

Managed Funds Association

The Voice of the Global Alternative Investment Industry

Washington, D.C. | New York | Brussels



June 10, 2022

Via Electronic Mail: rule-comments@sec.gov

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Re: Rules Relating to Security-Based Swap Execution and Registration and Regulation of Security-Based Swap Execution Facilities, File No. S7-14-22

Dear Ms. Countryman:

Managed Funds Association¹ (“**MFA**”) appreciates the opportunity to provide comments to the Securities and Exchange Commission (the “**SEC**” or the “**Commission**”) on the above-captioned notice of proposed rulemaking (the “**Proposal**”).² In the Proposing Release, the Commission provides for a set of rules (“**Regulation SE**” or the “**Proposed Rule**”) and forms under the Securities and Exchange Act of 1934 (the “**Exchange Act**”) that would create a regime for the registration and regulation of security-based swap execution facilities (“**SBSEFs**”) and address other issues relating to security-based swap (“**SBS**”) execution.

MFA generally supports the Proposed Rule and believes that an appropriately structured regulatory regime with respect to SBSEFs will enhance the integrity of SBS markets and facilitate their role in promoting secure, liquid and properly functioning markets for SBS and related securities. MFA also generally supports the SEC’s approach of harmonizing Regulation SE with the approach taken by the Commodity Futures Trading Commission (the “**CFTC**”) with respect to its swap execution facility (“**SEF**”) rules, as we believe that a consistent regulatory regime across markets will be less costly to and more efficient for platform operators and other market participants. However, we detail a few instances below where we believe additional clarity and modifications are necessary.

While MFA members do not expect to be registered as SBSEFs once Regulation SE is finalized, we do anticipate that our members will be active market participants on registered SBSEFs, given that they are currently active traders in SBS markets, generally.

¹ Managed Funds Association (“**MFA**”) represents the global hedge fund and alternative asset management industry and its investors by advocating for regulatory, tax, and other public policies that foster efficient, transparent, and fair capital markets. MFA’s more than 150 member firms collectively manage nearly \$2.6 trillion across a diverse group of investment strategies. Member firms help pension plans, university endowments, charitable foundations, and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time. MFA has a global presence and is active in Washington, Brussels, London, and Asia. www.managedfunds.org.

² SEC Release No. 34-94615 (Apr. 6, 2022), 87 F.R. 28872 (May 11, 2022) (the “**Proposing Release**”).

Because certain aspects of the Proposed Rule could impact how our members are able to transact in SBS, we believe that our perspective is an important one for the SEC to consider. In this regard, our comments focus on a few aspects of Regulation SE that we believe can be better tailored to ensure that Regulation SE does not unnecessarily constrain or disrupt SBS markets given the crucial role that SBS play in, among other things, allowing firms to manage risk, enhancing the liquidity of related securities markets and facilitating capital formation.

I. Summary

We support the adoption of a regulatory framework for SBSEFs and make the following recommendations with respect to the Proposed Rule:

- The Commission should make clear in any final rule that the SBSEF registration requirement applies only to multiple-to-multiple platforms.
- Proposed Regulation SE should allow for block trades in equity SBS on SBSEFs, and the Commission should establish customized minimum block sizes for different types of SBS.
- The Commission should provide additional clarity with respect to its request for quote (“RFQ”) method of execution requirements for Required Transactions (defined below) and should, in particular, require an SBSEF to communicate to RFQ requesters all available firm bids or offers, not only those on the SBSEF order book.
- The Commission should permit market participants and other interested parties to participate in the MAT analysis by introducing a public notice and comment period into the MAT assessment timeline.
- The Commission should incorporate the CFTC’s impartial access requirement guidance with respect to access to SBSEFs.
- The Commission should incorporate the CFTC’s straight-through processing guidance with respect to transactions on SBSEFs.
- In order to harmonize its approach with the CFTC’s approach, the Commission should remove the Daily Market Data Report requirement.
- The Commission should ensure that SBS trading on national securities exchanges is subject to the same substantive regulation as SBS trading on registered SBSEFs.

II. The Commission should make clear in any final rule that the SBSEF registration requirement applies only to multiple-to-multiple platforms.

Regulation SE would define “security-based swap execution facility” as “a trading system or platform in which *multiple participants* have the ability to execute or trade security-based swaps by accepting bids and offers made by *multiple participants* in the facility or system... including any trading facility that: (A) facilitates the execution of security-based swaps

between persons; and (B) is not a national securities exchange.”³ We note that the proposed definition of SBSEF tracks the definition established by Congress in section 761(a) of the Dodd-Frank Act⁴ and is generally harmonized with the definition of “swap execution facility” adopted by the CFTC.⁵ We are concerned, however, that an interpretation which would require certain platforms and other traditional communication systems that currently allow for bilateral communications to be subject to Regulation SE’s registration requirements would force certain such platforms to cease operations. The availability of a variety of trading platforms is necessary for market participants to efficiently manage risk.

We generally support the Commission’s proposed SBSEF definition as drafted and, in particular, that the definition, by its terms, adheres to the statutory definition and would only apply to “multiple to multiple” platforms. We urge the Commission, however, in any final rule, to make clear that the SBSEF registration requirement applies only to these types of platforms that are within the statutory and proposed regulatory definition and does not include any broader CFTC staff interpretations purporting to expand the SEF definition. In particular, in 2019, the CFTC Division of Market Oversight (“DMO”) published guidance (“**Letter No. 21-19**”)⁶ interpreting the SEF definition, although no such guidance was issued by the CFTC itself. Among other issues, Letter No. 21-19 states that platforms may be required to register as SEFs “(i) even where multiple participants cannot *simultaneously* request, make, or accept bids and offers from market participants; or (ii) where multiple participants can initiate a one-to-many communication.”⁷

The staff of the CFTC issued Letter No. 21-19 in reaction to a particular enforcement action and based on a specific and narrow set of facts that is not generally

³ Proposed Rule §242.802 (emphasis added). The definition would exclude registered clearing agencies that limit their SBSEF functions to the operation of a trading session designed to further the accuracy of end-of-day valuations. *Id.*

⁴ *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub. L. 111-203, 124 Stat. 1376, 1758 (codified 15 U.S.C. § 78c(77)) (the “**Dodd-Frank Act**”).

⁵ See 17 C.F.R. § 1.3. “Swap execution facility” is defined as a trading system or platform in which multiple participants have the ability to execute or trade swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce, including any trading facility, that – (1) Facilitates the execution of swaps between persons; and (2) is not a designated contract market.

⁶ *Staff Advisory on Swap Execution Facility Registration Requirement*, Letter No. 21-19 (Sept. 29, 2021), available at <https://www.cftc.gov/node/238336> (“**Letter No. 21-19**”). The CFTC’s guidance specifies that such facilities would still meet the multiple-to-multiple prong if “multiple participants have the ‘ability to execute or trade swaps’ with multiple participants.” *Id.* p. 2 (emphasis in original).

⁷ *Id.* The CFTC’s guidance specifies that such facilities would still meet the multiple-to-multiple prong if “multiple participants have the ‘ability to execute or trade swaps’ with multiple participants.” *Id.* p. 2 (emphasis in original).

applicable.⁸ For that reason alone, we believe the SEC should make clear that such guidance is inapplicable to SBSEFs. However, there are also numerous other reasons—noted below—why the letter should not apply to SBSEFs, and we urge the SEC to confirm in the Regulation SE final release that it is not adopting or incorporating, explicitly or implicitly, guidance similar to that issued in Letter No. 21-19.

As an initial matter, we do not believe that such an approach is consistent with the Commission’s statutory authority under the Exchange Act. Section 3D of the Exchange Act provides that the Commission may prescribe rules “governing the regulation of security-based swap execution facilities.”⁹ The definition of “security-based swap execution facility” in the Exchange Act is explicitly limited to trading systems or platforms in which *multiple participants* have the ability to execute or trade SBS by accepting bids and offers made by *multiple participants*, and proposed Regulation SE incorporates that definition. DMO’s guidance, if adopted analogously into Regulation SE, could extend the definition of SBSEF to include facilities offering one-to-many or bilateral communications, and could apply “if more than one participant is able to submit an RFQ on the platform.”¹⁰ Such an approach would contradict Congress’ express intent to limit the scope of SBSEF registration requirements to multiple-to-multiple platforms. Indeed, our members and market participants generally have expressed significant concerns as to the statutory authority of DMO, or the CFTC itself, to adopt the positions expressed in Letter No. 21-19 regarding SEFs. We believe that similar guidance would likewise exceed the Commission’s statutory authority in the context of SBSEF registration requirements pursuant to the Exchange Act.

If the Commission were to apply Letter No. 21-19 to SBSEFs, we are concerned that certain platforms and other traditional communication systems that currently allow for bilateral communications could become subject to Regulation SE’s registration requirements. A registration requirement would not be feasible for many of these platforms and would likely have the effect of limiting the functionality of certain such platforms, while forcing others to cease operations altogether. Reducing the number of available trading platforms—or requiring some to shut down altogether—would damage SBS and underlying securities markets by reducing liquidity, increasing volatility and generally constraining the ability of market participants to efficiently manage risk, all of which will ultimately inhibit capital formation, and undermine the achievement of the Commission’s objectives through its Proposed Rules.

Furthermore, securities markets and market participants benefit from having a variety of platforms and communication systems to choose from to help facilitate securities transactions. Accordingly, applying the interpretation in Letter No. 21-19 to SBSEFs would

⁸ *CFTC Orders California Company to Pay \$100,000 for Failing to Register as a Swap Execution Facility*, CFTC Release No. 8435-21 (Sept. 29, 2021), available at [https://www.cftc.gov/PressRoom/PressReleases/8435-21#:~:text=September%2029%2C%202021,swap%20execution%20facility%20\(SEF\).](https://www.cftc.gov/PressRoom/PressReleases/8435-21#:~:text=September%2029%2C%202021,swap%20execution%20facility%20(SEF).)

⁹ 15 U.S.C. § 78c-4(f) (emphasis added).

¹⁰ Letter No. 21-19, *supra* note 6, p. 2.

have a more severe adverse effect on the SBS markets, given the more pervasive and long-standing practices of individual dealers operating various types of execution platforms in the securities markets that have never been subject to regulation as exchanges or similar types of execution facilities. Platforms can be registered with the Commission in a variety of ways (e.g., as a national securities exchange, a broker-dealer/alternative trading system or a SBSEF) or not at all, depending on, among other things, the scope of the platform's services. The diversity of platforms provides a market participant with the ability to choose the platform that best suits its particular needs with respect to a particular transaction. Congress and the Commission have endeavored to preserve this diversity of platforms through clear definitions and rules that distinguish different registration categories (in addition to clarifying whether registration is necessary at all). If the SEC were to adopt guidance similar to Letter No. 21-19, it would muddle the boundaries among different registration categories to the detriment of securities markets and market participants. This would also create confusion and uncertainty with respect to the Commission's separate proposed rules regarding exchanges and automated trading systems.¹¹

To avoid these unintended results, and to align the SEC's approach to Regulation SE with the Commission's statutory authority under the Exchange Act, we recommend that the SEC make clear in any final rule that the SBSEF registration requirement only applies to multiple-to-multiple platforms.

III. Proposed Regulation SE should allow for block trades in equity SBS on SBSEFs, and the Commission should establish customized minimum block sizes for different types of SBS.

Proposed Rule 815 would require (subject to certain exceptions) any "Required Transaction" that is not a "block trade" to be executed on a SBSEF by means of an order book or a request-for-quote ("RFQ") system that operates in conjunction with an order book.¹² We support the inclusion of a block trade exemption to Regulation SE's trade execution requirements. Exempting block trades from order book and RFQ execution requirements is critical to the functioning of the SBS markets, particularly in order to execute large trades

¹¹ See *Amendments to Exchange Act Rule 3b-16 Regarding the Definition of "Exchange"; Regulation ATS for ATSS That Trade U.S. Government Securities, NMS Stocks, and Other Securities; Regulation SCI for ATSS That Trade U.S. Treasury Securities and Agency Securities*, SEC Release No. 34-94062 (Jan. 26, 2022), 87 F.R. 15496 (Mar. 18, 2022).

¹² Proposed Rule 242.815(a)(2). "**Required Transaction**" means any transaction involving a SBS that is subject to mandatory clearing pursuant to Section 3C(h) of the Exchange Act. "**Block trade**" is defined in Proposed Rule 242.802 as a SBS transaction that is subject to the Commission's public dissemination requirements pursuant to Exchange Act Rule 902 and: (1) involves a SBS that is listed on a SBSEF or national securities exchange; (2) is executed on a SBSEF's trading system or platform that is not an order book or occurs away from the SBSEF's or national securities exchange's system or platform and is executed pursuant to the rules and procedures of the SBSEF or national securities exchange; (3) is a SBS based on a single credit instrument (or issuer of credit instruments) or a narrow-based index of credit instruments (or issuers of credit instruments) having a notional size of \$5 million or greater; and (4) is reported subject to the rules and procedures of the SBSEF or national securities exchange.

without affecting price. Absent such an exemption, market participants would have difficulty executing, or would be unable to execute, large bona fide trades, since they would be required to do so only through the order book. This would increase the cost of trading and hedging, which could reduce participation in certain markets, resulting in less liquidity and increased volatility.

In its proposed form, however, the definition of “block trade” is limited to “SBS based on a single credit instrument (or issuer of credit instruments) or a narrow-based index of credit instruments (or issuers of credit instruments) having a notional size of \$5 million or greater.”¹³ In order to better tailor the definition of “block trade” to the nature of the SBS markets and the needs and circumstances of market participants, we recommend that the Commission (i) amend the definition to include block trades referencing equity securities and (ii) establish customized minimum block sizes for different types of SBS eligible for block trades.

A. Proposed Regulation SE should allow for block trades in equity SBS on SBSEFs.

As noted above, the definition of “block trade” is limited to SBS based on a single credit instrument or a narrow-based index of credit instruments.¹⁴ As such, market participants transacting in SBS that reference equity securities could not avail themselves of the block trade exemption. The Proposal does not justify this exclusion other than by noting that the CFTC excludes equity swaps in its block trade exemption.¹⁵ We do not believe that this is a persuasive policy reason for excluding SBS, as detailed below. To the contrary, there are compelling policy reasons why equity SBS should be treated differently in Proposed Regulation SE as compared to the treatment of equity swaps in the CFTC’s SEF rules.

By excluding equity SBS from the definition of “block trade,” the Proposed Rule would require large trades in equity SBS to be executed via an order book or an RFQ system. As noted by the Commission, “forcing a market participant who seeks liquidity to expose a large order to a SEF/SBSEF order book or to utilize RFQ-to-3 could cause the market to move against the liquidity requester before it can obtain an execution.”¹⁶ The Commission does not provide any justification for its limitation on block trades, nor does it explain why these concerns would not apply equally to equity SBS, as well as to credit SBS. Indeed, in our view, the use of block trades for equity SBS is at least as necessary as in the case of credit SBS, due to the need to customize the size of transactions and to obtain timely and efficient executions. By requiring all equity SBS trades to be executed only through the order book, the Proposal could result in these trades having significant price impact on SBSEF products, which would ultimately inhibit the ability of market participants to efficiently arrange and execute large, customized trades that are essential for market participants’ risk management activities. This would disincentive market participants from using equity SBS for their legitimate business purposes, including hedging,

¹³ Proposed Rule 242.802.

¹⁴ Proposed Rule 242.802.

¹⁵ Proposing Release, *supra* note 2, p. 92.

¹⁶ Proposing Release, *supra* note 2, p. 90.

which could increase volatility and reduce liquidity in equity SBS markets (as well as the underlying equity markets). Excluding equity SBS block trades would ultimately inhibit capital formation as an inability to execute blocks in equity SBS would make it riskier, more expensive and more difficult to hedge, which would in turn inhibit market participants from participating in equity offerings.

We also note that equity SBS are quite distinct from CFTC-regulated equity swaps in ways that make it more critical to allow block trades in equity SBS. In particular, CFTC-regulated equity swaps, by definition, are based solely on broad-based equity indices, such as the S&P 500 Index, that reflect markets and not individual equities or issuers. As a result, such products are used to assume or hedge exposure to the relevant market or sector generally. By contrast, equity SBS may reference a single name, and are therefore a preferred tool for hedging exposure to specific equities, which makes them essential to capital formation. In addition, the markets for SBS on individual equities will, in many cases, be less liquid than the markets for broad-based equity index swaps, further necessitating the opportunity for block trades. For these reasons, we respectfully submit that any final rule should allow equity SBS to be eligible for the block trade exemption.

B. The Commission should establish customized minimum block sizes for different types of SBS.

The Proposed Rule's block trade exemption applies only to block trades with a notional size of at least \$5 million.¹⁷ The Proposal does not provide any rationale or justification for this approach, other than noting that the Commission applied a \$5 million block threshold for certain no-action relief regarding the public dissemination of transaction reports, and that the Financial Industry Regulatory Authority applies a \$5 million cap when disseminating transaction reports of economically similar cash debt securities.¹⁸ Neither purported justification provides an economic basis for the proposed block size rule, and a similar threshold for minimum block sizes is neither warranted nor appropriate.

We also note that the Commission's one-size-fits all approach to minimum block sizes is a departure from the approach taken by the CFTC, which sets a different "appropriate minimum block size" for different categories of swaps.¹⁹ Given the Commission's expressed intention to harmonize its SBSEF rules with the CFTC's SEF rules, and in light of the adverse consequences of minimum block sizes that are miscalibrated, we strongly urge the Commission to reconsider this aspect of the Proposed Rule and develop a more structured and tailored approach. In fact, setting a miscalibrated block size will likely limit the utility of the block trade exemption, thereby preventing many market participants from executing transactions on SBSEFs. Indeed, in the context of credit SBS, there are a wide variety of instruments and structures, each of which may require a different minimum block size. This is particularly the case if the Commission accepts our

¹⁷ Proposed Rule 242.802; Proposing Release, *supra* note 2, p. 91.

¹⁸ Proposing Release, *supra* note 2, p. 91.

¹⁹ Proposing Release, *supra* note 2, p. 90-91.

recommendation expanding the definition of “block trade” to include equity SBS. In light of the expectation that liquidity on SBSEFs may be fairly limited, at least in the early stages of their development, a miscalibrated block trade threshold will operate as a significant deterrent to SBSEF execution. To avoid the negative consequences that are likely to occur if the minimum block size is set at an inappropriate level for a particular type of SBS, we recommend that the Commission propose customized block sizes by SBS, after an analysis of the SBS markets.

IV. The Commission should provide additional clarity with respect to its RFQ method of execution requirements for Required Transactions and should, in particular, require an SBSEF to communicate to RFQ requesters all available firm bids or offers, not only those on the SBSEF order book.

Regulation SE would mandate that certain Required Transactions be executed on a SBSEF pursuant to an order book or an RFQ system that operates in conjunction with an order book.²⁰ Proposed Rule 815(a)(3) provides certain requirements applicable to an SBSEF that offers an RFQ system. In addition to requiring all RFQs to buy or sell a specific SBS be made to no less than three market participants (so-called “**RFQ-to-3**”), SBSEFs that offer an RFQ system would also be required, at the same time that a requester receives the first responsive bid or offer, to communicate to the requester any firm bid or offer pertaining to the same instrument resting on any of the SBSEF’s order books.²¹ Further, the SBSEF would be required to provide the requester with the ability to execute against such firm resting bids or offers along with any responsive orders.²² We believe that a requirement to communicate firm bids and offers to RFQ requesters which is not restricted to firm bids and offers on an SBSEF order book would maintain liquidity and promote open and equitable participation in the markets.

We therefore recommend that the SBSEF’s proposed requirement to communicate to RFQ requesters not be limited to firm bids and offers on an SBSEF order book. There are other trading protocols (e.g., request-for-stream) on these platforms through which firm prices may be displayed. The Proposed Rule should instead ensure that an RFQ requester receives *all* firm indications of willingness to buy or sell (and not just orders resting on an order book) related to that SBS that are available on the SBSEF, regardless of the particular protocol. Accordingly, we recommend that the Commission revise this requirement to ensure that, in such circumstances, the SBSEF communicates to the requester any firm prices available on the SBSEF, in addition to resting firm bids or offers on the SBSEF’s order book(s), and makes this functionality available for Permitted Transactions as well. This approach, in our view, is necessary in order to ensure the availability of quotes for SBS transactions that will be essential to maintaining liquidity and promoting open and equitable participation in the markets.

²⁰ Proposed Rule 242.815(a)(2).

²¹ Proposed Rule 242.815(a)(3)(i).

²² Proposed Rule 242.815(a)(3)(ii).

V. The Commission should permit market participants and other interested parties to participate in the MAT analysis by introducing a public notice and comment period into the MAT assessment timeline.

Pursuant to the Proposed Rule, a SBS is subject to Regulation SE’s SBSEF trade execution requirement if it is subject to mandatory clearing and “made available to trade” (“MAT”).²³ Proposed Rule 816 sets out six factors that the Commission must consider when making a MAT determination: (1) Whether there are ready and willing buyers and sellers; (2) The frequency or size of transactions; (3) The trading volume; (4) The number and types of market participants; (5) The bid/ask spread; or (6) The usual number of resting firm or indicative bids and offers.²⁴ We believe that MAT determinations should also involve the input of market participants and that such involvement is a necessary safeguard against MAT determinations which would subject an SBS without sufficient liquidity to mandatory SBSEF trading.

MAT determinations, when appropriately applied, can promote efficiency and market liquidity, but an improper MAT designation that prematurely or inappropriately subjects an SBS to mandatory SBSEF trading and clearing could have the opposite effect on SBS markets, including by limiting, or altogether eliminating, trading in certain SBS contracts.

We generally support the Commission’s approach to MAT determinations and believe that the six factors, which are consistent with the CFTC’s SEF MAT factors and generally emphasize the importance of liquidity, are appropriate. We nonetheless urge the Commission to take a cautious approach in its assessment of whether a particular SBS is MAT. In its application of the proposed MAT determination process, we recommend that the Commission carefully consider each factor, individually and collectively, in assessing whether a particular SBS has sufficient liquidity to support mandatory SBSEF trading. Specifically, the Commission should avoid broad MAT categorizations for specific types of SBS where individual SBS products within each category may be more or less suitable for a MAT designation. To support this process and to guard against inappropriate MAT determinations, we recommend that the Commission permit market participants and other interested parties to participate in the MAT analysis by introducing a public notice and comment period into the MAT assessment timeline. This would provide market participants, who would be those most affected by a MAT determination, with the opportunity to identify specific aspects of individual SBS products that may limit their liquidity, which would help ensure each MAT determination is inappropriate for the relevant SBS product.

VI. The Commission should incorporate the CFTC’s impartial access requirement guidance with respect to SBSEFs.

Proposed Rule 819(c), which implements Core Principle 2 (Compliance with Rules), provides that an SBSEF must provide “any eligible contract participant and any

²³ Proposing Release, *supra* note 2, p. 98.

²⁴ Proposed Rule 242.816(b).

independent software vendor with impartial access to its market(s) and market services, including indicative quote screens or any similar pricing data displays.”²⁵ SBSEFs are also required to establish comparable fee structures for eligible contract participants and independent software vendors that receive comparable access and services from SBSEFs, in addition to introducing and impartially enforcing rules governing an eligible contract participant’s access to the SBSEF.²⁶ We believe that incorporating the CFTC’s guidance with respect to its analogous SEF impartial access requirements would further harmonize the approach to impartial access between SBSEFs and SEFs and assist market participants in interpreting how the impartial access rules should work.

We are generally supportive of the Commission’s approach to implementing Core Principle 2’s impartial access requirements, including its close harmonization with CFTC rules. Coordination of impartial access requirements not only affects an entity operating both an SEF and SBSEF but also their clients, many of whom use the same individual traders to trade both instrument types. Impartial access requirements provide firms with fair, unbiased and unprejudiced access to SBSEFs and are critical to the functioning of the SBS markets. In this regard, we note that the CFTC has further reinforced this principle in the context of SEFs through guidance issued in connection with its analogous SEF registration requirements. For example, in November 2013, the CFTC’s DMO, Division of Clearing and Risk (“**DCR**”), and Division of Swap Dealer and Intermediary Oversight issued guidance²⁷ that, among other things, clarified that: (1) the use of “enablement mechanisms”²⁸ that restrict the ability of market participants to interact on a trading system or platform for intended-to-be-cleared swaps are inconsistent with impartial access requirements and (2) restrictive requirements on eligible contract participants to obtain access are inconsistent with impartial access requirements.²⁹ Incorporating this guidance would ensure that SBSEFs do not implement participant qualifications or restrictions that would limit access in a way that would be inconsistent with Proposed Rule 819(c).

²⁵ Proposed Rule 242.819(c).

²⁶ Proposed Rule 242.819(c)(1), (3).

²⁷ *Division of Clearing and Risk, Division of Market Oversight and Division of Swap Dealer and Intermediary Guidance on Application of Certain Commission Regulations to Swap Execution Facilities* (Nov. 14, 2013), available at <https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/dmostaffguidance111413.pdf> (the “**CFTC Nov. 2013 Guidance**”).

²⁸ “Enablement mechanism” broadly refers to “any mechanism, scheme, functionality, counterparty filter, or other arrangement that prevents a market participant from interacting or trading with, or viewing the bids and offers (firm or indicative) displayed by any other market participant on that SEF, whether by means of any condition or restriction on its ability or authority to display a quote to any other market participant to respond to any quote issued by any other market participant on that SEF, or otherwise.” *Id.* p. 1.

²⁹ CFTC Nov. 2013 Guidance, *supra* note 27.

The CFTC’s 2013 final release implementing its core principles with respect to SEFs also provides additional guidance with respect to the impartial access requirements, including noting that “impartial” should be interpreted “in the ordinary sense of the word: fair, unbiased, and unprejudiced. Subject to these requirements, a SEF may use its own reasonable discretion to determine its access criteria, provided that the criteria are impartial, transparent and applied in a fair and non-discriminatory manner, and are not anti-competitive.”³⁰ The 2013 CFTC release further reiterates that “access criteria must be impartial and must not be used as a competitive tools against certain [eligible contract participants] or [independent software vendors]” and that access to a SEF should be determined, for example, “based on a SEF’s impartial evaluation of an applicant’s disciplinary history and financial and operational soundness against objective, pre-established criteria.”³¹

We believe that the CFTC’s statements with respect to its analogous SEF impartial access requirements have provided helpful guidance to market participants with respect to how impartial access rules should work. As such, we respectfully recommend that the Commission leverage the CFTC’s guidance by incorporating it into the Regulation SE final release (conformed as necessary in the context of SBSEFs). This approach would also help harmonize the approach to impartial access between SBSEFs and SEFs.

VII. The Commission should incorporate the CFTC’s straight-through processing guidance with respect to transactions on SBSEFs.

Proposed Rule 823, which implements Core Principle 6 (financial integrity of transactions) requires an SBSEF to establish and enforce rules and procedures for ensuring the financial integrity of SBS entered on or through the facilities of the SBSEF, including the clearance and settlement of SBS.³² Similar to the analogous CFTC Rule, proposed Rule 823 does not explicitly cover “straight-through-processing” (“STP”) requirements. In September 2013, however, the CFTC DMO and DCR issued guidance³³ regarding STP requirements with respect to swap trades on a SEF or a designated contract market. Specifically, the CFTC STP Guidance provides that, together, CFTC Rules 1.74, 37.702(b), 38.601 and 39.12(b)(7) (clearing requirements) establish STP requirements for SEFs.³⁴ The CFTC’s STP Guidance clarifies that STP is achieved as a result of the combination of rules that, together, require: (1) coordination between registrants and registered entities; (2) that SEFs have rules and procedures to facilitate prompt and efficient processing by derivative clearing organizations (“DCOs”); and (3) that DCOs “accept or reject all trades executed competitively on a SEF or designated contract market

³⁰ *Core Principles and Other Requirements for Swap Execution Facilities*, 78 F.R. 33475, 33507 (June 4, 2013) (the “**2013 CFTC Release**”).

³¹ *Id.* at 33508.

³² Proposed Rule 242.823.

³³ *Staff Guidance on Swaps Straight-Through Processing*, (Sept. 26, 2013) (the “**CFTC STP Guidance**”).

³⁴ CFTC STP Guidance, *supra* note 33, p. 2.

as quickly as would be technologically practicable as if fully automated systems were used.”³⁵ We believe that incorporating the CFTC’s STP guidance would further harmonize the approach to STP between SBSEFs and SEFs and provide market participants greater certainty of execution and clearing.

The CFTC’s STP Guidance, which reaffirms and establishes STP procedures for the “near-instantaneous acceptance or rejection of each trade” is intended to provide “certainty of execution and clearing, reduces costs, and decreases risk” in the swap markets.³⁶ We believe that STP, which is critical to maintaining a competitive, efficient and transparent market for SEF-traded swaps, is similarly applicable to the SBS markets. Specifically, STP would (1) provide market participants with certainty of clearing immediately following execution, which would allow them to more efficiently and effectively manage their risks via hedging; (2) encourage more clearing; (3) facilitate electronic trading, particularly central limit order book trading, as STP facilitates the immediate execution confirmation and acceptance for clearing that is required to support electronic transactions on an anonymous basis; and (4) promote accessible, competitive markets and access to best execution for each of the relevant parties.

To achieve these benefits, which would ultimately increase transparency, liquidity and fairness in the SBS markets, we respectfully recommend that the Commission issue rules similar to that contained in the CFTC’s STP Guidance (conformed as necessary to the SBSEF context) in any final rule.

VIII. In order to harmonize its approach with the CFTC’s approach, the Commission should remove the Daily Market Data Report requirement.

Proposed Rule 825, which implements Core Principle 8 (timely publication of trading information), would require every SBSEF to publish a “Daily Market Data Report” on its website containing information regarding each tenor of SBS traded on the SBSEF during the previous business day.³⁷ The required information would include: (1) Trade count (including block trades but excluding error trades, correcting trades and offsetting trades); (2) The notional amount traded (including block trades but excluding error trades, correcting trades and offsetting trades); (3) The number of block trades; (4) The total notional amount of block trades; (5) The opening and closing price; (6) The price that is used for settlement purposes, if different from the closing price; and (7) The lowest price of a sale or offer, whichever is lower, and the highest price of a sale or bid, whichever is higher, that the SBSEF reasonably determines accurately reflects market conditions. Bids and offers vacated or withdrawn shall not be used in making this determination. Proposed Rule 825(c)(2) would further require an SBSEF to provide additional explanatory information, including the method used in determining nominal and settlement prices; and an explanation of any discretion that is used by the SBSEF in determining

³⁵ CFTC STP Guidance, *supra* note 33, p. 3.

³⁶ CFTC STP Guidance, *supra* note 33, p. 2.

³⁷ Proposing Release, *supra* note 2, p. 157.

the opening and/or closing ranges or the settlement prices. We are concerned that the Daily Market Report would require inappropriate and detrimental disclosures which would undermine the Commission's goal of fostering a competitive and efficient market for SBS trading.

The Commission notes in the Proposal that the Daily Market Data Report is modelled after the CFTC Part 16 rules that govern reporting requirements for contract markets and swap execution facilities.³⁸ However, there are significant differences in the information required to be reported under the two regimes. CFTC Rule 16.00 requires that each reporting market submit a daily report to the Commission that includes, for each clearing member: (1) the total of all open long and short contracts (subject to certain exclusions); (2) the quantity of contracts bought and sold during the day; (3) the quantity of purchase and sales of futures for commodities or derivatives positions and the names of the clearing members who made the purchases or sales; and (4) for futures, the quantity of the commodity for which delivery notices have been issued by the clearing organization of the reporting market and the quantity for which notices have been stopped during the day covered by the report.³⁹ Reporting markets are also required to provide daily trade and supporting data reports to the Commission and to keep, and make publicly available, certain data regarding trading volume, open contracts, and pricing information for futures, options and swaps.⁴⁰ Proposed Rule 825(c)(1) increases the burden on SBSEFs compared to SEFs by requiring additional information regarding sale and offer prices, as well as qualitative descriptions of certain data that are reported. The Proposal does not address why the CFTC's approach would not be acceptable in the context of SBSEFs and does not justify the increased operational costs to SBSEFs (which will ultimately be passed on to members).

Furthermore, the Commission does not consider the costs and potential for duplicative requirements in the context of Regulation SBSR reporting requirements, which require the reporting of similar information. In sum, the Daily Market Data Report is overly granular and duplicative, is unnecessary for transparency purposes and could negatively impact the market and market participants. The Commission should therefore remove the Daily Market Data Report in favor of harmonizing with the analogous CFTC rules. If the Commission does not eliminate the Daily Market Data Report requirement altogether, it should adopt additional masking protections for trades, specifically with respect to block trades. Failure to do so would cause inappropriate and detrimental disclosures and would negate the benefits that the Proposed Rule purports to achieve by exempting block trades from clearing requirements.

IX. The Commission should ensure that SBS trading on national securities exchanges is subject to the same substantive regulation as SBS trading on registered SBSEFs.

³⁸ See 17 C.F.R. § 16.00 *et seq.*

³⁹ 17 C.F.R. § 16.00(a).

⁴⁰ 17 C.F.R. §§ 16.01-16.02.

The Proposing Release notes that a venue that provides for SBS trading need only register as a national securities exchange or an SBSEF. Therefore, if a venue elects to register as a national securities exchange, it would not need to also register as an SBSEF; similarly, if such venue registers as an SBSEF and provides a market for no securities other than SBS, then it need not also register as a national securities exchange.⁴¹ In addition, Proposed Rule 814 provides entities with the ability to operate both a national securities exchange and an SBSEF, and to separately register the two facilities.⁴² We support the Commission's position that an SBS trading platform should not be required to register as both a national securities exchange and an SBSEF, provided that a registered SBSEF is limited to the trading of SBS. However, we believe that the Commission should provide in any final rule that national securities exchanges that provide for SBS trading must also comply with applicable SBSEF rules to ensure uniform regulatory treatment of SBS trading. The application of different regulatory requirements to the same instruments, depending on the venue on which they are traded, could result in regulatory arbitrage, as market participants seek to trade on the platform that they believe imposes less onerous regulatory requirements. In addition, this disparate treatment could lead to inefficiencies and uncertainties, because the different regulatory treatment could impact pricing and market practices in various respects. The Commission should therefore make clear that SBS traded on regulated markets will be subject to the same regulatory requirements, regardless of the registration status of the platform.

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We appreciate the opportunity to provide our comments to the Commission regarding the Proposal, and we would be pleased to meet with the Commission or its staff to discuss our comments. If the staff has questions or comments, please do not hesitate to call Joseph Schwartz, Director and Counsel, or the undersigned at (202) 730-2600.

Respectfully submitted,

/s/ Jennifer W. Han

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cc: The Hon. Gary Gensler, SEC Chairman
The Hon. Hester M. Peirce, SEC Commissioner
The Hon. Allison Herren Lee, SEC Commissioner
The Hon. Caroline A. Crenshaw, SEC Commissioner
Mr. Haoxiang Zhu, Director, Division of Trading and Markets

⁴¹ Proposing Release, *supra* note 2, p. 28.

⁴² Proposed Rule 242.814.