positive and negative—to make more-informed investment decisions in physical assets and capital goods, as opposed to investment in financial assets, thereby promoting efficient resource allocation and capital formation in the real economy. Finally, transparent SBS prices may also make it easier for firms to obtain new financing for business opportunities, by providing information and reducing uncertainty about the value and profitability of a firm's investments.[1254]

The SDR Rules are intended to help the Commission perform its oversight functions in a more effective manner. For example, a more complete picture of the SBS market, including information on risk exposures and asset valuations, should allow the Commission to better assess risk in the SBS market and evaluate the effectiveness of the Commission's regulation of the SBS market. Appropriate and timely regulatory responses to market developments could enhance investor protection, and could encourage greater participation in the SBS market, thereby improving risk-sharing opportunities and efficient capital allocation. In addition, the SBS data provided by SDRs to the Commission should help it advance the goals of the Dodd-Frank Act, thereby promoting stability in the overall capital markets. Increased overall stability in the capital markets could promote investor participation, thereby increasing liquidity and capital formation.

Finally, to the extent that the SDR Rules promote competition among SDRs, as discussed above, the SDR Rules may lower costs for users of SDR services.[1255] Decreased costs may promote capital formation by increasing the amount of capital available for investment by users of SDR services.

D. Costs and Benefits of Specific Rules

1. Registration Requirements, Form SDR, and Withdrawal From Registration

Rule 13n–1 and Form SDR describe the information that a person must file to register as an SDR and also provide for interim amendments and required annual amendments that must be filed within 60 days after the end of each fiscal year of the SDR and that these filings must be in a tagged data format. Each non-resident SDR is required to (i) certify on Form SDR that the SDR can, as a matter of law, and will provide the Commission with prompt access to the SDR's books and records and can, as a matter of law, and will submit to onsite inspection and examination by the Commission and (ii) provide an opinion of counsel that the SDR can, as a matter

[1249] *See* Section I.D of this release.

[1250] *See* DTCC 2, *supra* note 19 (stating that "[t]he Commission's proposed required practices are generally consistent with those of" the commenter's trade repository).

[1251] *See* Section II.A of this release.

[1252] *See* Martin D.D. Evans and Richard K. Lyons, *Exchange Rate Fundamentals and Order Flow,* NBER Working Paper No. 13151 (June 2007), *available at: http://128.97.165.17/media/files/evans_lyons.pdf* (finding evidence, based on data regarding end-user currency trades, that transaction flows forecast future macroeconomic variables such as output growth, money growth, and inflation).

[1253] *See* Section II.A of this release discussing transparency in the SBS market.

[1254] *See* Philip Bond, Alex Edmans, and Itay Goldstein, *The Real Effects of Financial Markets,* 4 Annual Review of Financial Economics 339 (2012) (reviewing the theoretical literature on the feedback between financial market prices and the real economy).

[1255] *See* Section VIII.C.3.a of this release discussing the effect of competition between SDRs on the prices of SDR services.

of law, provide the Commission with access to the books and records of such SDR and can, as a matter of law, submit to onsite inspection and examination by the Commission. Rule 13n–2 sets forth the process by which a registered SDR would withdraw its registration or have its registration revoked or cancelled.[1256] Rule 13n–3 sets forth the registration process for a successor to a registered SDR.[1257] These rules and Form SDR are adopted pursuant to the Commission's rulemaking authority under Exchange Act Section 13(n).[1258]

a. Benefits

The rules and Form SDR described in this section provide for the registration of SDRs, withdrawal from registration, revocation and cancellation of the registration, and successor registration of SDRs. Congress enacted the new registration requirements as part of the Dodd-Frank Act in order to increase the transparency in the SBS market. The registration process will further the Dodd-Frank Act's goals by assisting the Commission in overseeing and regulating the SBS market. The requirement that a non-resident SDR (i) certify that the SDR can, as a matter of law, and will provide the Commission with prompt access to the SDR's books and records and can, as a matter of law, and will submit to onsite inspection and examination by the Commission and (ii) provide an opinion of counsel that it can, as a matter of law, provide the Commission with access to the SDR's books and records and can, as a matter of law, submit to inspection and examination will allow the Commission to evaluate an SDR's ability to meet the requirements for registration and to conduct ongoing oversight.

The information required to be provided in Form SDR is necessary to enable the Commission to assess whether an applicant has the capacity to perform the duties of an SDR and to comply with the duties, core principles, and other requirements imposed on SDRs pursuant to Exchange Act Section 13(n) and the rules and regulations thereunder.

The requirement that SDRs file Form SDR in a tagged data format will facilitate review and analysis of registration materials by Commission staff and, to the extent such materials are made public, the public This requirement is consistent with the Commission's longstanding efforts to increase transparency and the usefulness of information by requiring the data tagging of information contained in electronic filings in order to improve the accuracy of submitted information, including financial information, and facilitate its analysis.[1259]

The Commission solicited comments on the benefits associated with the registration-related rules and Form SDR.[1260] The Commission did not receive any comments specifically addressing these benefits.

b. Costs

The Commission anticipates that the primary costs to SDRs from the registration-related rules and Form SDR result from the requirement to complete Form SDR and any amendments thereto.

As discussed above, the Commission estimates that the average initial paperwork cost of SDR registration will be 481 hours per SDR and the average ongoing paperwork cost of interim and annual updated Form SDR will be 36 hours for each registered SDR.[1261] Assuming a maximum of ten SDRs, the aggregate one-time estimated dollar cost will be $793,840 [1262] and the aggregate ongoing estimated dollar cost per year will be $55,440 [1263] to comply with the rule.

As discussed above, the Commission estimates that the average initial paperwork cost of filing a Form SDR to withdraw from registration will be 12 hours per SDR.[1264] Assuming that, at most, one SDR per year would withdraw, the aggregate one-time estimated dollar cost will be $4,008 [1265] to comply with the rule.

As discussed above, the Commission estimates that the average initial paperwork cost for each non-resident SDR to (i) certify on Form SDR that the SDR can, as a matter of law, and will provide the Commission with prompt access to the SDR's books and records and can, as a matter of law, and will submit to onsite inspection and examination by the Commission and (ii) provide an opinion of counsel that the SDR can, as a matter of law, provide the Commission with prompt access to the SDR's books and records can, as a matter of law, and submit to onsite inspection and examination will be 1 hour and $900 per SDR.[1266] Assuming a maximum of three non-resident SDRs,[1267] the aggregate one-time estimated dollar cost will be $3,840.[1268]

The Commission believes that the costs of filing Form SDR in a tagged data format beyond the costs of collecting the required information, will be minimal. The Commission does not believe that these costs will be significant, as large-scale changes will likely not be necessary for most modern data management systems to output structured data files, particularly for widely used file formats such as XML. XML is a widely used file format, and

[1256] *See* Sections VI.B of this release discussing Rule 13n–2.

[1257] *See* Sections VI.C of this release discussing Rule 13n–3.

[1258] *See* 15 U.S.C. 78m(n).

[1259] *See* Regulation S–T, 17 CFR 232; *see also* Electronic Filing and Revision of Form D, Securities Act Release No. 8891 (Feb. 6, 2008), 73 FR 10592 (Feb. 27, 2008); Interactive Data to Improve Financial Reporting, Securities Act Release No. 9002 (Jan. 30, 2009), 74 FR 6776 (Feb. 10, 2009); Interactive Data for Mutual Fund Risk/Return Summary, Securities Act Release No. 9006 (Feb. 11, 2009), 74 FR 7748 (Feb. 19, 2009); Amendments to Rules for National Recognized Statistical Rating Organizations, Exchange Act Release No. 61050 (Nov. 23, 2009), 74 FR 63832 (Dec. 4, 2009); Money Market Fund Reform, Investment Company Release No. 29132 (Feb. 23, 2010), 75 FR 10060 (Mar. 4, 2010).

[1260] *See* Proposing Release, 75 FR at 77355, *supra* note 2.

[1261] *See* Section VII.D.1 of this release discussing the cost of SDR registration.

[1262] The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney and a Compliance Clerk. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2013,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Clerk is $64 per hour. Thus, the total one-time estimated dollar cost of complying with the initial registration-related requirements is $79,384 per SDR and $793,840 for all SDRs, calculated as follows: (Compliance Attorney at $334 per hour for 180 hours) + (Compliance Clerk at $64 per hour for 301 hours) × (10 registrants) = $793,840.

[1263] The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney and a Compliance Clerk. Thus, the total estimated dollar cost of complying with the ongoing registration-related requirements is $5,544 per year per SDR and $55,440 per year for all SDRs, calculated as follows: (Compliance Attorney at $334 per hour for 12 hours) + (Compliance Clerk at $64 per hour for 24 hours) × (10 registrants) = $55,440.

[1264] *See* Section VII.D.1 of this release discussing the cost of filing Form SDR to withdraw from registration.

[1265] The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Thus, the total estimated dollar cost of complying with the requirements related to withdrawal from registration is $4,008 per year per SDR and $4,008 per year for all SDRs, calculated as follows: (Compliance Attorney at $334 per hour for 12 hours) × (1 SDR withdrawing) = $4,008.

[1266] *See* Section VII.D.1 of this release discussing the cost of non-resident SDRs' certification on Form SDR and opinion of counsel.

[1267] *See* Section VII.C.1 of this release discussing the number of non-resident SDRs.

[1268] The Commission estimates that an SDR will assign these responsibilities to an Attorney. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2013,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of an Attorney is $380 per hour. Thus, the total estimated dollar cost of complying with the requirements of Rule 13n–1(f) is $1,280 per year per SDR and $3,840 per year for all SDRs, calculated as follows: ($900 for outside legal services + (Attorney at $380 per hour for 1 hour)) × (3 non-resident registrants) = $3,840.

based on the Commission's understanding of current practices, it is likely that most reporting persons and third party service providers have systems in place to accommodate the use of XML.

The Commission solicited comment on the estimated costs associated with the registration-related rules and Form SDR.[1269] The Commission specifically requested comment on the estimated number of respondents that would be filing Form SDR and the initial costs associated with completing the registration form and the ongoing annual costs of completing the required amendments.[1270]

One commenter expressed concern about non-resident SDRs being subject to a stricter regime than resident SDRs because of the non-resident SDRs' obligation to provide a certification and opinion of counsel under Rule 13n–1(f).[1271] The Commission acknowledges that non-resident SDRs may incur costs in providing the certification and opinion of counsel. The Commission believes, however, that these costs may be avoided to the extent that non-resident SDRs are able to take advantage of the SDR Exemption.

The Commission did not receive any other comments on the estimated costs associated with the registration-related rules and Form SDR.[1272]

c. Alternatives

Following one commenter's suggestion, the Commission considered requiring an SDR applicant to submit its rulebook [1273] with its initial Form SDR. As discussed above, the Commission has not adopted this approach because an SDR is already required to provide policies and procedures on Form SDR, and the Commission believes that most of the information that would be contained in a rulebook would be filed as part of an SDR's policies and procedures.[1274] If an SDR's rulebook is broader than its policies and procedures, however, an SDR may submit its rulebook to the Commission to assist the Commission in better understanding the context of the SDR's policies and procedures or how the policies and procedures relate to one another.

In accordance with one commenter's suggestion,[1275] the Commission amended Form SDR to accommodate SIP registration, as discussed above.[1276] The Commission considered requiring persons to register as an SDR and SIP on two separate forms, but determined not to do so because the costs to SDRs to make multiple filings of separate Form SDR and Form SIP would not provide any measureable benefits to the Commission.

The Commission considered, in accordance with one commenter's suggestion,[1277] adopting a joint form with the CFTC for SDR and swap data repository registration. As discussed above, the Commission believes that it is necessary to maintain separate registration so that each agency's form remains tailored to the particular needs of that agency.[1278] For example, the Commission is revising Form SDR to accommodate SIP registration, while the CFTC's form accommodates only swap data repository registration. Moreover, adopting a joint form may impose costs and cause uncertainty for dual registrants because the CFTC would be required to amend its form, which it has already adopted, at a time when the industry is still in the implementation phase and some swap data repositories are already provisionally registered with the CFTC. Finally, because the CFTC's registration form for swap data repositories is substantially similar to the Commission's Form SDR, the Commission does not anticipate that filing with each commission separately will entail a significant cost for a dual registrant. The Commission is sensitive to the potential costs imposed by duplicative forms, but believes that these costs are justified by the need of having a form specifically tailored to the SDR registration scheme.

The Commission considered the request of one commenter, which is provisionally registered with the CFTC as a swap data repository, for expedited review of the commenter's application for registration as an SDR.[1279] Although it is not clear what the commenter means by ''expedited review,'' the Commission believes that it is necessary to conduct a review of an SDR's application for registration independent of the CFTC's review of a swap data repository's application for registration. Moreover, the Commission believes that the procedures for reviewing applications for registration as an SDR that the Commission is adopting in this release provide reasonable timeframes for the Commission's review of the applications. These procedures are consistent with how the Commission reviews the applications of other registrants, such as SIPs and registered clearing agencies. The Commission believes that each SDR applicant, including an applicant who is provisionally registered with the CFTC, needs to demonstrate that it is so organized, and has the capacity, to be able to assure the prompt, accurate, and reliable performance of its functions as an SDR, comply with any applicable provision of the federal securities laws and the rules and regulations thereunder, and carry out its functions in a manner consistent with the purposes of Exchange Act Section 13(n) and the rules and regulations thereunder.

Finally, the Commission considered providing a method for temporary registration, as proposed.[1280] As discussed above, the Commission believes that the exemptive relief provided by the Commission in the Effective Date Order, which was effective on June 15, 2011, addressed the primary purpose for temporary registration.[1281] The Commission also believes that the Compliance Date for the SDR Rules[1282] should provide sufficient time for SDRs to analyze and understand the final SDR Rules, to develop and test new systems required to comply with the Dodd-Frank Act's provisions governing SDRs and the SDR Rules, to prepare and file Form SDR, to demonstrate their ability to meet the criteria for registration set forth in Rule 13n–1(c)(3), and to obtain registration with the Commission.[1283] For these reasons, the Commission no longer believes that a temporary registration regime for SDRs is necessary or appropriate.

[1269] *See* Proposing Release, 75 FR at 77355, *supra* note 2.

[1270] *See* Proposing Release, 75 FR at 77355, *supra* note 2.

[1271] ESMA, *supra* note 19.

[1272] Although one commenter expressed concern that non-resident SDRs would be subject to a stricter regulatory regime because of the certification and opinion of counsel requirements, the commenter did not comment specifically on the Commission's estimates of the costs of providing such an opinion. *See* ESMA, *supra* note 19.

[1273] *See* DTCC 3, *supra* note 19.

[1274] *See* Section VI.A.1.c of this release discussing rulebooks.

[1275] *See* DTCC 2, *supra* note 19; *see also* DTCC 3, *supra* note 19 (suggesting adopting a joint registration form with the CFTC that would include SIP registration).

[1276] *See* Section VI.A.1.c of this release discussing Form SDR.

[1277] *See* DTCC 3, *supra* note 19.

[1278] *See* Section VI.A.1.c of this release discussing Form SDR.

[1279] *See* ICE CB, *supra* note 26.

[1280] *See* Proposing Release, 75 FR at 77314, *supra* note 2.

[1281] *See* Effective Date Order, 76 FR at 36306, *supra* note 9.

[1282] *See* Section V.C of this release discussing the Compliance Date.

[1283] *See* Section VI.A.3 of this release discussing temporary registration.

2. SDR Duties, Data Collection and Maintenance, and Direct Electronic Access

Rules 13n–4(b)(2)–(7), 13n–5, and 13n–6 include various requirements relating to SDRs' information technology systems. Rules 13n–4(b)(2)–(7), 13n–5, and 13n–6 set forth the duties of an SDR, including an SDR's collection, maintenance, and analysis of transaction data and other records.[1284]

Under Rules 13n–4(b)(2) and (4), an SDR is required to accept data as prescribed in Regulation SBSR and maintain transaction data and related identifying information as required by Rule 13n–5(b)(4). Rule 13n–4(b)(5) states that each SDR must provide direct electronic access to the Commission or any of its designees.[1285]

Rule 13n–5 establishes requirements for data collection and maintenance.[1286] Rule 13n–5(b) requires, among other things, an SDR to promptly record transaction data and to establish, maintain, and enforce written policies and procedures reasonably designed (1) for reporting complete and accurate transaction data to the SDR; (2) to satisfy itself that the transaction data submitted to it is complete and accurate; (3) to calculate positions for all persons with open SBSs for which the SDR maintains records; (4) to ensure that the transaction data and positions that it maintains are complete and accurate; and (5) to prevent any provision in a valid SBS from being invalidated or modified through the procedures or operations of the SDR. Rule 13n–5(b)(4) establishes requirements related to the formats in which and time periods for which an SDR must maintain transaction data, related identifying information, and positions. Rule 13n–5(b)(7) requires an SDR that ceases doing business, or ceases to be registered pursuant to Exchange Act Section 13(n), to preserve, maintain, and make accessible the transaction data and historical positions for the remainder of the time period required by Rule 13n–5. Rule 13n–5(b)(8) requires an SDR to make and keep current a plan to ensure that the transaction data and positions that are recorded in the SDR continue to be maintained in accordance with Rule 13n–5(b)(7).

Rule 13n–6 requires SDRs, with respect to those systems that support or are integrally related to the performance of their activities, establish, maintain, and enforce written policies and procedures reasonably designed to ensure that their systems provide adequate levels of capacity, integrity, resiliency, availability, and security.[1287]

a. Benefits

The rules discussed in this section will enhance the Commission's ability to oversee the SBS market beyond that in the current voluntary reporting system. The Commission's ability to oversee the SBS market and benefits of SDRs to the market depend on the accuracy and reliability of the data maintained by SDRs. Exchange Act Section 13(n)(4)(B) specifically instructs the Commission to ''prescribe data collection and maintenance standards for'' SDRs.[1288] The rules related to an SDR's information technology and related policies and procedures are designed to facilitate accurate data collection and retention with respect to SBSs in order to promote transparency with respect to the SBS market.

The ability of the Commission to oversee the SBS market and detect fraudulent activity depends on the Commission having access to accurate current and historical market data. In particular, the direct electronic access requirement described in Rule 13n–4(b)(5) will permit the Commission to carry out these responsibilities in a more effective and more efficient manner. The requirement that each SDR make and keep current a plan to ensure that SBS data recorded in such SDR continues to be maintained is essential to ensure that the Commission will continue to have access to and the ability to analyze SBS data in the event that the SDR ceases to do business.

The requirements in the rules discussed in this section are likely to create benefits that will follow from providing the Commission with access to SBS market information. Pursuant to the rules discussed in this section, in conjunction with Regulation SBSR,[1289] SDRs will receive and maintain systemically important SBS transaction data from multiple market participants. This data will increase transparency about activity in the SBS market. In addition, this data will enhance the ability of the Commission to respond to market developments.

Benefits also may accrue from the Commission's ability to use SBS data in order to oversee the SBS market for illegal conduct. For example, data collected by SDRs will enhance the Commission's ability to detect and deter fraudulent and manipulative activity and other trading abuses in connection with the SBS market, conduct inspections and examinations to evaluate the financial responsibility and soundness of market participants, and verify compliance with the statutory requirements and duties of SDRs. This data may also help the Commission identify fraudulent or other predatory market activity. Increasing market participants' confidence that the likelihood of illegal or fraudulent activity is low and that the likelihood that they will suffer economic loss from such illegal or fraudulent activity is low will reduce the prices at which they are willing to use SBS to hedge market risks to which they are exposed, which should, in turn, encourage participation in the SBS market.

The richness of data collected by SDRs also may facilitate market analysis. For example, the Commission may review market activity through the study of SBS transactions, which may help assess the effectiveness of the Commission's regulation of the SBS market. Such reviews can inform the Commission on the need for modifications to these and other rules as the market evolves.

The Commission recognizes that these benefits may be reduced to the extent that SBS market data is fragmented across multiple SDRs. Fragmentation of SBS market data may impose costs on any user of this data associated with consolidating, reconciling, and aggregating that data. As discussed above, the Commission believes that the form and manner with which an SDR provides the data to the Commission should not only permit the Commission to accurately analyze the data maintained by a single SDR, but also allow the Commission to aggregate and analyze data received from multiple SDRs.[1290]

SDRs also may create economic benefits for market participants by providing non-core services, such as facilitating the reporting of life cycle events, asset servicing, or payment calculations. These activities may be less costly to perform when SBS market data is centrally located and accessible.

The Commission solicited comment on the benefits related to Rules 13n–4(b)(2)–(7), 13n–5, and 13n–6.[1291] The

[1284] *See* Sections VI.D.2.c, VI.E, and VI.F.3 of this release discussing Rules 13n–4(b)(2) and (4), 13n–5, and 13n–6, respectively.

[1285] *See also* Exchange Act Section 13(n)(5)(D)(i), 15 U.S.C. 78m(n)(5)(D)(i) (requiring an SDR to provide direct electronic access to the Commission or any of its designees).

[1286] *See* Section VI.E of this release discussing Rule 13n–5.

[1287] *See* Section VI.F.3 of this release discussing Rule 13n–6.

[1288] 15 U.S.C. 78m(n)(4)(B).

[1289] *See* Regulation SBSR Adopting Release, *supra* note 13.

[1290] *See* Section VI.D.2.c.ii of this release discussing direct electronic access.

[1291] *See* Proposing Release, 75 FR at 77357, *supra* note 2.

Commission specifically requested comment on whether any additional benefits would accrue if the Commission imposed further, more specific technology-related requirements.[1292] The Commission received no comments on the estimated benefits of the rules discussed in this section.

b. Costs

The Commission anticipates that the primary costs to SDRs, particularly those that are not already registered with the CFTC or operating as trade repositories, are from the rules described in this section that relate to the cost of developing and maintaining systems to collect and store SBS transaction data. SDRs also need to develop, maintain, and enforce compliance with related policies and procedures and provide applicable training. Changes in the cost of developing and maintaining such systems are likely to be passed on to market participants; similarly, compliance costs incurred by SDRs are likely to be passed on to market participants.

As discussed above, the Commission estimates that the cost associated with creating SDR information technology systems will be 42,000 hours and $10,000,000 for each SDR and the average ongoing paperwork cost will be 25,200 hours and $6,000,000 per year for each SDR.[1293] Assuming a maximum of ten SDRs, the aggregate one-time estimated dollar cost will be $210,810,000[1294] and the aggregate ongoing estimated dollar cost per year will be $126,486,000[1295] to comply with the rules. Based on Commission staff's conversations with industry representatives, the Commission estimates that the cost imposed on SDRs to provide direct electronic access to the Commission should be minimal as SDRs likely have or will establish comparable electronic access mechanisms to enable market participants to provide data to SDRs and review transactions to which such participants are parties.[1296]

As discussed above, the Commission estimates that the average initial paperwork cost associated with developing policies and procedures necessary to comply with Rules 13n–5(b)(1), (2), (3), and (5) and 13n–6 will be 1,050 hours and $100,000 for each SDR and the average ongoing paperwork cost will be 300 hours per year for each SDR.[1297] Assuming a maximum of ten SDRs, the aggregate one-time estimated dollar cost will be $4,185,300[1298] and the aggregate ongoing estimated dollar cost per year will be $965,400[1299] to comply with the rules.

The Commission believes that existing SDRs may have already developed and implemented information technology systems and related policies and procedures.[1300] Such persons are currently not subject to regulation by the Commission, and therefore, may need to enhance their information technology systems and related policies and procedures to comply with the SDR Rules. Thus, such persons may experience costs in enhancing their information technology systems and related policies and procedures to comply with the SDR Rules. Moreover, because the costs discussed above represent the costs of creating information technology systems and related policies and procedures without any existing information technology systems or policies and procedures in place, existing SDRs that already have information technology systems and related policies and procedures may experience initial costs lower than those estimated above. The Commission believes that after such persons bring their technology systems and related policies and procedures into compliance with the SDR Rules, however, the ongoing annual costs for such persons will likely be consistent with the estimates provided above.[1301]

Multiple SDRs may register with the Commission, potentially within the same asset class, with each SDR collecting data from a subset of market participants. While multiple SDRs per asset class will allow for market competition to decide how data is collected, it may hinder market-wide data aggregation due to coordination costs, particularly if market participants adopt incompatible reporting standards and practices. The SDR Rules do not specify a particular reporting format or structure, which may create the possibility that persons reporting to SDRs or other market participants accessing SBS data, will have to accommodate different data standards and develop different systems to accommodate each. This may result in increased costs for reporting persons and users of SBS data.

Furthermore, the costs associated with aggregating data across multiple SDRs by the Commission and other users of such data will increase to the extent that SDRs choose to use different identifying information for transactions, counterparties, and products. Data aggregation costs also could accrue to the extent that there is variation in the quality of data maintained across SDRs.

[1292] *See* Proposing Release, 75 FR at 77357, *supra* note 2.

[1293] *See* Section VII.D.2 of this release discussing the costs of creating SDR information technology systems.

[1294] The Commission estimates that an SDR will assign these responsibilities to an Attorney, a Compliance Manager, a Programmer Analyst, and a Senior Business Analyst. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2013,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Compliance Manager is $283 per hour, a Programmer Analyst is $220 per hour, and a Senior Business Analyst is $251 per hour. Thus, the total initial estimated dollar cost will be $21,081,000 per SDR and $210,810,000 for all SDRs, calculated as follows: ($10,000,000 for information technology systems + (Attorney at $380 per hour for 7,000 hours) + (Compliance Manager at $283 per hour for 8,000 hours) + (Programmer Analyst at $220 per hour for 20,000 hours) + (Senior Business Analyst at $251 per hour for 7,000 hours)) × 10 registrants = $210,810,000.

[1295] The Commission estimates that an SDR will assign these responsibilities to an Attorney, a Compliance Manager, a Programmer Analyst, and a Senior Business Analyst. Thus, the total ongoing estimated dollar cost will be $12,648,600 per SDR and $126,486,000 for all SDRs, calculated as follows: ($6,000,000 for information technology systems + (Attorney at $380 per hour for 4,200 hours) + (Compliance Manager at $283 per hour for 4,800 hours) + (Programmer Analyst at $220 per hour for 12,000 hours) + (Senior Business Analyst at $251 per hour for 4,200 hours)) × 10 registrants = $126,486,000.

[1296] *See* SDR Proposing Release, 75 FR at 77357, *supra* note 2. Indeed, the Commission notes that one commenter, which currently operates a trade repository, stated that ''[t]he Commission's proposed required practices are generally consistent with those of'' the commenter's trade repository. DTCC 2, *supra* note 19.

[1297] *See* Section VII.D.2 of this release discussing the costs of developing policies and procedures necessary to comply with Rules 13n–5(b)(1), (2), (3), and (5) and 13n–6.

[1298] The Commission estimates that an SDR will assign these responsibilities to a Compliance Manager, an Attorney, a Senior Systems Analyst, and an Operations Specialist. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2013,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Senior Systems Analyst is $260 per hour and the cost of an Operation Specialist is $125 per hour. Thus, the total initial estimated dollar cost will be $418,530 per SDR and $4,185,300 for all SDRs, calculated as follows: ($100,000 for outside legal services + (Compliance Manager at $283 per hour for 385 hours) + (Attorney at $380 per hour for 435 hours) + (Senior Systems Analyst at $260 per hour for 115 hours) + (Operations Specialist at $125 per hour for 115 hours)) × 10 registrants = $4,185,300.

[1299] The Commission estimates that an SDR will assign these responsibilities to a Compliance Manager and an Attorney. Thus, the total ongoing estimated dollar cost will be $96,540 per SDR and $965,400 for all SDRs, calculated as follows: ((Compliance Manager at $283 per hour for 180 hours) + (Attorney at $380 per hour for 120 hours)) × 10 registrants = $965,400.

[1300] *Cf.* DTCC 2, *supra* note 19 (stating that ''[t]he Commission's proposed required practices are generally consistent with those of'' the commenter's trade repository).

[1301] *See* Section VII.D.2 of this release discussing the costs of Rules 13n–4(b)(2)–(7), 13n–5, and 13n–6.

Each SDR has discretion over how to implement its policies and procedures in the recording of reportable data, and variations in quality may result. Since aggregated data used for surveillance and risk monitoring requires that the underlying components are provided with the same level of accuracy, variations in the quality of data could be costly if subsequent interpretations of analysis based on the data suffer from issues of integrity. To the extent that market competition among SDRs impacts profit margins and the level of resources devoted to collecting and maintaining transaction data, there is an increased likelihood of variations in the quality of reported data, which could make the aggregation of data across multiple SDRs more difficult.

In the Proposing Release the Commission solicited comment on the costs related to Rules 13n–4(b)(2)–(7), 13n–5, and 13n–6.[1302] The Commission specifically requested comment on the initial and ongoing costs associated with establishing and maintaining the technology systems and related policies and procedures; additional costs to creating an SDR that the Commission should consider; alternatives that the Commission should consider; whether the estimates accurately reflect the cost of storing data in a convenient and usable electronic format for the required retention period; and a description and, to the extent practicable, quantification of the costs associated with any comments that are submitted.[1303] The Commission received no comments on the estimated costs of the rules discussed in this section.

c. Alternatives

Commenters suggested that an SDR's duties should include reporting SBS data to a single SDR that would consolidate the data.[1304] Specifically, one commenter recommended that the Commission ''designate one SDR as the recipient of the information of the other SDRs to ensure the efficient consolidation of data.''[1305] The commenter further stated that the designated SDR would need to have ''the organization and governance structure that is consistent with being a financial market utility serving a vital function to the entire marketplace.''[1306] The Commission recognizes, as asserted by the commenter, that fragmentation of data among SDRs would ''leave to regulators the time consuming, complicated and expensive task of rebuilding complex data aggregation and reporting mechanisms.''[1307] If the Commission were to designate one SDR as the data consolidator, however, such an action could be deemed as the Commission's endorsement of one regulated person over another, discourage new market entrants, and interfere with competition, resulting in a perceived government-sponsored monopoly. In addition, such a requirement would likely impose an additional cost on market participants to cover the SDR's cost for acting as the data consolidator. The Commission does not believe that, at this time, the benefits of such a requirement, in terms of saving other SDRs the costs of having to make data available to the Commission and saving the costs of consolidating the data itself, would be substantial enough to justify this potential negative effect on competition among SDRs. The Commission, however, may revisit this issue if, for example, there is data fragmentation among SDRs that is creating substantial difficulties for relevant authorities to get a complete and accurate view of the market.

The Commission considered directing, under Rule 13n–4(b)(7), all SDRs to establish automated systems for monitoring, screening, and analyzing SBS data, a position urged by one commenter.[1308] The Commission believes that mandating automated systems for monitoring, screening, and analyzing SBS data at this time would impose an additional cost on SDRs. The Commission believes that it should avoid imposing the cost of automated systems on SDRs until the Commission can better determine what information it needs through such automated systems in addition to the information that it can obtain from SDRs through other rules applicable to SDRs, such as Rule 13n–4(b)(5).

The Commission considered requiring every SDR to maintain transaction data and related identifying information for not less than five years after the applicable SBS expires or ten years after the applicable SBS is executed, whichever is greater, as an alternative to the time period in Rule 13n–5(b)(4) (for not less than five years after the applicable SBS expires). The Commission understands, however, that the alternative time period does not fit current industry practices and therefore would be costly to implement. The five-year period is consistent with the record retention period for other Commission registrants and the statutory requirement for SB SEFs.

The Commission also considered, as an alternative to Rule 13n–5(b)(4)(i), prescribing a particular data format in which an SDR must maintain transaction data and positions, as suggested by three commenters.[1309] The Commission believes that SDRs should have the flexibility to choose their own data format, based on what works best in practice.[1310] The Commission is also concerned that a format that it mandates would eventually become outdated, necessitating either a rule change to keep pace with technological innovation or a requirement that SDRs use outdated technology. Market participants may incur the increased costs of converting their transaction data to a format that is no longer an industry standard. Although the Commission recognizes that a commonly-mandated format for all SBS data has the potential to facilitate aggregation of data across different SDRs, the Commission believes that not imposing a particular format saves SDRs the costs associated with using and implementing one data format chosen by the Commission. The Commission believes that SDRs, working with market participants, will be in the best position to choose and upgrade formats as needed.[1311] For these reasons, the Commission does not believe that mandating a particular format in which an SDR must maintain transaction data, related identifying information, and positions is, at this time, an appropriate alternative to the flexible approach of Rule 13n–5(b)(4)(i) and the lower compliance costs.

Finally, the Commission considered, as suggested by one commenter,

[1302] *See* Proposing Release, 75 FR at 77358, *supra* note 2.

[1303] *See* Proposing Release, 75 FR at 77358, *supra* note 2.

[1304] *See* DTCC 1*, *supra* note 20; Better Markets 1, *supra* note 19; *see also* FINRA SBSR, *supra* note 27 (urging the Commission to mandate the consolidation of disseminated SBS data to the public).

[1305] DTCC 1*, *supra* note 20; *see also* Better Markets 1, *supra* note 19 (making similar comments); DTCC 2, *supra* note 19 (''The role of an aggregating SDR is significant in that it ensures regulators efficient, streamlined access to consolidated data, reducing the strain on limited agency resources.'').

[1306] DTCC 1*, *supra* note 20.

[1307] DTCC 3, *supra* note 19.

[1308] *See* Better Markets 1, *supra* note 19. Similarly, another commenter suggested that the Commission ''provide additional details on the anticipated requirements in order to better manage the expectations of SDRs and wider market participants concerning their duties in this area.'' Barnard, *supra* note 19.

[1309] *See* Better Markets 1, *supra* note 19; ISDA Temp Rule, *supra* note 28; Barnard, *supra* note 19.

[1310] *See* Section VI.E.4.c of this release discussing Rule 13n–5(b)(4).

[1311] As discussed above, when an SDR is deciding the format in which it will maintain transaction data and positions, it may want to consider whether it will need to reformat or translate the data to reflect any formats and taxonomies that the Commission may adopt pursuant to Exchange Act Section 13(n)(5)(D) and Rule 13n–4(b)(5). *See* Section VI.E.4.c of this release.

requiring SDRs to keep records of data indefinitely.[1312] This commenter asserted that there was ''no technological or practical reason for limiting the retention period,'' [1313] but the Commission believes that given the volume of data and transactions SDRs may handle, prohibiting SDRs from ever eliminating records may result in SDRs retaining a large volume of records for which there may be little or no use. Having to maintain records secure and accessible for an indefinite period of time may impose significant costs to SDRs, particularly as storage and access technology evolves. Because the Commission believes that requiring transaction data to be maintained for not less than five years after the applicable SBS expires is more reasonable, and because that approach is consistent with the record retention period for other Commission registrants and the statutory requirement for SB SEFs, the Commission does not believe that risks and costs that could come with imposing an unlimited time period for retention are justified. Accordingly, the Commission is not adopting the alternative suggested by the commenter.

3. Recordkeeping

Rule 13n–7 requires an SDR to make and keep certain records relating to its business and retain a copy of records made or received by the SDR in the course of its business for a period of not less than five years, the first two years in a place that is immediately available to representatives of the Commission for inspection and examination. The rule also requires an SDR that ceases doing business or ceases to be registered as an SDR to preserve, maintain, and make accessible the records required to be collected, maintained, and preserved pursuant to the rule for the remainder of the time period required by Rule 13n–7.[1314]

a. Benefits

Rule 13n–7 is designed to further the Dodd-Frank Act's goals by enhancing the Commission's ability to oversee SDRs, which are critical components of the new regulatory scheme governing SBSs. The rule will assist the Commission in determining whether an SDR is complying with the federal securities laws and the rules and regulations thereunder. In addition, the recordkeeping requirements contained in the rule will permit the Commission to evaluate the financial responsibility and soundness of SDRs.

To the extent that the rule standardizes the business recordkeeping practices of SDRs, the Commission will be better able to perform efficient, targeted inspections and examinations with an increased likelihood of identifying improper conduct. To the extent that standardized recordkeeping requirements will allow the Commission to perform more efficient, targeted inspections and examinations, SDRs may incur less costs in responding to targeted inspections and examinations (as opposed to inspections and examinations that are broader in scope). In addition, both the Commission and SDRs should benefit from standardized recordkeeping requirements to the extent that uniform records will enable the Commission and SDRs to know what records the SDRs are required to maintain.

The Commission solicited comment on the benefits related to Rule 13n–7.[1315] The Commission did not receive any comments on the benefits related to Rule 13n–7.

b. Costs

As discussed above, the Commission estimates that the average initial paperwork cost associated with making, keeping and preserving certain records and developing and maintaining information technology systems to ensure compliance with the recordkeeping requirements will be 346 hours and $1,800 for each SDR and the average ongoing paperwork cost associated with compliance with the recordkeeping requirements will be 279.17 hours per year for each SDR.[1316] Assuming a maximum of ten SDRs, the aggregate one-time estimated dollar cost will be $986,600 [1317] and the aggregate ongoing estimated dollar cost per year will be $790,051.10 [1318] to comply with Rule 13n–7.

The Commission believes that existing SDRs may already maintain business records as part of their day-to-day operations.[1319] Such persons are currently not subject to regulation by the Commission, and therefore, may need to enhance their maintenance of business records to comply with Rule 13n–7. Thus, such persons may experience costs in enhancing their recordkeeping to comply with Rule 13n–7. Moreover, because the costs discussed above represent the costs of establishing a recordkeeping system without any existing recordkeeping system in place, existing SDRs that already have a recordkeeping system may experience initial costs lower than those estimated above. The Commission believes that after such persons bring their recordkeeping into compliance with Rule 13n–7, however, the ongoing annual costs for such persons will likely be consistent with the estimates provided above.

The Commission solicited comment on the costs related to Rule 13n–7.[1320] The Commission specifically requested comment on the initial and ongoing costs associated with establishing and maintaining the recordkeeping systems and related policies and procedures, including whether currently-operating SDRs would incur different recordkeeping costs.[1321] The Commission did not receive any comments on the costs related to Rule 13n–7.

4. Reports

Rule 13n–8 requires SDRs to report promptly to the Commission, in a form and manner acceptable to the Commission, such information as the Commission determines necessary or appropriate for the Commission to perform its duties.[1322]

a. Benefits

Title VII establishes a regulatory framework for the OTC derivatives market that depends on the Commission's access to information regarding the current and historical operation of the SBS market to verify compliance with the statute and to provide for effective monitoring for market abuse. In addition, specific provisions of Title VII require routine,

[1312] *See* Barnard, *supra* note 19.

[1313] Barnard, *supra* note 19.

[1314] *See* Section VI.G of this release discussing Rule 13n–7.

[1315] *See* Proposing Release, 75 FR at 77358, *supra* note 2.

[1316] *See* Section VII.D.3 of this release discussing the cost associated with Rule 13n–7.

[1317] The Commission estimates that an SDR will assign these responsibilities primarily to a Compliance Manager as well as a Senior Systems Analyst. Thus, the total initial estimated dollar cost will be $98,660 per SDR and $986,600 for all SDRs, calculated as follows: ($1,800 in information technology costs + (Compliance Manager at $283 per hour for 300 hours) + (Senior Systems Analyst at $260 per hour for 46 hours)) × 10 registrants = $986,600.

[1318] The Commission estimates that an SDR will assign these responsibilities to a Compliance Manager. Thus, the total ongoing estimated dollar cost will be $79,005.11 per SDR and $790,051.10 for all SDRs, calculated as follows: (Compliance Manager at $283 per hour for 279.17 hours) × 10 registrants = $790,051.10.

[1319] *Cf.* DTCC 2, *supra* note 19 (stating that ''[t]he Commission's proposed required practices are generally consistent with those of'' the commenter's trade repository).

[1320] *See* Proposing Release, 75 FR at 77359, *supra* note 2.

[1321] *See* Proposing Release, 75 FR at 77359, *supra* note 2.

[1322] *See* Section VI.H.3 of this release discussing Rule 13n–8.

targeted monitoring of certain types of events. Access to such information will enable the Commission to oversee the SBS market, which is critical to the continued integrity of the markets, and detect and deter fraudulent and manipulative activity and other trading abuses in connection with the derivatives markets.

The Commission solicited comment on the benefits related to the requirements contained in Rule 13n–8.[1323] The Commission did not receive any comments on the benefits related to the requirements contained in Rule 13n–8.

b. Costs

The Commission anticipates that the initial costs to SDRs from Rule 13n–8 relate to the cost of developing and maintaining systems to respond to requests for information and provide the necessary reports and establishing related policies and procedures. In addition, SDRs will need to employ staff to maintain systems to provide the requested reports as well as to respond to ad hoc requests that cannot be satisfied using such systems.[1324] The information technology costs associated with this rule are included in the overall information technology costs discussed above.[1325]

Furthermore, as discussed above, the Commission estimates that SDRs will incur costs in compiling the information requested under Rule 13n–8, which the Commission estimates will be limited to information already compiled under the SDR Rules, and thus, require only 1 hour per response to compile and transmit per year for each SDR.[1326] Assuming a maximum of ten SDRs, the aggregate ongoing estimated dollar cost per year will be $2,510 to comply with the rule.[1327]

The Commission solicited comment on the costs related to Rule 13n–8.[1328] The Commission specifically requested comment on the initial and ongoing costs associated with establishing and providing the reports required under the rule.[1329] The Commission did not receive any comments on the estimated costs related to this rule.

5. Disclosure

Under Rule 13n–10, before accepting any SBS data from a market participant or upon the market participant's request, each SDR is required to furnish to the market participant a disclosure document containing certain information that reasonably will enable the market participant to identify and evaluate the risks and costs associated with using the services of the SDR.[1330] An SDR's disclosure document must include the SDR's criteria for providing others with access to services offered and data maintained by the SDR; the SDR's criteria for those seeking to connect to or link with the SDR; a description of the SDR's policies and procedures regarding safeguarding of data and operational reliability; a description of the SDR's policies and procedures reasonably designed to protect the privacy of SBS transaction information; a description of the SDR's policies and procedures regarding its non-commercial and/or commercial use of SBS transaction information; a description of the SDR's dispute resolution procedures; a description of all of the SDR's services, including ancillary services; the SDR's updated schedule of dues, unbundled prices, rates, or other fees for all of its services, and any discounts or rebates; and a description of the SDR's governance arrangements.

a. Benefits

Rule 13n–10 is intended to provide certain information regarding an SDR to market participants prior to their entering into an agreement to provide SBS data to the SDR. To the extent that multiple SDRs accept data for the same asset class, the disclosure document should enable market participants to make an informed choice among SDRs. The disclosure document is necessary to inform market participants of the nature of the services provided by the SDR and the conditions and obligations that are imposed on market participants in order for them to report data to the SDR.

Rule 13n–10 is designed to further the Dodd-Frank Act's goals by providing market participants with applicable information regarding the operation of SDRs. The Commission solicited comment,[1331] but did not receive any comments on the benefits related to this rule.

b. Costs

The Commission anticipates that the primary costs to SDRs to complying with Rule 13n–10 relate to the development and dissemination of the disclosure document. As discussed above, the Commission estimates that the average initial paperwork cost associated with developing the disclosure document and related policies and procedures will be 97.5 hours and $9,400 for each SDR and the average ongoing paperwork cost will be 1 hour per year for each SDR.[1332] Assuming a maximum of ten registered SDRs, the aggregate one-time estimated dollar cost will be $263,162.5 [1333] and the aggregate ongoing estimated dollar cost per year will be $1,735 [1334] to comply with the rule.

The Commission solicited comment on the costs related to Rule 13n–10.[1335] The Commission specifically requested comment on the initial and ongoing costs associated with drafting, reviewing, and providing the required disclosure document.[1336] The Commission did not receive any comments on the costs related to this rule.

6. Chief Compliance Officer and Compliance Functions; Compliance Reports and Financial Reports

Rules 13n–4(b)(11) and 13n–11 and the amendments to Regulation S–T require each registered SDR to identify on Form SDR a person who has been designated by the board to serve as CCO whose duties include preparing an annual compliance report, which will

[1323] *See* Proposing Release, 75 FR at 77359, *supra* note 2.

[1324] The Commission understands that some existing trade repositories may have dedicated personnel who are responsible for responding to and providing ad hoc report requests from relevant authorities, including the Commission. To the extent that Rule 13n–8 may result in more automated reporting, the need for such dedicated personnel resources may be reduced.

[1325] *See* Section VIII.D.2.b of this release.

[1326] *See* Section VII.D.4 of this release discussing the cost associated with Rule 13n–8.

[1327] The Commission estimates that an SDR will assign these responsibilities to a Senior Business Analyst. Thus, the total ongoing estimated dollar cost will be $251 per SDR and $2,510 for all SDRs, calculated as follows: (Senior Business Analyst at $251 per hour for 1 hour) × 10 registrants = $2,510.

[1328] *See* Proposing Release, 75 FR at 77360, *supra* note 2.

[1329] *See* Proposing Release, 75 FR at 77360, *supra* note 2.

[1330] *See* Section VI.I.2 of this release discussing Rule 13n–10.

[1331] *See* Proposing Release, 75 FR at 77360, *supra* note 2.

[1332] *See* Section VII.D.5 of this release discussing the cost associated with Rule 13n–10.

[1333] The Commission estimates that an SDR will assign these responsibilities to a Compliance Manager and a Compliance Clerk. Thus, the total initial estimated dollar cost will be $26,316.25 per SDR and $263,162.5 for all SDRs, calculated as follows: ($4,400 for external legal costs + $5,000 for external compliance consulting costs + (Compliance Manager at $283 per hour for 48.75 hours) + (Compliance Clerk at $64 per hour for 48.75 hours)) × 10 registrants = $263,162.5.

[1334] The Commission estimates that an SDR will assign these responsibilities to a Compliance Manager and a Compliance Clerk. Thus, the total ongoing estimated dollar cost will be $173.5 per SDR and $1,735 for all SDRs, calculated as follows: ((Compliance Manager at $283 per hour for 0.5 hours) + (Compliance Clerk at $64 per hour for 0.5 hours)) × 10 registrants = $1,735.

[1335] *See* Proposing Release, 75 FR at 77360, *supra* note 2.

[1336] *See* Proposing Release, 75 FR at 77360, *supra* note 2.

be filed with the Commission along with a financial report.[1337] The CCO's appointment must be approved by the majority of the SDR's board and the CCO must report directly to the senior officer of the SDR or the board. As discussed above, the CCO is responsible for, among other things, establishing procedures for the remediation of noncompliance issues identified by the CCO and establishing and following appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.[1338] No officer, director, or employee may directly or indirectly take any action to coerce, manipulate, mislead, or fraudulently influence the CCO in the performance of his or her duties under Rule 13n–11.[1339] The CCO is required to prepare and sign an annual compliance report and submit the report to the board for its review prior to the report being filed with the Commission. Finally, the annual compliance report must be filed along with the financial report, which must be prepared pursuant to Rule 13n–11(f) and filed with the Commission. The compliance report must be filed in a tagged data format in accordance with the instructions contained in the EDGAR Filer Manual,[1340] and the financial report must be provided as an official filing in accordance with the EDGAR Filer Manual and include, as part of the official filing, an Interactive Data Financial Report filed in accordance with Rule 407 of Regulation S–T.[1341]

a. Benefits

Rules 13n–4(b)(11) and 13n–11 are designed to help ensure that SDRs comply with the federal securities laws, including Exchange Act Section 13(n), and the rules and regulations thereunder. Although existing SDRs may already have CCOs in place, the rules will make this standard practice for all registered SDRs, as mandated by the Exchange Act.[1342]

As a result of Rules 13n–4(b)(11) and 13n–11, the Commission believes that data and other records maintained by each SDR are more likely to be accurate and reliable. The Commission believes that strong internal compliance programs lower the likelihood of non-compliance with securities rules and regulations.[1343] The designation of a CCO, who will, among other things, take reasonable steps to ensure compliance with the rules and regulations thereunder relating to SBSs, including each rule prescribed by the Commission, will help ensure that each SDR complies with the Exchange Act and the rules and regulations thereunder. The prohibition against an SDR's officer, director, or employee from directly or indirectly taking any action to coerce, manipulate, mislead, or fraudulently influence its CCO increases the probability that the CCO's actions are based on accurate information and the compliance reports reflect the independent judgment of the CCO; however, these prohibitions may also cause some SDRs or SDR officers, directors and employees to implement additional controls in their interactions with the CCO, potentially limiting the scope or timeliness of the information made available to the CCO. To the extent that compliance with the Exchange Act and the rules and regulations thereunder results in more accurate data being maintained, publicly disseminated, and reported to the Commission, the ability of the Commission to rely on the SBS data will improve. Finally, strong compliance programs may help reduce non-compliance with the SDR Rules by SDRs; non-compliance with, for example, the privacy requirements (Rules 13n–4(b)(8) and 13n–9), have the potential of negatively impacting confidence in the overall SBS market.

Rule 13n–11(f) requires SDRs to file annual audited financial reports to the Commission. This rule will enhance the Commission's oversight of SDRs by facilitating the Commission's evaluation of an SDR's financial and managerial resources. The financial reports will also assist the Commission in assessing potential conflicts of interests of a financial nature arising from the operation of an SDR.

Benefits will also accrue from requiring SDRs to file financial reports in an interactive data format. This requirement will enable the Commission and, to the extent that the data is made public, the public to analyze the reported information more quickly, more accurately, and at a lower cost. In particular, the tagged data will make it easier to aggregate information collected from SDRs and compare across SDRs and over time, which the Commission believes is important to perform its regulatory mandate and legal responsibilities.

The Commission solicited comment on the benefits related to Rules 13n–4(b)(11) and 13n–11.[1344] The Commission specifically requested comment on the benefits that would accrue from designating a CCO who would be responsible for preparing and signing an annual compliance report and reporting annually to the board and on the benefits associated with the financial reports.[1345] The Commission did not receive any comments on the benefits of these rules.

b. Costs

The establishment of a designated CCO and compliance with the accompanying responsibilities of a CCO will impose certain costs on SDRs. As discussed above, the Commission estimates that the average initial paperwork cost associated with establishing procedures for the remediation of noncompliance issues identified by the CCO and establishing and following appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues will be 420 hours and $40,000 for each SDR and the average ongoing paperwork cost will be 120 hours for each SDR.[1346] In addition, each SDR is required to retain a CCO in order to comply with the SDR Rules, at an annual cost of $873,000.[1347] Assuming a maximum of ten SDRs, the aggregate initial estimated dollar cost per year will be $1,802,000[1348] and the aggregate ongoing estimated dollar cost per year will be $9,130,800[1349] to comply with the rules.

[1337] *See* Section VI.J of this release discussing Rule 13n–11.

[1338] *See* Section VI.J.3.c of this release discussing the duties of CCOs.

[1339] *See* Section VI.J.6 of this release discussing the prohibition of undue influence on CCOs.

[1340] *See* 17 CFR 232.301.

[1341] *See* Section VI.J.5.c of this release discussing Rule 407 of Regulation S–T.

[1342] *See* Exchange Act Section 13(n)(6), 15 U.S.C. 78m(n)(6).

[1343] *See* DTCC 2, *supra* note 19 (agreeing with the Commission that "a robust internal compliance function plays an important role in facilitating an SDR's monitoring of, and compliance with, the requirements of the Exchange Act (and rules thereunder) applicable to SDRs").

[1344] *See* Proposing Release, 75 FR at 77361, *supra* note 2.

[1345] *See* Proposing Release, 75 FR at 77361, *supra* note 2.

[1346] *See* Section VII.D.6 of this release discussing the costs of Rule 13n–11.

[1347] Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2013,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a CCO is $485 per hour. Thus, the total ongoing estimated dollar cost will be $873,000 per SDR and $8,730,000 for all SDRs, calculated as follows: (CCO at $485 per hour for 1800 hours) × 10 registrants = $8,730,000.

[1348] The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Thus, the total initial estimated dollar cost will be $180,280 per SDR and $1,802,800 for all SDRs, calculated as follows: ($40,000 for outside legal services + (Compliance Attorney at $334 per hour for 420 hours)) × 10 registrants = $1,802,800.

[1349] The Commission estimates that an SDR will assign these responsibilities to a Compliance

Continued

As discussed above, the Commission estimates that the average ongoing paperwork cost associated with preparing and submitting annual compliance reports to the SDR's board pursuant to Rules 13n–11(d) and (e) will be 5 hours.[1350] Assuming a maximum of ten SDRs, the aggregate ongoing estimated dollar cost per year will be $16,700 to comply with the rules.[1351]

As discussed above, the Commission estimates that the average ongoing paperwork cost associated with preparing and filing financial reports pursuant to Rule 13n–11(f) and (g) and the amendments to Regulation S–T will be 500 hours and $500,000 for each registered SDR.[1352] Assuming a maximum of ten SDRs, the aggregate ongoing estimated dollar cost per year will be $5,990,000 to comply with the rules.[1353]

As discussed above, the Commission estimates that the average ongoing paperwork cost associated with filing annual compliance and financial reports with the Commission in a tagged data format pursuant to Rules 13n–11(d), (f), and (g), and in accordance with the amendments to Regulation S–T, will be 54 hours and $22,772 for each registered SDR.[1354] Assuming a maximum of ten SDRs, the aggregate ongoing estimated dollar cost per year will be $368,120 to comply with the rules.[1355]

The Commission believes that existing SDRs may already maintain compliance programs that are overseen by a CCO or an individual who effectively serves as a CCO.[1356] In addition, CCOs may prepare compliance reports presented to senior management and/or the SDRs' boards as part of their current business practice. SDRs are currently not subject to regulation by the Commission, and therefore, may need to enhance their compliance programs and compliance reports to comply with Rules 13n–4(b)(11) and 13n–11. Thus, SDRs may experience costs in enhancing their compliance programs and compliance reports to comply with Rules 13n–4(b)(11) and 13n–11. Moreover, because the costs discussed above represent the costs of complying with Rules 13n–4(b)(11) and 13n–11 without any existing compliance programs in place that are overseen by a CCO or an individual who effectively serves as a CCO, existing SDRs that already maintain such compliance programs may experience initial costs lower than those estimated above. However, even if an SDR has an existing compliance program overseen by a CCO, it is possible that officers, directors, and employees concerned about the prohibition in Rule 13n–11(h) (prohibiting officers, directors, and employees of an SDR from directly or indirectly taking any action to coerce, manipulate, mislead, or fraudulently influence the CCO) may want expanded liability insurance coverage. In response, an SDR may seek to acquire additional insurance coverage. The Commission acknowledges that it is possible, therefore, that Rule 13n–11(h) may result in liability insurance rates that are above what they would have been in the absence of the rule. The Commission is unable to estimate these costs given that it lacks specific information regarding current insurance costs for SDRs, the amount of the demand that there will be for increased coverage, and thereby the potential increases associated with the rule. The Commission believes that after SDRs bring their compliance programs and compliance reports into compliance with Rules 13n–4(b)(11) and 13n–11, however, the ongoing annual costs for SDRs will likely be consistent with the estimates provided above.

The Commission solicited comment on these estimates related to Rules 13n–4(b)(11) and 13n–11.[1357] The Commission specifically requested comment on the initial and ongoing costs associated with designating a CCO and the costs associated with any personnel who may be necessary to support the CCO and create the annual compliance and financial reports.[1358] One commenter stated that it is difficult to assess the incremental costs to SDRs of implementing Rule 13n–11 regarding designation of a CCO and that even with an established compliance infrastructure, the commenter believed that ''it is likely that the new requirements of Rule 13n–11 will entail additional costs, potentially including additional personnel and systems'' and the ''compliance responsibilities in an SDR will evolve (and likely increase) as the scope of transactions reported to that SDR increase, which may also result in additional incremental costs.'' [1359] The Commission agrees with the commenter's views; nevertheless the Commission has attempted to quantify the costs of compliance with the rule, as discussed above.

c. Alternatives

The Commission considered requiring that the compensation, appointment, and termination of a CCO be approved by a majority of independent board members of an SDR, a position urged by two commenters.[1360] As discussed above, the Commission believes that the rules that are intended to minimize an SDR's potential and existing conflicts of interest and to help ensure that SDRs meet core principles are sufficient at this time. Consequently, the Commission does not believe that requiring SDRs to have independent directors, and imposing the associated costs on SDRs, is warranted at this time. For these same reasons, the Commission does not believe that approval of a CCO's compensation, appointment, and termination by a majority of independent directors will provide

Attorney. Thus, the total ongoing estimated dollar cost will be $913,080 per SDR and $9,130,800 for all SDRs, calculated as follows: ($873,000 for a CCO + (Compliance Attorney at $334 per hour for 120 hours)) × 10 registrants = $9,130,800.

[1350] *See* Section VII.D.6 of this release discussing the costs of Rule 13n–11.

[1351] The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Thus, the total ongoing estimated dollar cost will be $1,670 per SDR and $16,700 for all SDRs, calculated as follows: (Compliance Attorney at $334 per hour for 5 hours) × 10 registrants = $16,700.

[1352] *See* Section VII.D.6 of this release discussing the costs of Rule 13n–11.

[1353] The Commission estimates that an SDR will assign these responsibilities to a Senior Accountant. Data from SIFMA's *Management & Professional Earnings in the Securities Industry 2013,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, suggest that the cost of a Senior Accountant is $198 per hour. Thus, the total ongoing estimated dollar cost will be $599,000 per SDR and $5,990,000 for all SDRs, calculated as follows: ($500,000 for independent public accounting services + (Senior Accountant at $198 per hour for 500 hours)) × 10 registrants = $5,990,000.

[1354] *See* Section VII.D.6 of this release discussing the costs of Rule 13n–11.

[1355] The Commission estimates that an SDR will assign these responsibilities to a Senior Systems Analyst. Thus, the total ongoing estimated dollar cost will be $36,812 per SDR and $368,120 for all SDRs, calculated as follows: ($22,772 for information technology services + (Senior Systems Analyst at $260 per hour for 54 hours)) × 10 registrants = $368,120.

[1356] *Cf.* DTCC 2, *supra* note 19 (stating that it ''has an established compliance infrastructure for its businesses . . . which includes processes for establishing and implementing required compliance policies and procedures and overseeing adherence to those procedures and a mechanism for reporting, tracking, remediating and closing compliance issues whether self-identified or identified through internal or external examinations'' and that ''[t]he Commission's proposed required practices are generally consistent with those of'' the commenter's trade repository).

[1357] *See* Proposing Release, 75 FR at 77362, *supra* note 2.

[1358] *See* Proposing Release, 75 FR at 77362, *supra* note 2.

[1359] DTCC 2, *supra* note 19.

[1360] *See* Better Markets 1, *supra* note 19 (recommending that the CCO's compensation and termination be approved by independent board members of an SDR). Similarly, one commenter suggested that only public independent directors or directors with an ''Independent Perspective,'' and not the full board, have ''the authority and sole responsibility to appoint or remove the CCO, or to materially change its duties and responsibilities.'' Barnard, *supra* note 19.

substantially greater benefits than having a majority of the board approve compensation, appointment, and termination.

Similarly, the Commission considered requiring CCOs to report directly to independent directors, as suggested by one commenter.[1361] For the reasons stated above, the Commission does not believe that requiring independent directors, and therefore requiring CCOs to report to independent directors, is warranted at this time.[1362]

The Commission considered whether it should prohibit a CCO from being the general counsel of an SDR or a member of the SDR's legal department, as suggested by two commenters.[1363] The Commission is not adopting this prohibition because, as discussed above, the Commission believes that any potential conflicts of interest can be adequately addressed by the SDR's conflicts of interest policies and procedures, which are required to be established under Rule 13n–4(c)(3).[1364] The Commission believes that SDRs should have flexibility in appointing their CCOs and that these conflicts of interest provisions are sufficient to mitigate any risks from not adopting the prohibition suggested by the commenter. Further, the Commission believes that imposing such a prohibition could impose additional costs on SDRs by requiring that they employ two different persons as general counsel and CCO, each position with its own compensation.

The Commission considered reducing the amount of information required on the annual compliance report. For example, the Commission could have not required any discussion of recommendations for material changes to policies and procedures, as suggested by one commenter.[1365] The Commission believes, however, that the benefits of obtaining all of the information required by Rule 13n–11(d) justify any burdens associated with providing such information on the annual compliance report. The information will assist Commission staff in assessing an SDR's compliance with the federal securities laws and the rules and regulations thereunder, and information about recommendations for material changes to an SDR's policies and procedures may alert the staff to material compliance issues at an SDR. Moreover, only recommendations for material changes will have to be described, which will impose a lesser burden than requiring disclosure of every recommendation.

The Commission considered, as suggested by one commenter,[1366] harmonizing with the CFTC's approach [1367] and not adopting Rule 13n–11(f)(2)'s requirement that each financial report be audited in accordance with the PCAOB's standards by a registered public accounting firm that is qualified and independent. Although the Commission understands that SDRs will incur costs in hiring and retaining qualified public accounting firms, the Commission believes that obtaining audited financial reports from SDRs is important given the significant role the Commission believes that SDRs will play in the SBS market. The Commission believes that SDRs will provide transparency to, and increase the efficiency of, the SBS market. The Commission believes that SDRs will also be an important source of market data for regulators. Given the critical nature of their role in the marketplace, the Commission believes that it is important to obtain audited financial reports from SDRs in order to determine whether or not they have sufficient financial resources to continue operations. While the Commission recognizes that Rule 13n–11(f)(2) may, in some cases, be more costly than the CFTC's requirement of quarterly unaudited financial statements, the Commission believes that the additional burden, where it exists, is justified by the benefits of requiring audited financial reports.

Finally, the Commission considered one commenter's suggestion that there should be ''[c]ompetency standards to ensure that CCOs have the background and skills necessary to fulfill their responsibilities.'' [1368] The Commission believes that, as discussed above, such standards do not need to be adopted by rule, but rather that SDRs should have flexibility in determining what standards their CCOs should meet.[1369] The Commission believes that SDRs are in the best position to judge the competency of their CCOs and select them accordingly.

7. Other Policies and Procedures Relating to an SDR's Business

The SDR Rules require SDRs to develop and maintain various policies and procedures.[1370] Rules 13n–4(b)(8) and 13n–9 require each SDR to comply with certain requirements pertaining to the privacy of SBS transaction information.[1371] Rule 13n–4(c) requires each SDR to comply with certain core principles pertaining to market access to services and data, governance arrangements, and conflicts of interest, including developing policies and procedures related to these core principles.[1372] Rule 13n–5(b)(6) requires SDRs to establish procedures and provide facilities to effectively resolve disputes.[1373]

a. Benefits

The privacy requirements set forth in Rules 13n–4(b)(8) and 13n–9 are intended to safeguard transaction information provided to SDRs by market participants. These privacy requirements make it less likely that the transaction information that market participants are required to report will expose their trading strategies or unhedged positions, which could subject them to predatory trading.

Rule 13n–4(c)(1), which relates to market access to services and data, requires that SDRs impose fair, reasonable, and consistently applied fees and maintain objective access and participation criteria. This rule is designed to help ensure that SDRs do not engage in anticompetitive behavior and assuming that the SDR Rules promote competition among SDRs, that the cost of an SDR's core and ancillary services that are passed on to market participants are competitive. Furthermore, the Commission believes that by requiring each SDR to permit market participants to access specific services offered by the SDR separately, Rule 13n–4(c)(1)(ii) may promote efficiency to the extent that it saves market participants from having to purchase ancillary services that they do not want and will not use as a condition to using an SDR's data collection and maintenance services. Rule 13n–4(c)(1)(ii) may also promote efficiency and lower costs to the extent that it promotes competition among SDRs and

[1361] *See* Better Markets 1, *supra* note 19.

[1362] *See* Section VI.D.3.b.iii of this release discussing prescriptive governance requirements and limitations.

[1363] *See* Better Markets 1, *supra* note 19; Barnard, *supra* note 19.

[1364] *See* Section VI.J.1.c of this release discussing Rule 13n–11(a).

[1365] *See* DTCC 2, *supra* note 19.

[1366] *See* DTCC 5, *supra* note 19.

[1367] *See* CFTC Rule 49.25, 17 CFR 49.25.

[1368] *See* Better Markets 3, *supra* note 19.

[1369] *See* Section VI.J.1.c of this release discussing Rule 13n–11(a).

[1370] *See* Section VIII.D.2 of this release discussing the cost and benefits associated with the policies and procedures that SDRs must develop and maintain with respect to their information systems.

[1371] *See* Section VI.I.1 of this release discussing Rule 13n–9.

[1372] *See* Section VI.D.3 of this release discussing Rule 13n–4(c).

[1373] *See* Section VI.E.6 of this release discussing Rule 13n–5(b)(6).

among SDRs and third party service providers offering ancillary services.

The governance requirements in Rule 13n–4(c)(2) are designed to reduce conflicts of interest in the management of SDRs. In addition, by requiring fair representation of market participants on the board with the opportunity to participate in the process for nominating directors and the right to petition for alternative candidates, the rule will help reduce the likelihood that an incumbent market participant will exert undue influence on the board.

While the above requirements are designed to prevent and constrain potential conflicts of interest, Rule 13n–4(c)(3) directly addresses conflicts of interest through targeted policies and procedures and an obligation to establish a process for resolving conflicts of interest. This rule will help mitigate the possibility that SDRs' business practices and internal structures might disadvantage a particular group of market participants.

The requirement in Rule 13n–5(b)(6) is designed to help ensure that SDRs maintain accurate records relating to SBSs.[1374] In addition to helping to ensure the accuracy of data maintained by SDRs, the requirement will provide a facility through which market participants could correct inaccuracies in SBS data regarding transactions to which they are a party.

Collectively, the rules described in this section will help ensure that SDRs operate consistently with the objectives set forth in the Exchange Act by providing fair, open, and not unreasonably discriminatory access to market participants without taking advantage of the SDRs' access to transaction data that market participants are required to report to the SDRs.

The Commission solicited comment on the benefits related to Rules 13n–4(c), 13n–5(b)(6), 13n–4(b)(8), and 13n–9.[1375] Other than one commenter noting that Rule 13n–5(b)(6) is a key step in the effort to have accurate data at SDRs,[1376] the Commission did not receive any comments on the estimated benefits of these rules.

b. Costs

The Commission anticipates that the costs to SDRs from Rules 13n–4(c), 13n–5(b)(6), 13n–4(b)(8), and 13n–9 will derive primarily from the costs of establishing, maintaining, and enforcing the required policies and procedures.

The governance requirements in Rule 13n–4(c)(2) could impose costs resulting from educating senior management and each director about SBS trading and reporting and the new regulatory structure that will govern SBSs, which could slow management or board processes at least initially. Existing SDRs may experience lower costs, however, to the extent that they have already educated senior management and each director about SBS trading and reporting and the new regulatory structure that will govern SBSs.

The requirement in Rule 13n–5(b)(6) will also impose costs on SDRs because SDRs are required to establish procedures and provide facilities through which market participants can challenge the accuracy of the transaction data and positions recorded in the SDRs.

Rule 13n–4(c)(1)(ii) may also impose costs on SDRs by requiring SDRs to offer services separately. If SDRs would otherwise bundle their ancillary services with their data collection and maintenance services, or vice versa, then the requirement that they offer services separately may impose costs on SDRs. These costs include the cost of building the infrastructure to offer services separately, the potential losses of economies of scope in providing bundled services, and lost revenue from fees for services that market participants would otherwise be required to purchase. Similarly, the rule may impose costs on third party service providers that would be prevented from bundling their services with the services of an SDR.

As discussed above, the Commission estimates that the average initial paperwork cost associated with Rule 13n–4(c)(1) will be 367.5 hours and $35,000 and the average ongoing cost will be 105 hours per year for each SDR.[1377] Assuming a maximum of ten SDRs, the aggregate one-time estimated dollar cost will be $1,465,550[1378] and the aggregate ongoing estimated dollar cost per year will be $320,890[1379] to comply with the rule.

As discussed above, the Commission estimates that the average initial paperwork cost associated with Rule 13n–4(c)(2) will be 210 hours and $20,000 for each SDR and the average ongoing paperwork cost will be 60 hours per year for each SDR.[1380] Assuming a maximum of ten SDRs, the aggregate one-time estimated dollar cost will be $901,400[1381] and the aggregate ongoing estimated dollar cost per year will be $200,400[1382] to comply with the rule.

As discussed above, the Commission estimates that the average initial paperwork cost associated with Rule 13n–4(c)(3) will be 420 hours and $40,000 for each SDR and the average ongoing paperwork cost will be 120 hours per year for each SDR.[1383] Assuming a maximum of ten SDRs, the aggregate one-time estimated dollar cost will be $1,802,800[1384] and the aggregate ongoing estimated dollar cost per year will be $400,800[1385] to comply with the rule.

As discussed above, the Commission estimates that the average initial paperwork cost associated with Rule 13n–5(b)(6) will be 315 hours and $30,000 for each SDR and the average

[1374] *See* Exchange Act Section 13(n)(5)(B), 15 U.S.C. 78m(n)(5)(B) (requiring an SDR to confirm, as prescribed in Rule 13n–5, with both counterparties to the SBS the accuracy of the data that was submitted); Exchange Act Section 13(n)(5)(C), 15 U.S.C. 78m(n)(5)(C) (requiring SDRs to maintain SBS data).

[1375] *See* Proposing Release, 75 FR at 77363, *supra* note 2.

[1376] MFA 1, *supra* note 19; *see also* MFA SBSR, *supra* note 27.

[1377] *See* Section VII.D.7 of this release discussing costs of Rules 13n–4(c)(1)(iii) and (iv).

[1378] The Commission estimates that an SDR will assign these responsibilities to a Compliance Manager, an Attorney, a Senior Systems Analyst, and an Operations Specialist. Thus, the total initial estimated dollar cost will be $146,555 per SDR and $1,465,550 for all SDRs, calculated as follows: ($35,000 for outside legal services + (Compliance Manager at $283 per hour for 135 hours) + (Attorney at $380 per hour for 152.5 hours) + (Senior Systems Analyst at $260 per hour for 40 hours) + (Operations Specialist at $125 per hour for 40 hours)) × 10 registrants = $1,465,550.

[1379] The Commission estimates that an SDR will assign these responsibilities to a Compliance Manager, an Attorney, a Senior Systems Analyst, and an Operations Specialist. Thus, the total ongoing estimated dollar cost will be $32,089 per SDR and $320,890 for all SDRs, calculated as follows: ((Compliance Manager at $283 per hour for 38 hours) + (Attorney at $380 per hour for 45 hours) + (Senior Systems Analyst at $260 per hour for 11 hours) + (Operations Specialist at $125 per hour for 11 hours)) × 10 registrants = $320,890.

[1380] *See* Section VII.D.7 of this release discussing costs of Rule 13n–4(c)(2)(iv).

[1381] The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Thus, the total initial estimated dollar cost will be $90,140 per SDR and $901,400 for all SDRs, calculated as follows: ($20,000 for outside legal services + (Compliance Attorney at $334 per hour for 210 hours)) × 10 registrants = $901,400.

[1382] The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Thus, the total ongoing estimated dollar cost will be $20,040 per SDR and $200,400 for all SDRs, calculated as follows: (Compliance Attorney at $334 per hour for 60 hours) × 10 registrants = $200,400.

[1383] *See* Section VII.D.7 of this release discussing costs of Rule 13n–4(c)(3).

[1384] The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Thus, the total initial estimated dollar cost will be $180,280 per SDR and $1,802,800 for all SDRs, calculated as follows: ($40,000 for outside legal services + (Compliance Attorney at $334 per hour for 420 hours)) × 10 registrants = $1,802,800.

[1385] The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Thus, the total ongoing estimated dollar cost will be $40,080 per SDR and $400,800 for all SDRs, calculated as follows: (Compliance Attorney at $334 per hour for 120 hours) × 10 registrants = $400,800.

ongoing paperwork cost will be 90 hours per year for each SDR.[1386] Assuming a maximum of ten SDRs, the aggregate one-time estimated dollar cost will be $1,352,100 [1387] and the aggregate ongoing estimated dollar cost per year will be $300,600 [1388] to comply with the rule.

As discussed above, the Commission estimates that the average initial paperwork cost associated with Rules 13n–4(b)(8) and 13n–9 will be 630 hours and $60,000 for each SDR and the average ongoing paperwork cost will be 180 hours per year for each SDR.[1389] Assuming a maximum of ten SDRs, the aggregate one-time estimated dollar cost will be $2,704,200 [1390] and the aggregate ongoing estimated dollar cost per year will be $601,200 [1391] to comply with the rules.

The Commission solicited comment on the costs related to Rules 13n–4(c), 13n–5(b)(6), 13n–4(b)(8), and 13n–9.[1392] The Commission specifically requested comment on the initial and ongoing costs associated with establishing and maintaining the policies and procedures required by the rules, particularly as the costs apply to persons currently operating as SDRs.[1393] One commenter believed that an interpretation of Rule 13n–4(c)(1)(i) that prohibits the use of the ''dealer pays'' or ''sell-side pays'' model ''would have the unintended consequence of significantly increasing the costs for buy-side participants . . . .'' [1394] Because, as discussed above, Rule 13n–4(c)(1)(i) is not intended to prohibit an SDR from utilizing any one particular model, including a ''dealer pays'' or ''sell-side pays'' model, the Commission does not believe that the rule will necessarily increase costs for buy-side participants, as stated by the commenter.[1395] The Commission further believes that if there is significant demand by buy-side participants with reporting responsibility for a ''dealer pays'' model, then an SDR is likely to provide such a service.

A commenter to proposed Regulation SBSR suggested that SDRs should not be permitted to charge fees to third parties acting on behalf of counterparties for accepting SBS transaction information, as such fees would increase the cost of using an SB SEF or other third party.[1396] Although the Commission agrees that an SB SEF or other third party could pass along fees charged by SDRs, the Commission does not believe that it is appropriate to determine who an SDR can charge for its services. Rather, the Commission believes that SDRs should have flexibility in determining how and whom to charge for their services, and that any costs associated with such flexibility are justified by the benefits of allowing SDRs to develop sustainable business models in an open, competitive environment.

The Commission believes that existing SDRs may already have in place policies and procedures similar to the policies and procedures required by Rules 13n–4(c), 13n–5(b)(6), 13n–4(b)(8), and 13n–9. Such persons are currently not subject to regulation by the Commission, and therefore, may need to enhance their policies and procedures to comply with Rules 13n–4(c), 13n–5(b)(6), 13n–4(b)(8), and 13n–9. Thus, such persons may experience costs in enhancing their policies and procedures to comply with Rules 13n–4(c), 13n–5(b)(6), 13n–4(b)(8), and 13n–9. Moreover, because the costs discussed above represent the costs of creating policies and procedures without any existing policies and procedures in place, existing SDRs that already have policies and procedures may experience initial costs lower than those estimated above. The Commission believes that after such persons bring their policies and procedures into compliance with Rules 13n–4(c), 13n–5(b)(6), 13n–4(b)(8), and 13n–9, however, the ongoing annual costs for such persons will likely be consistent with the estimates provided above.

c. Alternatives

As suggested by a commenter, the Commission considered (1) adding safeguards specifically related to confidentiality of trading positions and (2) requiring SDRs to adopt policies and procedures to limit access to confidential information to directors, officers, employees, agents, and representatives who need to know such information in order to fulfill their regulatory obligations.[1397] As discussed above, the Commission believes that Rules 13n–4(b)(8) and 13n–9, as adopted, are broad enough to cover information about trading positions, so no specific requirement regarding confidentiality of trading positions is necessary.[1398] The Commission also believes that the rules are broad enough to allow SDRs, if they choose, to adopt policies and procedures to limit access to confidential information to directors, officers, employees, agents, and representatives who need to know such information in order to fulfill their regulatory obligations. The Commission believes that the adoption of the specific policies that were suggested by the commenter would prevent an SDR's management from finding the most cost effective method of meeting the privacy requirements in these rules.

The Commission considered, as an alternative to Rules 13n–4(c)(2) and (3), adopting, as suggested by two commenters, prescriptive rules relating to governance (*e.g.,* ownership or voting limitations, independent directors, nominating committees composed of a majority of independent directors).[1399] As discussed above, the Commission believes that rules that are intended to minimize an SDR's potential and existing conflicts of interest and to help ensure that an SDR meets its core principles are sufficient and that prescriptive governance requirements are not warranted at this time.[1400] If the Commission were to impose additional governance requirements and limitations, SDRs would likely incur costs in addition to the costs already imposed by the SDR Rules, which do not seem to be warranted at this time. For these reasons, the Commission is

[1386] *See* Section VII.D.7 of this release discussing costs of Rule 13n–5(b)(6).

[1387] The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Thus, the total initial estimated dollar cost will be $135,210 per SDR and $1,352,100 for all SDRs, calculated as follows: ($30,000 for outside legal services + (Compliance Attorney at $334 per hour for 315 hours)) × 10 registrants = $1,352,100.

[1388] The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Thus, the total initial estimated dollar cost will be $30,060 per SDR and $300,600 for all SDRs, calculated as follows: (Compliance Attorney at $334 per hour for 90 hours) × 10 registrants = $300,600.

[1389] *See* Section VII.D.7 of this release discussing costs of Rules 13n–4(b)(8), 13n–9(b)(1), and 13n–9(b)(2).

[1390] The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Thus, the total initial estimated dollar cost will be $270,420 per SDR and $2,704,200 for all SDRs, calculated as follows: ($60,000 for outside legal services + (Compliance Attorney at $334 per hour for 630 hours)) × 10 registrants = $2,704,200.

[1391] The Commission estimates that an SDR will assign these responsibilities to a Compliance Attorney. Thus, the total ongoing estimated dollar cost will be $60,120 per SDR and $601,200 for all SDRs, calculated as follows: (Compliance Attorney at $334 per hour for 180 hours) × 10 registrants = $601,200.

[1392] *See* Proposing Release 75 FR at 77364, *supra* note 2.

[1393] *See* Proposing Release 75 FR at 77364, *supra* note 2.

[1394] MarkitSERV, *supra* note 19.

[1395] *See* Section VI.D.3.a.iii(1) of this release discussing Rule 13n–4(c)(1)(i).

[1396] Tradeweb SBSR, *supra* note 27.

[1397] *See* MFA 1, *supra* note 19.

[1398] *See* Sections VI.D.2.c and VI.I.1.c of this release discussing Rules 13n–4(b)(8) and 13n–9, respectively.

[1399] *See* Barnard, *supra* note 19; Better Markets 1, *supra* note 19; *see also* Better Markets 2, *supra* note 19.

[1400] *See* Sections VI.D.3.b.iii and VI.D.3.c.iii of this release discussing Rules 13n–4(c)(2) and 13n–4(c)(3), respectively.

not adopting the alternative to Rules 13n–4(c)(2) and (3) of more prescriptive governance arrangements.

The Commission considered whether the resolution of disputes should be left primarily to the SBS counterparties and third party service providers, which one commenter suggested.[1401] The Commission believes that the benefits of a dispute resolution procedure in Rule 13n–5(b)(6) justify the possible issues cited by the commenter, such as duplication of services already provided by third party service providers. As discussed above, there may be instances where a third party service provider cannot resolve a dispute, and, in those situations, the cost of dispute resolution through the SDR will be necessary to maintain the accuracy and quality of the SBS data.[1402] The value of the SBS data depends on its accuracy and quality.

The Commission also considered prohibiting the commercial use of SBS data by SDRs unless the parties to the SBS provide written consent. Three commenters, including two commenters to proposed Regulation SBSR, also suggested that SDRs be prohibited from using SBS data for commercial purposes.[1403] As discussed above, the Commission believes that limiting the commercial use of SBS data would potentially limit the business models that SDRs may develop, thereby reducing competition.[1404] Decreased competition may result in higher costs for SDR services. Limiting the commercial use of SBS data would reduce SDRs' potential revenue streams, reducing the profitability and stability of SDRs. Further, as discussed above, such a limitation may decrease transparency by preventing an SDR from releasing to the public anonymized, aggregated reports of SBS data.[1405] Finally, the Commission believes that the SDR Rules, including Rules 13n–4(c)(3) and 13n–9, are sufficient to reduce conflicts of interest and protect the privacy of SBS data. For these reasons, the Commission is not adopting the alternative of limiting the commercial use of SBS data.

8. Total Costs

Based on the analyses described above, the Commission estimates that Rules 13n–1 through 13n–11 and Form SDR will impose on registered SDRs an aggregate total initial one-time estimated dollar cost of $227,075,600.50.[1406] The Commission further estimates that Rules 13n–1 through 13n–11 and Form SDR will impose on registered SDRs a total ongoing annualized aggregate dollar cost of $145,630,646.10.[1407] Finally, the Commission estimates that certain non-U.S. persons may incur an aggregate total initial one-time estimated dollar cost of approximately $7,600 [1408] in determining the availability of the SDR Exemption (*i.e.,* Rule 13n–12).

Existing SDRs may experience costs lower than these estimates. Such persons may have in place existing technology systems, policies and procedures, personnel, and compliance regimes that they can use to comply with the SDR Rules. Because the estimates discussed above represent the costs of compliance starting from scratch, an existing SDR will most likely experience costs lower than these estimates.

Similarly, if such a person is registered with the CFTC as a swap data repository, the person's costs of complying with the SDR Rules will most likely be lower than the estimates provided above because the person may be able to use its existing policies, procedures, and operations to comply with the SDR Rules. As stated above, the Commission believes that on the whole, the SDR Rules are largely consistent with the rules adopted by the CFTC for swap data repositories.[1409] Consequently, a person registered with the CFTC as a swap data repository may be able to use its existing policies, procedures, and operations to comply with the SDR Rules and may not need to create policies, procedures, and operations from scratch.

IX. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act (''RFA'') [1410] requires Federal agencies, in promulgating rules, to consider the impact of those rules on small entities. Section 603(a) [1411] of the Administrative Procedure Act,[1412] as amended by the RFA, generally requires the Commission to undertake a regulatory flexibility analysis of all proposed rules, or proposed rule amendments, to determine the impact of such rulemaking on ''small entities.'' [1413] Section 605(b) of the RFA states that this requirement does not apply to any final rule that an agency certifies will not ''have a significant economic impact on a substantial number of small entities.'' [1414]

For purposes of Commission rulemaking in connection with the RFA, a small entity includes: (1) An issuer or a person, other than an investment company, that, on the last day of its most recent fiscal year, had total assets of $5 million or less and (2) a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to Exchange Act Rule 17a–5(d), or, if not required to file such statements, a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the last business day of the preceding fiscal year (or in the time that it has been in business, if shorter); and is not affiliated with any person (other than a natural person) that is not a small entity.[1415]

In the Proposing Release, the Commission stated that it did not believe that any persons that would register as SDRs would be considered small entities.[1416] The Commission stated that it believed that most, if not

[1401] *See* DTCC 2, *supra* note 19.

[1402] *See* Section VI.E.6.c of this release discussing Rule 13n–5(b)(6).

[1403] *See* MFA 1, *supra* note 19; DTCC SBSR, *supra* note 27; WMBAA SBSR, *supra* note 27.

[1404] *See* Section VI.D.3.c.iii of this release discussing Rule 13n–4(c)(3).

[1405] *See* Section VI.D.3.c.iii of this release discussing Rule 13n–4(c)(3).

[1406] The Commission derived its estimate from the following: ($801,688 ($793,840 + $3,840 + $4,008) for Registration Requirements and Form SDR) + ($214,995,300 ($210,810,000 + $4,185,300) for SDR Duties, Data Collection and Maintenance, and Direct Electronic Access) + ($986,600 for Recordkeeping) + ($263,162.50 for Disclosure) + ($1,802,800 for Chief Compliance Officer and Compliance Functions) + ($8,226,050 ($1,465,550 + $901,400 + $1,802,800 + $1,352,100 + 2,704,200) for Other Policies and Procedures Relating to an SDR's Business) = $227,075,600.50.

[1407] The Commission derived its estimate from the following: ($55,440 for Registration Requirements and Form SDR) + ($127,451,400 ($126,486,000 + $965,400) for SDR Duties, Data Collection and Maintenance, and Direct Electronic Access) + ($790,051.10 for Recordkeeping) + ($2,510 for Reports) + ($1,735 for Disclosure) + ($15,505,620 ($9,130,800 + $16,700 + $5,990,000 + $368,120) for Chief Compliance Officer and Compliance Functions) + ($1,823,890 ($320,890 + $200,400 + $400,800 + $300,600 + $601,200) for Other Policies and Procedures Relating to an SDR's Business) = $145,630,646.10.

[1408] The Commission derived its estimate from the following: ($380 for one hour of an Attorney's time per person) × (20 non-U.S. persons that perform the functions of an SDR using in-house legal counsel to determine whether an applicable MOU or arrangement is in place).

[1409] *See* Section I.D of this release.

[1410] 5 U.S.C. 601 *et seq.*

[1411] 5 U.S.C. 603(a).

[1412] 5 U.S.C. 551 *et seq.*

[1413] Although Section 601(b) of the RFA defines the term ''small entity,'' the statute permits agencies to formulate their own definitions. The Commission has adopted definitions for the term small entity for the purposes of Commission rulemaking in accordance with the RFA. Those definitions, as relevant to this rulemaking, are set forth in Rule 0–10, 17 CFR 240.0–10. *See* Final Definitions of ''Small Business'' and ''Small Organization'' for Purposes of the Regulatory Flexibility Act, Exchange Act Release No. 18451 (Jan. 28, 1982), 47 FR 5215 (Feb. 4, 1982).

[1414] *See* 5 U.S.C. 605(b).

[1415] 17 CFR 240.0–10.

[1416] Proposing Release, 75 FR at 77365, *supra* note 2.

all, SDRs would be part of large business entities with assets in excess of $5 million and total capital in excess of $500,000. As a result, the Commission certified that the proposed rules would not have a significant impact on a substantial number of small entities and requested comments on this certification.

The Commission did not receive any comments that specifically addressed whether Rules 13n–1 through 13n–12 and Form SDR would have a significant economic impact on small entities. Therefore, the Commission continues to believe that Rules 13n–1 through 13n–12 and Form SDR will not have a significant economic impact on a substantial number of small entities.[1417] Accordingly, the Commission hereby certifies that, pursuant to 5 U.S.C. 605(b), Rules 13n–1 through 13n–12, Form SDR will not have a significant economic impact on a substantial number of small entities.

X. Statutory Authority

Pursuant to the Exchange Act, and particularly Sections 13(n) and 23(a) thereof, 15 U.S.C. 78m(n) and 78w(a), the Commission is adopting new Rules 13n–1 to 13n–12, which govern SDRs and a new form for registration as an SDR. Additionally, the Commission is adopting new Rule 407 and amendments to Regulation S–T under authority set forth in Exchange Act Section 23(a).[1418] The Commission is also adopting amendments to Exchange Act Rule 24b–2 under authority set forth in Exchange Act Section 23(a).[1419] All the new rules and amendments are adopted under Chapter II of Title 17 of the Code of Federal Regulations in the manner set forth below.

List of Subjects

17 CFR Part 232

Reporting and recordkeeping requirements.

17 CFR Parts 240 and 249

Confidential business information, Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

[1417] *See* Proposing Release, 75 FR at 77365, *supra* note 2.

[1418] 15 U.S.C. 78w(a).

[1419] 15 U.S.C. 78w(a).

PART 232—REGULATION S–T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

■ 1. The authority citation for part 232 continues to read, in part, as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77z–3, 77sss(a), 78c(b), 78*l*, 78m, 78n, 78*o*(d), 78w(a), 78*ll*, 80a–6(c), 80a–8, 80a–29, 80a–30, 80a–37, and 7201 *et seq.;* and 18 U.S.C. 1350.

* * * * *

■ 2. Section 232.11 is amended by adding the definitions of ''Interactive Data Financial Report'' and ''Related Official Financial Report Filing'' in alphabetical order to read as follows:

§ 232.11 Definition of terms used in part 232.

* * * * *

Interactive Data Financial Report. The term *Interactive Data Financial Report* means the machine-readable computer code that presents information in eXtensible Business Reporting Language (XBRL) electronic format pursuant to § 232.407.

* * * * *

Related Official Financial Report Filing. The term *Related Official Financial Report* Filing means the ASCII or HTML format part of the official filing with which an Interactive Data Financial Report appears as an exhibit.

* * * * *

■ 3. Section 232.101 is amended by:

■ a. Removing, in paragraph (a)(1)(xv), the word ''and'' after the semicolon;

■ b. In paragraph (a)(1)(xvi), removing the period and adding in its place a semicolon, and adding the word ''and'' after the semicolon;

■ c. Adding paragraph (a)(1)(xvii);

■ d. Revising paragraph (c) introductory text; and

■ e. Adding paragraph (d).

The additions and revision read as follows:

§ 232.101 Mandated electronic submissions and exceptions.

(a) * * *

(1) * * *

(xvii) Documents filed with the Commission pursuant to section 13(n) of the Exchange Act (15 U.S.C. 78m(n)) and the rules and regulations thereunder, including Form SDR (17 CFR 249.1500) and reports filed pursuant to Rules 13n–11(d) and (f) (17 CFR 240.13n–11(d) and (f)) under the Exchange Act.

* * * * *

(c) *Documents to be submitted in paper only.* Except as otherwise specified in paragraph (d) of this section, the following shall not be submitted in electronic format:

* * * * *

(d) All documents, including any information with respect to which confidential treatment is requested, filed pursuant to section 13(n) of the Exchange Act (15 U.S.C. 78m(n)) and the rules and regulations thereunder shall be filed in electronic format.

■ 4. Section 232.305 is amended by revising paragraph (b) to read as follows:

§ 232.305 Number of characters per line; tabular and columnar information.

* * * * *

(b) Paragraph (a) of this section does not apply to HTML documents, Interactive Data Files (§ 232.11), Interactive Data Financial Reports (§ 232.11) or XBRL-Related Documents (§ 232.11).

■ 5. Section 232.407 is added to read as follows:

§ 232.407 Interactive data financial report filings.

Section 407 of Regulation S–T (§ 232.407) applies to electronic filers that file Interactive Data Financial Reports (§ 232.11) as required by Rule 13n–11(f)(5) (§ 240.13n–11(f)(5) of this chapter). Section 407 imposes content, format, and filing requirements for Interactive Data Financial Reports, but does not change the substantive content requirements for the financial and other disclosures in the Related Official Financial Report Filing (§ 232.11). Rule 13n–11(f)(5) specifies the circumstances under which an Interactive Data Financial Report must be filed as an exhibit.

(a) *Content, format, and filing requirements—General.* Interactive Data Financial Reports must:

(1) Comply with the content, format, and filing requirements of this section;

(2) Be filed only by an electronic filer that is required to file an Interactive Data Financial Report pursuant to Rule 13n–11(f)(5) (§ 240.13n–11(f)(5) of this chapter) as an exhibit to a filing; and

(3) Be filed in accordance with the EDGAR Filer Manual and Rules 13n–11(f)(5) and (g) (§ 240.13n–11(f)(5) and (g) of this chapter).

(b) *Content—categories of information presented.* An Interactive Data Financial Report must consist of only a complete set of information for all periods required to be presented in the corresponding data in the Related Official Financial Report Filing, no more and no less, for the following categories, as applicable:

(1) The complete set of the electronic filer's financial statements (which

includes the face of the financial statements and all footnotes); and

(2) All schedules set forth in Article 12 of Regulation S–X (§§ 210.12–01 through 210.12–29 of this chapter) related to the electronic filer's financial statements.

Note to paragraph (b): It is not permissible for the Interactive Data Financial Report to present only partial face financial statements, such as by excluding comparative financial information for prior periods.

(c) *Format—Generally.* An Interactive Data Financial Report must comply with the following requirements, except as modified by paragraph (d) or (e) of this section, as applicable, with respect to the corresponding data in the Related Official Financial Report Filing consisting of footnotes to financial statements or financial statement schedules as set forth in Article 12 of Regulation S–X (§§ 210.12–01 through 210.12–29 of this chapter):

(1) *Data elements and labels*—(i) *Element accuracy.* Each data element (*i.e.,* all text, line item names, monetary values, percentages, numbers, dates and other labels) contained in the Interactive Data Financial Report reflects the same information in the corresponding data in the Related Official Financial Report Filing;

(ii) *Element specificity.* No data element contained in the corresponding data in the Related Official Financial Report Filing is changed, deleted or summarized in the Interactive Data Financial Report;

(iii) *Standard and special labels and elements.* Each data element contained in the Interactive Data Financial Report is matched with an appropriate tag from the most recent version of the standard list of tags specified by the EDGAR Filer Manual. A tag is appropriate only when its standard definition, standard label, and other attributes as and to the extent identified in the list of tags match the information to be tagged, except that:

(A) *Labels.* An electronic filer must create and use a new special label to modify a tag's existing standard label when that tag is an appropriate tag in all other respects (*i.e.*, in order to use a tag from the standard list of tags only its label needs to be changed); and

(B) *Elements.* An electronic filer must create and use a new special element if and only if an appropriate tag does not exist in the standard list of tags for reasons other than or in addition to an inappropriate standard label; and

(2) *Additional mark-up related content.* The Interactive Data Financial Report contains any additional mark-up related content (*e.g.*, the eXtensible Business Reporting Language tags themselves, identification of the core XML documents used and other technology-related content) not found in the corresponding data in the Related Official Financial Report Filing that is necessary to comply with the EDGAR Filer Manual requirements.

(d) *Format—Footnotes—Generally.* The part of the Interactive Data Financial Report for which the corresponding data in the Related Official Financial Report Filing consists of footnotes to financial statements must comply with the requirements of paragraphs (c)(1) and (2) of this section, as modified by this paragraph (d). Each complete footnote must be block-text tagged.

(e) *Format—Schedules—Generally.* The part of the Interactive Data Financial Report for which the corresponding data in the Related Official Financial Report Filing consists of financial statement schedules as set forth in Article 12 of Regulation S–X (§§ 210.12–01 through 210.12–29 of this chapter) must comply with the requirements of paragraphs (c)(1) and (2) of this section, as modified by this paragraph (e). Each complete schedule must be block-text tagged.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 6. The general authority citation for Part 240 is revised to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c–3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78n–1, 78*o*, 78*o*–4, 78*o*–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78*ll*, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, 7201 *et seq.*, and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; and Pub. L. 111–203, 939A, 124 Stat. 1376 (2010), unless otherwise noted.

* * * * *

■ 7. Sections 240.13n–1 through 240–13n–12 are added to read as follows:

Sec.

240.13n–1 Registration of security-based swap data repository.
240.13n–2 Withdrawal from registration; revocation and cancellation.
240.13n–3 Registration of successor to registered security-based swap data repository.
240.13n–4 Duties and core principles of security-based swap data repository.
240.13n–5 Data collection and maintenance.
240.13n–6 Automated systems.
240.13n–7 Recordkeeping of security-based swap data repository.
240.13n–8 Reports to be provided to the Commission.
240.13n–9 Privacy requirements of security-based swap data repository.
240.13n–10 Disclosure requirements of security-based swap data repository.
240.13n–11 Chief compliance officer of security-based swap data repository; compliance reports and financial reports.
240.13n–12 Exemption from requirements governing security-based swap data repositories for certain non-U.S. persons.

§ 240.13n–1 Registration of security-based swap data repository.

(a) *Definitions.* For purposes of this section —

(1) *Non-resident security-based swap data repository* means:

(i) In the case of an individual, one who resides in or has his principal place of business in any place not in the United States;

(ii) In the case of a corporation, one incorporated in or having its principal place of business in any place not in the United States; or

(iii) In the case of a partnership or other unincorporated organization or association, one having its principal place of business in any place not in the United States.

(2) *Tag* (including the term *tagged*) has the same meaning as set forth in Rule 11 of Regulation S–T (17 CFR 232.11).

(b) An application for the registration of a security-based swap data repository and all amendments thereto shall be filed electronically in a tagged data format on Form SDR (17 CFR 249.1500) with the Commission in accordance with the instructions contained therein. As part of the application process, each security-based swap data repository shall provide additional information to any representative of the Commission upon request.

(c) Within 90 days of the date of the publication of notice of the filing of such application (or within such longer period as to which the applicant consents), the Commission shall –

(1) By order grant registration; or

(2) Institute proceedings to determine whether registration should be granted or denied. Such proceedings shall include notice of the issues under consideration and opportunity for hearing on the record and shall be concluded within 180 days of the date of the publication of notice of the filing of the application for registration under paragraph (b) of this section. At the conclusion of such proceedings, the Commission, by order, shall grant or deny such registration. The Commission may extend the time for conclusion of such proceedings for up to 90 days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the applicant consents.

(3) The Commission shall grant the registration of a security-based swap data repository if the Commission finds that such security-based swap data repository is so organized, and has the capacity, to be able to assure the prompt, accurate, and reliable performance of its functions as a security-based swap data repository, comply with any applicable provision of the federal securities laws and the rules and regulations thereunder, and carry out its functions in a manner consistent with the purposes of section 13(n) of the Act (15 U.S.C. 78m(n)) and the rules and regulations thereunder. The Commission shall deny the registration of a security-based swap data repository if it does not make any such finding.

(d) If any information reported in items 1 through 17, 26, and 48 of Form SDR (17 CFR 249.1500) or in any amendment thereto is or becomes inaccurate for any reason, whether before or after the registration has been granted, the security-based swap data repository shall promptly file an amendment on Form SDR updating such information. In addition, the security-based swap data repository shall annually file an amendment on Form SDR within 60 days after the end of each fiscal year of such security-based swap data repository.

(e) Each security-based swap data repository shall designate and authorize on Form SDR an agent in the United States, other than a Commission member, official, or employee, who shall accept any notice or service of process, pleadings, or other documents in any action or proceedings brought against the security-based swap data repository to enforce the federal securities laws and the rules and regulations thereunder.

(f) Any non-resident security-based swap data repository applying for registration pursuant to this section shall:

(1) Certify on Form SDR that the security-based swap data repository can, as a matter of law, and will provide the Commission with prompt access to the books and records of such security-based swap data repository and can, as a matter of law, and will submit to onsite inspection and examination by the Commission, and

(2) Provide an opinion of counsel that the security-based swap data repository can, as a matter of law, provide the Commission with prompt access to the books and records of such security-based swap data repository and can, as a matter of law, submit to onsite inspection and examination by the Commission.

(g) An application for registration or any amendment thereto that is filed pursuant to this section shall be considered a ''report'' filed with the Commission for purposes of sections 18(a) and 32(a) of the Act (15 U.S.C. 78r(a) and 78ff(a)) and the rules and regulations thereunder and other applicable provisions of the United States Code and the rules and regulations thereunder.

§ 240.13n–2 Withdrawal from registration; revocation and cancellation.

(a) *Definition.* For purposes of this section, *tag* (including the term *tagged*) has the same meaning as set forth in Rule 11 of Regulation S–T (17 CFR 232.11).

(b) A registered security-based swap data repository may withdraw from registration by filing a withdrawal from registration on Form SDR (17 CFR 249.1500) electronically in a tagged data format. The security-based swap data repository shall designate on Form SDR a person to serve as the custodian of the security-based swap data repository's books and records. When filing a withdrawal from registration on Form SDR, a security-based swap data repository shall update any inaccurate information.

(c) A withdrawal from registration filed by a security-based swap data repository shall become effective for all matters (except as provided in this paragraph (c)) on the 60th day after the filing thereof with the Commission, within such longer period of time as to which such security-based swap data repository consents or which the Commission, by order, may determine as necessary or appropriate in the public interest or for the protection of investors, or within such shorter period of time as the Commission may determine.

(d) A withdrawal from registration that is filed pursuant to this section shall be considered a ''report'' filed with the Commission for purposes of sections 18(a) and 32(a) of the Act (15 U.S.C. 78r(a) and 78ff(a)) and the rules and regulations thereunder and other applicable provisions of the United States Code and the rules and regulations thereunder.

(e) If the Commission finds, on the record after notice and opportunity for hearing, that any registered security-based swap data repository has obtained its registration by making any false and misleading statements with respect to any material fact or has violated or failed to comply with any provision of the federal securities laws and the rules and regulations thereunder, the Commission, by order, may revoke the registration. Pending final determination of whether any registration shall be revoked, the Commission, by order, may suspend such registration, if such suspension appears to the Commission, after notice and opportunity for hearing on the record, to be necessary or appropriate in the public interest or for the protection of investors.

(f) If the Commission finds that a registered security-based swap data repository is no longer in existence or has ceased to do business in the capacity specified in its application for registration, the Commission, by order, may cancel the registration.

§ 240.13n–3 Registration of successor to registered security-based swap data repository.

(a) In the event that a security-based swap data repository succeeds to and continues the business of a security-based swap data repository registered pursuant to section 13(n) of the Act (15 U.S.C. 78m(n)), the registration of the predecessor shall be deemed to remain effective as the registration of the successor if, within 30 days after such succession, the successor files an application for registration on Form SDR (17 CFR 249.1500), and the predecessor files a withdrawal from registration on Form SDR; *provided, however,* that the registration of the predecessor security-based swap data repository shall cease to be effective 90 days after the publication of notice of the filing of the application for registration on Form SDR filed by the successor security-based swap data repository.

(b) Notwithstanding paragraph (a) of this section, if a security-based swap data repository succeeds to and continues the business of a registered predecessor security-based swap data repository, and the succession is based solely on a change in the predecessor's date or state of incorporation, form of organization, or composition of a partnership, the successor may, within 30 days after the succession, amend the registration of the predecessor security-based swap data repository on Form SDR (17 CFR 249.1500) to reflect these changes. This amendment shall be deemed an application for registration filed by the predecessor and adopted by the successor.

§ 240.13n–4 Duties and core principles of security-based swap data repository.

(a) *Definitions.* For purposes of this section—

(1) *Affiliate* of a security-based swap data repository means a person that, directly or indirectly, controls, is

controlled by, or is under common control with the security-based swap data repository.

(2) *Board* means the board of directors of the security-based swap data repository or a body performing a function similar to the board of directors of the security-based swap data repository.

(3) *Control* (including the terms *controlled by* and *under common control with*) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise. A person is presumed to control another person if the person:

(i) Is a director, general partner, or officer exercising executive responsibility (or having similar status or functions);

(ii) Directly or indirectly has the right to vote 25 percent or more of a class of voting securities or has the power to sell or direct the sale of 25 percent or more of a class of voting securities; or

(iii) In the case of a partnership, has the right to receive, upon dissolution, or has contributed, 25 percent or more of the capital.

(4) *Director* means any member of the board.

(5) *Direct electronic access* means access, which shall be in a form and manner acceptable to the Commission, to data stored by a security-based swap data repository in an electronic format and updated at the same time as the security-based swap data repository's data is updated so as to provide the Commission or any of its designees with the ability to query or analyze the data in the same manner that the security-based swap data repository can query or analyze the data.

(6) *Market participant* means any person participating in the security-based swap market, including, but not limited to, security-based swap dealers, major security-based swap participants, and any other counterparties to a security-based swap transaction.

(7) *Nonaffiliated third party* of a security-based swap data repository means any person except:

(i) The security-based swap data repository;

(ii) Any affiliate of the security-based swap data repository; or

(iii) A person employed by a security-based swap data repository and any entity that is not the security-based swap data repository's affiliate (and ''nonaffiliated third party'' includes such entity that jointly employs the person).

(8) *Person associated with a security-based swap data repository* means:

(i) Any partner, officer, or director of such security-based swap data repository (or any person occupying a similar status or performing similar functions);

(ii) Any person directly or indirectly controlling, controlled by, or under common control with such security-based swap data repository; or

(iii) Any employee of such security-based swap data repository.

(b) *Duties.* To be registered, and maintain registration, as a security-based swap data repository, a security-based swap data repository shall:

(1) Subject itself to inspection and examination by any representative of the Commission;

(2) Accept data as prescribed in Regulation SBSR (17 CFR 242.900 through 242.909) for each security-based swap;

(3) Confirm, as prescribed in Rule 13n–5 (§ 240.13n–5), with both counterparties to the security-based swap the accuracy of the data that was submitted;

(4) Maintain, as prescribed in Rule 13n–5, the data described in Regulation SBSR in such form, in such manner, and for such period as provided therein and in the Act and the rules and regulations thereunder;

(5) Provide direct electronic access to the Commission (or any designee of the Commission, including another registered entity);

(6) Provide the information described in Regulation SBSR in such form and at such frequency as prescribed in Regulation SBSR to comply with the public reporting requirements set forth in section 13(m) of the Act (15 U.S.C. 78m(m)) and the rules and regulations thereunder;

(7) At such time and in such manner as may be directed by the Commission, establish automated systems for monitoring, screening, and analyzing security-based swap data;

(8) Maintain the privacy of any and all security-based swap transaction information that the security-based swap data repository receives from a security-based swap dealer, counterparty, or any registered entity as prescribed in Rule 13n–9 (§ 240.13n–9); and

(9) [Reserved]

(10) [Reserved]

(11) Designate an individual to serve as a chief compliance officer.

(c) *Compliance with core principles.* A security-based swap data repository shall comply with the core principles as described in this paragraph.

(1) *Market access to services and data.* Unless necessary or appropriate to achieve the purposes of the Act and the rules and regulations thereunder, the security-based swap data repository shall not adopt any policies or procedures or take any action that results in an unreasonable restraint of trade or impose any material anticompetitive burden on the trading, clearing, or reporting of transactions. To comply with this core principle, each security-based swap data repository shall:

(i) Ensure that any dues, fees, or other charges imposed by, and any discounts or rebates offered by, a security-based swap data repository are fair and reasonable and not unreasonably discriminatory. Such dues, fees, other charges, discounts, or rebates shall be applied consistently across all similarly-situated users of such security-based swap data repository's services, including, but not limited to, market participants, market infrastructures (including central counterparties), venues from which data can be submitted to the security-based swap data repository (including exchanges, security-based swap execution facilities, electronic trading venues, and matching and confirmation platforms), and third party service providers;

(ii) Permit market participants to access specific services offered by the security-based swap data repository separately;

(iii) Establish, monitor on an ongoing basis, and enforce clearly stated objective criteria that would permit fair, open, and not unreasonably discriminatory access to services offered and data maintained by the security-based swap data repository as well as fair, open, and not unreasonably discriminatory participation by market participants, market infrastructures, venues from which data can be submitted to the security-based swap data repository, and third party service providers that seek to connect to or link with the security-based swap data repository; and

(iv) Establish, maintain, and enforce written policies and procedures reasonably designed to review any prohibition or limitation of any person with respect to access to services offered, directly or indirectly, or data maintained by the security-based swap data repository and to grant such person access to such services or data if such person has been discriminated against unfairly.

(2) *Governance arrangements.* Each security-based swap data repository shall establish governance arrangements that are transparent to fulfill public interest requirements under the Act and the rules and regulations thereunder; to

carry out functions consistent with the Act, the rules and regulations thereunder, and the purposes of the Act; and to support the objectives of the Federal Government, owners, and participants. To comply with this core principle, each security-based swap data repository shall:

(i) Establish governance arrangements that are well defined and include a clear organizational structure with effective internal controls;

(ii) Establish governance arrangements that provide for fair representation of market participants;

(iii) Provide representatives of market participants, including end-users, with the opportunity to participate in the process for nominating directors and with the right to petition for alternative candidates; and

(iv) Establish, maintain, and enforce written policies and procedures reasonably designed to ensure that the security-based swap data repository's senior management and each member of the board or committee that has the authority to act on behalf of the board possess requisite skills and expertise to fulfill their responsibilities in the management and governance of the security-based swap data repository, have a clear understanding of their responsibilities, and exercise sound judgment about the security-based swap data repository's affairs.

(3) *Conflicts of interest.* Each security-based swap data repository shall establish and enforce written policies and procedures reasonably designed to minimize conflicts of interest in the decision-making process of the security-based swap data repository and establish a process for resolving any such conflicts of interest. Such conflicts of interest include, but are not limited to: conflicts between the commercial interests of a security-based swap data repository and its statutory and regulatory responsibilities; conflicts in connection with the commercial interests of certain market participants or linked market infrastructures, third party service providers, and others; conflicts between, among, or with persons associated with the security-based swap data repository, market participants, affiliates of the security-based swap data repository, and nonaffiliated third parties; and misuse of confidential information, material, nonpublic information, and/or intellectual property. To comply with this core principle, each security-based swap data repository shall:

(i) Establish, maintain, and enforce written policies and procedures reasonably designed to identify and mitigate potential and existing conflicts of interest in the security-based swap data repository's decision-making process on an ongoing basis;

(ii) With respect to the decision-making process for resolving any conflicts of interest, require the recusal of any person involved in such conflict from such decision-making; and

(iii) Establish, maintain, and enforce reasonable written policies and procedures regarding the security-based swap data repository's non-commercial and/or commercial use of the security-based swap transaction information that it receives from a market participant, any registered entity, or any other person.

Note to § 240.13n–4: This rule is not intended to limit, or restrict, the applicability of other provisions of the federal securities laws, including, but not limited to, section 13(m) of the Act (15 U.S.C. 78m(m)) and the rules and regulations thereunder.

§ 240.13n–5 Data collection and maintenance.

(a) *Definitions.* For purposes of this section—

(1) *Asset class* means those security-based swaps in a particular broad category, including, but not limited to, credit derivatives and equity derivatives.

(2) *Position* means the gross and net notional amounts of open security-based swap transactions aggregated by one or more attributes, including, but not limited to, the:

(i) Underlying instrument, index, or reference entity;

(ii) Counterparty;

(iii) Asset class;

(iv) Long risk of the underlying instrument, index, or reference entity; and

(v) Short risk of the underlying instrument, index, or reference entity.

(3) *Transaction data* means all information reported to a security-based swap data repository pursuant to the Act and the rules and regulations thereunder, except for information provided pursuant to Rule 906(b) of Regulation SBSR (17 CFR 242.906(b)).

(b) *Requirements.* Every security-based swap data repository registered with the Commission shall comply with the following data collection and data maintenance standards:

(1) *Transaction data.* (i) Every security-based swap data repository shall establish, maintain, and enforce written policies and procedures reasonably designed for the reporting of complete and accurate transaction data to the security-based swap data repository and shall accept all transaction data that is reported in accordance with such policies and procedures.

(ii) If a security-based swap data repository accepts any security-based swap in a particular asset class, the security-based swap data repository shall accept all security-based swaps in that asset class that are reported to it in accordance with its policies and procedures required by paragraph (b)(1)(i) of this section.

(iii) Every security-based swap data repository shall establish, maintain, and enforce written policies and procedures reasonably designed to satisfy itself that the transaction data that has been submitted to the security-based swap data repository is complete and accurate, and clearly identifies the source for each trade side and the pairing method (if any) for each transaction in order to identify the level of quality of the transaction data.

(iv) Every security-based swap data repository shall promptly record the transaction data it receives.

(2) *Positions.* Every security-based swap data repository shall establish, maintain, and enforce written policies and procedures reasonably designed to calculate positions for all persons with open security-based swaps for which the security-based swap data repository maintains records.

(3) Every security-based swap data repository shall establish, maintain, and enforce written policies and procedures reasonably designed to ensure that the transaction data and positions that it maintains are complete and accurate.

(4) Every security-based swap data repository shall maintain transaction data and related identifying information for not less than five years after the applicable security-based swap expires and historical positions for not less than five years:

(i) In a place and format that is readily accessible and usable to the Commission and other persons with authority to access or view such information; and

(ii) In an electronic format that is non-rewriteable and non-erasable.

(5) Every security-based swap data repository shall establish, maintain, and enforce written policies and procedures reasonably designed to prevent any provision in a valid security-based swap from being invalidated or modified through the procedures or operations of the security-based swap data repository.

(6) Every security-based swap data repository shall establish procedures and provide facilities reasonably designed to effectively resolve disputes over the accuracy of the transaction data and positions that are recorded in the security-based swap data repository.

(7) If a security-based swap data repository ceases doing business, or ceases to be registered pursuant to section 13(n) of the Act (15 U.S.C. 78m(n)) and the rules and regulations thereunder, it must continue to preserve, maintain, and make accessible the transaction data and historical positions required to be collected, maintained, and preserved by this section in the manner required by the Act and the rules and regulations thereunder and for the remainder of the period required by this section.

(8) Every security-based swap data repository shall make and keep current a plan to ensure that the transaction data and positions that are recorded in the security-based swap data repository continue to be maintained in accordance with Rule 13n–5(b)(7) (§ 240.13n–5(b)(7)), which shall include procedures for transferring the transaction data and positions to the Commission or its designee (including another registered security-based swap data repository).

§ 240.13n–6 Automated systems.

Every security-based swap data repository, with respect to those systems that support or are integrally related to the performance of its activities, shall establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its systems provide adequate levels of capacity, integrity, resiliency, availability, and security.

§ 240.13n–7 Recordkeeping of security-based swap data repository.

(a) Every security-based swap data repository shall make and keep current the following books and records relating to its business:

(1) A record for each office listing, by name or title, each person at that office who, without delay, can explain the types of records the security-based swap data repository maintains at that office and the information contained in those records; and

(2) A record listing each officer, manager, or person performing similar functions of the security-based swap data repository responsible for establishing policies and procedures that are reasonably designed to ensure compliance with the Act and the rules and regulations thereunder.

(b) *Recordkeeping rule for security-based swap data repositories.* (1) Every security-based swap data repository shall keep and preserve at least one copy of all documents, including all documents and policies and procedures required by the Act and the rules and regulations thereunder, correspondence, memoranda, papers, books, notices, accounts, and other such records as shall be made or received by it in the course of its business as such.

(2) Every security-based swap data repository shall keep all such documents for a period of not less than five years, the first two years in a place that is immediately available to representatives of the Commission for inspection and examination.

(3) Every security-based swap data repository shall, upon request of any representative of the Commission, promptly furnish to the possession of such representative copies of any documents required to be kept and preserved by it pursuant to paragraphs (a) and (b) of this section.

(c) If a security-based swap data repository ceases doing business, or ceases to be registered pursuant to section 13(n) of the Act (15 U.S.C. 78m(n)) and the rules and regulations thereunder, it must continue to preserve, maintain, and make accessible the records and data required to be collected, maintained and preserved by this section in the manner required by this section and for the remainder of the period required by this section.

(d) This section does not apply to transaction data and positions collected and maintained pursuant to Rule 13n–5 (§ 240.13n–5).

§ 240.13n–8 Reports to be provided to the Commission.

Every security-based swap data repository shall promptly report to the Commission, in a form and manner acceptable to the Commission, such information as the Commission determines to be necessary or appropriate for the Commission to perform the duties of the Commission under the Act and the rules and regulations thereunder.

§ 240.13n–9 Privacy requirements of security-based swap data repository.

(a) *Definitions.* For purposes of this section—

(1) *Affiliate* of a security-based swap data repository means a person that, directly or indirectly, controls, is controlled by, or is under common control with the security-based swap data repository.

(2) *Control* (including the terms *controlled by* and *under common control with*) means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise. A person is presumed to control another person if the person:

(i) Is a director, general partner, or officer exercising executive responsibility (or having similar status or functions);

(ii) Directly or indirectly has the right to vote 25 percent or more of a class of voting securities or has the power to sell or direct the sale of 25 percent or more of a class of voting securities; or

(iii) In the case of a partnership, has the right to receive, upon dissolution, or has contributed, 25 percent or more of the capital.

(3) *Market participant* means any person participating in the security-based swap market, including, but not limited to, security-based swap dealers, major security-based swap participants, and any other counterparties to a security-based swap transaction.

(4) *Nonaffiliated third party* of a security-based swap data repository means any person except:

(i) The security-based swap data repository;

(ii) The security-based swap data repository's affiliate; or

(iii) A person employed by a security-based swap data repository and any entity that is not the security-based swap data repository's affiliate (and *nonaffiliated third party* includes such entity that jointly employs the person).

(5) *Nonpublic personal information* means:

(i) Personally identifiable information that is not publicly available information; and

(ii) Any list, description, or other grouping of market participants (and publicly available information pertaining to them) that is derived using personally identifiable information that is not publicly available information.

(6) *Personally identifiable information* means any information:

(i) A market participant provides to a security-based swap data repository to obtain service from the security-based swap data repository;

(ii) About a market participant resulting from any transaction involving a service between the security-based swap data repository and the market participant; or

(iii) The security-based swap data repository obtains about a market participant in connection with providing a service to that market participant.

(7) *Person associated with a security-based swap data repository* means:

(i) Any partner, officer, or director of such security-based swap data repository (or any person occupying a similar status or performing similar functions);

(ii) Any person directly or indirectly controlling, controlled by, or under

common control with such security-based swap data repository; or

(iii) Any employee of such security-based swap data repository.

(b) Each security-based swap data repository shall:

(1) Establish, maintain, and enforce written policies and procedures reasonably designed to protect the privacy of any and all security-based swap transaction information that the security-based swap data repository receives from a security-based swap dealer, counterparty, or any registered entity. Such policies and procedures shall include, but are not limited to, policies and procedures to protect the privacy of any and all security-based swap transaction information that the security-based swap data repository shares with affiliates and nonaffiliated third parties; and

(2) Establish and maintain safeguards, policies, and procedures reasonably designed to prevent the misappropriation or misuse, directly or indirectly, of:

(i) Any confidential information received by the security-based swap data repository, including, but not limited to, trade data, position data, and any nonpublic personal information about a market participant or any of its customers;

(ii) Material, nonpublic information; and/or

(iii) Intellectual property, such as trading strategies or portfolio positions, by the security-based swap data repository or any person associated with the security-based swap data repository for their personal benefit or the benefit of others. Such safeguards, policies, and procedures shall address, without limitation:

(A) Limiting access to such confidential information, material, nonpublic information, and intellectual property;

(B) Standards pertaining to the trading by persons associated with the security-based swap data repository for their personal benefit or the benefit of others; and

(C) Adequate oversight to ensure compliance with this subparagraph.

§ 240.13n–10 Disclosure requirements of security-based swap data repository.

(a) *Definition.* For purposes of this section, m*arket participant* means any person participating in the over-the-counter derivatives market, including, but not limited to, security-based swap dealers, major security-based swap participants, and any other counterparties to a security-based swap transaction.

(b) Before accepting any security-based swap data from a market participant or upon a market participant's request, a security-based swap data repository shall furnish to the market participant a disclosure document that contains the following written information, which must reasonably enable the market participant to identify and evaluate accurately the risks and costs associated with using the services of the security-based swap data repository:

(1) The security-based swap data repository's criteria for providing others with access to services offered and data maintained by the security-based swap data repository;

(2) The security-based swap data repository's criteria for those seeking to connect to or link with the security-based swap data repository;

(3) A description of the security-based swap data repository's policies and procedures regarding its safeguarding of data and operational reliability, as described in Rule 13n–6 (§ 240.13n–6);

(4) A description of the security-based swap data repository's policies and procedures reasonably designed to protect the privacy of any and all security-based swap transaction information that the security-based swap data repository receives from a security-based swap dealer, counterparty, or any registered entity, as described in Rule 13n–9(b)(1) (§ 240.13n–9(b)(1));

(5) A description of the security-based swap data repository's policies and procedures regarding its non-commercial and/or commercial use of the security-based swap transaction information that it receives from a market participant, any registered entity, or any other person;

(6) A description of the security-based swap data repository's dispute resolution procedures involving market participants, as described in Rule 13n–5(b)(6) (§ 240.13n–5(b)(6));

(7) A description of all the security-based swap data repository's services, including any ancillary services;

(8) The security-based swap data repository's updated schedule of any dues; unbundled prices, rates, or other fees for all of its services, including any ancillary services; any discounts or rebates offered; and the criteria to benefit from such discounts or rebates; and

(9) A description of the security-based swap data repository's governance arrangements.

§ 240.13n–11 Chief compliance officer of security-based swap data repository; compliance reports and financial reports.

(a) *In general.* Each security-based swap data repository shall identify on Form SDR (17 CFR 249.1500) a person who has been designated by the board to serve as a chief compliance officer of the security-based swap data repository. The compensation, appointment, and removal of the chief compliance officer shall require the approval of a majority of the security-based swap data repository's board.

(b) *Definitions.* For purposes of this section—

(1) *Board* means the board of directors of the security-based swap data repository or a body performing a function similar to the board of directors of the security-based swap data repository.

(2) *Director* means any member of the board.

(3) *EDGAR Filer Manual* has the same meaning as set forth in Rule 11 of Regulation S–T (17 CFR 232.11).

(4) *Interactive Data Financial Report* has the same meaning as set forth in Rule 11 of Regulation S–T (17 CFR 232.11).

(5) *Material change* means a change that a chief compliance officer would reasonably need to know in order to oversee compliance of the security-based swap data repository.

(6) *Material compliance matter* means any compliance matter that the board would reasonably need to know to oversee the compliance of the security-based swap data repository and that involves, without limitation:

(i) A violation of the federal securities laws by the security-based swap data repository, its officers, directors, employees, or agents;

(ii) A violation of the policies and procedures of the security-based swap data repository by the security-based swap data repository, its officers, directors, employees, or agents; or

(iii) A weakness in the design or implementation of the policies and procedures of the security-based swap data repository.

(7) *Official filing* has the same meaning as set forth in Rule 11 of Regulation S–T (17 CFR 232.11).

(8) *Senior officer* means the chief executive officer or other equivalent officer.

(9) *Tag* (including the term *tagged*) has the same meaning as set forth in Rule 11 of Regulation S–T (17 CFR 232.11).

(c) *Duties.* Each chief compliance officer of a security-based swap data repository shall:

(1) Report directly to the board or to the senior officer of the security-based swap data repository;

(2) Review the compliance of the security-based swap data repository with respect to the requirements and

core principles described in section 13(n) of the Act (15 U.S.C. 78m(n)) and the rules and regulations thereunder;

(3) In consultation with the board or the senior officer of the security-based swap data repository, take reasonable steps to resolve any material conflicts of interest that may arise;

(4) Be responsible for administering each policy and procedure that is required to be established pursuant to section 13 of the Act (15 U.S.C. 78m) and the rules and regulations thereunder;

(5) Take reasonable steps to ensure compliance with the Act and the rules and regulations thereunder relating to security-based swaps, including each rule prescribed by the Commission under section 13 of the Act (15 U.S.C. 78m);

(6) Establish procedures for the remediation of noncompliance issues identified by the chief compliance officer through any—

(i) Compliance office review;

(ii) Look-back;

(iii) Internal or external audit finding;

(iv) Self-reported error; or

(v) Validated complaint; and

(7) Establish and follow appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.

(d) *Compliance reports*—(1) *In general.* The chief compliance officer shall annually prepare and sign a report that contains a description of the compliance of the security-based swap data repository with respect to the Act and the rules and regulations thereunder and each policy and procedure of the security-based swap data repository (including the code of ethics and conflicts of interest policies of the security-based swap data repository). Each compliance report shall also contain, at a minimum, a description of:

(i) The security-based swap data repository's enforcement of its policies and procedures;

(ii) Any material changes to the policies and procedures since the date of the preceding compliance report;

(iii) Any recommendation for material changes to the policies and procedures as a result of the annual review, the rationale for such recommendation, and whether such policies and procedures were or will be modified by the security-based swap data repository to incorporate such recommendation; and

(iv) Any material compliance matters identified since the date of the preceding compliance report.

(2) *Requirements.* A financial report of the security-based swap data repository shall be filed with the Commission as described in paragraph (g) of this section and shall accompany a compliance report as described in paragraph (d)(1) of this section. The compliance report shall include a certification by the chief compliance officer that, to the best of his or her knowledge and reasonable belief, and under penalty of law, the compliance report is accurate and complete. The compliance report shall also be filed in a tagged data format in accordance with the instructions contained in the EDGAR Filer Manual, as described in Rule 301 of Regulation S–T (17 CFR 232.301).

(e) The chief compliance officer shall submit the annual compliance report to the board for its review prior to the filing of the report with the Commission.

(f) *Financial reports.* Each financial report filed with a compliance report shall:

(1) Be a complete set of financial statements of the security-based swap data repository that are prepared in accordance with U.S. generally accepted accounting principles for the most recent two fiscal years of the security-based swap data repository;

(2) Be audited in accordance with the standards of the Public Company Accounting Oversight Board by a registered public accounting firm that is qualified and independent in accordance with Rule 2–01 of Regulation S–X (17 CFR 210.2–01);

(3) Include a report of the registered public accounting firm that complies with paragraphs (a) through (d) of Rule 2–02 of Regulation S–X (17 CFR 210.2–02);

(4) If the security-based swap data repository's financial statements contain consolidated information of a subsidiary of the security-based swap data repository, provide condensed financial information, in a financial statement footnote, as to the financial position, changes in financial position and results of operations of the security-based swap data repository, as of the same dates and for the same periods for which audited consolidated financial statements are required. Such financial information need not be presented in greater detail than is required for condensed statements by Rules 10–01(a)(2), (3), and (4) of Regulation S–X (17 CFR 210.10–01). Detailed footnote disclosure that would normally be included with complete financial statements may be omitted with the exception of disclosures regarding material contingencies, long-term obligations, and guarantees. Descriptions of significant provisions of the security-based swap data repository's long-term obligations, mandatory dividend or redemption requirements of redeemable stocks, and guarantees of the security-based swap data repository shall be provided along with a five-year schedule of maturities of debt. If the material contingencies, long-term obligations, redeemable stock requirements, and guarantees of the security-based swap data repository have been separately disclosed in the consolidated statements, then they need not be repeated in this schedule; and

(5) Be provided as an official filing in accordance with the EDGAR Filer Manual and include, as part of the official filing, an Interactive Data Financial Report filed in accordance with Rule 407 of Regulation S–T (17 CFR 232.407).

(g) Reports filed pursuant to paragraphs (d) and (f) of this section shall be filed within 60 days after the end of the fiscal year covered by such reports.

(h) No officer, director, or employee of a security-based swap data repository may directly or indirectly take any action to coerce, manipulate, mislead, or fraudulently influence the security-based swap data repository's chief compliance officer in the performance of his or her duties under this section.

§ 240.13n–12 Exemption from requirements governing security-based swap data repositories for certain non-U.S. persons.

(a) *Definitions.* For purposes of this section—

(1) *Non-U.S. person* means a person that is not a U.S. person.

(2) *U.S. person* shall have the same meaning as set forth in Rule 3a71–3(a)(4)(i) (§ 240.3a71–3(a)(4)(i)).

(b) A non-U.S. person that performs the functions of a security-based swap data repository within the United States shall be exempt from the registration and other requirements set forth in section 13(n) of the Act (15 U.S.C. 78m(n)), and the rules and regulations thereunder, provided that each regulator with supervisory authority over such non-U.S. person has entered into a memorandum of understanding or other arrangement with the Commission that addresses the confidentiality of data collected and maintained by such non-U.S. person, access by the Commission to such data, and any other matters determined by the Commission.

■ 8. Section 240.24b–2 is amended by:

■ a. In the first sentence of paragraph (b), removing ''paragraph (g)'' and adding in its place ''paragraphs (g) and (h)''; and

■ b. Adding paragraph (h).

The addition reads as follows:

§ 240.24b–2 Nondisclosure of information filed with the Commission and with any exchange.

* * * * *

(h) A security-based swap data repository shall not omit the confidential portion from the material filed in electronic format pursuant to section 13(n) of the Act (15 U.S.C. 78m(n)) and the rules and regulations thereunder. In lieu of the procedures described in paragraph (b) of this section, a security-based swap data repository shall request confidential treatment electronically for any material filed in electronic format pursuant to section 13(n) of the Act (15 U.S.C. 78m(n)) and the rules and regulations thereunder.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 9. The authority citation for Part 249 continues to read, in part, as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.;* 12 U.S.C. 5461 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 10. Subpart P consisting of § 249.1500 is added to read as follows:

Subpart P—Forms for Registration of Security-Based Swap Data Repositories

§ 249.1500 Form SDR, for application for registration as a security-based swap data repository, amendments thereto, or withdrawal from registration.

Note: The text of Form SDR does not, and the amendments will not, appear in the Code of Federal Regulations.]

The form shall be used for registration as a security-based swap data repository, and for the amendments to and withdrawal from such registration pursuant to section 13(n) of the Exchange Act (15 U.S.C. 78m(n)).

UNITED STATES

SECURITIES AND EXCHANGE COMMISSION

Washington, DC 20549

FORM SDR

APPLICATION OR AMENDMENT TO APPLICATION FOR REGISTRATION OR WITHDRAWAL FROM REGISTRATION AS SECURITY-BASED SWAP DATA REPOSITORY UNDER THE SECURITIES EXCHANGE ACT OF 1934

GENERAL INSTRUCTIONS FOR PREPARING AND FILING FORM SDR

1. Form SDR and exhibits thereto are to be filed electronically in a tagged data format through EDGAR with the Securities and Exchange Commission by an applicant for registration as a security-based swap data repository, by a registered security-based swap data repository amending its application for registration, or by a registered security-based swap data repository withdrawing its registration, pursuant to Section 13(n) of the Securities Exchange Act of 1934 (''Exchange Act'') and Rules 13n–1 and 13n–2 thereunder. The electronic filing requirements of Regulation S–T will apply to all such filings.

2. With respect to an applicant for registration as a security-based swap data repository, Form SDR also constitutes an application for registration as a securities information processor. An amendment or withdrawal on Form SDR also constitutes an amendment or withdrawal of securities information processor registration pursuant to Section 11A of the Exchange Act and the rules and regulations thereunder. Applicants for registration as a securities information processor not seeking to become dually-registered as a security-based swap data repository and a securities information processor, or registered securities information processors that are not dually-registered as a security-based swap data repository and a securities information processor, should continue to file on Form SIP.

3. Upon the filing of an application for registration, the Commission will publish notice of the filing and afford interested persons an opportunity to submit written data, views, and arguments. No application for registration shall be effective unless the Commission, by order, grants such registration.

4. Individuals' names shall be given in full (last name, first name, middle name).

5. Form SDR shall be signed by a person who is duly authorized to act on behalf of the security-based swap data repository.

6. If Form SDR is being filed as an application for registration, all applicable items must be answered in full. If any item is not applicable, indicate by ''none'' or ''N/A'' as appropriate.

7. Disclosure of the information specified on this form is mandatory prior to processing of an application for registration as a security-based swap data repository and a securities information processor. The information will be used for the principal purpose of determining whether the Commission should grant or deny registration to an applicant. Except in cases where confidential treatment is requested by the applicant and granted by the Commission pursuant to the Freedom of Information Act and the rules of the Commission thereunder, information supplied on this form may be made available on the Commission's Web site, will be included routinely in the public files of the Commission, and will be available for inspection by any interested person. A form that is not prepared and executed in compliance with applicable requirements may be deemed as not acceptable for filing. Acceptance of this form, however, shall not constitute any finding that it has been filed as required or that the information submitted is true, current, or complete. Intentional misstatements or omissions of fact constitute federal criminal violations (*see* 18 U.S.C. 1001 and 15 U.S.C. 78ff(a)).

8. Rule 13n–1(d) under the Exchange Act requires a security-based swap data repository to amend promptly Form SDR if any information contained in items 1 through 17, 26, and 48 of this application, or any amendment thereto, is or becomes inaccurate for any reason. Rule 13n–1(d) under the Exchange Act also requires a security-based swap data repository to file annually an amendment on Form SDR within 60 days after the end of each fiscal year of such security-based swap data repository. Rule 13n–2 under the Exchange Act requires a security-based swap data repository that seeks to withdraw from registration to file such withdrawal on Form SDR.

9. For the purposes of this form, the term ''applicant'' includes any applicant for registration as a security-based swap data repository or any registered security-based swap data repository that is amending Form SDR or withdrawing its registration as a security-based swap data repository. In addition, the term ''applicant'' includes any applicant for registration as a securities information processor.

10. Applicants filing Form SDR as an amendment (other than an annual amendment) need to update any information contained in items 1 through 17, 26, and 48 that has become inaccurate since the security-based swap data repository's last filing of Form SDR. An applicant submitting an amendment (other than an annual amendment) represents that all unamended information contained in items 1 through 17, 26, and 48 remains true, current, and complete as filed.

11. Applicants filing a withdrawal need to update any items or exhibits that are being amended since the security-based swap data repository's last filing of Form SDR. An applicant submitting a withdrawal represents that

all unamended items and exhibits remain true, current, and complete as filed.

12. Applicants filing an annual amendment must file a complete form, including all pages, answers to all items, together with all exhibits. Applicants filing an annual amendment must indicate which items have been amended since the last annual amendment, or, if the security-based swap data repository has not yet filed an annual amendment, since the security-based swap data repository's application for registration.

DEFINITIONS: Unless the context requires otherwise, all terms used in this form have the same meaning as in the Exchange Act, as amended, and in the rules and regulations of the Commission thereunder.

This collection of information will be reviewed by the Office of Management and Budget in accordance with the clearance requirements of 44 U.S.C. 3507. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. The Commission estimates that the average burden to respond to Form SDR will be between 12 and 482 hours depending upon the purpose for which the form is being filed. Any member of the public may direct to the Commission any comments concerning the accuracy of this burden estimate and any suggestions for reducing this burden. It is mandatory that a security-based swap data repository file all notifications, updates, and reports required by Rules 13n–1 and 13n–2 using Form SDR.

UNITED STATES

SECURITIES AND EXCHANGE COMMISSION

Washington, DC 20549

FORM SDR

APPLICATION OR AMENDMENT TO APPLICATION FOR REGISTRATION OR WITHDRAWAL FROM REGISTRATION AS SECURITY-BASED SWAP DATA REPOSITORY UNDER THE SECURITIES EXCHANGE ACT OF 1934

_____

(Exact Name of Applicant as Specified in Charter)

_____

(Address of Principal Executive Offices)

If this is an APPLICATION for registration, complete this form in full and check here ☐

If this is an AMENDMENT to an application, or to an effective registration (other than an annual amendment), list all items that are amended and check here ☐

_____

_____

_____

If this is an ANNUAL AMENDMENT to an application, or to an effective registration, complete this form in full, list all items that are amended since the last annual amendment, and check here ☐

_____

_____

_____

If this is a WITHDRAWAL from registration, list all items that are amended and check here ☐

_____

_____

_____

Or check here to confirm that there is no inaccurate information to update ☐

GENERAL INFORMATION

1. Name under which business is conducted, if different than name specified herein: _____

_____

2. If name of business is amended, state previous business name: _____

_____

3. Mailing address: _____

_____

(Number and Street)

_____

(City) (State/Country) (Mailing Zip/Postal Code)

4. List of principal office(s) and address(es) where security-based swap data repository and securities information processor activities are conducted:

Office

_____

_____

_____

_____

Address

_____

_____

_____

_____

5. If the applicant is a successor (within the definition of Rule 12b–2 under the Exchange Act) to a previously registered security-based swap data repository, please complete the following:

a. Date of succession: _____

b. Full name and address of predecessor security-based swap data repository:

_____

(Name)

_____

(Number and Street)

_____

(City) (State/Country) (Mailing Zip/Postal Code)

_____

c. Predecessor's CIK _____

6. List all asset classes of security-based swaps for which the applicant is collecting and maintaining data or for which it proposes to collect and maintain data.

_____

_____

7. Furnish a description of the function(s) that the applicant performs or proposes to perform. _____

_____

_____

_____

8. Applicant is a:

☐ Corporation

☐ Partnership

☐ Other Form of Organization (Specify) _____

9. If the applicant is a corporation or other form of organization (besides a partnership):

a. Date of incorporation or organization

_____

b. Place of incorporation or state/country of organization

_____

10. If the applicant is a partnership:

a. Date of filing of partnership agreement _____

b. Place where partnership agreement was filed _____

11. Applicant understands and consents that any notice or service of process, pleadings, or other documents in connection with any action or proceeding against the applicant may be effectuated by certified mail to the officer specified or person named below at the U.S. address given. Such officer or person cannot be a Commission member, official, or employee.

_____

(Name of Person or, if Applicant is a Corporation, Title of Officer)

_____

(Name of Applicant or Applicable Entity)

_____

(Number and Street)

_____

(City) (State) (Zip Code)

_____

(Area Code) (Telephone Number)

12. If this is a withdrawal from registration, furnish:

a. Name(s) and address(es) of the person(s) who has or will have custody or possession of the books and records

that the applicant maintained in connection with its performance of security-based swap data repository and securities information processor functions.

_____
(Name of Person)

_____
(Number and Street)

_____
(City) (State/Country) (Mailing Zip/Postal Code)

_____
(Area Code) (Telephone Number)

b. If different from above, provide address(es) where such books and records will be located.

_____
(Number and Street)

_____
(City) (State/Country) (Mailing Zip/Postal Code)

13. SIGNATURE: Applicant has duly caused this application, amendment, or withdrawal to be signed on its behalf by the undersigned, hereunto duly authorized, on this date:_____. Applicant and the undersigned hereby represent that all information contained herein is true, current, and complete. Intentional misstatements or omissions of fact constitute federal criminal violations (*see* 18 U.S.C. 1001 and 15 U.S.C. 78ff(a)). It is understood that all required items and exhibits are considered integral parts of this form and that the submission of any amendment or withdrawal represents that all unamended items and exhibits remain true, current, and complete as previously filed and that the submission of any amendment (other than an annual amendment) represents that all unamended information contained in items 1 through 17, 26, and 48 remains true, current, and complete as filed. If the applicant is a non-resident security-based swap data repository, the applicant and the undersigned further represent that the applicant can, as a matter of law, and will provide the Commission with prompt access to the applicant's books and records and that the applicant can, as a matter of law, and will submit to an onsite inspection and examination by the Commission. For purposes of this certification, ''non-resident security-based swap data repository'' means (i) in the case of an individual, one who resides in or has his principal place of business in any place not in the United States; (ii) in the case of a corporation, one incorporated in or having its principal place of business in any place not in the United States; or (iii) in the case of a partnership or other unincorporated organization or association, one having its principal place of business in any place not in the United States.

_____
(Name of Applicant)

_____
(Signature of General Partner, Managing Agent, or Principal Officer)

_____
(Title)

EXHIBITS—BUSINESS ORGANIZATION

14. List as Exhibit A any person as defined in Section 3(a)(9) of the Exchange Act that owns 10 percent or more of the applicant's stock or that, either directly or indirectly, through agreement or otherwise, in any other manner, may control or direct the management or policies of the applicant. State in Exhibit A the full name and address of each such person and attach a copy of the agreement or, if there is none written, describe the agreement or basis upon which such person exercises or may exercise such control or direction.

15. Attach as Exhibit B the following information about the chief compliance officer who has been appointed by the board of directors of the applicant or a person or group performing a function similar to such board of directors:

a. Name

b. Title

c. Date of commencement and, if appropriate, termination of present term of position

d. Length of time the chief compliance officer has held the same position

e. Brief account of the business experience of the chief compliance officer over the last five years

f. Any other business affiliations in the securities industry or derivatives industry

g. Details of:

(1) any order of the Commission with respect to such person pursuant to Sections 15(b)(4), 15(b)(6), 19(h)(2), or 19(h)(3) of the Exchange Act;

(2) any conviction or injunction of a type described in Sections 15(b)(4)(B) or (C) of the Exchange Act within the past ten years;

(3) any action of a self-regulatory organization with respect to such person imposing a final disciplinary sanction pursuant to Sections 6(b)(6), l5A(b)(7), or 17A(b)(3)(G) of the Exchange Act;

(4) any final action by a self-regulatory organization with respect to such person constituting a denial, bar, prohibition, or limitation of membership, participation, or association with a member, or of access to services offered by such organization or a member thereof; and

(5) any final action by another federal regulatory agency, including the Commodity Futures Trading Commission, any state regulatory agency, or any foreign financial regulatory authority resulting in:

i. a finding that such person has made a false statement or omission, or has been dishonest, unfair, or unethical;

ii. a finding that such person has been involved in a violation of any securities-related regulations or statutes;

iii. a finding that such person has been a cause of a business having its authorization to do business denied, suspended, revoked, or restricted;

iv. an order entered, in the past ten years, against such person in connection with a securities-related activity; or

v. any disciplinary sanction, including a denial, suspension, or revocation of such person's registration or license or otherwise, by order, a prevention from associating with a securities-related business or a restriction of such person's activities.

16. Attach as Exhibit C a list of the officers, directors, governors, and persons performing similar functions, and the members of all standing committees grouped by committee of the applicant or of the entity identified in item 19 that performs the security-based swap data repository and securities information processor activities of the applicant, indicating for each:

a. Name

b. Title

c. Dates of commencement and, if appropriate, termination of present term of office or position

d. Length of time each present officer, director, governor, persons performing similar functions, or member of a standing committee has held the same office or position

e. Brief account of the business experience of each officer, director, governor, persons performing similar functions, or member of a standing committee over the last five years

f. Any other business affiliations in the securities industry or derivatives industry

g. Details of:

(1) any order of the Commission with respect to such person pursuant to Sections 15(b)(4), 15(b)(6), 19(h)(2), or 19(h)(3) of the Exchange Act;

(2) any conviction or injunction of a type described in Sections 15(b)(4)(B) or (C) of the Exchange Act within the past ten years;

(3) any action of a self-regulatory organization with respect to such person imposing a final disciplinary sanction

pursuant to Sections 6(b)(6), l5A(b)(7), or 17A(b)(3)(G) of the Exchange Act;

(4) any final action by a self-regulatory organization with respect to such person constituting a denial, bar, prohibition, or limitation of membership, participation, or association with a member, or of access to services offered by such organization or a member thereof; and

(5) any final action by another federal regulatory agency, including the Commodity Futures Trading Commission, any state regulatory agency, or any foreign financial regulatory authority resulting in:

i. a finding that such person has made a false statement or omission, or has been dishonest, unfair, or unethical;

ii. a finding that such person has been involved in a violation of any securities-related regulations or statutes;

iii. a finding that such person has been a cause of a business having its authorization to do business denied, suspended, revoked, or restricted;

iv. an order entered, in the past ten years, against such person in connection with a securities-related activity; or

v. any disciplinary sanction, including a denial, suspension, or revocation of such person's registration or license or otherwise, by order, a prevention from associating with a securities-related business or a restriction of such person's activities.

17. Attach as Exhibit D a copy of documents relating to the governance arrangements of the applicant, including, but not limited to, the nomination and selection process of the members on the applicant's board of directors, a person or group performing a function similar to a board of directors (collectively, ''board''), or any committee that has the authority to act on behalf of the board; the responsibilities of the board and each such committee; the composition of the board and each such committee; and the applicant's policies and procedures reasonably designed to ensure that the applicant's senior management and each member of the board or such committee possess requisite skills and expertise to fulfill their responsibilities in the management and governance of the applicant, to have a clear understanding of their responsibilities, and to exercise sound judgment about the applicant's affairs.

18. Attach as Exhibit E a copy of the constitution, articles of incorporation or association with all amendments thereto, existing by-laws, rules, procedures, and instruments corresponding thereto, of the applicant.

19. Attach as Exhibit F a narrative and/or graphic description of the organizational structure of the applicant. Note: If the security-based swap data repository or securities information processor activities of the applicant are conducted primarily by a division, subdivision, or other segregable entity within the applicant's corporation or organization, describe the relationship of such entity within the overall organizational structure and attach as Exhibit F the description that applies to the segregable entity.

20. Attach as Exhibit G a list of all affiliates of the applicant and indicate the general nature of the affiliation. For purposes of this application, an ''affiliate'' of an applicant means a person that, directly or indirectly, controls, is controlled by, or is under common control with the applicant.

21. Attach as Exhibit H a brief description of any material pending legal proceeding(s), other than ordinary and routine litigation incidental to the business, to which the applicant or any of its affiliates is a party or to which any of its property is the subject. Include the name of the court or agency in which the proceeding(s) are pending, the date(s) instituted, the principal parties to the proceeding, a description of the factual basis alleged to underlie the proceeding(s), and the relief sought. Include similar information as to any such proceeding(s) known to be contemplated by any governmental agencies.

22. Attach as Exhibit I copies of all material contracts with any security-based swap execution facility, clearing agency, central counterparty, or third party service provider. To the extent that form contracts are used by the applicant, submit a sample of each type of form contract used. In addition, include a list of security-based swap execution facilities, clearing agencies, central counterparties, and third party service providers with whom the applicant has entered into material contracts.

23. Attach as Exhibit J procedures implemented by the applicant to minimize conflicts of interest in the decision-making process of the applicant and to resolve any such conflicts of interest.

EXHIBITS—FINANCIAL INFORMATION

24. Attach as Exhibit K a statement of financial position, results of operations, statement of sources and application of revenues and all notes or schedules thereto, as of the most recent fiscal year of the applicant. If statements certified by an independent public accountant are available, such statements shall be submitted as Exhibit K. Alternatively, a financial report, as described in Rule 13n–11(f) under the Exchange Act, may be filed as Exhibit K.

25. Attach as Exhibit L a statement of financial position and results of operations for each affiliate of the applicant as of the end of the most recent fiscal year of each such affiliate. Alternatively, identify, if available, the most recently filed annual report on Form 10–K under the Exchange Act for any such affiliate as Exhibit L.

26. Attach as Exhibit M the following:

a. A complete list of all dues, fees, and other charges imposed, or to be imposed, as well as all discounts or rebates offered, or to be offered, by or on behalf of the applicant for its services, including the security-based swap data repository's services, securities information processor's services, and any ancillary services, and identify the service(s) provided for each such due, fee, other charge, discount, or rebate;

b. A description of the basis and methods used in determining at least annually the level and structure of the services as well as the dues, fees, other charges, discounts, or rebates listed in paragraph a of this item; and

c. If the applicant differentiates, or proposes to differentiate, among its customers, or classes of customers in the amount of any dues, fees, or other charges imposed or any discount or rebate offered for the same or similar services, then state and indicate the amount of each differential. In addition, identify and describe any differences in the cost of providing such services, and any other factors, that account for such differences.

EXHIBITS—OPERATIONAL CAPABILITY

27. Attach as Exhibit N a narrative description, or the functional specifications, of each service or function listed in item 7 and performed as a security-based swap data repository or securities information processor. Include a description of all procedures utilized for the collection and maintenance of information or records with respect to transactions or positions in, or the terms and conditions of, security-based swaps entered into by market participants.

28. Attach as Exhibit O a list of all computer hardware utilized by the applicant to perform the security-based swap data repository or securities information processor functions listed in item 7, indicating:

a. Name of manufacturer and manufacturer's equipment identification number;

b. Whether such hardware is purchased or leased (If leased, state

from whom leased, duration of lease, and any provisions for purchase or renewal); and

c. Where such equipment (exclusive of terminals and other access devices) is physically located.

29. Attach as Exhibit P a description of the personnel qualifications for each category of professional, non-professional, and supervisory employees employed by the applicant or the division, subdivision, or other segregable entity within the applicant as described in item 19.

30. Attach as Exhibit Q a description of the measures or procedures implemented by the applicant to provide for the security of any system employed to perform the functions of the security-based swap data repository or securities information processor. Include a general description of any physical and operational safeguards designed to prevent unauthorized access (whether by input or retrieval) to the system. Describe any circumstances within the past year in which the described security measures or safeguards failed to prevent any such unauthorized access to the system and any measures taken to prevent a reoccurrence. Describe any measures used by the applicant to satisfy itself that the information received or disseminated by the system is accurate.

31. Where security-based swap data repository or securities information processor functions are performed by automated facilities or systems, attach as Exhibit R a description of all backup systems or subsystems that are designed to prevent interruptions in the performance of any such function as a result of technical malfunctions or otherwise in the system itself, in any permitted input or output system connection, or as a result of any independent source.

32. Attach as Exhibit S the following:

a. For each of the security-based swap data repository or securities information processor functions described in item 7:

(1) quantify in appropriate units of measure the limits on the applicant's capacity to receive (or collect), process, store, or display (or disseminate for display or other use) the data elements included within each function (*e.g.,* number of inquiries from remote terminals); and

(2) identify the factors (mechanical, electronic, or other) that account for the current limitations reported in answer to (1) on the applicant's capacity to receive (or collect), process, store, or display (or disseminate for display or other use) the data elements included within each function.

b. If the applicant is able to employ, or presently employs, its system(s) for any use other than for performing the functions of a security-based swap data repository or securities information processor, state the priorities of assignment of capacity between such functions and such other uses, and state the methods used or able to be used to divert capacity between such functions and other uses.

EXHIBITS—ACCESS TO SERVICES AND DATA

33. Attach as Exhibit T the following:

a. State the number of persons who subscribe, or who have notified the applicant of their intention to subscribe, to the applicant's services.

b. For each instance during the past year in which any person has been prohibited or limited with respect to access to services offered or data maintained by the applicant, indicate the name of each such person and the reason for the prohibition or limitation.

c. For each of such services that involves the supply of information to a quotation board, ticker device, electronic information terminal, or other such device, state the total number of devices to which information is, or will be supplied (''serviced'') and any minimum and or maximum number of devices required or permitted by agreement or otherwise to be serviced by the applicant. In addition, define the data elements for each service.

d. For each service that is furnished in machine-readable form, state the storage media of any service furnished and define the data elements of such service.

34. Attach as Exhibit U copies of all contracts governing the terms by which persons may subscribe to the security-based swap data repository services, securities information processor services, and any ancillary services provided by the applicant. To the extent that form contracts are used by the applicant, submit a sample of each type of form contract used.

35. Attach as Exhibit V a description of any specifications, qualifications, or other criteria that limit, are interpreted to limit, or have the effect of limiting access to or use of any security-based swap data repository or securities information processor services offered or data maintained by the applicant and state the reasons for imposing such specifications, qualifications, or other criteria.

36. Attach as Exhibit W any specifications, qualifications, or other criteria required of persons who supply security-based swap information to the applicant for collection, maintenance, processing, preparing for distribution, and publication by the applicant or of persons who seek to connect to or link with the applicant.

37. Attach as Exhibit X any specifications, qualifications, or other criteria required of any person, including, but not limited to, regulators, market participants, market infrastructures, venues from which data could be submitted to the applicant, and third party service providers, who requests access to data maintained by the applicant.

38. Attach as Exhibit Y policies and procedures implemented by the applicant to review any prohibition or limitation of any person with respect to access to services offered or data maintained by the applicant and to grant such person access to such services or data if such person has been discriminated against unfairly.

EXHIBITS—OTHER POLICIES AND PROCEDURES

39. Attach as Exhibit Z policies and procedures implemented by the applicant to protect the privacy of any and all security-based swap transaction information that the applicant receives from a market participant or any registered entity.

40. Attach as Exhibit AA a description of safeguards, policies, and procedures implemented by the applicant to prevent the misappropriation or misuse of (a) any confidential information received by the applicant, including, but not limited to, trade data, position data, and any nonpublic personal information about a market participant or any of its customers; (b) material, nonpublic information; and/or (c) intellectual property by applicant or any person associated with the applicant for their personal benefit or the benefit of others.

41. Attach as Exhibit BB policies and procedures implemented by the applicant regarding its use of the security-based swap transaction information that it receives from a market participant, any registered entity, or any person for non-commercial and/or commercial purposes.

42. Attach as Exhibit CC procedures and a description of facilities of the applicant for effectively resolving disputes over the accuracy of the transaction data and positions that are recorded in the security-based swap data repository.

43. Attach as Exhibit DD policies and procedures relating to the applicant's calculation of positions.

44. Attach as Exhibit EE policies and procedures implemented by the applicant to prevent any provision in a

valid security-based swap from being invalidated or modified through the procedures or operations of the applicant.

45. Attach as Exhibit FF a plan to ensure that the transaction data and position data that are recorded in the applicant continue to be maintained after the applicant withdraws from registration as a security-based swap data repository, which shall include procedures for transferring the transaction data and position data to the Commission or its designee (including another registered security-based swap data repository).

46. Attach as Exhibit GG all of the policies and procedures required under Regulation SBSR.

47. If the applicant has a rulebook, then the applicant may attach the rulebook as Exhibit HH.

EXHIBIT—LEGAL OPINION

48. If the applicant is a non-resident security-based swap data repository, then attach as Exhibit II an opinion of counsel that the security-based swap data repository can, as a matter of law, provide the Commission with prompt access to the books and records of such security-based swap data repository and that the security-based swap data repository can, as a matter of law, submit to onsite inspection and examination by the Commission.

By the Commission.

Dated: February 11, 2015.

Brent J. Fields,

Secretary.

[FR Doc. 2015–03127 Filed 3–18–15; 8:45 am]

BILLING CODE 8011–01–P