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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34–78716; File No. S7–15–15]

RIN 3235–AL74

Access to Data Obtained by Security-Based Swap Data Repositories

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 amendments to rule 13n–4 under the Securities Exchange Act of 1934 (''Exchange Act'') related to regulatory access to security-based swap data held by security-based swap data repositories. The rule amendments would implement the conditional Exchange Act requirement that security-based swap data repositories make data available to certain regulators and other authorities.

DATES: Effective November 1, 2016.

FOR FURTHER INFORMATION CONTACT: Carol McGee, Assistant Director, Joshua Kans, Senior Special Counsel, or Kateryna Imus, Special Counsel, at (202) 551–5870; Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–7010.

SUPPLEMENTARY INFORMATION: The Commission is adding paragraphs (b)(9) and (b)(10) to Exchange Act rule 13n–4 to implement the statutory requirement that security-based swap data repositories conditionally provide data to certain regulators and other authorities. The Commission also is adding paragraph (d) to rule 13n–4 to specify the method to be used to comply with the associated statutory notification requirement.

I. Background

A. Statutory Requirements for Access to Security-Based Swap Data Repository Information, as Amended

Title VII of the Dodd-Frank Act amended the Exchange Act to provide a comprehensive regulatory framework for security-based swaps, including the regulation of security-based swap data repositories.[1]

Those amendments, among other things, require that security-based swap data repositories make data available to certain regulators and other entities. In particular, the amendments conditionally require that security-based swap data repositories ''on a confidential basis pursuant to section 24, upon request, and after notifying the Commission of the request, make available security-based swap data obtained by the security-based swap data repository, including individual counterparty trade and position data'' to specified recipients.[2] As provided by the statute, these recipients include ''each appropriate prudential regulator'' [3]; the Financial Stability Oversight Council (''FSOC''); the Commodity Futures Trading Commission (''CFTC''); the Department of Justice; and ''any other person that the Commission determines to be appropriate,'' including foreign financial supervisors (including foreign futures authorities), foreign central banks, foreign ministries and other foreign authorities.[4]

Access to data pursuant to these provisions is conditioned on the repository receiving ''a written agreement from each entity stating that the entity shall abide by the confidentiality requirements described in section 24 relating to the information on security-based swap transactions that is provided.'' [5]

As enacted in 2010, moreover, the data access provisions stated that before such data is shared, ''each entity shall agree to indemnify the security-based swap data repository and the Commission for any expenses arising from litigation relating to the information provided under section 24.'' [6] Congress repealed the indemnification requirement in December 2015.[7]

B. Proposed Rule Amendments

In 2015, prior to the legislative revision of the data access provisions, the Commission proposed rule amendments to implement the data access provisions.[8] This proposal built upon two earlier Commission proposals,[9] and specifically set forth proposed amendments to Exchange Act rule 13n–4—which the Commission previously adopted as part of a series of rules governing the registration process, duties and core principles applicable to security-based swap data repositories.[10] Key elements of the proposal were:

• *Designation of entities eligible to access data.* The proposal: (i) Specifically identified each of the five applicable prudential regulators as being eligible to access data under these

[1] Public Law 111–203, section 761(a) (adding Exchange Act section 3(a)(75) (defining ''security-based swap data repository'')) and section 763(i) (adding Exchange Act section 13(n) (establishing a regulatory regime for security-based swap data repositories)).

References in this release to the terms ''data repository,'' ''trade repository,'' ''repository'' or ''SDR'' generally address security-based swap data repositories unless stated otherwise.

[2] Exchange Act section 13(n)(5)(G), 15 U.S.C. 78m(n)(5)(G). The confidentiality requirements addressed by Exchange Act section 24, 15 U.S.C. 78x, are addressed below. *See* note 83, *infra.* As initially adopted, this provision addressed access to ''all'' data obtained by the security-based swap data repository. As amended by Congress in 2015, the reference to ''all'' was replaced by a reference to ''security-based swap'' data. *See* Public Law 114–94, section 86011(c)(1)(A) (striking ''all'' and adding ''security-based swap'' in the introductory part of Exchange Act section 13(n)(5)(G)).

[3] As discussed below, the term ''prudential regulator'' encompasses the Board of Governors of the Federal Reserve System and certain other regulators, with regard to certain categories of regulated entities. *See* note 26, *infra.*

[4] Exchange Act section 13(n)(5)(G), 15 U.S.C. 78m(n)(5)(G). As initially adopted this provision did not reference ''other foreign authorities.'' That provision was added by Congress in December 2015. *See* Public Law 114–94, section 86011(c)(1)(B) (adding paragraph (G)(v)(IV) to Exchange Act section 13(n)(5)).

[5] Exchange Act section 13(n)(5)(H), 15 U.S.C. 78m(n)(5)(H).

[6] *See* Dodd Frank Act section 763(i) (adding former Exchange Act section 13(n)(5)(H)(ii)).

[7] *See* Public Law 114–94, section 86011(c)(2).

[8] *See* Exchange Act Release No. 75845 (Sept. 4, 2015), 80 FR 55182 (Sept. 14, 2015) (''Proposing Release'').

[9] *See generally* Proposing Release, 80 FR at 55182–84 (discussing relevant provisions of 2010 proposed rules regarding security-based swap data repositories, and 2013 proposed rules regarding cross-border application of Title VII).

[10] *See* Exchange Act Release No. 74246 (Feb. 11, 2015), 80 FR 14438 (Mar. 19, 2015) (''SDR Adopting Release''). Those rules did not address the data access requirements applicable to data repositories, and the Commission stated that final resolution of the issue would benefit from further consideration and public comment. *See* SDR Adopting Release, 80 FR at 14487–88.

provisions [11]; (ii) identified the Federal Reserve Banks and the Office of Financial Research (''OFR'') as being able to access data [12]; and (iii) stated that the Commission would consider the presence of certain confidentiality-related protections in determining whether to permit other entities to access data pursuant to these provisions, and that the associated determination orders typically would incorporate conditions that ''specify the scope of a relevant authority's access to data, and that limit this access in a manner that reflects the relevant authority's regulatory mandate or legal responsibility or authority.'' [13]

- *Confidentiality condition.* To implement the statutory confidentiality condition, the proposal stated that before a repository could provide access, there would have to be in effect an arrangement between the Commission and the entity (in the form of a memorandum of understanding (''MOU'') or otherwise) to address the confidentiality of the information made available. This arrangement would be deemed to satisfy the statutory requirement that the repository receive a written confidentiality agreement from the recipient entity.[14]
- *Notification requirement.* To implement the statutory requirement that the Commission be notified of data access requests, the proposal provided that a repository must notify the Commission of the first request for data from a particular entity, and must maintain records of all information related to the initial and all subsequent request for data access from that entity.[15]
- *Limitation to security-based swap data.* The proposal specified that data access under the rules would apply only to ''security-based swap data.'' [16]
- *Scope of application of data access provisions.* The proposal stated that the data access provisions and its associated conditions would not apply in certain circumstances, including when information is received directly from the Commission.[17]
- *Indemnification exemption.* The proposal set forth a conditional exemption to the then-extant indemnification requirement. The proposed exemption was conditioned in part on the applicable security-based swap information relating to persons or activities being within the recipient entity's ''regulatory mandate, or legal responsibility or authority.'' [18]

C. Commenter Views

A commenter criticized the inclusion of a notification requirement,[19] suggesting that the scope of certain regulators' access to security-based swap data should be determined on a case-by-case basis,[20] and supported elimination of the statutory indemnification requirement.[21]

The Commission reopened the comment period earlier this year to allow the public the opportunity to comment on the remainder of the proposal in light of the statutory changes, including removal of the statutory indemnification requirement.[22] That release recognized that Congress eliminated the indemnification requirement discussed above, making unnecessary paragraph (d) of proposed rule 13n–4. The Commission received two additional comments in response.[23]

II. Final Data Access Rules

For the reasons discussed below, and after considering commenter concerns, the Commission is adopting final rules to implement the data access statutory provisions. The final rules largely are the same as those that were proposed, apart from eliminating the proposed indemnification exemption in response to the removal of the underlying statutory provision.[24]

Accordingly, should the confidentiality condition to data access be satisfied, security-based swap data repositories would be legally obligated to provide relevant authorities with access to security-based swap data, consistent with the parameters of any Commission orders, MOUs or other arrangements that are relevant to the availability and scope of access.[25]

A. Application to Prudential Regulators and Federal Reserve Banks

1. Proposed Approach

As noted above, the Exchange Act provides that a repository is conditionally obligated to make information available to, among others, ''each appropriate prudential

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[11] *See* Proposing Release, 80 FR at 55185–86. The Commission proposed those provisions so the ability of those regulators to access data would not vary depending on the registration status of the regulated entity, and on whether the regulator was acting in a ''prudential'' capacity. *See id.*

[12] *See* Proposing Release, 80 FR at 55186–87. The Commission preliminarily concluded that access by these entities would be appropriate given the mandates of the Federal Reserve Banks and the OFR. *See id.*

[13] *See* Proposing Release, 80 FR at 55187–88. The Commission noted that limiting access in this manner may help minimize the risk of unauthorized disclosure, misappropriation or misuse. *See id.*

[14] *See* Proposing Release, 80 FR at 55189–90. The Commission stated that this proposed approach would: build upon the Commission's experience in negotiating MOUs with other regulators with regard to enforcement and supervision, help avoid the possibility of uneven and potentially inconsistent application of confidentiality protections, and appropriately implement the statutory reference to Exchange Act section 24. *See id.*

[15] *See* Proposing Release, 80 FR at 55188–89. The Commission stated that this approach should place the Commission on notice that an entity has the ability to access data, and place the Commission in a position to examine such access as appropriate, while avoiding the inefficiencies that would accompany an approach that requires a repository to direct to the Commission information regarding each instance of access. *See id.*

[16] *See* Proposing Release, 80 FR at 55189.

[17] *See* Proposing Release, 80 FR at 55193.

[18] *See* Proposing Release, 80 FR at 55191–93. The indemnification exemption further would have been conditioned on there being one or more arrangements (in the form of an MOU or otherwise) between the Commission and the recipient entity that addressed the confidentiality of the security-based swap information provided and any other matters as determined by the Commission, and that also specified the types of information that would relate to persons or activities within the recipient entity's ''regulatory mandate, legal responsibility or authority.'' *See id.*

[19] *See* Depository Trust & Clearing Corp. comment dated Oct. 29, 2015 (''DTCC comment'') at 4 (requesting that rulemaking not include a notification requirement; stating that requiring notice to the Commission of data access requests may cause other regulators to hesitate to make such requests, particularly in connection with investigations, and that a notice requirement could impede the real-time flow of information among regulators; adding that if any notification requirement is included, it should not require a repository to submit the identity of the requesting party).

[20] *See* DTCC comment at 5 (stating that for requests by entities other than the prudential regulators, ''the Commission should determine on a case-by-case basis whether an SB SDR should make available confidential swap data based on the unique set of facts and circumstances of that request for information and address permissible uses and disclosures of such data, such as for research or publications,'' and adding that such an approach would help ensure that ''data access is granted based on an entity's regulatory mandate, responsibly balanc[ing] the need for efficient, timely information sharing, and avoid[ing] overly expansive access to confidential information'').

[21] *See* DTCC comment at 5–6.

One comment submitted to the comment file did not address the substance of the Commission's proposal. *See* Zeba Gomez comment dated Sept. 19, 2015. The public comments that the Commission received on the Proposing Release are available on the Commission's Web site at *http://www.sec.gov/comments/s7-15-15/s71515.shtml.*

[22] *See* Exchange Act Release No. 76922 (Jan. 15, 2016), 81 FR 3354 (Jan. 21, 2016) (''Comment Reopening Release'').

[23] *See* Depository Trust & Clearing Corp. comment dated Feb. 22, 2016 (''DTCC 2016 comment''); Suzanne Shatto comment dated Jan. 20, 2016 (''Shatto comment'').

[24] As discussed below, the Commission also has revised the proposal regarding the designation of additional entities that may access data, for consistency with the statute as amended. *See* part II.C.2, *infra.*

[25] We believe that the approach taken by the final rule is generally consistent with the principles expressed by a commenter that supported access, while also putting into effect the statutory conditions to data access for persons identified by statute or subject to a determination by the Commission. *See* Shatto comment.

regulator.'' [26] To implement this, the proposed rules identified, as being eligible to access data, each of the entities encompassed within the statutory ''prudential regulator'' definition: The Board of Governors of the Federal Reserve System (''Board''), the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation (''FDIC''), the Farm Credit Administration, and the Federal Housing Finance Agency.[27] The proposed rules also included ''any Federal Reserve Bank'' among the entities conditionally eligible to access data,[28] in accordance with the Exchange Act provision that extends data access to ''any other person that the Commission determines to be appropriate.'' [29]

No commenter addressed the proposal to specifically identify the prudential regulators or the Federal Reserve Banks as being eligible to access such data.[30]

2. Final Rule

The final rule incorporates the elements of proposed Exchange Act rule 13n–4(b)(9)(i)–(v), as discussed below, without change.[31]

The final rule accordingly identifies each of the five prudential regulators as being able to access data. Consistent with the discussion in the proposal, this is to specify that those regulators' ability to access security-based swap data would not vary depending on whether entities regulated by the regulators are acting as security-based swap dealers, as major security-based swap participants, or in some other capacity,[32] or vary depending on whether the regulator acts in a ''prudential'' capacity in connection with the information, so long as the prerequisites to data access, including the confidentiality condition, have been met.[33]

The final rules also include ''any Federal Reserve Bank'' among the entities conditionally eligible to access security-based swap data from repositories,[34] in accordance with the Exchange Act provision that extends data access to ''any other person that the Commission determines to be appropriate.'' [35] The Commission believes that it is appropriate for the Federal Reserve Banks to be able to access security-based swap data, subject to the confidentiality condition and other applicable prerequisites. In part, this conclusion is based on the Commission's understanding that the Federal Reserve Banks occupy important oversight roles under delegated authority from the Board, including supervision of banks that are under the Board's authority, and gathering and analyzing information to inform the Federal Open Market Committee regarding financial conditions.[36] The Commission further understands that the Federal Reserve Banks, as well as the Board, would use data from security-based swap data repositories to fulfill statutory responsibilities related to prudential supervision and financial stability.[37] The Commission accordingly concludes that the Federal Reserve Banks should conditionally have access to the security-based swap data.[38]

A Federal Reserve Bank's ability to access such data would be subject to

[26] *See* Exchange Act section 13(n)(5)(G)(i), 15 U.S.C. 78m(n)(5)(G)(i). Exchange Act section 3(a)(74), 15 U.S.C. 78c(a)(74), defines ''prudential regulator'' by reference to the Commodity Exchange Act (''CEA''). The CEA, in turn, defines ''prudential regulator'' to encompass: (a) The Board, (b) the Office of the Comptroller of the Currency, (c) the FDIC, (d) the Farm Credit Administration or (e) the Federal Housing Finance Agency—in each case with respect to swap dealers, major swap participants, security-based swap dealers or major security-based swap participants (cumulatively, ''dealers'' or ''major participants'') that fall within the regulator's authority. *See* CEA section 1a(39); 7 U.S.C. 1a(39).

For example, the definition provides that the Board is a prudential regulator with regard to, among others, certain dealers and major participants that are: State-chartered banks and agencies, foreign banks that do not operate insured branches, or members of bank holding companies. Also, for example, the definition provides that the Office of the Comptroller of the Currency is a prudential regulator with regard to, among others, certain dealers or major participants that are national banks, federally chartered branches or agencies of foreign banks or federal saving associations.

[27] *See* proposed Exchange Act rule 13n–4(b)(9)(i)–(v).

[28] *See* proposed Exchange Act rule 13n–4(b)(9)(i).

[29] *See* Exchange Act section 13(n)(5)(G)(v), 15 U.S.C. 78m(n)(5)(G)(v).

[30] As noted, one commenter suggested that data access by recipients other than the prudential regulators should be more circumscribed than the access afforded the prudential regulators, in that the access of the other recipients should be subject to case-by-case review by the Commission. *See* note 20, *supra.* As discussed below the Commission will have the ability to tailor access in accordance with each entity's regulatory mandate or legal responsibility or authority. *See* parts II.C.2.a and II.F.2, *infra.*

[31] *See* Proposing Release, 80 FR at 55185–86; Exchange Act rule 13n–4(b)(9)(i)–(v).

[32] This particularly addresses the fact that the statutory ''prudential regulator'' definition noted above specifically refers to those regulators in connection with dealers and major participants that fall within their authority. The Commission concludes that application of the data access provision should not vary depending on whether an entity regulated by the regulator is acting as a dealer or major participant, or in some other capacity. Such a reading would not further the purposes of Title VII, and the Dodd-Frank Act more generally, including facilitating regulator access to security-based swap information to help address the risks associated with those instruments.

[33] Those regulators' ability to access security-based swap data accordingly would not be limited to situations in which they act in the capacity of a prudential supervisor. Thus, for example, the FDIC is conditionally authorized to access security-based swap data from a repository in connection with all of its statutory capacities, including its prudential supervisory capacity as well as other capacities such as the FDIC's resolution authority pursuant to the Federal Deposit Insurance Act and the Orderly Liquidation Authority provisions of Title II of the Dodd-Frank Act.

[34] *See* Exchange Act rule 13n–4(b)(9)(i).

[35] *See* Exchange Act section 13(n)(5)(G)(v), 15 U.S.C. 78m(n)(5)(G)(v). The CFTC has identified the Federal Reserve Banks as being ''appropriate domestic regulators'' that may access swap data from swap data repositories. *See* Proposing Release, 80 FR at 55184 n.29. *See* 17 CFR 49.17(b)(1).

[36] Section 11(k) of the Federal Reserve Act grants the Board authority ''to delegate, by published order or rule . . . any of its functions, other than those relating to rulemaking or pertaining to monetary and credit policies to . . . members or employees of the Board, or Federal Reserve banks.'' 12 U.S.C. 248(k). The Federal Reserve Banks carry out the Board's activities including the supervision, examination and regulation of financial institutions as directed by the Board and under its supervision. *See* the Board's Rules of Organization, section 3(j) FRRS 8–008 (providing that the Director of the Board's Division of Banking Supervision and Regulation ''coordinates the System's supervision of banks and bank holding companies and oversees and evaluates the Reserve Banks' examination procedures''). The Board further has delegated extensive authority to the Reserve Banks with respect to numerous supervisory matters. *See* 12 CFR 265.11 (functions delegated by the Board to the Federal Reserve Banks).

[37] We understand that the Board and the Federal Reserve Banks jointly would use the data in support of the prudential supervision of institutions under the Board's jurisdiction, such as state member banks, bank holding companies, and Edge Act corporations. *See, e.g.,* section 9 of the Federal Reserve Act, 12 U.S.C. 321–338a (supervision of state member banks); the Bank Holding Company Act, 12 U.S.C. 1841–1852 (supervision of bank holding companies); the Edge Act, 12 U.S.C. 610 *et seq.* (supervision of Edge Act corporations). We also understand that the Board and the Federal Reserve Banks would use the data in support of the implementation of monetary policy, such as through market surveillance and research. *See, e.g.,* section 12A of the Federal Reserve Act, 12 U.S.C. 263 (establishing the Federal Open Market Committee); and section 2A of the Federal Reserve Act, 12 U.S.C. 225a (setting monetary policy objectives). In addition, we understand that the Board and the Federal Reserve Banks would use the data in fulfilling the Board's responsibilities with respect to assessing, monitoring and mitigating systemic risk, such as supervision of systemically important institutions. *See, e.g.,* section 113 of the Dodd-Frank Act, 12 U.S.C. 5323 (SIFIs); and section 807 of the Dodd-Frank Act, 12 U.S.C. 5466 (designated FMUs).

[38] In permitting the Federal Reserve Banks to access security-based swap information pursuant to the data access provisions, the Commission concludes that the Federal Reserve Banks' access should not be limited to information regarding security-based swap transactions entered into by banks supervised by the Board, but should be available more generally with regard to security-based swap transaction data, subject to the confidentiality condition and other applicable prerequisites. This is consistent with the fact that Title VII does not limit the Board's access to data in such a way. This view also reflects the breadth of the Federal Reserve Banks' responsibilities regarding prudential supervision and financial stability, as addressed above. Their access, however, would be subject to the confidentiality condition, including all access limits incorporated as part of implementing that condition.

conditions related to confidentiality, as would the ability of any other entity that is identified by statute or determined by the Commission to access such data.[39] As discussed below, the Commission may consider the recipient entity's regulatory mandate or legal responsibility or authority, and tailor the entity's access in accordance with that regulatory mandate or legal responsibility or authority.[40]

B. FSOC, CFTC, Department of Justice and Office of Financial Research

1. Proposed Approach

The Exchange Act also states that FSOC, CFTC, and the Department of Justice may access security-based swap data,[41] and the proposed rules accordingly identified those entities as being conditionally authorized to access such data.[42] The proposed rules further stated that the OFR conditionally would be eligible to access such data,[43] in accordance with the Exchange Act provision that extends data access to ''any other person that the Commission determines to be appropriate.'' [44]

No commenter addressed these aspects of the proposal.

2. Final Rule

The final rule incorporates these elements of the proposal without change.[45] As discussed in the Proposing Release, the rule includes the FSOC, CFTC, and the Department of Justice among the entities that may access data.

Moreover, the Commission believes that such access by the OFR is appropriate in light of the OFR's regulatory mandate and legal responsibility and authority.[46] The OFR was established by Title I of the Dodd-Frank Act to support FSOC and FSOC's member agencies by identifying, monitoring and assessing potential threats to financial stability through the collection and analysis of financial data gathered from across the public and private sectors.[47] In connection with this statutory mandate to monitor and assess potential threats to financial stability, the OFR's access to security-based swap transaction data may be expected to help assist it in examining the manner in which derivatives exposures and counterparty risks are distributed through the financial system, and in otherwise assessing those risks. The Commission accordingly concludes that the OFR should conditionally have access to the security-based swap data.[48]

As with the other entities that may access data pursuant to the data access provision, the OFR's ability to access such data would be subject to conditions related to confidentiality.[49]

C. Future Commission Determination of Additional Entities

1. Proposed Approach

As noted, the Dodd-Frank Act amended the Exchange Act to provide that data access under these provisions would be available to ''any other person that the Commission'' determines to be appropriate, including foreign financial supervisors (including foreign futures authorities), foreign central banks and foreign ministries.[50] To implement that requirement, the proposed rule provided that data access would be available to any other person that the Commission determines to be appropriate, conditionally or unconditionally, by order, including but not limited to foreign financial supervisors, foreign central banks and foreign ministries.[51] The Commission noted that one or more self-regulatory organizations potentially may seek such access under this provision.[52]

In the proposal, the Commission further stated that in connection with making such a determination, it would consider the presence of a confidentiality-related MOU or other arrangement between the Commission and a relevant authority, and whether the information would be subject to robust confidentiality safeguards. The Commission added that it would consider an authority's interest in access to security-based swap data based on the relevant authority's regulatory mandate or legal responsibility or authority, and that the Commission preliminarily expected that determination orders typically would incorporate conditions that specify the scope of a relevant authority's access to data, and that limit such access in a manner that reflects the relevant authority's regulatory mandate or legal responsibility or authority.[53] In addition, the Commission anticipated that it would take into account any other factors appropriate to the determination, including whether the determination was in the public

[39] In this regard, the Commission notes that personnel of the Board and the Reserve Banks already are subject to a number of confidentiality requirements. *See* 18 U.S.C. 1905 (imposing criminal sanctions on U.S. government personnel who disclose non-public information except as provided by law), 18 U.S.C. 641 (imposing criminal sanctions on the unauthorized transfer of records), 5 CFR 2635.703 (Office of Government Ethics regulations prohibiting unauthorized disclosure of nonpublic information); *see also* Federal Reserve Bank Code of Conduct section 3.2 (requiring Reserve Bank employees to maintain the confidentiality of nonpublic information).

[40] *See* part II.F.2, *infra*.

[41] *See* Exchange Act sections 13(n)(5)(G)(ii)–(iv), 15 U.S.C. 78m(n)(5)(G)(ii)–(iv).

[42] *See* proposed Exchange Act rule 13n–4(b)(9)(vi)–(viii).

[43] *See* proposed Exchange Act rule 13n–4(b)(9)(ix).

[44] *See* Exchange Act section 13(n)(5)(G)(v), 15 U.S.C. 78m(n)(5)(G)(v).

[45] *See* Exchange Act rule 13n–4(b)(9)(vi)–(ix).

[46] *See* Exchange Act rule 13n–4(b)(9)(ix). We note that the CFTC has identified the OFR as being an ''appropriate domestic regulator'' that may access swap data from swap data repositories. *See* Proposing Release, 80 FR at 55184 n.29; *see also* 17 CFR 49.17(b)(1).

[47] *See* Dodd-Frank Act section 153(a) (identifying the purpose of the OFR as: (1) Collecting data on behalf of FSOC and providing such data to FSOC and its member agencies; (2) standardizing the types and formats of data reported and collected; (3) performing applied research and essential long-term research; (4) developing tools for risk measurement and monitoring; (5) performing other related services; (6) making the results of the activities of the Office available to financial regulatory agencies; and (7) assisting those member agencies in determining the types and formats of data authorized by the Dodd-Frank Act to be collected by the member agencies); Dodd-Frank Act section 154(c) (requiring that OFR's Research and Analysis Center, on behalf of FSOC, develop and maintain independent analytical capabilities and computing resources to: (A) Develop and maintain metrics and reporting systems for risks to U.S. financial stability; (B) monitor, investigate, and report on changes in systemwide risk levels and patterns to FSOC and Congress; (C) conduct, coordinate, and sponsor research to support and improve regulation of financial entities and markets; (D) evaluate and report on stress tests or other stability-related evaluations of financial entities overseen by FSOC member agencies; (E) maintain expertise in such areas as may be necessary to support specific requests for advice and assistance from financial regulators; (F) investigate disruptions and failures in the financial markets, report findings and make recommendations to FSOC based on those findings; (G) conduct studies and provide advice on the impact of policies related to systemic risk; and (H) promote best practices for financial risk management).

The OFR is also required to report annually to Congress its analysis of any threats to the financial stability of the United States. *See* Dodd-Frank Act section 154(d).

[48] As discussed below, the proposed confidentiality condition could limit an entity's access to data by linking the scope of the access to information that related to persons or activities within an entity's regulatory mandate or legal responsibility or authority, as could be specified in an MOU or other arrangement between the Commission and the entity. *See* part II.F.2, *infra*.

[49] Also, as U.S. government personnel, OFR personnel are subject to the same general confidentiality requirements that are addressed above in the context of the Board and the Federal Reserve Banks. *See* note 39, *supra*. In addition, the OFR is required to keep data collected and maintained by the OFR data center secure and protected against unauthorized disclosure. *See* Dodd-Frank Act section 154(b)(3); *see also* 12 CFR 1600.1 (ethical conduct standards applicable to OFR employees, including post-employment restrictions linked to access to confidential information); 31 CFR 0.206 (Treasury Department prohibition on employees disclosing official information without proper authority).

[50] *See* Exchange Act section 13(n)(5)(G)(v). As discussed below, the 2015 legislative change added to that provision. *See* note 58, *infra*.

[51] *See* proposed Exchange Act rule 13n–4(b)(9)(x).

[52] *See* Proposing Release, 80 FR at 55187.

[53] *See* Proposing Release, 80 FR at 55187–88.

interest, and whether the relevant authority agrees to provide the Commission and other U.S. authorities with reciprocal assistance in matters within their jurisdiction.[54]

As part of the proposal, the Commission noted that it may issue determination orders of a limited duration, and that the Commission may revoke a determination at any time.[55] The Commission also stated the preliminary belief that it is not necessary to prescribe by rule specific processes to govern a repository's treatment of requests for access.[56]

As discussed below, one commenter addressed the Commission's future determination orders regarding data access.[57]

2. Final Rule

To implement its determination authority the Commission largely is adopting these provisions as proposed, except that the final rule, consistent with the recent statutory change, also identifies ''other foreign authorities'' within the nonexclusive list of the types of entities that may be subject to a determination pursuant to this authority.[58] The Commission will make such determinations through the issuance of Commission orders, and such determinations may be conditional or unconditional.[59]

a. Determination Factors and Conditions

As stated in the proposal, the Commission expects that it would consider a variety of factors in connection with making such a determination, and that it may impose associated conditions in connection with the determination. In part, given the importance of maintaining the confidentiality of security-based swap data, the Commission expects to consider whether there is an MOU or other arrangement between the Commission and the relevant authority that is designed to protect the confidentiality of the security-based swap data provided to the authority.[60] The Commission also expects to consider whether such data would be subject to robust confidentiality safeguards, such as safeguards set forth in the relevant jurisdiction's statutes, rules or regulations with regard to disclosure of confidential information by an authority or its personnel, and/or safeguards set forth in the authority's internal policies and procedures.

In addition, the Commission may consider the relevant authority's interest in access to security-based swap data based on the relevant authority's regulatory mandate or legal responsibility or authority. Consistent with that factor, the Commission expects that such determination orders typically would incorporate conditions that specify the scope of a relevant authority's access to data, and that limit this access in a manner that reflects the relevant authority's regulatory mandate or legal responsibility or authority.[61] Depending on the nature of the relevant authority's interest in the data, such conditions could address factors such as the domicile of the counterparties to the security-based swap, and the domicile of the underlying reference entity. Limiting the amount of information accessed by an authority in this manner should be expected to help minimize the risk of unauthorized disclosure, misappropriation or misuse of security-based swap data, as each relevant authority will only have access to information within its regulatory mandate, or legal responsibility or authority.[62]

The Commission continues to anticipate taking into account any other factors that are appropriate to the determination, including whether such a determination would be in the public interest, and whether the relevant authority agrees to provide the Commission and other U.S. authorities with reciprocal assistance in matters within their jurisdiction.

One commenter suggested that the ability of authorities (other than prudential regulators) to access data pursuant to these provisions should be subject to request-by-request Commission determinations that address permissible uses and disclosures of such data, to balance the need for information sharing against ''overly expansive access to confidential information.'' [63] That commenter subsequently expressed the view that the Commission should simplify its proposal to allow access to data by certain named entities, consistent with their interest based on their regulatory mandate or legal responsibility or authority, ''without further action needed to be taken by the requesting body or the [repository].'' The commenter added that trade repositories needed ''clear and specific guidance''—such as that expressed in the CPMI–IOSCO guidance regarding access to trade repository data—regarding the type of data that should be made accessible to each of the different requesting entities.'' [64]

The Commission has considered these suggestions, but has determined not to change the approach of the proposal, either by implementing a request-by-request approach toward access for some entities, or by allowing data access to other entities without further action. The Commission concludes that a request-by-request approach for access generally would be impracticable in terms of resources and operational delays, as well as unnecessary in light of the final rule's approach of linking access under the Commission's determination authority in a manner that reflects an entity's regulatory mandate or legal responsibility or authority. In our view, this approach reasonably achieves the goal of providing clear and specific guidance to repositories, as suggested by the commenter, in a manner that appropriately balances the benefits of information sharing with the need to protect the confidentiality of information. Moreover, with respect to the suggestion that data access may be allowed for certain entities without further action by these entities or the repository, in our view such an approach would not achieve the confidentiality benefits that will flow from using MOUs or other arrangements. The final rule's approach of using MOUs or other arrangements between the Commission and recipient

[54] *See id.* at 55188.

[55] *See id.*

[56] *See id.*

[57] *See* text accompanying notes 62 through 64.

[58] *See* Exchange Act rule 13n–4(b)(9)(x). The 2015 statutory amendment added the term ''other foreign authorities'' to the entities identified in Exchange Act section 13(n)(5)(G)(v). *See* note 7, *supra.* The addition of that term to the rule is consistent with the proposal, which, like the final rule, uses the phrase ''including, but not limited to'' when identifying the types of authorities that may be subject to a Commission determination.

[59] *See* Exchange Act rule 13n–4(b)(9)(x).

[60] Such an MOU or other arrangement will also satisfy the statutory requirement that a security-based swap data repository obtain a confidentiality agreement from the authority. *See* part II.F.2, *infra.* To the extent that a relevant authority needs access to additional information, the relevant authority may request that the Commission consider revising its determination order, and MOU or other arrangement, as applicable. *See* Proposing Release, 80 FR at 55187–88.

[61] *See* Proposing Release, 80 FR at 55187–88. To appropriately limit a relevant authority's access to only security-based swap data that is consistent with the designation order, a repository may, for example, need to customize permissioning parameters to reflect each relevant authority's designated access to security-based swap data. *See generally* note 140, *infra* (discussing access criteria currently used by DTCC in connection with current voluntary disclosure practices).

[62] As discussed below, the Commission will consider similar issues in connection with implementing the confidentiality condition. *See also* part II.F.2, *infra.*

[63] *See* note 20, *supra.*

[64] *See* DTCC 2016 comment at 2 (citing the Committee on Payments and Market Infrastructure (''CPMI'') and the International Organization of Securities Commissions' (''IOSCO'') guidance on authorities access to trade repository data as an example of such guidance).

entities to satisfy the confidentiality condition, in any event, addresses the commenter's suggestion in part by obviating the need for the repository (as opposed to the recipient entities) to take further action with respect to satisfying the confidentiality condition. In addition, this approach will provide a vehicle for the Commission to provide the type of ''clear and specific guidance'' requested by the commenter. Moreover, the use of the Commission-negotiated confidentiality arrangements will eliminate the need for each recipient entity to negotiate separate confidentiality arrangements with each trade repository.

b. Additional Matters Related to the Determinations

Consistent with the proposal, the Commission may take various approaches in deciding whether to impose additional conditions in connection with its consideration of requests for determination orders. For example, the Commission may issue a determination order that is of a limited duration. In addition, the Commission further may revoke a determination at any time, such as, for example, if a relevant authority fails to comply with the MOU or other arrangement by failing to keep confidential security-based swap data provided to it by a repository. Even absent such a revocation, an authority's access to data pursuant to these provisions also would cease upon the termination of the MOU or other arrangement used to satisfy the confidentiality condition.[65]

The Commission continues to expect that repositories will provide relevant authorities with access to security-based swap data in accordance with the determination orders, and the Commission generally does not expect to be involved in reviewing, signing-off on or otherwise approving relevant authorities' requests for security-based swap data from repositories that are made in accordance with a determination order. The final rule also does not prescribe any specific processes to govern a repository's treatment of requests for access.[66]

Finally, consistent with the proposal, the Commission notes that when it designates an authority to receive direct electronic access to data under section 13(n)(5)(D)—which states that a repository must provide such access to the Commission ''or any designee of the Commission, including another registered entity''—the Commission may elect to apply these determination factors and consider applying protections similar to those in the data access provisions of Exchange Act sections 13(n)(5)(G) and (H).[67]

D. Notification Requirement

1. Proposed Approach

The Exchange Act states that a repository must notify the Commission when an entity requests the repository to make available security-based swap data.[68] The Commission proposed to implement that notification requirement by requiring that the repository inform the Commission upon its receipt of the first request for data from a particular entity (which may include any request that the entity be provided ongoing online or electronic access to the data), and to maintain records of all information related to the initial and all subsequent requests for data access requests from that entity, including records of all instances of online or electronic access, and records of all data provided in connection with such requests or access.[69]

In making this proposal, the Commission noted that one commenter had opposed any requirement that the Commission receive notice of a recipient's initial request, on the grounds that such notice may cause other authorities to hesitate to make such requests. The Commission explained, however, that it is necessary for the Commission to be informed of the initial request from a particular entity, and that commenter's concerns that other regulators may be reluctant to place the Commission on notice of such initial requests are mitigated by the Commission's long history of cooperation with other authorities in supervisory and enforcement matters.[70] As discussed below, one commenter addressed the notification requirement.[71]

2. Final Rule

The Commission is adopting as proposed the approach for implementing the notification requirement.[72] Accordingly, a security-based swap data repository would be required to inform the Commission upon its receipt of the first request for data from a particular entity (which may include any request that the entity be provided ongoing online or electronic access to the data).[73] A repository must keep such notifications and any related requests confidential.[74]

Under the final rule, the repository also must maintain records of all information related to the initial and all subsequent requests for data access requests from that entity, including records of all instances of online or electronic access, and records of all data provided in connection with such requests or access.[75] For these purposes, we believe that ''all information related to'' such requests would likely include, among other things: The identity of the requestor or person accessing the data; the date, time and substance of the request or access; date and time access is provided; and copies of all data reports or other aggregations of data provided in connection with the request or access.[76]

Consistent with the discussion accompanying the proposal, the Commission concludes that the final

[65] *See* part II.F.2, *infra.*

[66] *See* Proposing Release, 80 FR at 55188.

[67] *See* Proposing Release, 80 FR at 55188. In practice, the Commission expects that security-based swap data repositories may satisfy their obligation to make available data pursuant to sections 13(n)(5)(G) and (H) by providing direct electronic access to appropriate authorities. To the extent a repository were to satisfy those requirements by some method other than electronic access, however, the Commission separately may consider whether to also designate particular authorities as being eligible for direct electronic access to the repository pursuant to section 13(n)(5)(D). In making such assessments under section 13(n)(5)(D), the Commission will have the ability to consider factors similar to the above determination factors, including the presence of confidentiality safeguards, and the authority's interest in the information based on its regulatory mandate or legal responsibility or authority.

[68] *See* Exchange Act section 13(n)(5)(G), 15 U.S.C. 78m(n)(5)(G). As discussed below, *see* part III, *infra,* the notification requirement does not apply to circumstances in which the Commission provides security-based swap data to an entity.

[69] *See* proposed Exchange Act rule 13n–4(e).

[70] *See* Proposing Release, 80 FR at 55189.

[71] *See* text accompanying notes 78 through 80, *infra.*

[72] *See* Exchange Act rule 13n–4(d). This provision has been redesignated as paragraph (d) in light of the elimination of the proposed indemnification exemption.

[73] The rule does not require the repository to inform the Commission of subsequent requests.

[74] Exchange Act section 13(n)(5)(G), 15 U.S.C. 78m(n)(5)(G), and rule 13n–4(b)(9) both require that a repository must make data available ''on a confidential basis.'' Failure by a repository to treat such notifications and requests as confidential could have adverse effects on the underlying basis for the requests. If, for example, a regulatory use of the data is improperly disclosed, such disclosure could signal a pending investigation or enforcement action, which could have detrimental effects.

[75] We note that Exchange Act rule 13n–7(b)(1) requires security-based swap data repositories to maintain copies of ''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.'' *See also* SDR Adopting Release, 80 FR at 14501 (''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.''). Exchange Act rule 13n–4(d) identifies specific types of records that must be maintained in the specific context of access requests to repositories.

[76] *Cf.* Proposing Release, 80 FR at 55189.

rule regarding the notification requirement appropriately accounts for the way in which entities are likely to access such data from repositories, by distinguishing steps that an entity takes to arrange access from subsequent electronic instructions and other means by which the recipient obtains data. By making relevant data available to the Commission in this manner, the approach would place the Commission on notice that a recipient has the ability to access security-based swap data, and place the Commission in a position to examine such access as appropriate, while avoiding the inefficiencies that would accompany an approach whereby a repository must direct to the Commission information regarding each instance of access by each recipient. The approach of the final rule accordingly is more consistent with the manner in which the Commission examines the records of other regulated entities under the Commission's authority.[77]

In response to the proposal, one commenter reiterated its opposition to the Commission being provided notice of a recipient's initial request, on the grounds that such notice might cause other authorities to hesitate to make such requests.[78] As we discussed at the time of the proposal, the Commission believes that it is necessary that it be informed of the initial request from a particular entity so that the Commission may assess whether the initial conditions to data access (*i.e.,* MOUs or other arrangements as needed to satisfy the confidentiality condition [79]) have been met at the time the repository first is requested to provide the entity with information pursuant to the data access provisions, and, more generally, to facilitate the Commission's ongoing assessment of the repository's compliance with the data access provisions. Also, as previously stated, the Commission believes that commenter concerns that other regulators may be reluctant to place the Commission on notice of such initial requests are mitigated by the Commission's long history of cooperation with other authorities in supervisory and enforcement matters.[80] For the same reasons, we decline to follow that commenter's suggestion that a repository may comply with the notification requirement without submitting the identity of the requesting party to the Commission.

E. Limitation to ''Security-Based Swap Data''

1. Proposed Approach

The proposed rule amendments specifically addressed access to ''security-based swap data'' obtained by a security-based swap data repository.[81] In taking that approach, the Commission recognized that repositories that obtain security-based swap data may also obtain data regarding other types of financial instruments, such as swaps under the CFTC's jurisdiction,[82] but preliminarily concluded that the relevant data access provisions should not be read to require a repository to make available data that does not involve security-based swaps.[83]

No commenter addressed this limitation on the type of data made available by repositories.

2. Final Rule

The 2015 amendment to the data access provisions under the Exchange Act clarified that those provisions specifically addressed the disclosure of security-based swap data.[84] This clarification is consistent with the proposal. The Commission accordingly is adopting this part of the rule as proposed.

F. Confidentiality Condition

1. Proposed Approach

As noted, the Exchange Act provides that, prior to providing data, a repository ''shall receive a written agreement from each entity stating that the entity shall abide by the confidentiality requirements described in section 24 relating to the information on security-based swap transactions that is provided.'' [85]

The proposed rule implementing this condition would require that, before a repository provides information to an entity pursuant to the data access provisions, the Commission and the entity shall have entered into an MOU or other arrangement addressing confidentiality. This arrangement would be deemed to satisfy the statutory requirement that the repository receive a written confidentiality agreement from the entity.[86]

As discussed below, one commenter addressed the Commission's future determination orders regarding data access in response to the Comment Reopening Release.[87]

2. Final Rule

The Commission is adopting as proposed the approach for implementing the confidentiality requirement. Accordingly, the final rule provides that ''there shall be in effect an arrangement between the Commission and the entity (in the form of a memorandum of understanding or otherwise) to address the confidentiality of the security-based swap information made available to the entity,'' and that this arrangement between the Commission and a regulator or other recipient entity will satisfy the statutory confidentiality condition. [88]

As discussed in the proposal, in the Commission's view this approach should help obviate the need for each individual repository to negotiate and enter into multiple agreements and help avoid the possibility of uneven and potentially inconsistent application of confidentiality protections across data repositories and recipient entities. [89]

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[77] *See* Proposing Release, 80 FR at 55189.

[78] *See* note 19, *supra.*

[79] *See* part II.F.2, *infra.*

[80] *See* Proposing Release, 80 FR at 55189. As noted in conjunction with the proposal, moreover, data repositories can provide direct electronic access to relevant authorities under this approach. The requirement that the repository inform the Commission when the relevant authority first requests access to security-based swap data maintained by the repository, and to retain records of subsequent access, is designed to facilitate such direct electronic access. *See* Proposing Release, 80 FR at 55189 n.80.

[81] *See* proposed Exchange Act rule 13n–4(b)(9).

[82] Specifically, the Dodd-Frank Act provides that the CFTC will regulate ''swaps,'' the Commission will regulate ''security-based swaps,'' and both the CFTC and the Commission will regulate ''mixed swaps.'' *See* Dodd-Frank Act section 712.

[83] *See* Proposing Release, 80 FR at 55189 (noting that those data access provisions were added by Subtitle B of Title VII, which focused on the regulatory treatment of security-based swaps, to the Exchange Act, which generally addresses the regulation of securities such as security-based swaps; also addressing the significance of language in the confidentiality condition).

[84] *See* note 7, *supra.*

[85] *See* Exchange Act section 13(n)(5)(H)(i), 15 U.S.C. 78m(n)(5)(H)(i).

Exchange Act section 24, 15 U.S.C. 78x, generally addresses disclosures of information by the Commission and its personnel. In relevant part it provides that the Commission may, ''in its discretion and upon a showing that such information is needed,'' provide all records and other information ''to such persons, both domestic and foreign, as the Commission by rule deems appropriate if the person receiving such records or information provides such assurances of confidentiality as the Commission deems appropriate.'' *See* Exchange Act section 24(c), 15 U.S.C 78x(c); *see also* Exchange Act rule 24c–1(b) (providing that the Commission may, upon ''such assurances of confidentiality as the Commission deems appropriate,'' provide non-public information to persons such as domestic and foreign governments or their political subdivisions, authorities, agencies or instrumentalities, self-regulatory organizations and foreign financial authorities).

[86] *See* proposed Exchange Act rule 13n–4(b)(10).

[87] *See* text accompanying note 92, *infra.*

[88] *See* Exchange Act rule13n–4(b)(10). As discussed below, *see* part III, *infra,* the confidentiality condition in Exchange Act sections 13(n)(5)(G) and (H) does not apply to circumstances in which the Commission provides security-based swap data to an entity.

[89] As discussed in the proposal, *see* Proposing Release, 80 FR at 55190 n. 87, the Commission

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This approach also should appropriately implement the statutory reference to the ''confidentiality requirements described in section 24'' of the Exchange Act, which articulates an approach whereby the Commission determines standards for confidentiality assurances.[90]

Consistent with the importance of protecting confidentiality of the security-based swap data provided, MOUs or other arrangements may include a variety of means of safeguarding confidentiality. These may include, for example, restrictions regarding the personnel who may access the data provided, and limits on the distribution of that data to third parties. Moreover, such MOUs or other arrangements may incorporate conditions that specify the scope of the relevant authority's access to data, and that limit this access in a manner that reflects the relevant authority's regulatory mandate or legal responsibility or authority.

One commenter expressed the view that an MOU should help determine a regulatory body's interest in security-based swap data, notify the Commission of the intent to access the data and provide the Commission with ''confirmation that an appropriate confidentiality agreement has been made by the requesting regulatory authority or that statutory confidentiality requirements are applicable to such requesting authority.'' The commenter further requested that the rule permit repositories to require entities to certify their ability to keep such data confidential.[91] Consistent with that commenter's view, we anticipate that, as appropriate, each MOU or other arrangement will set forth access provisions that reflect a recipient's interest in security-based swap data. We decline to adopt the commenter's suggestion that the MOU or other arrangement should be deemed to provide the Commission with notification of an entity's intent to access data, given that we are adopting separately a requirement with respect to notification from the repository to the Commission.[92] While an SDR may seek additional confidentiality certifications from other regulatory authorities, consistent with the statute, an SDR may not decline the regulatory authority access to the data based on another regulatory authority's refusal to agree to these certifications. Allowing repositories to require additional confidentiality certifications, moreover, could lead to an uneven application of the data access provisions, potentially undermining the benefits of using arrangements between the Commission and recipient entities to satisfy the statutory confidentiality condition.

III. Applicability of Exchange Act Data Access Provisions

In the Proposing Release, the Commission discussed how Exchange Act sections 13(n)(5)(G) and (H)[93] do not provide the exclusive means by which regulators or other authorities might access security-based swap data. In part, the Proposing Release suggested that regulators and other authorities may separately access security-based swap data directly from the Commission.[94] The Commission preliminarily stated that the conditions associated with the data access provisions of sections 13(n)(5)(G) and 13(n)(5)(H) should not govern access in those circumstances. The Commission received no comments on that proposed interpretation.[95]

The Exchange Act provides that relevant authorities may obtain security-based swap data from the Commission, rather than directly from data repositories.[96] First, Exchange Act section 21(a)(2)[97] states that, upon request of a foreign securities authority, the Commission may provide assistance in connection with an investigation the foreign securities authority is conducting to determine whether any person has violated, is violating or is about to violate any laws or rules relating to securities matters that the requesting authority administers or enforces.[98] That section further provides that, as part of this assistance, the Commission in its discretion may conduct an investigation to collect information and evidence pertinent to the foreign securities authority's request for assistance.[99] In addition, the Commission may share ''nonpublic information in its possession'' with, among others, any ''federal, state, local, or foreign government, or any political subdivision, authority, agency or instrumentality of such government . . . [or] a foreign financial regulatory authority,'' subject to the recipient providing ''such assurances of confidentiality as the Commission deems appropriate.''[100] Consistent with the Commission practice for many years, these sections provide the Commission with separate, additional authority to assist a domestic or a foreign authority in certain circumstances, such as, for example, by providing security-based swap data directly to the authority. At those times, the foreign authority would receive information not from the data repository, but instead from the Commission.

IV. Effective Date

These amendments to Exchange Act rule 13n–4 to implement the data access requirements will become effective 60 days following publication of the rule amendments in the **Federal Register**.

The obligation of a security-based swap data repository to provide data pursuant to the rules will be conditioned on the Commission and a relevant authority entering into an MOU or other arrangement addressing the confidentiality of the security-based swap information that is made available.

notes that the Exchange Act does not require that the security-based swap data repository ''agree'' with the entity, ''enter into'' an agreement or otherwise be a party to the confidentiality agreement. The Exchange Act merely states that the repository ''receive'' such an agreement. *See* Exchange Act section 13(n)(5)(H)(i), 15 U.S.C. 78m(n)(5)(H)(i). Accordingly, we believe that, at a minimum, the statutory language is ambiguous as to whether the data repository must itself be a party to the confidentiality agreement. In light of this ambiguity, we read the statute to permit the Commission to enter into confidentiality agreements with the entity, with the repository receiving the benefits of the agreement. The Commission further concludes that it is appropriate to view a security-based swap data repository as having received a confidentiality agreement when the entity enters into a confidentiality arrangement with the Commission and the arrangement runs to the benefit of the repository.

[90] *See* Proposing Release, 80 FR at 55190.

[91] *See* DTCC 2016 comment.

[92] *See* part II.D.2, *infra.*

[93] 15 U.S.C. 78m(n)(5)(G) and (H).

[94] *See* Proposing Release, 80 FR at 55193.

[95] In the Proposing Release, the Commission also discussed the application of data access provisions to access that is authorized by foreign law. In light of the repeal of the indemnification requirement, the Commission is not addressing data access in such circumstances.

[96] *See* Proposing Release, 80 FR at 55193.

[97] 15 U.S.C. 78u(a)(2).

[98] Exchange Act section 3(a)(50), 15 U.S.C. 78c(a)(50), broadly defines ''foreign securities authority'' to include ''any foreign government, or any governmental body or regulatory organization empowered by a foreign government to administer or enforce its laws as they relate to securities matters.''

[99] Exchange Act section 21(a)(2), 15 U.S.C. 78u(a)(2), also states that the Commission may provide such assistance without regard to whether the facts stated in the request also would constitute a violation of U.S. law. That section further states that when the Commission decides whether to provide such assistance to a foreign securities authority, the Commission shall consider whether the requesting authority has agreed to provide reciprocal assistance in securities matters to the United States, and whether compliance with the request would prejudice the public interest of the United States.

[100] *See* Exchange Act rule 24c–1(c) (implementing Exchange Act section 24(c), 15 U.S.C. 78x(c), which states that the Commission may, ''in its discretion and upon a showing that such information is needed,'' provide records and other information ''to such persons, both domestic and foreign, as the Commission by rule deems appropriate,'' subject to assurances of confidentiality).

A repository accordingly will have no disclosure obligation pursuant to these rules until such MOUs or other arrangements have been entered into and become effective.[101]

V. Paperwork Reduction Act

Certain provisions of the final rules contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[102] The Commission has submitted them to the Office of Management and Budget (''OMB'') for review in accordance with 44 U.S.C. 3507 and 5 CFR 1320.11. The title of the new collection of information is ''Security-Based Swap Data Repository Data Access Requirements.'' 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 has not yet assigned a control number 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.[103] Although, as discussed above, one commenter addressed certain substantive issues with regard to the proposal,[104] that commenter did not address the burden estimates in the Proposing Release related to the collection of information.

Although the final rules have been changed from the proposal to reflect the removal of the proposed indemnification exemption, in the Commission's view this change does not alter the estimates from the Proposing Release. In particular, although the conditions to the proposed indemnification exemption would have caused the Commission and a relevant authority to enter into an MOU or other arrangement to address confidentiality, and to address the types of activities that would be within the regulatory mandate or legal responsibility or authority of that relevant authority, the Commission would still expect to enter into that type of MOU or other arrangement with the relevant authority in connection with the confidentiality condition. Accordingly, the Commission's estimates remain unchanged from the Proposing Release.

A. Summary of Collection of Information

The final rules would require security-based swap data repositories to make security-based swap data available to other parties, including certain government bodies. This data access obligation would be conditioned on a confidentiality requirement. The final rules further would require such repositories to create and maintain information regarding such data access.

B. Use of Information

The data access requirement and associated conditions would provide the regulators and other authorities that receive the relevant security-based swap data with tools to assist with the oversight of the security-based swap market and of dealers and other participants in the market, and to assist with the monitoring of risks associated with that market.

C. Respondents

The data access requirement will apply to every person required to be registered with the Commission as a security-based swap data repository—that is, every U.S. person performing the functions of a security-based swap data repository, and to every non-U.S. person performing the functions of a security-based swap data repository within the United States absent an exemption. The Commission continues to estimate, for PRA purposes, that ten persons might register with the Commission as security-based swap data repositories.[105]

The conditions to data access under these rules further will affect all persons that may seek access to security-based swap data pursuant to these provisions. As discussed below, these may include up to 30 domestic entities.

D. Total Annual Reporting and Recordkeeping Burden

1. Data Access Generally

The data access provisions may implicate various types of PRA burdens and costs: (i) Burdens and costs that regulators and other authorities incur in connection with negotiating MOUs or other arrangements with the Commission in connection with the data access provisions; (ii) burdens and costs that certain authorities that have not been determined by statute or Commission rule may incur in connection with requesting that the Commission grant them access to repository data; [106] (iii) burdens and costs associated with information technology systems that repositories develop in connection with providing data to regulators and other authorities; and (iv) burdens and costs associated with the requirement that repositories notify the Commission of requests for access to security-based swap data, including associated recordkeeping requirements.

a. MOUs and Other Arrangements

As discussed above, entities that access security-based swap data pursuant to these data access provisions would be required to enter into MOUs or other arrangements with the Commission to address the confidentiality condition. In some cases, any such entity also would enter into an MOU or other arrangement in connection with the Commission's determination of the entity as authorized to access such data (to the extent that the entity's access is not already determined by statute or by the final rules). For purposes of the PRA requirements, the Commission estimates that up to 30 domestic entities potentially might enter into such MOUs or other arrangements, reflecting the nine entities specifically identified by statute or the final rules, and up to 21 additional domestic governmental entities or self-regulatory organizations that may seek access to such data. Based on the Commission's experience in negotiating similar MOUs that address regulatory cooperation, including confidentiality issues associated with regulatory cooperation, the Commission believes that each regulator on average would expend 500 hours in negotiating such MOUs and other arrangements.[107]

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[101] The Commission anticipates that any such MOU or other arrangement would not become immediately effective after the agreement of the parties, to allow repositories an appropriate amount of time to make any technical arrangements needed to provide access, potentially including electronic access, to the recipient.

[102] 44 U.S.C. 3501 *et seq.*

[103] *See* Proposing Release, 80 FR at 55196.

[104] *See* notes 19 through 21, *supra,* and accompanying text.

[105] *See* Proposing Release, 80 FR 55194. The Commission used the same estimate when adopting final rules to implement statutory provisions related to the registration process, duties and core principles applicable to security-based swap data repositories. *See* SDR Adopting Release, 80 FR at 14521.

[106] These include MOUs and other arrangements in connection with: the determination of additional entities that may access security-based swap data (*see* part II.C.2.a, *supra*), and the confidentiality condition (*see* part II.F.2, *supra*). Although under the proposal these also would have included MOUs and other arrangements in connection with the indemnification exemption, as noted above we believe that the original PRA estimates associated with such MOUs or other arrangements remain appropriate.

[107] It may be expected that the initial MOU or other arrangement that is entered into between the Commission and another regulator may take up to 1,000 hours for that regulator to negotiate. In practice, however, subsequent MOUs and other arrangements involving other recipient entities would be expected to require significantly less time on average, by making use of the prior MOUs as a basis for negotiation. Based on these principles, the Commission estimates that the average amount of

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b. Requests for Access

Separately, certain entities that are not identified by statute and/or the final rules may request that the Commission determine that they may access such security-based swap data. For those entities, in light of the relevant information that the Commission may consider in connection with such determinations (apart from the MOU issues addressed above)—including information regarding how the entity would be expected to use the information, information regarding the entity's regulatory mandate or legal responsibility or authority, and information regarding reciprocal access—the Commission estimates that each such entity would expend 40 hours in connection with such request. As noted above, the Commission estimates that 21 domestic entities not encompassed in the final rule may seek access to the data. Accordingly, to the extent that 21 domestic entities were to request access (apart from the nine entities identified by statute or the final rule), the Commission estimates a total burden of 840 hours for these entities to prepare and submit requests for access.

c. Systems Costs

The Commission previously addressed the PRA costs associated with the Exchange Act's data access requirement in 2010, when the Commission initially proposed rules to implement those data access requirements in conjunction with other rules to implement the duties applicable to security-based swap data repositories. At that time, based on discussions with market participants, the Commission estimated that a series of proposed rules to implement duties applicable to security-based swap data repositories—including the proposed data access rules as well as other rules regarding repository duties (*e.g.,* proposed rules requiring repositories to accept and maintain data received from third parties, to calculate and maintain position information, and to provide direct electronic access to the Commission and its designees)—together would result in an average one-time start-up burden per repository of 42,000 hours and $10 million in information technology costs for establishing systems compliant with all of those requirements. The Commission further estimated that the average per-repository ongoing annual costs of such systems would be 25,200 hours and $6 million.[108]

The Commission incorporated those same burden estimates in 2015, when the Commission adopted final rules to implement the duties applicable to security-based swap data repositories, apart from the data access requirement.[109]

Subject to the connectivity issues addressed below, the Commission believes that the burden estimates associated with the 2010 proposed repository rules encompassed the costs and burdens associated with the data access requirements in conjunction with other system-related requirements applicable to security-based swap dealers. To comply with those other system-related requirements—including in particular requirements that repositories provide direct electronic access to the Commission and its designees—we believe that it is reasonable to expect that repositories may use the same systems as they would use to comply with the data access requirements at issue here, particularly given that both types of access requirements would require repositories to provide security-based swap information to particular recipients subject to certain parameters.[110] As a result, subject to per-recipient connectivity burdens addressed below, the Commission believes that there would be no additional burdens associated with information technology costs to implement the data access requirements of the final rule.

The Commission also recognizes, however, that once the relevant systems have been set up, repositories may be expected to incur additional incremental burdens and costs associated with setting up access to security-based swap data consistent with the recipient's regulatory mandate or legal responsibility or authority.[111] The Commission believes that, for any particular recipient, security-based swap data repositories on average would incur a burden of 26 hours.[112] As discussed below, and consistent with our estimates in the Proposing Release, based on the estimate that approximately 300 relevant authorities may make requests for data from security-based swap data repositories,[113] the Commission estimates that each repository would incur a one-time burden of 7,800 hours in connection with providing that connectivity.[114]

d. Providing Notification of Requests, and Associated Records Requirements

Under the final rules, repositories would be required to inform the Commission when it receives the first request for security-based swap data from a particular entity.[115] As discussed below, based on the estimate that approximately 300 relevant authorities may make requests for data from security-based swap data repositories, the Commission estimates that each repository would provide the Commission with actual notice approximately 300 times.[116] Moreover, based on the estimate that ten persons may register with the Commission as security-based swap data repositories,

time that domestic and foreign recipients of data would incur in connection with negotiating these arrangements would be 500 hours.

To the extent that each of those 30 domestic entities were to seek to access data pursuant to these provisions, and each of the applicable MOUs or other arrangements were to take 500 hours on average, the total burden would amount to 15,000 hours.

[108] *See* Proposing Release, 80 FR at 55194–95 (citing Exchange Act Release No. 63347 (Nov. 19, 2010), 75 FR 77306, 77348–49 (Dec. 10, 2010) (''SDR Proposing Release'')). The Commission further estimated, for PRA purposes, that ten persons may register with the Commission as security-based swap data repositories. Based on the estimate of ten respondents, the Commission estimated total one-time costs of 420,000 hours and $100 million, and total annual ongoing systems costs of 252,000 and $60 million. *See* Proposing Release, 80 FR at 55195 n. 120 (citing SDR Adopting Release, 75 FR at 14523).

[109] *See* Proposing Release, 80 FR at 55194–95 (citing SDR Adopting Release, 80 FR at 14523).

[110] The Commission also anticipates that repositories would use the same systems in connection with the Exchange Act data access requirements as they use in connection with the corresponding requirements under the CEA.

[111] In addressing those burdens, the Commission expects that the determination order will set forth objective criteria that delimit the scope of a recipient's ability to access security-based swap data. The Commission may also consider the recipient entity's regulatory mandate or legal responsibility or authority, and tailor the entity's access in accordance with that regulatory mandate or legal responsibility or authority, when entering into MOUs or other arrangements with recipient entities. The Commission further expects that repositories would use those criteria to program their data systems to reflect the scope of the recipient's access to repository data. Absent such objective and programmable criteria, repositories would be expected to incur greater burdens to assess whether an authority's request satisfies the relevant conditions, particularly with regard to whether particular information relates to persons or activities within the entity's regulatory mandate or legal responsibility or authority.

[112] This estimate is based on the view that, for each recipient requesting data, a repository would incur a 25 hour burden associated with programming or otherwise inputting the relevant parameters, encompassing 20 hours of programmer analyst time and five hours of senior programmer time. The estimate also encompasses one hour of attorney time in connection with each such recipient.

[113] *See* note 195, *infra.*

[114] Across an estimated ten repositories, accordingly, the Commission estimates that repositories cumulatively would incur a one-time burden of 78,000 hours in connection with providing such connectivity.

[115] *See* Exchange Act rule 13n–4(d).

[116] *See* part VI.C.3.a.ii, *infra; see also* Proposing Release, 80 FR at 55195.

the Commission estimates that repositories in the aggregate would provide the Commission with actual notice a total of 3,000 times. The Commission estimates that each such notice would take no more than one-half hour to make on average, leading to a cumulative estimate of 1,500 hours associated with the notice requirement.

The final rules further require that repositories must maintain records of all information related to the initial and all subsequent requests for data access, including records of all instances of online or electronic access, and records of all data provided in connection with such access.[117] Consistent with our estimates in the Proposing Release, the Commission estimates that there cumulatively may be 360,000 subsequent data requests or instances of direct electronic access per year across all security-based swap data repositories, for which repositories must maintain records as required by the final rule.[118] Based on its experience with recordkeeping costs associated with security-based swaps generally, the Commission estimates that for each repository this requirement would create an initial burden of roughly 360 hours, and an annual burden of roughly 280 hours and $40,000 in information technology costs.[119]

2. Confidentiality Condition

The Commission does not believe that the confidentiality provision of the final rule will be associated with collections of information that would result in a reporting or recordkeeping burden for security-based swap data repositories. This is because, under the final rule, the confidentiality condition will be satisfied by an MOU or other arrangement between the Commission and the recipient entity (*i.e.,* another regulatory authority) addressing confidentiality. We expect that repositories accordingly will not be involved in the drafting or negotiation of confidentiality agreements.

As discussed above, however, the confidentiality condition is expected to impose burdens on authorities that seek to access data pursuant to these provisions, as a result of the need to negotiate confidentiality MOUs or other arrangements.[120]

E. Collection of Information is Mandatory

The conditional data access requirements of Exchange Act sections 13(n)(5)(G) and (H) and the underlying rules are mandatory for all security-based swap data repositories. The confidentiality condition is mandatory for all entities that seek access to data under those requirements.

F. Confidentiality

The Commission will make public requests for a determination that an authority is appropriate to conditionally access security-based swap data, as well as Commission determinations issued in response to such requests. The Commission expects that it will make publicly available the MOUs or other arrangements with the Commission used to satisfy the confidentiality condition.[121]

Initial notices of requests for access provided to the Commission by repositories will be kept confidential, subject to the provisions of applicable law. To the extent that the Commission obtains subsequent requests for access that would be required to be maintained by the repositories, such as in connection with an examination or investigation, the Commission also will keep those records confidential, subject to the provisions of applicable law.

VI. Economic Analysis

As discussed above, the Commission is adopting final rules to implement data access requirements for relevant authorities other than the Commission that the Dodd-Frank Act imposes on security-based swap repositories. To carry out their regulatory mandate, or legal responsibility or authority, certain relevant entities other than the Commission may periodically need access to security-based swap data collected and maintained by SEC-registered security-based swap data repositories, and the final rules are intended to facilitate such access.

Although the final rules have been changed from the proposal to reflect the removal of the proposed indemnification exemption, in the Commission's view this change does not significantly alter the economic costs and benefits from the Proposing Release. In particular, although the conditions to the proposed indemnification exemption would have caused the Commission and a relevant authority to enter into an MOU or other arrangement to address confidentiality, and to address the types of activities that would be within the regulatory mandate or legal responsibility or authority of that relevant authority, such MOU or other arrangement will still be necessary in connection with the confidentiality condition. Accordingly, the Commission's assessment of the costs and benefits remain largely unchanged from the Proposing Release.

The Commission is sensitive to the economic effects of its rules, including the costs and benefits and the effects of its rules on efficiency, competition and capital formation. Section 3(f) [122] of the Exchange Act 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 also consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation. In addition, section 23(a)(2) [123] of the Exchange Act requires the Commission, when promulgating rules under the Exchange Act, to consider the impact such rules would have on competition. Exchange Act section 23(a)(2) also provides that the Commission shall not adopt any rule which would impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

A. Economic Considerations

1. Title VII Transparency Framework

The security-based swap market prior to the passage of the Dodd-Frank Act has been described as being opaque, in part because transaction-level data were not widely available to market participants or to regulators.[124] To

[117] *See* Exchange Act rule 13n–4(d).

[118] *See* part VI.C.3.a.ii, *infra; see also* Proposing Release, 80 FR at 55195.

[119] Across an estimated ten repositories, accordingly, the Commission preliminarily estimates that repositories cumulatively will incur an initial burden of roughly 3,600 hours in information technology costs, and an annual burden of roughly 2,800 hours and $400,000 in information technology costs.

[120] *See* part V.D.1.a, *supra.*

[121] The Commission provides a list of MOUs and most other arrangements with foreign authorities on its public Web site, which are available at: *http://www.sec.gov/about/offices/oia/oia_cooparrangements.shtml.*

[122] 15 U.S.C. 78c(f).

[123] 15 U.S.C. 78w(a)(2).

[124] With respect to one type of security-based swap, credit default swaps (''CDS''), 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,

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increase the transparency of the over-the-counter derivatives market to both market participants and regulatory authorities, Title VII requires the Commission to undertake a number of rulemakings, including rules the Commission adopted last year to address the registration process, duties and core principles applicable to security-based swap data repositories,[125] and to address regulatory reporting and public dissemination of security-based swap information.[126] Among other matters, those rules address market transparency by requiring security-based swap data repositories, absent an exemption, to collect and maintain accurate security-based swap transaction data, and address regulatory transparency by requiring security-based swap data repositories to provide the Commission with direct electronic access to such data.[127]

Consistent with the goal of increasing transparency to regulators, the data access provisions at issue here set forth a framework for security-based swap data repositories to provide access to security-based swap data to relevant authorities other than the Commission. The final rules implement that framework for repositories to provide data access to other relevant entities in order to fulfill their regulatory mandate, or legal responsibility or authority.

2. Transparency in the Market for Security-Based Swaps

The data access rules, in conjunction with the transparency-related requirements generally applicable to security-based swap data repositories, are designed, among other things, to make available to the Commission and other relevant authorities data that will provide a broad view of the security-based swap market and help monitor for pockets of risk and potential market abuses that might not otherwise be observed by those authorities.[128] Unlike many other types of securities transactions, security-based swaps involve ongoing financial obligations between counterparties during the life of transactions that typically span several years. Counterparties to a security-based swap rely on each other's creditworthiness and bear this credit risk and market risk until the security-based swap terminates or expires. If a large market participant, such as a security-based swap dealer, major security-based swap participant, or central counterparty were to become financially distressed, a general lack of information about market participants' exposures to the distressed entity could contribute to uncertainty and ongoing market instability. In addition, 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.[129]

A broad view of the security-based swap market, including information regarding aggregate market exposures to particular reference entities (or securities), positions taken by individual entities or groups, and data elements necessary to determine the market value of the transaction, may be expected to provide the Commission and other relevant authorities with a better understanding of the actual and potential risks in the market and promote better risk monitoring efforts. The information provided by security-based swap data repositories also may be expected to help the Commission and other relevant authorities investigate market manipulation, fraud and other market abuses.

3. Global Nature of the Security-Based Swap Market

As highlighted in more detail in the Economic Baseline below, the security-based swap market is a global market. Based on market data in the Depository Trust and Clearing Corporation's Trade Information Warehouse (''DTCC–TIW''), the Commission estimates that only 12 percent of the global transaction volume that involves either a U.S.-domiciled counterparty or a U.S-domiciled reference entity (as measured by gross notional) between 2008 and 2015 was between two U.S.-domiciled counterparties, compared to 48 percent entered into between one U.S.-domiciled counterparty and a foreign-domiciled counterparty and 40 percent entered into between two foreign-domiciled counterparties.[130]

In light of the security-based swap market's global nature there is the possibility that regulatory data may be fragmented across jurisdictions, particularly because a large fraction of transaction volume includes at least one counterparty that is not a U.S. person [131] and the applicable U.S. regulatory reporting rules depend on the U.S. person status of the counterparties.[132] As discussed further below, fragmentation of data can increase the difficulty in consolidating and interpreting security-based swap market data from repositories, potentially reducing the general economic benefits derived from transparency of the security-based swap market to regulators. Absent a framework for the cross-border sharing of data reported pursuant to regulatory requirements in various jurisdictions, the relevant authorities responsible for monitoring the security-based swap market may not be able to access data consistent with their regulatory mandate or legal responsibility or authority.

4. Economic Purposes of the Rulemaking

The data access requirements are designed to increase the quality and

2010, *available at: http://www.ft.com/intl/cms/s/0/f49f635c-8081-11df-be5a-00144feabdc0.html.*

[125] *See* SDR Adopting Release.

[126] *See* Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, Exchange Act Release No. 74244 (Jan. 14, 2015), 80 FR 14564 (Mar. 19, 2015) (''Regulation SBSR Adopting Release''). In July 2016, the Commission adopted amendments and guidance to Regulation SBSR. *See* Exchange Act Release No. 78321 (Jul. 14, 2016), 81 FR 53546 (Aug. 12, 2016).

[127] *See* Exchange Act rule 13n–5 (requiring repositories to comply with data collection and data maintenance standards related to transaction and position data); Exchange Act rule 13n–4(b)(5) (requiring repositories to provide direct electronic access to the Commission and its designees).

[128] *See, e.g.,* 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 and its designees). *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.'').

[129] *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).

[130] The data the Commission receives from DTCC–TIW does not include transactions between two non-U.S. domiciled counterparties that reference a non-U.S. entity or security. This is approximately 19 percent of global transaction volume. *See* note 143, *infra.* Therefore, factoring in these transactions, approximately 10 percent of global transaction volume involves two U.S.-domiciled counterparties, 39 percent involve one U.S.-domiciled counterparty and one foreign counterparty, and 51 percent are between two foreign-domiciled counterparties.

[131] This statement is based on staff analysis of voluntarily reported CDS transaction data to DTCC–TIW, which includes self-reported counterparty domicile. *See* note 154, *infra.* The Commission notes that DTCC–TIW entity domicile may not be completely consistent with the Commission's definition of ''U.S. person'' in all cases but believes that these two characteristics have a high correlation.

[132] *See* Regulation SBSR rule 908(a) (generally requiring regulatory reporting and public dissemination of a security-based swap transaction when at least one direct or indirect counterparty is a U.S. person). Note that current voluntary reporting considers the self-reported domicile of the counterparty but Regulation SBSR considers the counterparty's status as a U.S. person.

quantity of transaction and position information available to relevant authorities about the security-based swap market while helping to maintain the confidentiality of that information. The increased availability of security-based swap information may be expected to help relevant authorities act in accordance with their regulatory mandate, or legal responsibility or authority, and to respond to market developments.

Moreover, by facilitating access to security-based swap data for relevant authorities, including non-U.S. authorities designated by the Commission, the Commission anticipates an increased likelihood that the Commission itself will have commensurate access to security-based swap data stored in trade repositories located in foreign jurisdictions.[133] This may be particularly important in identifying transactions in which the Commission has a regulatory interest (*e.g.,* transactions involving a U.S. reference entity or security) but may not have been reported to a registered security-based swap data repository due to the transactions occurring outside of the U.S. between two non-U.S. persons.[134] This should assist the Commission in fulfilling its regulatory mandate and legal responsibility and authority, including by facilitating the Commission's ability to detect and investigate market manipulation, fraud and other market abuses, and by providing the Commission with greater access to security-based swap information than that provided under the current voluntary reporting regime.[135]

Such data access may be especially critical during times of market turmoil, by giving the Commission and other relevant authorities information to examine risk exposures incurred by individual entities or in connection with particular reference entities. Increasing the available data about the security-based swap market should further give the Commission and other relevant authorities better insight into how regulations are affecting or may affect the market, which may allow the Commission and other regulators to better craft regulations to achieve desired goals, and therefore increase regulatory effectiveness.

B. Economic Baseline

To assess the economic impact of the data access rules adopted herein, the Commission is using as a baseline the security-based swap market as it exists today, including applicable rules that have already been adopted and excluding rules that have been proposed but not yet finalized. Thus we include in the baseline the rules that the Commission adopted to govern the registration process, duties and core principles applicable to security-based swap data repositories, and to govern regulatory reporting and public dissemination of security-based swap transactions.[136]

There are not yet any registered security-based swap data repositories; therefore, the Commission does not yet have access to regulatory reporting data.[137] Hence, our characterization of the economic baseline, including the quantity and quality of security-based swap data available to the Commission and other relevant authorities and the extent to which data are fragmented, considers the anticipated effects of the rules that govern the registration process, duties and core principles applicable to SDRs and Regulation SBSR. The Commission acknowledges limitations in the degree to which it can quantitatively characterize the current state of the security-based swap market. As described in more detail below, because the available data on security-based swap 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. Regulatory Transparency in the Security-Based Swap Market

There currently is no robust, widely accessible source of information about individual security-based swap transactions. In 2006, a group of major dealers expressed their commitment in support of DTCC's initiative to create a central ''industry utility trade contract warehouse'' for credit derivatives.[138] Moreover, in 2009, the leaders of the G20—whose members include the United States, 18 other countries, and the European Union—addressed global improvements in the over-the-counter (''OTC'') derivatives markets. They expressed their view on a variety of issues relating to OTC derivatives contracts, including, among other things, that OTC derivatives contracts should be reported to trade repositories.[139] A single repository, DTCC–TIW, makes the data reported to it under the voluntary reporting regime available to the Commission and other relevant authorities in accordance with the guidance from the OTC Derivatives Regulatory Forum (''ODRF''), of which the Commission is a member, and similar subsequent guidance.[140] Although many jurisdictions have implemented rules concerning reporting of security-based swaps to trade repositories,[141] the Commission understands that many market participants continue to report voluntarily to DTCC–TIW.

The data that the Commission receives from DTCC–TIW do not encompass CDS transactions that both: (i) Do not involve any U.S. counterparty, and (ii) are not based on a U.S. reference entity.[142] Based on a comparison of weekly transaction volume publicly disseminated by DTCC–TIW with data provided to the Commission under the voluntary arrangement, we estimate that the transaction data provided to the Commission covers approximately 81 percent of the global single-name CDS market.[143]

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[133] For example, EU law conditions the ability of non-EU authorities to access data from EU repositories on EU authorities having ''immediate and continuous'' access to the information they need. *See* EU regulation 648/2012 (''EMIR''), art. 75(2).

As discussed above, the Commission anticipates considering whether the relevant authority requesting access agrees to provide the Commission and other U.S. authorities with reciprocal assistance in matters within their jurisdiction when making a determination whether the requesting authority shall be granted access to security-based swap data held in registered SDRs. *See* part II.C.1 *supra.*

[134] For example, it is possible to replicate the economic exposure of either a long or short position in a debt security that trades in U.S. markets by trading in U.S. treasury securities and CDS that reference that debt security. Transactions between two non-U.S. persons on a U.S. reference entity or novations between two non-U.S. persons that reduce exposure to a U.S. registrant may provide information to the Commission about the market's views concerning the financial stability or creditworthiness of the registered entity.

[135] *See* part VI.B, *supra,* for a description of the data the Commission receives from DTCC–TIW under the current voluntary reporting regime.

[136] *See* SDR Adopting Release and Regulation SBSR Adopting Release.

[137] *See* note 157, *infra.*

[138] *See* Letter to Timothy Geithner, President, Federal Reserve Bank of New York, Mar. 10, 2006, available at: *https://www.newyorkfed.org/medialibrary/media/newsevents/news/markets/2006/industryletter2.pdf.*

[139] *See* G20 Leaders Statement from the 2009 Pittsburgh Summit, available at: *http://www.g20.utoronto.ca/2009/2009communique0925.html.*

[140] *See* Proposing Release, 80 FR 55181, note 71. *See* also DTCC 2016 comment at 2 (''DTCC is strongly supportive of the work of the [CPMI], [IOSCO] and the Financial Stability Board ('FSB') to improve regulatory access to OTC derivatives data, including CPMI–IOSCO's guidance on authorities' access to trade repository data'').

[141] *See* OTC Derivatives Market Reforms: Tenth Progress Report on Implementation (Nov. 2015), *available at: http://www.fsb.org/wp-content/uploads/OTC-Derivatives-10th-Progress-Report.pdf.*

[142] The Commission notes that the identification of entity domicile in the voluntary data reported to DTCC–TIW may not be consistent with the Commission's definition of ''U.S. person'' in all cases. *See* note 154, *infra.*

[143] In 2015, DTCC–TIW reported on its Web site new trades in single-name CDS with gross notional

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While DTCC–TIW generally provides detailed data on positions and transactions to regulators that are members of the ODRF, DTCC–TIW makes only summary information available to the public.[144]

2. Current Security-Based Swap Market

The Commission's understanding of the market is informed in part by available data on security-based swap transactions, though the Commission acknowledges that limitations in the data prevent the Commission from quantitatively characterizing certain aspects of the market.[145] Because these data do not cover the entire market, the Commission has developed an understanding of market activity using a sample of transaction data that includes only certain portions of the market. The Commission believes, however, that the data underlying its analysis here provide reasonably comprehensive information regarding single-name CDS transactions and the composition of participants in the single-name CDS market.

Specifically, the Commission's analysis of the state of the current security-based swap market is based on data obtained from the DTCC–TIW, especially data regarding the activity of market participants in the single-name CDS market during the period from 2008 to 2015. According to data published by the Bank for International Settlements (''BIS''), the global notional amount outstanding in single-name CDS was approximately $7.18 trillion,[146] in multi-name index CDS was approximately $4.74 trillion, and in multi-name, non-index CDS was approximately $373 billion. The total gross market value outstanding in single-name CDS was approximately $284 billion, and in multi-name CDS instruments was approximately $137 billion.[147] The global notional amount outstanding in equity forwards and swaps as of December 2015 was $3.32 trillion, with total gross market value of $147 billion.[148] As these figures show (and as the Commission has previously noted), although the definition of security-based swap is not limited to single-name CDS, single-name CDS make up a majority of security-based swaps in terms of notional amount, and the Commission believes that the single-name CDS data are sufficiently representative of the market to inform the Commission's analysis of the state of the current security-based swap market.[149]

Based on this information, our analysis below indicates that the current security-based swap market: (i) Is global in scope, and (ii) is concentrated among a small number of dealing entities. Although under the voluntary reporting regime discussed above there was a single repository, as various jurisdictions have implemented mandatory reporting rules in their jurisdictions the number of trade repositories holding security-based swap data has grown.[150]

a. Security-Based Swap Market Participants

A key characteristic of security-based swap activity is that it is concentrated among a relatively small number of entities that engage in dealing activities.[151] Based on the Commission's analysis of DTCC–TIW data, there were 1,957 entities engaged directly in trading CDS between November 2006 and December 2015.[152] Table 1 below highlights that of these entities, there were 17, or approximately 0.9 percent, that were ISDA-recognized dealers.[153] ISDA-recognized dealers executed the vast majority of transactions (83.7 percent) measured by the number of counterparties (each transaction has two counterparties or transaction sides). Many of these dealers are regulated by entities other than, or in addition to, the Commission. In addition, thousands of other market participants appear as counterparties to security-based swap transactions, including, but not limited to, investment companies, pension funds, private funds, sovereign entities and non-financial companies.

of $11.8 trillion. During the same period, data provided to the Commission by DTCC–TIW, which include only transactions with a U.S. counterparty or transactions written on a U.S. reference entity or security, included new trades with gross notional equaling $9.6 trillion, or 81% of the total reported by DTCC–TIW.

[144] DTCC–TIW publishes weekly transaction and position reports for single-name CDS. In addition, ICE Clear Credit provides aggregated volumes of clearing activity, and large multilateral organizations periodically further report measures of market activity. For example, the Bank for International Settlements (''BIS'') reports gross notional outstanding for single-name CDS and equity forwards and swaps semiannually.

[145] The Commission also relies on qualitative information regarding market structure and evolving market practices provided by commenters, both in letters and in meetings with Commission staff, and knowledge and expertise of Commission staff.

[146] The global notional amount outstanding represents the total face amount of the swap used to calculate payments. The gross market value is the cost of replacing all open contracts at current market prices.

[147] *See* Semi-annual OTC derivatives statistics (December 2015), Table D10.1, available at *http://stats.bis.org/statx/toc/DER.html* (last viewed May 24, 2016). For purposes of this analysis, the Commission assumes that multi-name index CDS are not narrow-based security index CDS, and therefore do not fall within the definition of security-based swap. *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).

[148] These totals include both swaps and security-based swaps, as well as products that are excluded from the definition of ''swap,'' such as certain equity forwards. *See* Semi-annual OTC derivatives statistics (December 2015), Table D8, available at *http://stats.bis.org/statx/toc/DER.html* (last viewed May 24, 2016). The Commission 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 security-based swap.

[149] *See* Proposing Release, 80 FR 55199, note 154.

[150] *See,* for example, the list of trade repositories registered by ESMA, *available at: https://www.esma.europa.eu/supervision/trade-repositories/list-registered-trade-repositories.* As of May 28, 2016, there were six repositories registered by ESMA, all of which are authorized to receive data on credit derivatives.

[151] *See* Exchange Act Release No. 72472 (Jun. 25, 2014), 79 FR 47278, 47293 (Aug. 12, 2014) (''Cross-Border Definitions Adopting Release''). All data in this section cites updated data from the Proposing Release. *See* Proposing Release, 80 FR at 55196–202.

[152] These 1,957 transacting agents represent over 10,000 accounts representing principal risk holders. *See* Proposing Release, 80 FR 55199, note 158.

As noted above, the data provided to the Commission by DTCC–TIW includes only transactions that either include at least one U.S.-domiciled counterparty or reference a U.S. entity or security. Therefore, any entity that is not domiciled in the U.S., never trades with a U.S.-domiciled entity and never buys or sells protection on a U.S. reference entity or security would not be included in this analysis.

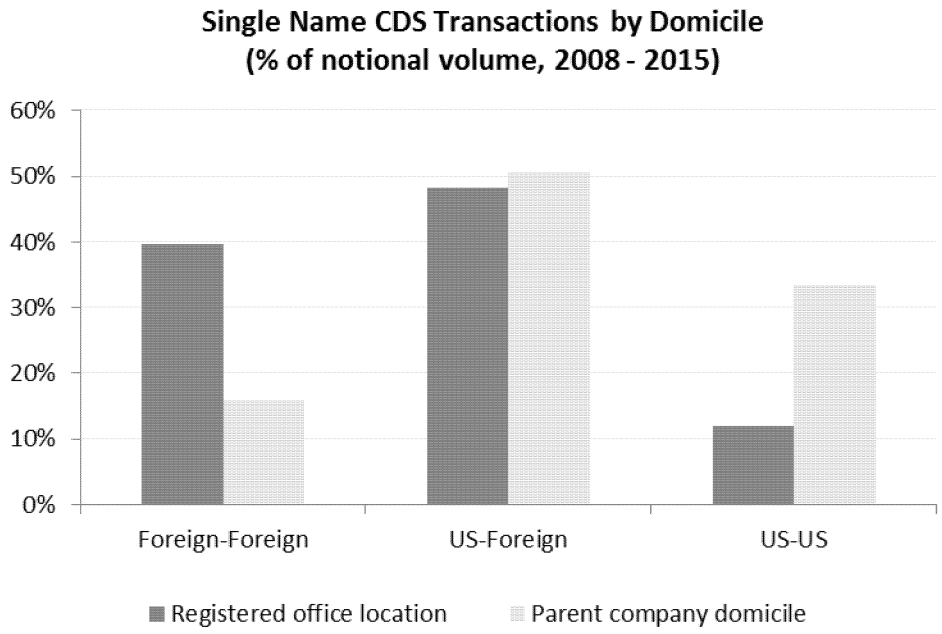
[153] For the purpose of this analysis, the ISDA-recognized dealers are those identified by ISDA as a recognized dealer in any year during the relevant period. Dealers are only included in the ISDA-recognized dealer category during the calendar year in which they are so identified. The complete list of ISDA recognized dealers during the applicable period was: 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.*

TABLE 1—THE NUMBER OF TRANSACTING AGENTS IN THE SINGLE-NAME CDS MARKET BY COUNTERPARTY TYPE AND THE FRACTION OF TOTAL TRADING ACTIVITY, FROM NOVEMBER 2006 THROUGH DECEMBER 2015, REPRESENTED BY EACH COUNTERPARTY TYPE

Transacting agents	Number	Percent	Transaction share (%)
Investment Advisers	1,499	76.6	12.2
—SEC registered	*603*	*30.8*	*8.1*
Banks	253	12.9	3.6
Pension Funds	29	1.5	0.1
Insurance Companies	39	2.0	0.2
ISDA-Recognized Dealers	17	0.9	83.7
Other	120	6.1	0.2
Total	1,957	100	100

Although the security-based swap market is global in nature, approximately 60 percent of the transaction volume reflected in DTCC–TIW data during the 2008–2015 period included at least one U.S.-domiciled entity (*see* Figure 1). Moreover, 48 percent of the single-name CDS transactions that include at least one U.S.-domiciled counterparty or a U.S. reference entity or security 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 2015.



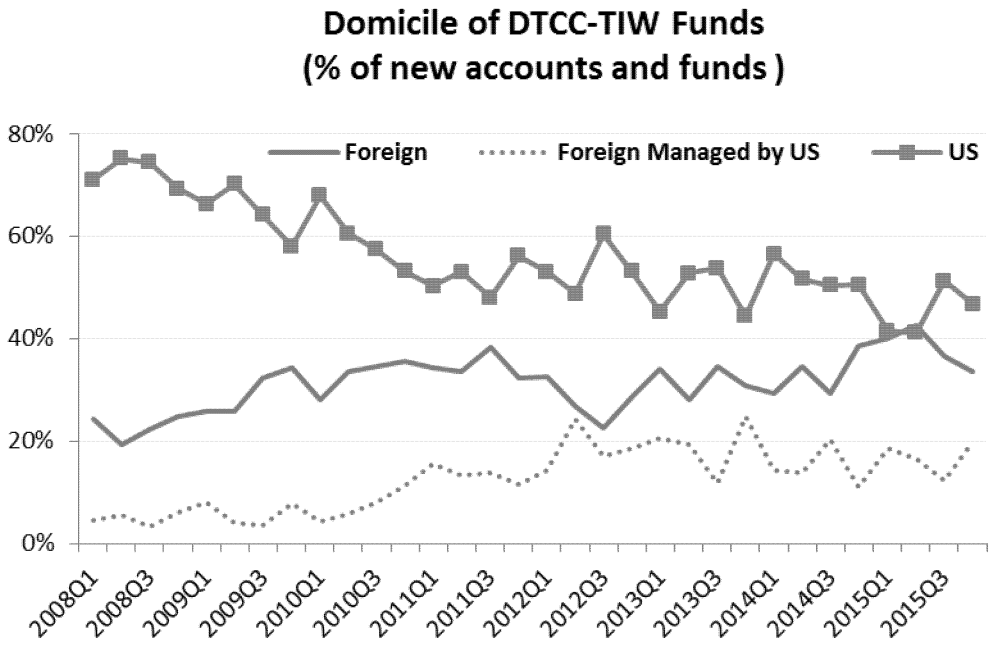
The fraction of new accounts with transaction activity that are domiciled in the United States fell through the 2008–2015 period. Figure 2 below is a chart of: (1) The percentage of new accounts with a domicile in the United States,[154] (2) the percentage of new accounts with a domicile outside the United States, and (3) the percentage of new accounts that are domiciled outside the United States but managed by a U.S. entity, foreign accounts that include new accounts of a foreign branch of a

[154] 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, 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 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.

U.S. bank, and new accounts of a foreign subsidiary of a U.S. entity. Over time, a greater share of accounts entering DTCC–TIW data either have had a foreign domicile or have had 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 include only accounts that are domiciled in the United States, transact with U.S.-domiciled counterparties or transact in single-name CDS with U.S. reference entities or securities, changes in the domicile of new accounts may reflect increased transaction activity between U.S. and non-U.S. counterparties.

We note that cross-border rules related to regulatory reporting and public dissemination of security-based swap transactions depend on, among other things, the U.S.-person status of the counterparties.[155] The analyses behind Figures 1 and 2 show that the security-based swap market is global, with an increasing share of the market characterized by cross-border trade.

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").[156] Unique, new accounts are aggregated each quarter and shares are computed on a quarterly basis, from January 2008 through December 2015.



b. Security-Based Swap Data Repositories

No security-based swap data repositories are currently registered with the Commission.[157] The Commission is aware of one entity in the market (*i.e.,* DTCC–TIW) that has been accepting voluntary reports of single-name and index CDS transactions. In 2015, DTCC–TIW received approximately 2.5 million records of single-name CDS transactions, of which approximately 798,000 were price-forming transactions.[158]

[155] *See* note 132, *supra.*

[156] Following publication of the Warehouse Trust Guidance on CDS data access, DTCC–TIW surveyed market participants, asking for the physical address associated with each of their accounts (*i.e.,* where the account is organized as a legal entity). This is designated the registered office location by DTCC–TIW. When an account does not report a registered office location, we have assumed that the settlement country reported by the investment adviser or parent entity to the fund or account is the place of domicile. This treatment assumes that the registered office location reflects the place of domicile for the fund or account.

[157] ICE Trade Vault, LLC (''ICE Trade Vault'') and DTCC Data Repository (U.S.) LLC (''DDR'') filed with the Commission Form SDRs seeking registration as a security-based swap data repository under Section 13(n) of the Exchange Act and the Commission's rules promulgated thereunder. *See* Notice of Filing of Application for Registration as a Security-Based Swap Data Repository, Release No. 77699 (Apr. 22, 2016), 81 FR 25475 (Apr. 28, 2016) and Notice of Filing of Application for Registration as a Security-Based Swap Data Repository, Release No. 78216 (Jun. 30, 2016), 81 FR 44379 (July 7, 2016).

[158] Price-forming CDS transactions include 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

The CFTC has provisionally registered four swap data repositories.[159] These swap data repositories are: BSDR LLC, Chicago Mercantile Exchange Inc., DDR, and ICE Trade Vault. The Commission believes that some or all of these entities will likely register with the Commission as security-based swap data repositories and that other persons may seek to register with both the CFTC and the Commission as swap data repositories and security-based swap data repositories, respectively.[160]

Efforts to regulate the swap and security-based swap markets are underway not only in the United States, but also abroad. Consistent with the call of the G20 leaders for global improvements in the functioning, transparency and regulatory oversight of OTC derivatives markets,[161] substantial progress has been made in establishing the trade repository infrastructure to support the reporting of OTC derivatives transactions.[162] Currently, multiple trade repositories operate, or are undergoing approval processes to do so, in a number of different jurisdictions.[163] Combined with the fact that the requirements for trade reporting differ across jurisdictions, the result is that security-based swap data is fragmented across many locations, stored in a variety of formats, and subject to many different rules for authorities' access. Authorities will be able to obtain a comprehensive and accurate view of the global OTC derivatives markets to the extent that means exist to aggregate data in these trade repositories.

C. Economic Costs and Benefits, Including Impact on Efficiency, Competition and Capital Formation

As discussed above, the security-based swap market to date largely has developed as an opaque OTC market with limited dissemination of transaction-level price and volume information.[164] Accordingly, the Commission envisions that registered security-based swap data repositories, by maintaining security-based swap transaction data and positions, will become an essential part of the infrastructure of the market in part by providing the data to relevant authorities in accordance with their regulatory mandate, or legal responsibility or authority.

In finalizing these rules to implement the Exchange Act data access requirement, the Commission has attempted to balance different goals. On the one hand, the Commission believes that these rules will facilitate the sharing of information held by repositories with relevant authorities, which should assist those authorities in acting in accordance with their regulatory mandate, or legal responsibility or authority. At the same time, although regulatory access raises important issues regarding the confidentiality of the information, the Commission believes that the rules should appropriately reduce the risk of breaching the confidentiality of the data by providing for a reasonable assurance that confidentiality will be maintained before access is granted.

Additionally, we note that the magnitude of the costs and benefits of these rules depend in part on the type of access granted to relevant authorities. Ongoing, unrestricted direct electronic access by relevant authorities may be most beneficial in terms of facilitating efficient access to data necessary for those authorities to act in accordance with their regulatory mandate, or legal responsibility or authority, but at the cost of increasing the risk of improper disclosure of confidential information. Restricting each relevant authority's access to only that data consistent with that authority's regulatory mandate, or legal responsibility or authority, reduces the quantity of data that could become subject to improper disclosure. On the other hand, restricting a relevant authority's access to data may make it more difficult for it to effectively act in accordance with its regulatory mandate or legal responsibility or authority.

The potential economic effects stemming from the final rules can be grouped into several categories. In this section, we first discuss the general costs and benefits of the final rules, including the benefits of reducing data fragmentation, data duplication and enhancing regulatory oversight, as well as the risks associated with potential breaches of data confidentiality. Next, we discuss the effects of the rules on efficiency, competition and capital formation. Finally, we discuss specific costs and benefits linked to the final rules.

1. General Costs and Benefits

As discussed above, the final rules would implement the statutory provisions that require a security-based swap data repository to disclose information to certain relevant authorities. Access under the final rules would be conditioned upon the authority entering into an MOU or other arrangement with the Commission addressing the confidentiality of the information provided.

a. Benefits

The final rules should facilitate access to security-based swap transaction and position data by entities that require such information to fulfill their regulatory mandate or legal responsibility or authority. Market participants accordingly should benefit from relevant domestic authorities other than the Commission having access to the data necessary to fulfill their responsibilities. In particular, such access could help promote stability in the security-based swap market particularly during periods of market turmoil,[165] and thus could indirectly contribute to improved stability in related financial markets, including equity and bond markets.[166]

Moreover, as noted in part II.C.1, the Commission anticipates, when making a determination concerning a relevant authority's access to security-based swap data, considering whether the relevant authority agrees to provide the Commission and other U.S. authorities with reciprocal assistance in matters within their jurisdiction. Allowing non-U.S. authorities access to security-based swap data held by registered security-based swap data repositories may be expected to help facilitate the Commission's own ability to access data held by repositories outside the United States.[167] Accordingly, to the extent the Commission obtains such access, the rules further may be expected to assist the Commission in fulfilling its regulatory responsibilities, including by detecting market manipulation, fraud and other market abuses by providing the Commission with greater access to global security-based swap information.[168]

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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.

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

[160] For the purpose of estimating PRA related costs, the number of security-based swap data repositories is estimated to be as high as ten. *See* part V.C, *supra.*

[161] *See* note 139, *supra,* and accompanying text.

[162] *See* OTC Derivatives Market Reforms: Tenth Progress Report on Implementation (Nov. 2015), *available at: http://www.fsb.org/wp-content/uploads/OTC-Derivatives-10th-Progress-Report.pdf.*

[163] *Id.*

[164] *See* part VI.B.1, *supra* (addressing limited information currently available to market participants and regulators).

[165] *See* Proposing Release, 80 FR 55202, note 171.

[166] *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, dated January 2010, as revised March 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.'').

[167] *See* note 133 *supra,* and accompanying text.

[168] *See* Proposing Release, 80 FR 55203, note 174.

The ability of other relevant authorities to access data held in trade repositories registered with the Commission, as well as the ability of the Commission to access data held in repositories registered with other regulators, may be especially crucial during times of market turmoil. Increased data sharing should provide the Commission and other relevant authorities more-complete information to monitor risk exposures taken by individual entities and exposures connected to particular reference entities, and should promote global stability through enhanced regulatory transparency. Security-based swap data repositories registered with the Commission are required to retain complete records of security-based swap transactions and maintain the integrity of those records.[169] Based on discussions with other regulators, the Commission believes repositories registered with other authorities are likely to have analogous requirements with respect to the data maintained at the repositories. As a result, rules and practices to facilitate regulatory access to those records in line with the recipient authorities' regulatory mandate, or legal responsibility or authority, are designed to help position the Commission and other authorities to: Detect market manipulation, fraud and other market abuses; monitor the financial responsibility and soundness of market participants; perform market surveillance and macroprudential supervision; resolve issues and positions after an institution fails; monitor compliance with relevant regulatory requirements; and respond to market turmoil.[170]

Additionally, improving the availability of data regarding the security-based swap market should give the Commission and other relevant authorities improved insight into how regulations are affecting, or may affect, the market. This may be expected to help increase regulatory effectiveness by allowing the Commission and other regulators to better craft regulation to achieve desired goals.

In addition, the Commission believes that providing relevant foreign authorities with access to data maintained by repositories may help reduce costs to market participants by reducing the potential for duplicative security-based swap transaction reporting requirements in multiple jurisdictions. The Commission notes that relevant foreign authorities have imposed their own reporting requirements on market participants within their jurisdictions.[171] Given the global nature of the security-based swap market and the large number of cross-border transactions, the Commission recognizes that it is likely that such transactions are or may become subject to the reporting requirements of at least two jurisdictions.[172] However, the Commission believes that if relevant authorities are able to access security-based swap data in trade repositories outside their jurisdiction, such as repositories registered with the Commission, as needed, then relevant authorities may be more inclined to permit market participants involved in such transactions to fulfill their reporting requirements by reporting the transactions to a single trade repository.[173] If market participants can satisfy their reporting requirements by reporting transactions to a single trade repository rather than to separate trade repositories in each applicable jurisdiction, their compliance costs may be reduced. Similarly, to the extent that security-based swap data repositories provide additional ancillary services,[174] if market participants choose to make use of such services, they would likely find such services that make use of all of their data held in a single trade repository more useful than services that are applied only to a portion of that market participant's transactions. Ancillary services applied to only a portion of a participant's transactions could result if data were divided across multiple repositories as a result of regulations requiring participants to report data to separate trade repositories in each applicable jurisdiction.

b. Costs

The Commission believes that although there are benefits to security-based swap data repositories providing access to relevant authorities to data maintained by the repositories, such access will likely involve certain costs and potential risks. For example, the Commission expects that repositories will maintain data that are proprietary and highly sensitive[175] and that are subject to strict privacy requirements.[176] Extending access to such data to anyone, including relevant authorities, increases the risk that the confidentiality of the data maintained by repositories may not be preserved.[177] A relevant authority's inability to protect the confidentiality of data maintained by repositories could erode market participants' confidence in the integrity of the security-based swap market and increase the overall risks associated with trading.[178] As we discuss below, this may ultimately lead to reduced trading activity and liquidity in the market, hindering price discovery and impeding the capital formation process.[179]

To help mitigate these risks and potential costs to market participants, the Exchange Act and the final data access rules impose certain conditions on relevant authorities' access to data maintained by repositories.[180] In part, the Exchange Act and these final rules limit the authorities that may access data maintained by a security-based swap data repository to a specific list of domestic authorities and other persons, including foreign authorities, determined by the Commission to be appropriate,[181] and further require that

[169] *See* Proposing Release, 80 FR 55293, note 175.

[170] *See* Proposing Release, 80 FR 55203, note 176.

[171] For example, EU law requires that counterparties to derivatives contracts report the details of the contract to a trade repository, registered or recognized in accordance with EU law, no later than the working day following the conclusion, modification or termination of the contract. *See* EMIR art. 9; *see also* EC Delegated Regulation no. 148/2013 (regulatory technical standards implementing the reporting requirement).

[172] For example, as noted above, market data regarding single-name CDS transactions involving U.S.-domiciled counterparties and/or U.S.-domiciled reference entities indicates that 12 percent of such transactions involve two U.S.-domiciled counterparties, while 48 percent involve a U.S.-domiciled counterparty and a foreign-domiciled counterparty. *See* note 130, *supra,* and accompanying text.

[173] For example, EU law anticipates the possibility that market participants may be able to satisfy their EU reporting obligations by reporting to a trade repository established in a third country, so long as that repository has been recognized by ESMA. *See* EMIR art. 77; *see also* Regulation SBSR, rule 908(c) (providing that to the extent that the Commission has issued a substituted compliance order/determination, compliance with Title VII regulatory reporting and public dissemination requirements may be satisfied by compliance with the comparable rules of a foreign jurisdiction).

[174] *See* Proposing Release, 80 FR 55204, note 181.

[175] *See* SDR Adopting Release, 80 FR at 14504.

[176] *See* Exchange Act section 13(n)(5)(F), 15 U.S.C. 78m(n)(5)(F) (requiring an SDR to maintain the privacy of security-based swap transaction information); Exchange Act rules 13n–4(b)(8) and 13n–9 (implementing Exchange Act section 13(n)(5)(F)).

[177] *See* Proposing Release, 80 FR 55204, note 184.

[178] For example, should it become generally known by market participants that a particular dealer had taken a large position in order to facilitate a trade by a customer and was likely to take offsetting positions to reduce its exposure, other market participants may seek to take positions in advance of the dealer attempting to take its offsetting positions.

[179] *See* Proposing Release, 80 FR 55204, note 186.

[180] Exchange Act sections 13(n)(5)(G) and (H), 15 U.S.C. 78m(n)(5)(G) and (H); *see also* Exchange Act rules 13n–4(b)(9) (implementing Exchange Act section 13(n)(5)(G)) and 13n–4(b)(10) (implementing Exchange Act section 13(n)(5)(H)).

[181] As discussed above in part II.C, the Commission anticipates that such determinations may be conditioned, in part, by specifying the scope of a relevant authority's access to data, and may

a repository notify the Commission when the repository receives an authority's initial request for data maintained by the repository.[182] Restricting access to security-based swap data available to relevant authorities should reduce the risk of unauthorized disclosure, misappropriation or misuse of security-based swap data because each relevant authority will only have access to information within its regulatory mandate, or legal responsibility or authority.

The final rules further require that, before a repository shares security-based swap information with a relevant authority, there must be an arrangement (in the form of an MOU or otherwise) between the Commission and the relevant authority that addresses the confidentiality of the security-based swap information provided. The arrangement should reduce the likelihood of confidential trade or position data being inadvertently made public.

2. Effects on Efficiency, Competition and Capital Formation

The final rules described in this release are intended to facilitate access for relevant authorities to data stored in repositories registered with the Commission and therefore affect such repositories, but do not directly affect security-based swap market participants. As discussed below, access by relevant authorities to security-based swap data could indirectly affect market participants through the benefits that accrue from the relevant authorities' improved ability to fulfill their regulatory mandate or legal responsibility or authority as well as the potential impact of disclosure of confidential data. However, because these rules will condition access to security-based swap data on the agreement of the relevant authorities to protect the confidentiality of the data, the Commission expects these rules to have little effect on the structure or operations of the security-based swap market. Therefore, the Commission believes that effects of the final rules on efficiency, competition and capital formation will be small.[183] Nevertheless, there are some potential effects, particularly with respect to efficiency and capital formation, which flow from efficient collection and aggregation of security-based swap data. We describe these effects below.

In part VI.B of this release, the Commission describes the baseline used to evaluate the economic impact of the final rules, including the impact on efficiency, competition and capital formation. In particular, the Commission notes that the security-based swap data currently available from DTCC–TIW is the result of a voluntary reporting system and access to that data is made consistent with guidelines published by the ODRF.

Under the voluntary reporting regime, CDS transaction data involving counterparties and reference entities from most jurisdictions is reported to a single entity, DTCC–TIW. DTCC–TIW, using the ODRF guidelines, then allows relevant authorities, including the Commission, to obtain data necessary to carry out their respective authorities and responsibilities with respect to OTC derivatives and the regulated entities that use derivatives.[184] As various regulators implement reporting rules within their jurisdictions, counterparties within those jurisdictions may or may not continue to report to DTCC–TIW. As a result, the ability of the Commission and other relevant authorities to obtain the data required consistent with their regulatory mandate, or legal responsibility or authority, may require the ability to access data held in a trade repository outside of their own jurisdictions. That is, because the market is global and interconnected, effective regulatory monitoring of the security-based swap market may require regulators to have access to information on the global market, particularly during times of market turmoil. The data access rules should facilitate access of relevant authorities other than the Commission to security-based swap data held in repositories, and may indirectly facilitate Commission access to data held by trade repositories registered with regulators other than the Commission. To the extent that the final data access rules facilitate the ability of repositories to collect security-based swap information involving counterparties across multiple jurisdictions, there may be benefits in terms of efficient collection and aggregation of security-based swap data.

To the extent that the final data access provisions increase the quantity of transaction and position information available to regulatory authorities about the security-based swap market, the ability of the Commission and other relevant authorities to respond in an appropriate and timely manner to market developments could enhance investor protection through improved detection, and facilitate the investigation of fraud and other market abuses. Moreover, as noted above, we do not anticipate that the final rules will directly affect market participants, and such enhancements in investor protections may decrease the risks and indirect costs of trading and could therefore encourage greater participation in the security-based swap market for a wider range of entities seeking to engage in a broad range of hedging and trading activities.[185] While increased participation is a possible outcome of the Commission's transparency initiatives, including these rules, relative to the level of participation in this market if these initiatives were not undertaken, the Commission believes that the benefits that flow from improved detection, facilitating the investigation of fraud and other market abuses and more-efficient data aggregation are the more direct benefits of the rules.

In addition, the improvement in the quantity of data available to regulatory authorities, including the Commission, should improve their ability to monitor concentrations of risk exposures and evaluate risks to financial stability and could promote the overall stability in the capital markets.[186]

Aside from the effects that the final data access rules may have on regulatory oversight and market participation, the Commission expects the rules potentially to affect how SDRs are structured. In particular, the data access rules could reduce the potential for SDRs to be established along purely jurisdictional lines. That is, effective data sharing may reduce the need for repositories to be established along jurisdictional lines, reducing the likelihood that a single security-based swap transaction must be reported to multiple swap-data repositories. As noted previously by the Commission, due to high fixed costs and increasing economies of scale, the total cost of providing trade repository services to the market for security-based swaps may be lower if the total number of repositories is not increased due to a regulatory environment that results in

limit this access to reflect the relevant authority's regulatory mandate or legal responsibility or authority.

[182] *See* Exchange Act section 13(n)(5)(G), 15 U.S.C. 78m(n)(5)(G); Exchange Act rule 13n–4(b)(9).

[183] *See* part VI.C.1.b *supra* for a discussion of the potential impact on capital formation of inadequate data confidentiality protections. The Commission believes that its approach balances the need for data confidentiality and the need for regulatory transparency.

[184] *See* note 140, *supra.*

[185] Indirect trading costs refer to costs other than direct transaction costs. Front running costs described above provide an example of indirect trading costs. In the context of investor protection, the risk of fraud represents a cost of trading in a market with few investor protections or safeguards.

[186] *See* note 166, *supra.*

trade repositories being established along jurisdictional lines.[187] To the extent that the final rules result in fewer repositories that potentially compete across jurisdictional lines, cost savings realized by fewer repositories operating on a larger scale could result in reduced fees, with the subsequent cost to market participants to comply with reporting requirements being lower. At the same time, the Commission acknowledges that fewer repositories operating on a larger scale could result in those repositories having the ability to take advantage of the reduced level of competition to charge higher prices.

Furthermore, multiple security-based swap data repositories with duplication of reporting requirements for cross-border transactions increase data fragmentation and data duplication, both of which increase the potential for difficulties in data aggregation. To the extent that the data access rules facilitate the establishment of SDRs that accept transactions from multiple jurisdictions, there may be benefits in terms of efficient collection and aggregation of security-based swap data. To the extent that these rules allow relevant authorities to have better access to the data necessary to form a more complete picture of the security-based swap market—including information regarding risk exposures and asset valuations—these rules should help the Commission and other relevant authorities perform their oversight functions in a more effective manner.

However, while reducing the likelihood of having multiple SDRs established along jurisdictional lines would resolve many of the challenges involved in aggregating security-based swap data, there may be costs associated with having fewer repositories. In particular, the existence of multiple repositories may reduce operational risks, such as the risk that a catastrophic event or the failure of a repository leaves no repositories to which transactions can be reported, impeding the ability of the Commission and relevant authorities to obtain information about the security-based swap market.

Finally, as we noted above, a relevant authority's inability to protect the privacy of data maintained by repositories could erode market participants' confidence in the integrity of the security-based swap market. More specifically, confidentiality breaches, including the risk that trading strategies may no longer be anonymous due to a breach, may increase the overall risks associated with trading or decrease the profits realized by certain traders. Increased risks or decreased profits may reduce incentives to participate in the security-based swap markets which may lead to reduced trading activity and liquidity in the market. Depending on the extent of confidentiality breaches, as well as the extent to which such breaches lead to market exits, disclosures of confidential information could hinder price discovery and impede the capital formation process.[188]

3. Additional Costs and Benefits of Specific Rules

Apart from the general costs and benefits associated with the structure of the Exchange Act data access provisions and implementing rules, certain discrete aspects of the final rules and related interpretation raise additional issues related to economic costs and benefits.

a. Benefits

i. Determination of Recipient Authorities

The Commission is adopting an approach to determining whether an authority, other than those expressly identified in the Exchange Act and the implementing rules,[189] should be provided access to data maintained by SDRs. The Commission believes that this approach has the benefit of appropriately limiting relevant authorities' access to data maintained by repositories to protect the confidentiality of the data.[190] The Commission expects that relevant authorities from a number of jurisdictions may seek to obtain a determination by the Commission that they may appropriately have access to repository data. Each of these jurisdictions may have a distinct approach to supervision, regulation or oversight of its financial markets or market participants and to the protection of proprietary and other confidential information. The Commission believes that the approach of the final rule—which among other things would consider whether an authority has an interest in access to security-based swap data based on the relevant authority's regulatory mandate or legal responsibility or authority, whether there is an MOU or other arrangement between the Commission and the relevant authority that addresses the confidentiality of the security-based swap data provided to the authority, and whether information accessed by the applicable authority would be subject to robust confidentiality safeguards [191]—appropriately condition an authority's ability to access data on the confidentiality protections the authority will afford that data. This focus further would be strengthened by the Commission's ability to revoke its determination where necessary, including, for example, if a relevant authority fails to keep such data confidential.[192] This approach should increase market participants' confidence that their confidential trade data will be protected, reducing perceived risks of transacting in security-based swaps.

The Commission also believes that its approach in determining the appropriate relevant authorities would reduce the potential for fragmentation and duplication of security-based swap data among trade repositories by facilitating mutual access to the data. Narrower approaches such as allowing regulatory access to security-based swap data only to those entities specifically identified in the Exchange Act [193] may increase fragmentation and duplication, and hence increase the difficulty in consolidating and interpreting security-based swap market data from repositories, potentially reducing the general economic benefits discussed above.

Furthermore, the Commission believes that its approach in conditioning access to security-based swap data held in SDRs by requiring there to be in effect an arrangement between the Commission and the authority in the form of a MOU or other arrangement would promote the intended benefits of access by relevant authorities to data maintained by SDRs. Under this approach, rather than requiring regulatory authorities to negotiate confidentiality agreements with multiple SDRs, a single MOU or other arrangement between the Commission and the relevant authority can serve as the confidentiality agreement that will satisfy the requirement for a written agreement stating that the relevant authority will abide by the confidentiality requirements described in section 24 of the Exchange Act relating to the security-based swap data. The Commission routinely negotiates MOUs or other arrangements with relevant authorities to secure mutual assistance or for other purposes, and the Commission believes that this approach

[187] *See* Proposing Release, 80 FR 55205, note 197.

[188] *See* Proposing Release, 80 FR 55206, note 199.

[189] *See* parts II.A–B *supra* for a discussion of specific authorities included in the implementing rules.

[190] *See* Proposing Release, 80 FR 55206, note 201.

[191] *See* part II.C.1, *supra.*

[192] *See* part II.C, *supra.*

[193] *See* Exchange Act section 3(a)(74), 15 U.S.C. 78c(a)(74).

is generally consistent with existing practice.

The Commission further believes that negotiating a single such agreement with the Commission will be less costly for the authority requesting data than negotiating directly with each registered SDR. This approach is intended to eliminate the need for each SDR to negotiate as many as 300 confidentiality agreements with requesting authorities. This approach would also avoid the difficulties that may be expected to accompany an approach that requires SDRs to enter into confidentiality agreements—particularly questions regarding the parameters of an adequate confidentiality agreement, and the presence of uneven and potentially inconsistent confidentiality protections across SDRs and recipient entities.

ii. Notification Requirement

The Commission is adopting an approach by which an SDR may satisfy the notification requirement by notifying the Commission upon the initial request for security-based swap data by a relevant authority and maintaining records of the initial request and all subsequent requests.[194] The Commission estimates that approximately 300 relevant authorities may make requests for data from security-based swap data repositories.[195] Based on the Commission's experience in making requests for security-based swap data from trade repositories, the Commission estimates that each relevant authority will access security-based swap data held in SDRs using electronic access. Such access may be to satisfy a narrow request concerning a specific counterparty or reference entity or security, to create a summary statistic of trading activity or outstanding notional or to satisfy a large request for detailed transaction and position data. Requests may occur as seldom as once per month if the relevant authority is downloading all data to which it has access in order to analyze it on its own systems, or may occur 100 or more times per month if multiple staff of the relevant authority are making specific electronic requests concerning particular counterparties or reference entities and associated positions or transactions. Therefore, under the Commission's approach to notification requirement compliance, the Commission estimates based on staff experience that each repository would provide the Commission with actual notice as many as 300 times, and that repositories cumulatively would maintain records of as many as 360,000 subsequent data requests per year.[196] The final rule is expected to permit repositories to respond to requests for data by relevant authorities more promptly and at lower cost than if notification was required for each request for data access, while helping to preserve the Commission's ability to monitor whether the repository provides data to each relevant entity consistent with the applicable conditions.

The Commission's final rule also is designed to simplify a relevant authority's direct access to security-based swap data needed in connection with its regulatory mandate or legal responsibility or authority, because a repository would not be required to provide the Commission with actual notice of every request prior to providing access to the requesting relevant authority.

iii. Use of Confidentiality Agreements Between the Commission and Recipient Authorities

The final rules in part would condition regulatory access on there being an arrangement between the Commission and the recipient entity, in the form of an MOU or otherwise, addressing the confidentiality of the security-based swap information made available to the recipient. These rules add that those arrangements shall be deemed to satisfy the statutory requirement for a written confidentiality agreement.[197]

As discussed above, the Commission believes that this approach reflects an appropriate way to satisfy the interests associated with the confidentiality condition. The benefits associated with this approach include obviating the need for repositories to negotiate and enter into multiple confidentiality agreements, avoiding difficulties regarding the parameters of an adequate confidentiality agreement, and avoiding uneven and potentially inconsistent confidentiality protections. This approach also would build upon the Commission's experience in negotiating such agreements.[198]

b. Costs

The Commission recognizes that its approach to providing access to relevant authorities other than the Commission to security-based swap data held in repositories has the potential to involve certain costs and risks.

The relevant authorities requesting security-based swap data would incur some costs in seeking a Commission order deeming the authority appropriate to receive security-based swap data. These costs would include the negotiation of an MOU or other arrangement to address the confidentiality of the security-based swap information it seeks to obtain and providing information to justify that the security-based swap data relates to the entity's regulatory mandate or legal responsibility or authority. As discussed above, the Commission estimates that up to 300 entities potentially might enter into such MOUs or other arrangements.[199] Based on the Commission staff's experience in negotiating MOUs that address regulatory cooperation, the Commission estimates the cost to each relevant authority requesting data associated with negotiating such an arrangement of approximately $208,300 per entity for a total of $62,490,000.[200]

In addition, authorities that are not specified by the final rule may request that the Commission determine them to be appropriate to receive access to such security-based swap data. Given the relevant information that the Commission would consider in connection with such designations (apart from the MOU issues addressed

[194] *See* Exchange Act rule 13n–4(d).

[195] *See* Exchange Act rules 13n–4(b)(9)(i)–(v) for a list of prudential regulators that may request data maintained by SDRs from SDRs. The Exchange Act also states that FSOC, the CFTC and the Department of Justice may access security-based swap data. *See* parts II.B.1, 2, *supra.* The rules further state that the OFR may access security-based swap data. *See* parts II.B.1,2, *supra.* The Commission also expects that certain self-regulatory organizations and registered futures associations may request security-based swap data from repositories. Therefore, the Commission estimates that up to approximately 30 relevant authorities in the United States may seek to access security-based swap data from repositories. The Commission believes that most requests will come from authorities in G20 countries, and estimates that each of the G20 countries will also have no more and likely fewer than 30 relevant authorities that may request data from SDRs. Certain authorities from outside the G20 also may request data. Accounting for all of those entities, the Commission estimates that there will likely be a total of no more than 300 relevant domestic and foreign authorities that may request security-based swap data from repositories.

[196] The annual estimate of 360,000 is calculated based on 300 recipient entities each making 100 requests per month cumulatively across all repositories. The estimate of 100 requests per authority is based on staff experience with similar data requests in other contexts.

[197] *See* Exchange Act rule 13n–4(b)(10).

[198] *See* part II.F, *supra.*

[199] *See* part VI.C.3.a.ii, *supra.*

[200] These figures are based on 300 entities each requiring 500 personnel hours on average to negotiate an MOU or other arrangement. *See* part V.D.1.a, *supra.* The cost per entity is 400 hours × attorney at $386 per hour + 100 hours × deputy general counsel at $539 per hour = $208,300, or a total of $62,490,000. We use salary figures from SIFMA's Management & Professional Earnings in the Securities Industry 2013, modified by Commission staff to account for an 1800-hour year-week, multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead, and adjusted for inflation using the Consumer Price Index (CPI).

above)—including information regarding how the authority would be expected to use the information, information regarding the authority's regulatory mandate or legal responsibility or authority, and information regarding reciprocal assistance—the Commission estimates the cost associated with such a request to be approximately $15,440 per requesting entity for a total of $4,632,000.[201]

Security-based swap data repositories would incur some costs to verify that an entity requesting data entered into the requisite agreements concerning confidentiality with the Commission. The Commission generally expects that such verification costs would be minimal because information regarding such Commission arrangements would generally be readily available.[202]

To the extent that the security-based swap data repository provides the requested data through direct electronic means, the repository may incur some cost in providing the requesting authority access to the system that provides such access and setting data permissions to allow access only to the information that relates to the authority's regulatory mandate, or legal responsibility or authority. The Commission believes most of the costs associated with providing such access would be the fixed costs incurred in designing and building the systems to provide the direct electronic access required by rules the Commission adopted last year to address the registration process, duties and core principles applicable to security-based swap data repositories.[203] The Commission believes the marginal cost of providing access to an additional relevant authority and setting the associated permissions is approximately $6,406.[204] Based on an estimated 300 entities requesting access to each of ten registered SDRs, we estimate the total cost of connecting entities to SDRs to be approximately $19,218,000.

In addition, under the Commission's notification compliance rule, SDRs would be required to notify the Commission of the initial request for data but would not have to inform the Commission of all relevant authorities' requests for data prior to a SDR fulfilling such requests. Based on the estimate that approximately 300 relevant authorities may make requests for data from security-based swap data repositories, the Commission estimates that a repository would provide the Commission with actual notice approximately 300 times.[205] Moreover, based on the estimate that ten persons may register with the Commission as SDRs,[206] this suggests that repositories in the aggregate would provide the Commission with actual notice up to a total of 3,000 times. The Commission estimates that the total cost of providing such notice to be $57,900 per SDR for a total of $579,000 for all SDRs.[207]

Pursuant to the rule, SDRs would be required to maintain records of subsequent requests.[208] Not receiving actual notice of all requests may impact the Commission's ability to track such requests, but the Commission believes that the benefits of receiving actual notice of each request would not justify the additional costs that repositories would incur in providing such notices and the potential delay in relevant authorities receiving data that they need to fulfill their regulatory mandate, or legal responsibility or authority. At the same time, providing notice of initial requests will help to preserve the Commission's ability to monitor whether the repository provides data to each relevant entity consistent with the applicable conditions. As discussed above, the Commission estimates that the average initial paperwork burden associated with maintaining certain records related to data requests or access would be roughly 360 hours, and that the annualized burden would be roughly 280 hours and $121,000 for each repository.[209] Assuming a maximum of ten security-based swap data repositories, the estimated aggregate one-time dollar cost would be roughly $1 million,[210] and the estimated aggregate annualized dollar cost would be roughly $1.21 million.[211]

D. Alternatives

The Commission considered a number of alternative approaches to implementing the Exchange Act data access provisions, but, for the reasons discussed below, is not adopting any of them.

1. Use of confidentiality arrangements directly between repositories and recipients

The Commission considered the alternative approach of permitting confidentiality agreement between an SDR and the recipient of the information to satisfy the confidentiality condition to the data access requirement. The Commission believes, however, that the approach taken in the final rules, which would instead make use of confidentiality arrangements between the Commission and the recipients of the data, would avoid difficulties such as questions regarding the parameters of the confidentiality agreement, and the presence of uneven and inconsistent confidentiality protections.[212] This also would avoid the need for SDRs to negotiate and

[201] These figures are based on roughly 300 entities (noting that certain entities designated by statute or rule would not need to prepare such requests) requiring 40 personnel hours to prepare a request for access. *See* part V.D.1.b, *supra.* The cost per entity is 40 hours × attorney at $386 per hour = $15,440, or a total of $4,632,000. We use salary figures from SIFMA's Management & Professional Earnings in the Securities Industry 2013, modified by Commission staff to account for an 1800-hour year-week, multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead, and adjusted for inflation using the Consumer Price Index (CPI).

[202] The Commission provides a list of MOUs and most other arrangements on its public Web site, which are available at: *http://www.sec.gov/about/offices/oia/oia_cooparrangements.shtml.*

[203] *See* Proposing Release, 80 FR at 55208, n. 222.

[204] This figure is based on the view that, for each recipient requesting data, a repository would incur a 25-hour burden associated with programming or otherwise inputting the relevant parameters, encompassing 20 hours of programmer analyst time and five hours of senior programmer time. The estimate also encompasses one hour of attorney time in connection with each such recipient. *See* part V.D.1.c, *supra.* The cost per entity is 20 hours × programmer analyst at $224 per hour + 5 hours × senior programmer at $308 per hour + 1 hour × attorney at $386 per hour = $6,406. We use salary figures from SIFMA's Management & Professional Earnings in the Securities Industry 2013, modified by Commission staff to account for an 1800-hour year-week, multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead, and adjusted for inflation using the Consumer Price Index (CPI).

[205] *See* part VI.C.3.a.ii, *supra.*

[206] *See* note 105, *supra,* and accompanying text.

[207] These figures are based each of ten SDRs providing notice for each of 300 requesting entities. *See* part V.D.1.d, *supra.* The cost per SDR is 300 requesting entities × 0.5 hours × attorney at $386 per hour = $57,900, or a total of $579,000. We use salary figures from SIFMA's Management & Professional Earnings in the Securities Industry 2013, modified by Commission staff to account for an 1800-hour year-week, multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead, and adjusted for inflation using the Consumer Price Index (CPI).

[208] *See* part V.D.1.d, *supra.* As noted above, existing rules require SDRs to maintain copies of all documents they make or receive in their course of business, including electronic documents. *See* note 75, *supra.*

[209] *See* part V.D.1.d, *supra.*

[210] The Commission anticipates that a repository would assign the associated responsibilities primarily to a compliance manager and a senior systems analyst. The total estimated dollar cost would be roughly $102,240 per repository, reflecting the cost of a compliance manager at $288 per hour for 300 hours, and a senior systems analyst at $264 per hour for 60 hours. Across the estimated ten repositories, this equals $1,022,400.

[211] The Commission anticipates that a repository would assign the associated responsibilities primarily to a compliance manager. The total estimated dollar cost would be roughly $121,000 per repository, reflecting $40,000 annualized information technology costs, as well as a compliance manager at $288 per hour for 280 hours. Across the estimated ten repositories, this equals $1.21 million.

[212] *See* part II.A, *supra.*

potentially enter into hundreds of confidentiality agreements, as under the adopted approach such costs will be borne by the Commission.

2. Notice of Individual Requests for Data Access

Finally, the Commission considered requiring repositories to provide notice to the Commission of all requests for data prior to repositories fulfilling such requests, rather than the approach of requiring such notice only of the first request from a particular recipient, with the repository maintaining records of all subsequent requests.[213] The Commission believes that the benefits of receiving actual notice for each request would not justify the additional costs that would be imposed on repositories to provide such notice, and providing notice of subsequent requests might not be feasible if data is provided by direct electronic access.

VII. Regulatory Flexibility Act Certification

Section 3(a) of the Regulatory Flexibility Act of 1980 (''RFA'') [214] requires Federal agencies, in promulgating rules, to consider the impact of those rules on small entities. The Commission certified in the proposing release, pursuant to Section 605(b) of the RFA,[215] that the proposed rule would not, if adopted, have a significant economic impact on a substantial number of ''small entities.'' The Commission received no comments on this certification.

For purposes of Commission rulemaking in connection with the RFA, a small entity includes: (1) When used with reference to an ''issuer'' or a ''person,'' other than an investment company, an ''issuer'' or ''person'' that, on the last day of its most recent fiscal year, had total assets of $5 million or less; [216] or (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 Rule 17a–5(d) under the Exchange Act,[217] 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 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 business or small organization.[218]

In initially proposing rules regarding the registration process, duties and core principles applicable to SDRs, the Commission stated that it preliminarily did not believe that any persons that would register as repositories would be considered small entities.[219] The Commission further stated that it preliminarily believed that most, if not all, SDRs would be part of large business entities with assets in excess of $5 million and total capital in excess of $500,000, and, 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.[220] The Commission reiterated that conclusion in adopting final rules generally addressing repository registration, duties and core principles.[221]

In the Proposing Release for these rule amendments, the Commission stated that it continued to hold the view that any persons that would register as SDRs would not be considered small entities. The Commission accordingly certified that the proposed rules would not have a significant economic impact on a substantial number of small entities for purposes of the RFA.[222]

We continue to believe that the entities that will register as SDRs will not be small entities. Accordingly, the Commission certifies that the final rules will not have a significant economic impact on a substantial number of small entities for purposes of the RFA.

Statutory Basis and Text of Final Rules

Pursuant to the Exchange Act, and particularly sections 3(b), 13(n), and 23(a) thereof, 15 U.S.C. 78c(b), 78m(n), and 78w(a), and section 752(a) of the Dodd-Frank Act, 15 U.S.C 8325, the Commission is adopting amendments to rule 13n–4 under the Exchange Act by adding paragraphs (b)(9), (b)(10), and (d) to that rule.

List of Subjects in 17 CFR Part 240

Confidential business information, Reporting and recordkeeping requirements, Securities.

Text of Final Rules

For the reasons stated in the preamble, the Commission is amending Title 17, Chapter II, of the Code of Federal Regulations as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 1. The authority citation for part 240 continues to read, in part, 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; Pub. L. 111–203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112–106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

■ 2. Amend § 240.13n–4 by removing the ''and'' after the semicolon in paragraph (b)(8), and adding paragraphs (b)(9), (b)(10), and (d) to read as follows:

§ 240.13n–4 Duties and core principles of security-based swap data repository.

* * * * *

(b) * * *

(9) On a confidential basis, pursuant to section 24 of the Act (15 U.S.C. 78x), upon request, and after notifying the Commission of the request in a manner consistent with paragraph (d) of this section, make available security-based swap data obtained by the security-based swap data repository, including individual counterparty trade and position data, to the following:

(i) The Board of Governors of the Federal Reserve System and any Federal Reserve Bank;

(ii) The Office of the Comptroller of the Currency;

(iii) The Federal Deposit Insurance Corporation;

(iv) The Farm Credit Administration;

(v) The Federal Housing Finance Agency;

(vi) The Financial Stability Oversight Council;

(vii) The Commodity Futures Trading Commission;

(viii) The Department of Justice;

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[213] *See* part II.D, *supra.*

[214] 5 U.S.C. 603(a).

[215] 5 U.S.C. 605(b).

[216] *See* 17 CFR 240.0–10(a).

[217] 17 CFR 240.17a–5(d).

[218] *See* 17 CFR 240.0–10(c).

For purposes of the Regulatory Flexibility Act, the definition of ''small entity'' also encompasses ''small governmental jurisdictions,'' which in relevant part means governments of locales with a population of less than fifty thousand. 5 U.S.C. 601(5), (6). Although the Commission anticipates that these final rules may be expected to have an economic impact on various governmental entities that access data pursuant to Dodd-Frank's data access provisions, the Commission does not anticipate that any of those governmental entities will be small entities.

[219] *See* 75 FR at 77365.

[220] *See id.* (basing the conclusions on review of public sources of financial information about the current repositories that are providing services in the OTC derivatives market).

[221] *See* SDR Adopting Release, 80 FR at 14549 (noting that the Commission did not receive any comments that specifically addressed whether the applicable rules would have a significant economic impact on small entities).

[222] *See* Proposing Release, 80 FR at 55210.

(ix) The Office of Financial Research; and

(x) Any other person that the Commission determines to be appropriate, conditionally or unconditionally, by order, including, but not limited to—

(A) Foreign financial supervisors (including foreign futures authorities);

(B) Foreign central banks;

(C) Foreign ministries; and

(D) Other foreign authorities;

(10) Before sharing information with any entity described in paragraph (b)(9) of this section, there shall be in effect an arrangement between the Commission and the entity (in the form of a memorandum of understanding or otherwise) to address the confidentiality of the security-based swap information made available to the entity; this arrangement shall be deemed to satisfy the requirement, set forth in section 13(n)(5)(H) of the Act (15 U.S.C. 78m(n)(5)(H)), that the security-based swap data repository receive a written agreement from the entity stating that the entity shall abide by the confidentiality requirements described in section 24 of the Act (15 U.S.C. 78x) relating to the information on security-based swap transactions that is provided; and

* * * * *

(d) *Notification requirement compliance.* To satisfy the notification requirement of the data access provisions of paragraph (b)(9) of this section, a security-based swap data repository shall inform the Commission upon its receipt of the first request for security-based swap data from a particular entity (which may include any request to be provided ongoing online or electronic access to the data), and the repository shall maintain records of all information related to the initial and all subsequent requests for data access from that entity, including records of all instances of online or electronic access, and records of all data provided in connection with such requests or access.

* * * * *

Dated: August 29, 2016.

By the Commission.

Brent J. Fields,

Secretary.

[FR Doc. 2016–21137 Filed 9–1–16; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF STATE

22 CFR Part 51

[Public Notice: 9678]

RIN 1400–AD97

Passports

AGENCY: State Department.

ACTION: Final rule.

SUMMARY: This final rule provides various changes and updates to the Department of State passport rules as a result of the passage of two laws: International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders (IML); and the Fixing America's Surface Transportation Act (FAST Act). The final rule incorporates statutory passport denial and revocation requirements for certain covered sex offenders under the IML, those persons with a seriously delinquent tax debt as defined by the FAST Act, and/or those persons who submit a passport application without a correct and valid Social Security number.

DATES: The effective date of this regulation is September 2, 2016.

FOR FURTHER INFORMATION CONTACT: Stephanie Traub, Office of Legal Affairs, Passport Services, (202) 485–6500. Hearing- or speech-impaired persons may use the Telecommunications Devices for the Deaf (TDD) by contacting the Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: The Department is amending § 51.60 of subpart E within part 51 of title 22 of the Code of Federal Regulations. The rules incorporate statutory passport denial and revocation requirements as codified at 22 U.S.C. 2714a for certain individuals who have seriously delinquent tax debt or submit passport applications without correct and valid Social Security numbers. The rules incorporate new provisions for denial and revocation of passport books that do not contain conspicuous identifiers for covered sex offenders as defined in 42 U.S.C. 16935a. The rule provides for denial of passport cards to these same covered sex offenders, as passport cards are not able to contain the unique identifier required by 22 U.S.C. 212b.

The new § 51.60(a)(3) requires denial of a passport to an individual who is certified by the Secretary of the Treasury as having a seriously delinquent tax debt as described in 26 U.S.C. 7345.

The new § 51.60(f) permits denial of a passport to an individual who does not include his or her Social Security number or willfully, intentionally, negligently, or recklessly includes an incorrect or invalid Social Security number on his or her passport application.

The new § 51.60(g) requires denial of a passport card to an individual who is a covered sex offender as described in 42 U.S.C. 16935a.

Regulatory Findings

Administrative Procedure Act

Because this rulemaking implements the Congressional mandates within the FAST Act and IML, the Department is publishing this rulemaking without notice and comment under the ''good cause'' exemption of 5 U.S.C. 553(b). The Department believes that public comment on this rulemaking would be unnecessary, impractical, and contrary to the public interest. In addition, for the same reasons, the effective date for this rulemaking is the date of publication in accordance with the ''good cause'' provision of 5 U.S.C. 553(d)(3).

Regulatory Flexibility Act

The Department of State, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Act of 1995

This rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based companies to compete with foreign based companies in domestic and import markets.