COMMODITY FUTURES TRADING COMMISSION

17 CFR Chapter I

Order Granting Conditional Substituted Compliance in Connection with Certain Capital and Financial Reporting Requirements Applicable to Nonbank Swap Dealers Domiciled in the French Republic and Federal Republic of Germany and Subject to Regulation in the European Union

AGENCY: Commodity Futures Trading Commission.

ACTION: Order.

SUMMARY: On June 27, 2023, the Commodity Futures Trading Commission issued a notice and request for comment on an application submitted by the Institute of International Bankers, International Swaps and Derivatives Association, and Securities Industry and Financial Markets Association requesting that the Commission determine that registered nonbank swap dealers organized and domiciled within the European Union may comply with certain capital and financial reporting requirements under the Commodity Exchange Act and Commission regulations by being subject to, and complying with, corresponding capital and financial reporting requirements of the European Union. The Commission also solicited public comment on a proposed comparability determination and related order providing for the conditional availability of substituted compliance in connection with the application.

The Commission is adopting the proposed order with certain modifications and clarifications to address comments. The final order provides that a nonbank swap dealer organized and domiciled in the French Republic or the Federal Republic of Germany may satisfy the capital requirements under Section 4s(e) of the Commodity Exchange Act and Commission Regulation 23.101(a)(1)(i) and the financial reporting rules under Section 4s(f) of the

Commodity Exchange Act and Commission Regulation 23.105 by complying with certain specified EU laws and regulations and conditions set forth in the order.

DATES: This determination was made and issued by the Commission on [**INSERT DATE OF COMMISSION APPROVAL**].

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SUPPLEMENTARY INFORMATION: The Commodity Futures Trading Commission ("Commission" or "CFTC") is issuing an order providing that registered nonbank swap dealers ("SDs") organized and domiciled in the French Republic ("France") and Federal Republic of Germany ("Germany") and subject to capital and financial reporting requirements of the European Union ("EU nonbank SDs") may satisfy certain capital and financial reporting requirements under the Commodity Exchange Act ("CEA")[1] and Commission regulations[2] by being subject to, and complying with, comparable capital and financial reporting requirements under the relevant European Union ("EU") laws and regulations, subject to certain conditions set forth in the order below. The order is based on the proposed comparability determination and

[1] 7 U.S.C. 1 *et seq.* The CEA may be accessed through the Commission's website, *www.cftc.gov*.

[2] 17 CFR Chapter I. Commission regulations may be accessed through the Commission's website, *www.cftc.gov*.

related proposed order published by the Commission on June 27, 2023,[3] as modified in certain aspects to address comments and to clarify its terms.

I. Introduction

A. Regulatory Background – CFTC Capital, Margin, and Financial Reporting Requirements for Swap Dealers and Major Swap Participants

Section 4s(e) of the CEA[4] directs the Commission and "prudential regulators" [5] to impose capital requirements on SDs and major swap participants ("MSPs") registered with the Commission.[6] Section 4s(e) also directs the Commission and prudential regulators to adopt regulations imposing initial and variation margin requirements on swaps entered into by SDs and MSPs that are not cleared by a registered derivatives clearing organization ("uncleared swaps").

Section 4s(e) applies a bifurcated approach with respect to the above Congressional directives, requiring each SD and MSP that is subject to the regulation of a prudential regulator ("bank SD" and "bank MSP," respectively) to meet the minimum capital requirements and

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[3] *Notice of Proposed Order and Request for Comment on an Application for Capital Comparability Determination Submitted on Behalf of Nonbank Swap Dealers Domiciled in the French Republic and Federal Republic of Germany and Subject to Capital and Financial Reporting Requirements of the European Union*, 88 FR 41774 (June 27, 2023) ("2023 Proposal").

[4] 7 U.S.C. 6s(e).

[5] The term "prudential regulators" is defined in the CEA to mean the Board of Governors of the Federal Reserve System ("Federal Reserve Board"); the Office of the Comptroller of the Currency; the Federal Deposit Insurance Corporation; the Farm Credit Administration; and the Federal Housing Finance Agency. 7 U.S.C. 1a(39).

[6] Subject to certain exceptions, the term "swap dealer" is generally defined as any person that: (i) holds itself out as a dealer in swaps; (ii) makes a market in swaps; (iii) regularly enters into swaps with counterparties as an ordinary course of business for its own account; or (iv) engages in any activity causing the person to be commonly known in the trade as a dealer or market maker in swaps. 7 U.S.C. 1a(49).

The term "major swap participant" is generally defined as any person who is not an SD, and: (i) subject to certain exclusions, maintains a substantial position in swaps for any of the major swap categories as determined by the Commission; (ii) whose outstanding swaps create substantial counterparty exposure that could have serious adverse effects on the financial stability of the U.S. banking system or financial markets; or (iii) is a financial entity that: (a) is highly leveraged relative to the amount of capital it holds and that is not subject to capital requirements established by an appropriate Federal banking agency; and (b) maintains a substantial position in outstanding swaps in any major swap category as determined by the Commission. 7 U.S.C. 1a(33).

uncleared swaps margin requirements adopted by the applicable prudential regulator, and requiring each SD and MSP that is not subject to the regulation of a prudential regulator ("nonbank SD" and "nonbank MSP," respectively) to meet the minimum capital requirements and uncleared swaps margin requirements adopted by the Commission.[7] Therefore, the Commission's authority to impose capital requirements and margin requirements for uncleared swap transactions extends to nonbank SDs and nonbank MSPs, including nonbanking subsidiaries of bank holding companies regulated by the Federal Reserve Board.[8]

The prudential regulators implemented Section 4s(e) in 2015 by amending existing capital requirements applicable to bank SDs and bank MSPs to incorporate swap transactions into their respective bank capital frameworks, and by adopting rules imposing initial and variation margin requirements on bank SDs and bank MSPs that engage in uncleared swap transactions.[9] The Commission adopted final rules imposing initial and variation margin obligations on nonbank SDs and nonbank MSPs for uncleared swap transactions on January 6, 2016.[10] The Commission also approved final capital requirements for nonbank SDs and nonbank MSPs on July 24, 2020, which were published in the Federal Register on September 15, 2020 with a compliance date of October 6, 2021 ("CFTC Capital Rules").[11]

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[7] 7 U.S.C. 6s(e)(2).

[8] 7 U.S.C. 6s(e)(1) and (2).

[9] *Margin and Capital Requirements for Covered Swap Entities*, 80 FR 74840 (Nov. 30, 2015).

[10] *Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants*, 81 FR 636 (Jan. 6, 2016).

[11] *Capital Requirements of Swap Dealers and Major Swap Participants*, 85 FR 57462 (Sept. 15, 2020).

On April 30, 2024, the Commission amended the capital and financial reporting requirements to revise certain financial reporting obligations, among other changes. *See Capital and Financial Reporting Requirements for Swap Dealers and Major Swap Participants*, 89 FR 45569 (May 23, 2024). The amendments have limited impact on nonbank SDs covered by this order.

Section 4s(f) of the CEA addresses SD and MSP financial reporting requirements.[12] Section 4s(f) authorizes the Commission to adopt rules imposing financial condition reporting obligations on all SDs and MSPs (*i.e.*, nonbank SDs, nonbank MSPs, bank SDs, and bank MSPs). Specifically, Section 4s(f)(1)(A) provides, in relevant part, that each registered SD and MSP must make financial condition reports as required by regulations adopted by the Commission.[13] The Commission's financial reporting obligations were adopted with the Commission's nonbank SD and nonbank MSP capital requirements, and also had a compliance date of October 6, 2021 ("CFTC Financial Reporting Rules").[14]

B. Commission Capital Comparability Determinations for Non-U.S. Nonbank Swap Dealers and Non-U.S. Nonbank Major Swap Participants

Commission Regulation 23.106 establishes a substituted compliance framework whereby the Commission may determine that compliance by a non-U.S. domiciled nonbank SD or non-U.S. domiciled nonbank MSP with its home country's capital and financial reporting requirements will satisfy all or parts of the CFTC Capital Rules and all or parts of the CFTC Financial Reporting Rules (such a determination referred to as a "Comparability Determination").[15] The Commission's capital adequacy and financial reporting requirements are

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[12] 7 U.S.C. 6s(f).

[13] 7 U.S.C. 6s(f)(1)(A).

[14] 85 FR 57462.

[15] 17 CFR 23.106. Commission Regulation 23.106(a)(1) provides that a request for a Comparability Determination may be submitted by a non-U.S. nonbank SD or non-US nonbank MSP, a trade association or other similar group on behalf of its SD or MSP members, or a foreign regulatory authority that has direct supervisory authority over one or more non-US nonbank SDs or non-U.S. nonbank MSPs. However, Commission regulations also provide that any non-U.S. nonbank SD or non-U.S. nonbank MSP that is dually-registered with the Commission as a futures commission merchant ("FCM") is subject to the capital requirements of Commission Regulation 1.17 (17 CFR 1.17) and may not petition the Commission for a Comparability Determination. 17 CFR 23.101(a)(5) and (b)(4), respectively.

Furthermore, substituted compliance is not available to non-U.S. bank SDs and non-U.S. bank MSPs with respect to their respective financial reporting requirements under Commission Regulation 23.105(p). Commission Regulation

designed to address and manage risks that arise from a firm's operation as an SD or MSP. Given their functions, both sets of requirements and rules must be applied on an entity-level basis (meaning that the rules apply on a firm-wide basis, irrespective of the type of transactions involved) to effectively address risk to the firm as a whole. The availability of such substituted compliance is conditioned upon the Commission issuing a Comparability Determination finding that the relevant foreign jurisdiction's capital adequacy and financial reporting requirements for non-U.S. nonbank SDs and/or non-U.S. nonbank MSPs are comparable to the corresponding CFTC Capital Rules and CFTC Financial Reporting Rules. The Commission would issue a Comparability Determination in the form of an order ("Comparability Order").[16]

The Commission's approach for conducting a Comparability Determination with respect to the CFTC Capital Rules and the CFTC Financial Reporting Rules is a principles-based, holistic approach that focuses on assessing whether the applicable foreign jurisdiction's capital and financial reporting requirements have comparable objectives with, and achieve comparable outcomes to, corresponding CFTC requirements.[17] The Commission's assessment is not a line-by-line evaluation or comparison of a foreign jurisdiction's regulatory requirements with the Commission's requirements.[18] In performing the analysis, the Commission recognizes that jurisdictions may adopt differing approaches to achieving regulatory objectives and outcomes, and the Commission will focus on whether the foreign jurisdiction's capital and financial

23.105(p), however, permits non-U.S. bank SDs and non U.S. bank MSPs that do not submit financial reports to a U.S. prudential regulator to file with the Commission a statement of financial condition, certain regulatory capital information, and Schedule 1 of Appendix C to Subpart E of Part 23 of the Commission's regulations prepared and presented in accordance with the accounting standards permitted by the non-U.S. bank SD's or non-U.S. bank MSP's home country regulatory authorities. 17 CFR 23.105(p)(2).

[16] 17 CFR 23.106(a)(3).

[17] 17 CFR 23.106(a)(3)(ii). *See also* 85 FR 57462 at 57521.

[18] *See* 85 FR 57462 at 57521.

reporting requirements are based on regulatory objectives, and produce regulatory outcomes, that are comparable to the Commission's in purpose and effect, and not whether they are comparable in every aspect or contain identical elements.

A person requesting a Comparability Determination is required to submit an application to the Commission containing: (i) a description of the objectives of the relevant foreign jurisdiction's capital adequacy and financial reporting requirements applicable to entities that are subject to the CFTC Capital Rules and the CFTC Financial Reporting Rules; (ii) a description (including specific legal and regulatory provisions) of how the relevant foreign jurisdiction's capital adequacy and financial reporting requirements address the elements of the CFTC Capital Rules and CFTC Financial Reporting Rules, including, at a minimum, the methodologies for establishing and calculating capital adequacy requirements and whether such methodologies comport with international standards; and (iii) a description of the ability of the relevant foreign regulatory authority to supervise and enforce compliance with the relevant foreign jurisdiction's capital adequacy and financial reporting requirements. The applicant must also submit, upon request, such other information and documentation as the Commission deems necessary to evaluate the comparability of the capital adequacy and financial reporting requirements of the foreign jurisdiction.[19]

The Commission will consider an application for a Comparability Determination to be a representation by the applicant that the laws and regulations of the foreign jurisdiction that are submitted in support of the application are finalized and in force, that the description of such laws and regulations is accurate and complete, and that, unless otherwise noted, the scope of

[19] 17 CFR 23.106(a)(2).

such laws and regulations encompasses the relevant non-U.S. nonbank SDs and/or non-U.S. nonbank MSPs domiciled in the foreign jurisdiction.[20] Each non-U.S. nonbank SD or non-U.S. nonbank MSP that seeks to rely on a Comparability Order is responsible for determining whether it is subject to the foreign laws and regulations found comparable in the Comparability Order. A non-U.S. nonbank SD or non-U.S. nonbank MSP that is not legally required to comply with a foreign jurisdiction's laws and/or regulations determined to be comparable in a Comparability Order may not voluntarily comply with such laws and/or regulations in lieu of compliance with the CFTC Capital Rules or the CFTC Financial Reporting Rules.

The Commission may consider all relevant factors in making a Comparability Determination, including: (i) the scope and objectives of the relevant foreign jurisdiction's capital and financial reporting requirements; (ii) whether the relevant foreign jurisdiction's capital and financial reporting requirements achieve comparable outcomes to the Commission's corresponding capital requirements and financial reporting requirements; (iii) the ability of the relevant foreign regulatory authority or authorities to supervise and enforce compliance with the relevant foreign jurisdiction's capital adequacy and financial reporting requirements; and (iv) any other facts or circumstances the Commission deems relevant, including whether the Commission and foreign regulatory authority or authorities have a memorandum of understanding ("MOU") or similar arrangement that would facilitate supervisory cooperation.[21]

[20] The Commission provides the applicant with an opportunity to review for accuracy and completeness the Commission's description of relevant home country laws and regulations on which a proposed Comparability Determination and a proposed Comparability Order are based. The Commission relies on this review, and any corrections or feedback received, as part of the comparability assessment. A Comparability Determination and Comparability Order based on an inaccurate description of foreign laws and regulations may not be valid.

[21] 17 CFR 23.106(a)(3) and 85 FR 57462 at 57520-57522.

In performing the comparability assessment for foreign nonbank SDs, the Commission's review will include the extent to which the foreign jurisdiction's requirements address: (i) the process of establishing minimum capital requirements for nonbank SDs and how such process addresses risk, including market risk and credit risk of the nonbank SD's on-balance sheet and off-balance sheet exposures; (ii) the types of equity and debt instruments that qualify as regulatory capital in meeting minimum requirements; (iii) the financial reports and other financial information submitted by a nonbank SD to its relevant regulatory authority and whether such information provides the regulatory authority with the means necessary to effectively monitor the financial condition of the nonbank SD; and (iv) the regulatory notices and other communications between a nonbank SD and its foreign regulatory authority that address potential adverse financial or operational issues that may impact the firm. With respect to the ability of the relevant foreign regulatory authority to supervise and enforce compliance with the foreign jurisdiction's capital adequacy and financial reporting requirements, the Commission's review will include an assessment of the foreign jurisdiction's surveillance program for monitoring nonbank SDs' compliance with such capital adequacy and financial reporting requirements, and the disciplinary process imposed on firms that fail to comply with such requirements.[22]

Commission Regulation 23.106 further provides that the Commission may impose any terms or conditions that it deems appropriate in issuing a Comparability Determination.[23] Any specific terms or conditions with respect to capital adequacy or financial reporting requirements

[22] The Commission would conduct a similar analysis, adjusted as appropriate to account for regulatory distinctions, in performing a comparability assessment for foreign nonbank MSPs. Commission Regulation 23.101(b) requires a nonbank MSP to maintain positive tangible net worth. 17 CFR 23.101(b). There are no MSPs currently registered with the Commission.

[23] 17 CFR 23.106(a)(5).

will be set forth in the Commission's Comparability Order. As a general condition to all Comparability Orders, the Commission will require notification from the applicants of any material changes to information submitted by the applicants in support of a comparability finding, including, but not limited to, changes in the foreign jurisdiction's relevant laws and regulations, as well as changes to the relevant supervisory or regulatory regime.

To rely on a Comparability Order, a nonbank SD or nonbank MSP domiciled in the foreign jurisdiction and subject to supervision by the relevant regulatory authority (or authorities) in the foreign jurisdiction must file a notice with the Commission of its intent to comply with the applicable capital adequacy and financial reporting requirements of the foreign jurisdiction set forth in the Comparability Order in lieu of all or parts of the CFTC Capital Rules and/or CFTC Financial Reporting Rules.[24] Notices must be filed electronically with the Commission's Market Participants Division ("MPD").[25] The filing of a notice by a non-U.S. nonbank SD or non-U.S. nonbank MSP provides MPD staff with the opportunity to engage with the firm and to obtain representations that it is subject to, and complies with, the laws and regulations cited in the Comparability Order and that it will comply with any listed conditions. MPD will issue a letter under delegated authority from the Commission confirming that the non-U.S. nonbank SD or non-U.S. nonbank MSP may comply with the foreign laws and regulations cited in the Comparability Order in lieu of complying with the CFTC Capital Rules and CFTC Financial Reporting Rules upon MPD's confirmation through discussions with the non-U.S. nonbank SD or non-U.S. nonbank MSP that the firm is subject to, and complies with, such foreign laws and

[24] 17 CFR 23.106(a)(4)(i).

[25] Notices must be filed in electronic form to the following email address: MPDFinancialRequirements@cftc.gov.

regulations, is subject to the jurisdiction of the applicable foreign regulatory authority (or authorities), and can meet the conditions in the Comparability Order.[26]

Each non-U.S. nonbank SD and each non-U.S. nonbank MSP that receives confirmation from the Commission that it may comply with a foreign jurisdiction's capital adequacy and financial reporting requirements will be deemed by the Commission to be in compliance with the corresponding CFTC Capital Rules and/or CFTC Financial Reporting Rules. A non-U.S. nonbank SD or non-U.S. nonbank MSP that receives confirmation of substituted compliance remains subject, however, to the Commission's examination and enforcement authority.[27] Accordingly, if a nonbank SD or nonbank MSP fails to comply with the foreign jurisdiction's capital adequacy and/or financial reporting requirements, the Commission may initiate an action for a violation of the corresponding CFTC Capital Rules and/or CFTC Financial Reporting Rules.[28] In addition, a finding of a violation by a foreign jurisdiction's regulatory authority is not a prerequisite for the exercise of such examination and enforcement authority by the Commission.

C. Application for a Comparability Determination for EU Nonbank Swap Dealers

On September 24, 2021, the Institute of International Bankers ("IIB"), International Swaps and Derivatives Association ("ISDA"), and Securities Industry and Financial Markets Association ("SIFMA") (collectively, the "Applicants") submitted an application ("EU Application") requesting that the Commission conduct a Comparability Determination and issue a Comparability Order finding that compliance by EU nonbank SDs domiciled in France or

[26] 17 CFR 23.106(a)(4)(ii) and 17 CFR 140.91(a)(11).

[27] 17 CFR 23.106(a)(4)(ii). Confirmation will be issued by MPD under authority delegated by the Commission. Commission Regulation 140.91(a)(11). 17 CFR 140.91(a)(11).

[28] *Id*.

Germany with certain designated capital requirements of the EU and certain designated financial reporting requirements of the EU satisfies corresponding CFTC Capital Rules and CFTC Financial Reporting Rules applicable to a nonbank SD under Sections 4s(e) and (f) of the CEA and Commission Regulations 23.101 and 23.105.[29] There are currently four EU nonbank SDs registered with Commission that are domiciled in France or Germany.[30]

The Applicants represented that the capital adequacy and financial reporting requirements applicable to financial institutions licensed to operate in a member state of the EU ("EU Member State") are established by EU regulations and directives. Specifically, the Capital Requirements Regulation[31] and the Capital Requirements Directive[32] set forth capital and financial reporting requirements applicable to entities defined as "credit institutions" or "investment firms" within the EU, including EU nonbank SDs. The term "credit institution" includes an entity engaged in taking deposits or other repayable funds from the public and granting credits for its own account ("Banking Activities").[33] An entity engaged in Banking Activities is subject to the capital and financial reporting requirements of CRR and CRD. The term "credit institution" also includes an entity engaged in: (i) dealing for its own account; (ii) underwriting financial instruments; or (iii)

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[29] Letter from Stephanie Webster, General Counsel, IIB, Steven Kennedy, Global Head of Public Policy, ISDA, and Kyle Brandon, Managing Director, Head of Derivatives Policy, SIFMA, dated September 24, 2021. The EU Application is available on the Commission's website at: https://www.cftc.gov/LawRegulation/DoddFrankAct/CDSCP/index.htm.

[30] BofA Securities Europe SA and Goldman Sachs Paris Inc. et Cie ("Goldman Sachs Paris") are nonbank SDs registered with the Commission and domiciled in France. Citigroup Global Markets Europe AG and Morgan Stanley Europe SE are also registered nonbank SDs and are domiciled in Germany.

[31] *Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and amending Regulation (EU) No 648/2012, as amended* ("Capital Requirements Regulation" or "CRR").

[32] *Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC*, as amended ("Capital Requirements Directive" or "CRD").

[33] CRR, Article 4(1)(1) (defining the term "credit institution").

placing financial instruments on a firm commitment basis (collectively, "Investment Activities"), provided that the entity also meets certain defined financial thresholds set forth in the definition.[34] Specifically, an entity engaged in Investment Activities that maintains a total value of consolidated assets equal to or in excess of EUR 30 billion is required to be authorized as a "credit institution" and is subject to the capital and financial reporting requirements of CRR and CRD.[35]

Credit institutions that qualify as "significant supervised entities" are subject to the direct prudential supervision of the European Central Bank ("ECB").[36] Credit institutions that are "less significant supervised entities" are prudentially supervised by the applicable prudential supervisory authority in the entity's home EU Member State (*i.e.*, "national competent

[34] *Id.*

[35] *Id.* and CRD, Articles 8 and 8a (requiring an entity that engages in Investment Activities and meets the financial thresholds to submit an application for authorization as a "credit institution" under the relevant provisions of the applicable national law). CRR, Article 4(1)(1) provides that an entity carrying out Investment Activities meets the financial threshold for authorization as a credit institution if: (i) the total value of the consolidated assets of the entity is equal to or in excess of EUR 30 billion; (ii) the total value of the assets of the entity is less than EUR 30 billion, and the entity is part of a group in which the total value of the consolidated assets of all entities in that group that individually have total assets of less than EUR 30 billion and that engage in Investment Activities is equal to or in excess of EUR 30 billion; or (iii) the total value of the assets of the entity is less than EUR 30 billion, and the entity is part of a group in which the total value of the consolidated assets of all entities in the group that engage in Investment Activities is equal to or in excess of EUR 30 billion, where the consolidated supervisor, in consultation with the supervisory college, decides that the entity must be authorized as a credit institution to address potential risks of circumvention and potential risks for financial stability of the EU.

[36] *See generally*, *Council Regulation (EU) 1024/ 2013 of 15 October 2013 Conferring Specific Tasks to the European Central Bank Concerning Policies Relating to the Prudential Supervision of Credit Institutions* ("SSM Regulation") and *Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 Establishing the Framework for Cooperation within the Single Supervisory Mechanism Between the European Central Bank and the National Competent Authorities and with National Designated Authorities* ("SSM Framework Regulation").

The criteria for determining whether credit institutions are considered "significant supervised entities" include size, economic importance for the specific EU Member State or the EU economy, significance of cross-border activities, and request for or receipt of direct public financial assistance. SSM Regulation, Article 6 and SSM Framework Regulation, Articles 39–44 and 50–62.

authority").[37] The term "competent authority" is used in this Comparability Determination and Comparability Order to refer to the ECB or the national competent authority, as appropriate.

The term "investment firm" is defined as an entity authorized under the Markets in Financial Instruments Directive,[38] and whose regular business is the provision of one or more investment services to third parties and/or the performance of one or more investment-related activities on a professional basis (including Investment Activities as defined above).[39] An investment firm that engages in Investment Activities and maintains total consolidated assets of at least EUR 15 billion is also subject to the capital and financial reporting requirements of CRR and CRD.[40] The investment firm, however, is not required to be authorized as a "credit

[37] SSM Regulation, Article 6. Less significant entities are supervised by their national competent authorities in close cooperation with the ECB. With respect to the prudential supervision of less significant entities, the ECB has the power to issue regulations, guidelines or general instructions to the national competent authorities. SSM Regulation, Article 6(5)(a). At any time, the ECB can also decide to directly supervise a less significant entity to ensure that high supervisory standards are applied consistently. SSM Regulation, Article 6(5)(b).

[38] *Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU* ("Markets in Financial Instruments Directive" or "MiFID").

[39] CRR, Article 4(1)(2) cross-referencing Article 4(1)(1) of MiFID.

[40] *See Regulation (EU) 2019/2033 of the European Parliament and of the Council of 27 November 2019 on the prudential requirements of investment firms and amending Regulations (EU) No 1093/2010, (EU) No 575/2013, (EU) No 600/2014 and (EU) No 806/ 2014* ("Investment Firms Regulation" or "IFR"), Article 1(1) and (1)(2) (indicating that an investment firm that engages in Investment Activities is subject to CRR (and by cross-reference to CRD) if any of the following applies: (i) the total value of the consolidated assets of the investment firm is equal to or exceeds EUR 15 billion; (ii) the total value of the consolidated assets of the investment firm is less than EUR 15 billion, and the investment firm is part of a group in which the total value of the consolidated assets of all investment firms in the group that individually have total assets of less than EUR 15 billion and that engage in Investment Activities is equal to or exceeds EUR 15 billion; or (iii) the total value of the consolidated assets of the investment firm is equal to or exceeds EUR 5 billion, the investment firm engages in Investment Activities, and the competent authority has determined that the investment firm should be subject to CRR based on criteria set forth in Article 5 of Directive (EU) 2019/2034). *See also, Directive (EU) 2019/2034 of the European Parliament and of the Council of 27 November 2019 on the prudential supervision of investment firms and amending Directives 2002/87/EC, 2009/65/EC, 2011/61/EU, 2013/36/EU, 2014/59/EU and 2014/65/EU* ("Investment Firms Directive" or "IFD"), Article 5 (providing that the competent authority may decide to apply the requirements of CRR to an investment firm whose consolidated assets are equal or exceed EUR 5 billion and that engages in Investment Activities if one or more of the following criteria apply: (i) the investment firm engages in Investment Activities on a scale that the failure or distress of the investment firm could lead to systemic risk; (ii) the investment firm is a clearing member; and/or (iii) the competent authority considers it to be justified in light of the size, nature, scale, and complexity of the activities of the investment firm considering the importance of the investment firm for the

institution" under the relevant provisions of the applicable national law in the EU Member State and is prudentially supervised by the national competent authority.[41] Lastly, an entity defined as an "investment firm" that does not engage in Investment Activities, or that engages in Investment Activities but does not meet the criteria of either maintaining consolidated assets of at least EUR 15 billion or maintaining consolidated assets of at least EUR 5 billion and meeting certain criteria of significance and interconnectedness, is not subject to CRR and CRD.[42] Such an investment firm is subject to capital and financial reporting requirements established by IFR and IFD, which EU Member States were required to adopt and apply by June 26, 2021.[43] The new IFR and IFD capital and financial reporting requirements are tailored to the risks faced and posed by smaller investment firms that operate differently from banking entities and larger investment firms. Such smaller investment firms are also prudentially supervised by the national competent authority.

Three of the four EU nonbank SDs currently registered with the Commission are subject to CRR and CRD.[44] The Application did not include an analysis of the comparability of the

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economy of the EU or of the relevant EU Member State, the significance of the investment firm's cross-border activities, and the interconnectedness of the investment firm with the financial system).

[41] Although no EU nonbank SD currently registered with the Commission falls in this category, the analysis in the Comparability Determination would apply to such an investment firm. To capture investment firms that are subject to the capital and financial reporting requirements of CRR and CRD but are not required to be authorized as "credit institutions," the Commission has removed the requirement in proposed Condition 3 that the EU nonbank SD be "treated for the purposes of the EU capital and financial reporting rules as an "institution," as defined in [CRR]."

[42] IFD, Article 5 (setting forth the criteria that may justify a decision by the competent authority to apply the requirements of CRR to an investment firm that engages in Investment Activities and whose consolidated assets equal or exceed EUR 5 billion).

[43] IFR, Article 66 and IFD, Article 67.

[44] BofA Securities Europe SA, Citigroup Global Markets Europe AG and Morgan Stanley Europe SE have been authorized as credit institutions. These three EU nonbank SDs also qualify as "significant supervised entities" subject to the direct supervision of the ECB. At the time the Commission issued the 2023 Proposal, Goldman Sachs Paris had a pending application for authorization as a credit institution. *See* Responses to Staff Questions of May 15, 2023. Subsequent to the publication of the 2023 Proposal, however, Goldman Sachs Paris informed the Commission that following further analysis and discussion with the relevant authorities, it was determined that on

capital and financial reporting rules under the IFR and IFD to the CFTC Capital Rules and CFTC Financial Reporting Rules. As such, the Commission did not assess the comparability of the capital and financial reporting requirements imposed by IFR and IFD on smaller investment firms with the CFTC Capital Rules and CFTC Financial Reporting Rules. Therefore, an EU nonbank SD, or a future EU nonbank SD applicant, that is subject to the IFR and IFD frameworks and seeks substituted compliance for some or all of the CFTC Capital Rules and CFTC Financial Reporting Rules must submit an application to the Commission in accordance with Commission Regulation 23.106.[45] In addition, as noted above, the three EU nonbank SDs that are currently subject to CRR and CRD, and registered with the Commission, are domiciled in the EU Member States of France and Germany. The Commission's analysis therefore involved an assessment of how certain EU directives were implemented into the national laws of France and Germany. The Commission did not review the implementation of the relevant EU directives in other EU Member States. Therefore, an entity organized and domiciled in an EU Member State other than France or Germany that seeks to register with the Commission as an SD and to comply with some or all of the Commission's capital and financial reporting rules via substituted compliance must submit an application under Commission Regulation 23.106. Commission staff expects that it will engage with such potential entities during the registration process and use the analysis performed during this assessment in performing a comparability assessment of the applicant's home country capital and financial reporting requirements.

March 31, 2024, the entity had to start complying with the capital and financial reporting frameworks of IFR and IFD.

[45] 17 CFR 23.106. Because the Commission had not assessed the capital and financial reporting frameworks established by IFR and IFD at the time of issuance of the 2023 Proposal, an application for substituted compliance by Goldman Sachs Paris, if one is submitted in accordance with Commission Regulation 23.106, would be addressed separately from this Comparability Determination.

As noted above, three of the EU nonbank SDs currently registered with the Commission are subject to CRR and CRD. CRR, as a regulation, is binding in its entirety and directly applicable in all EU Member States.[46] CRD, as a directive, was required to be transposed into EU Member States' national law.[47] France implemented CRD in various provisions of its Monetary and Financial Code ("MFC")[48] and through several ministerial orders, including Ministerial Order on Capital Buffers[49] and Ministerial Order on Internal Control.[50] France also adopted Ministerial Order on Distribution Restrictions[51] and amended relevant national law provisions, including the above-referenced ministerial orders, to implement CRD V.[52] Germany implemented CRD via amendments to the Banking Act (Kreditwesengesetz, "KWG") and its subordinate statutory instruments.[53] In addition, Germany adopted and published the Risk

[46] *Consolidated Version of the Treaty on the Functioning of the European Union, OJ (C 326) 171, Oct. 26, 2012* ("TFEU"), Article 288. Accordingly, CRR is directly applicable and binding law in France and Germany, the two EU Member States where EU nonbank SDs are currently organized and operating.

[47] TFEU, Article 288 (stating that a directive is binding as to the result to be achieved upon each EU Member State to which the directive is addressed, and further provides, however, that each EU Member State elects the form and method of implementing the directive). In this connection, EU Member States were required to implement and start applying amendments to CRD, introduced by *Directive (EU) 2019/878 of the European Parliament and of the Council of 20 May 2019 amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures* ("CRD V") by December 29, 2020.

[48] In particular, MFC, Articles L.511–41 to L.511– 50–1 contain provisions relating to prudential requirements applicable to credit institutions. In addition, MFC, Articles L.612–1 to L.612–50 relate to the role, functioning, and powers of the national competent authority.

[49] *Arrêté of 3 November 2014 Relating to Capital Buffers of Banking Services Providers and Investment Firms Other Than Portfolio Management Companies* ("Ministerial Order on Capital Buffers").

[50] *Arrêté of 3 November 2014 on Internal Control of Companies in the Banking, Payment Services and Investment Services Sector Subject to the Control of Autorité de Contrôle Prudentiel et de Résolution* ("Ministerial Order on Internal Control").

[51] *Arrêté of 25 February 2021 Relating to Distribution Restrictions Applicable to Credit Institutions, Financial Companies and Certain Investment Firms.*

[52] Specifically, to implement CRD V, France amended the MFC via *Ordinance No. 2020–1635 of December 21, 2020* and *Decree No. 2020–1637 of December 22, 2020*, with most of the relevant changes becoming effective on December 29, 2020. France also introduced consecutive amendments to *Ministerial Order on Capital Buffers* and *Ministerial Order on Internal Control*, with the latest changes effective as of August 1, 2021.

[53] Specifically, the KWG includes, among other things, provisions related to capital adequacy requirements, including provisions granting power the Federal Ministry of Finance to issue statutory instruments to provide details

Reduction Act (Risikoreduzierungsgesetz, "RiG") on December 14, 2020 to implement CRD V, with most of the relevant changes becoming effective on December 28, 2020. CRR and CRD as implemented in French and German law are collectively referred to hereafter as the "EU Capital Rules" in this Comparability Determination and Comparability Order.

The Applicants also represented that in addition to CRR and CRD, the Bank Recovery and Resolution Directive ("BRRD") includes relevant EU capital requirements.[54] BRRD establishes a framework for recovery and resolution of credit institutions and investment firms, and mandates that EU Member States require such institutions to satisfy "a minimum requirement for own funds and eligible liabilities" ("MREL") if they meet certain requirements.[55] France implemented BRRD primarily via amendments to the MFC.[56] Germany transposed BRRD into national law by the Recovery and Resolution Act (Sanierungs und Abwicklungsgesetz, "SAG").[57]

on capital adequacy requirements (Section 10(1)), provisions specifying the basis for imposing higher capital requirements (Section 10(3)), provisions setting forth requirements related to capital buffers (Sections 10c to 10i) and provisions describing the powers of the competent authority (Sections 6b, 56, 60b).

[54] *Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/ EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/ EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council* ("Bank Recovery and Resolution Directive" or "BRRD"). EU Application, p. 5.

[55] EU Member States were required to transpose BRRD into national law and start applying the implementing measures from January 1, 2015. BRRD, Article 130. BRRD was amended by *Directive (EU) 2019/879 of the European Parliament and of the Council of 20 May 2019 amending Directive 2014/59/EU as regards loss-absorbing and recapitalization capacity of credit institutions and investment firms and Directive 98/26/EC* ("Bank Recovery and Resolution Directive II" or "BRRD II") and EU Member States were required to start applying national law measures implementing BRRD II by December 28, 2020. BRRD II, Article 3. BRRD as amended by BRRD II will be referred to as ''BRRD'' in this document, unless otherwise stated.

[56] Among other provisions, MFC Article L.613–44 relates in particular to the MREL requirement and Article R.613–46–1 defines the conditions that items and instruments need to meet to qualify as "eligible liabilities."

[57] In particular, SAG, Section 49(1) and (2) relate to the MREL requirement.

The Applicants further represent that with respect to supervisory financial reporting, Commission Implementing Regulation (EU) 2021/451 supplements CRR with implementing technical standards ("CRR Reporting ITS")[58] specifying, among other things, uniform formats and frequencies for the financial reporting required under CRR.[59] In addition, the ECB has adopted a regulation setting forth a common minimum set of financial information that should be reported by credit institutions subject to CRR, including EU nonbank SDs, on the basis of the CRR Reporting ITS ("ECB FINREP Regulation").[60] The Applicants also represent that Directive 2013/34/EU[61] contains provisions related to financial reporting, including a mandate that entities of a certain size be required to prepare annual audited financial statements and a management report.[62] CRR, CRR Reporting ITS, ECB FINREP Regulation, relevant provisions of CRD regarding certain notice requirements as implemented in French and German law, and the relevant provisions of the Accounting Directive as implemented in French and German law are collectively referred to hereafter as the "EU Financial Reporting Rules" in this Comparability Determination and Comparability Order.

[58] *Commission Implementing Regulation (EU) 2021/451 of 17 December 2020 laying down implementing technical standards for the application of Regulation (EU) No 575/2013 of the European Parliament and of the Council with regard to supervisory reporting of institutions and repealing Implementing Regulation (EU) No 680/2014*.

[59] EU Application, p. 21 and Responses to Staff Questions of May 15, 2023.

[60] *Regulation (EU) 2015/534 of the European Central Bank of 17 March 2015 on reporting of supervisory financial information*.

[61] *Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/ EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/394/EEC* ("Accounting Directive").

[62] EU Application, p. 5. Accounting Directive, Articles 4, 19 and 34.

D. Proposed Comparability Determination and Proposed Comparability Order for EU Nonbank Swap Dealers

On June 27, 2023, the Commission published the 2023 Proposal, seeking comment on the EU Application and the Commission's proposed Comparability Determination and Comparability Order.[63] The 2023 Proposal set forth the Commission's preliminary Comparability Determination and proposed Comparability Order providing for the conditional availability of substituted compliance with the CFTC Capital Rules and CFTC Financial Reporting Rules for EU nonbank SDs regulated under CRR and CRD and domiciled in either Germany or France, subject to EU nonbank SDs' compliance with EU laws and regulations, as well as conditions specified in the proposed Comparability Order.[64]

Based on its review of the EU Application and applicable EU laws and regulations, the Commission preliminarily found that the EU Capital Rules and the EU Financial Reporting Rules, subject to the conditions set forth in the proposed Comparability Order, achieve comparable outcomes and are comparable in purpose and effect to the CFTC Capital Rules and CFTC Financial Reporting Rules. The Commission, however, noted that there were certain differences between the EU Capital Rules and CFTC Capital Rules and certain differences between the EU Financial Reporting Rules and the CFTC Financial Reporting Rules. As such, the Commission proposed certain conditions to the Comparability Order. The proposed

[63] 2023 Proposal at 41774.

[64] *Id.* at 41807-41810. Consistent with the process specified in Section I.B. above for conducting Comparability Determinations, the Commission provided the Applicants with an opportunity to review for factual accuracy and completeness the Commission's description of relevant EU laws and regulations on which the proposed Comparability Determination and proposed Comparability Order were based. The Commission has relied on the Applicants' review, and has incorporated feedback and corrections received from the Applicants. As previously noted, a Comparability Determination and Comparability Order based on an inaccurate description of foreign laws and regulations may not be valid.

conditions were designed to promote consistency in regulatory outcomes, to reflect the scope of substituted compliance that would be available notwithstanding the differences, and to ensure that the Commission and National Futures Association ("NFA") receive information to monitor EU nonbank SDs for ongoing compliance with the Comparability Order.[65] The Commission further stated that, in its preliminary view, the identified differences would not be inconsistent with providing a substituted compliance framework for EU nonbank SDs subject to the conditions specified in the proposed Comparability Order.[66]

The proposed Comparability Order was limited to the comparison of the EU Capital Rules to the CFTC Capital Rules' Bank-Based Capital Approach ("Bank-Based Approach") for computing regulatory capital for nonbank SDs, which is based on certain capital requirements imposed by the Federal Reserve Board for bank holding companies.[67] As noted by the Commission in the 2023 Proposal, the Applicants had not requested, nor has the Commission

[65] NFA is a registered futures association ("RFA") under Section 17 of the CEA (7 U.S.C. 21). Each SD registered with the Commission is required to be an NFA member. 17 CFR 170.16. NFA, as an RFA, is also required by the CEA to adopt rules imposing minimum capital, segregation, and other financial requirements, as applicable, to its members, including SDs, that are at least as stringent as the Commission's minimum capital, segregation, and other financial requirements for such registrants, and to implement a program to audit and enforce such requirements. 7 U.S.C. 21(p). Therefore, the Commission's proposed Comparability Order required EU nonbank SDs to file certain financial reports and notices with NFA so that it may perform oversight of such firms as required under Section 17 of the CEA. The Commission will refer to NFA in this Comparability Determination when referring to the requirements or obligations of an RFA.

[66] *Id.* at 41807.

[67] *Id.* As described in the 2023 Proposal, the CFTC Capital Rules provide nonbank SDs with three alternative capital approaches: (i) the Tangible Net Worth Capital Approach ("TNW Approach"); (ii) the Net Liquid Assets Capital Approach ("NLA Approach"); and (iii) the Bank-Based Approach. *See* 2023 Proposal at 41780-41782 and 17 CFR 23.101.

The Bank-Based Approach is consistent with the Basel Committee on Banking Supervision's ("BCBS") international framework for bank capital requirements ("BCBS framework" or "Basel standards"). The BCBS is the primary global standard-setter for the prudential regulation of banks and provides a forum for cooperation on banking supervisory matters. Institutions represented on the BCBS include the Federal Reserve Board, the ECB, Deutsche Bundesbank, Bank of England, Bank of France, Bank of Japan, Banco de Mexico, and Bank of Canada. The BCBS framework is available at https://www.bis.org/basel_framework/index.htm.

performed, a comparison of the EU Capital Rules to the Commission's TNW Approach or NLA Approach.[68]

E. General Comments on the EU Application and the Commission's Proposed Finding of Comparability Between the CFTC Capital Rules and CFTC Financial Reporting Rules and the EU Capital Rules and EU Financial Reporting Rules

The public comment period on the EU Application and the proposed Comparability Determination and proposed Comparability Order ended on October 28, 2023. The Commission received three substantive comment letters from interested parties: Better Markets, Inc.; a joint letter from the Applicants; and William J. Harrington.[69] The Commission received 16 additional non-substantive comments from one individual that are not addressed in this Comparability Determination.[70]

The Applicants filed a comment letter generally expressing support for the proposed Comparability Determination and Comparability Order, agreeing with the Commission's overall analysis and determination of comparability of the CFTC Capital Rules and CFTC Financial Reporting Rules and the EU Capital and EU Financial Reporting Rules.[71] The Applicants also

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[68] *See* 2023 Proposal at 41784.

[69] Letter from Cantrell Dumas, Director of Derivatives Policy, Better Markets Inc. ("Better Markets") (August 28, 2023) ("Better Markets Letter"); Letter from Stephanie Webster, General Counsel, IIB; Steven Kennedy, Global Head of Public Policy, ISDA; Kyle L. Brandon, Managing Director, Head of Derivatives Policy, SIFMA (August 24, 2023) ("Applicants' Letter"); Letter from William J. Harrington ("Harrington") (August 28, 2023) ("Harrington 08/28/2023 Letter"). The Commission also received a second letter from the Applicants, dated May 22, 2024, complementing their comments to the 2023 Proposal ("Applicants' Supplemental Letter"). The comment letters for the 2023 Proposal are available at: https://comments.cftc.gov/PublicComments/CommentList.aspx?id=7397&ctl00_ctl00_cphContentMain_MainContent_gvCommentListChangePage=1.

[70] The non-substantive comments are also available on the Commission's website at: https://comments.cftc.gov/PublicComments/CommentList.aspx?id=7397&ctl00_ctl00_cphContentMain_MainContent_gvCommentListChangePage=1.

[71] Applicants' Letter at p. 2.

included several technical comments, further discussed in Section II. below, on the proposed conditions requiring EU nonbank SDs to file a notice with the Commission and the NFA upon the occurrence of certain events.

Conversely, two commenters disagreed with the CFTC's proposed Comparability Determination and proposed Comparability Order.[72] Better Markets asserted that the principles-based, holistic approach applied by the Commission, which assesses whether the applicable foreign jurisdiction's capital and financial requirements achieve comparable outcomes to the corresponding Commission requirements, "is insufficiently rigorous, leaving far too much room for inaccurate and unwarranted comparability determinations."[73]

The Commission does not believe that the principles-based, holistic assessment that it conducted on the comparability of the EU Capital Rules and EU Financial Reporting Rules with the CFTC Capital Rules and CFTC Financial Reporting Rules was "insufficiently rigorous," nor does the Commission believe that it left "room for inaccurate and unwarranted comparability determinations." The principles-based, holistic approach employed in the Comparability Determination was performed in accordance with the substituted compliance assessment framework adopted by the Commission for capital and financial reporting requirements for foreign nonbank SDs and set out in Commission Regulation 23.106. Consistent with this assessment framework, the Commission focused on whether the EU Capital Rules and EU Financial Reporting Rules are designed with the objective of ensuring overall safety and

[72] Better Markets Letter at p. 2; Harrington 08/28/2023 Letter at pp. 3-4 (referencing a separate submission to the Commission, dated October 20, 2022, in connection with the Commission's *Notice of Proposed Order and Request for Comment on an Application for a Capital Comparability Determination From the Financial Services Agency of Japan*, 87 FR 48092, (August 8, 2022), and asserting, as further discussed below, that the Commission should condition the Comparability Determination on a prohibition against EU nonbank SDs' entering into swap contracts with certain specified features).

[73] Better Markets Letter at p. 3.

soundness of the EU nonbank SDs in a manner that is comparable with the Commission's overall objective of ensuring the safety and soundness of nonbank SDs.

As stated in Section I.B. above, when adopting Commission Regulation 23.106, the Commission stated that "its approach to substituted compliance is a principles-based, holistic approach that focuses on whether the foreign regulations are designed with the objectives of ensuring the overall safety and soundness of the [non-US nonbank SD] in a manner that is comparable with the Commission's overall capital and financial reporting requirements, and is not based on a line-by-line assessment or comparison of a foreign jurisdiction's regulatory requirements with the Commission's requirements."[74]

As stated in the 2023 Proposal, due to the detailed and complex nature of the capital frameworks, differences in how jurisdictions approach and implement the requirements are expected, even among jurisdictions that base their requirements on the principles and standards set forth in the BCBS framework.[75] Furthermore, as discussed in Section I.B. above, the Commission stated when adopting Commission Regulation 23.106 that "its approach to substituted compliance is a principles-based, holistic approach that focuses on whether the foreign regulations are designed with the objectives of ensuring the overall safety and soundness of the [non-US nonbank SD] in a manner that is comparable with the Commission's overall capital and financial reporting requirements, and is not based on a line-by-line assessment or comparison of a foreign jurisdiction's regulatory requirements with the Commission's requirements."[76]

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[74] 85 FR 57462 at 57521.

[75] *See* 2023 Proposal at 41785.

[76] 85 FR 57462 at 57521.

The approach and standards contained in Commission Regulation 23.106, with the focus on "comparable outcomes," are also consistent with the Commission's precedents of undertaking a principles-based, holistic assessment of the comparability of foreign regulatory regimes for purposes of substituted compliance for cross-border swap transactions. The Commission first outlined its approach to substituted compliance with respect to swaps requirements in 2013, when it issued an Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations.[77] In the Guidance, the Commission stated that "[i]n evaluating whether a particular category of foreign regulatory requirement(s) is comparable and comprehensive to the applicable requirement(s) under the CEA and Commission regulations, the Commission will take into consideration all relevant factors, including but not limited to, the comprehensiveness of those requirement(s), the scope and objectives of the relevant regulatory requirement(s), the comprehensiveness of the foreign regulator's supervisory compliance program, as well as the home jurisdiction's authority to support and enforce its oversight of the registrant.[78] The Commission emphasized that in this context, "comparable does not necessarily mean identical."[79] Rather, the Commission stated that it would evaluate whether the home jurisdiction's regulatory requirement is comparable to, and as comprehensive as, the corresponding U.S. regulatory requirement(s).[80] In conducting comparability determinations based on the policy set forth in the Guidance, the Commission noted that the "outcome-based" approach recognizes that "foreign regulatory systems differ and their approaches vary and may

[77] *Interpretative Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations*, 78 FR 45292 (July 26, 2013) ("Guidance").

[78] Guidance at 45343.

[79] *Id*.

[80] *Id*.

differ from how the Commission chose to address an issue, but that the foreign jurisdiction's regulatory requirements nonetheless achieve the regulatory outcome sought to be achieved by a certain provision of the CEA or Commission regulation."[81]

The Commission further elaborated on the required elements of comparability in 2016, when it issued final rules to address the cross-border application of the Commission's margin requirements for uncleared swap transactions. Specifically, the Commission stated that its substituted compliance approach reflects an outcome-based assessment of the comparability of a foreign jurisdiction's margin requirements with the Commission's corresponding requirements.[82] The Commission further stated that it would evaluate the objectives and outcomes of the foreign margin requirements in light of foreign regulator(s)' supervisory and enforcement authority.[83] Consistent with its previously stated position, the Commission recognized that jurisdictions may adopt different approaches to achieving the same outcome and, therefore, the assessment would focus on whether the foreign jurisdiction's margin requirements are comparable to the Commission's in purpose and effect, not whether they are comparable in every aspect or contain identical elements.[84] The Commission's policy thus reflects an understanding that a line-by-line evaluation of a foreign jurisdiction's regulatory regime is not the optimum approach to assessing the comparability of complex structures whose individual components may differ based on jurisdiction-specific considerations, but which achieve the objective and outcomes set forth in the Commission's framework.

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[81] *See e.g.*, *Comparability Determination for the European Union: Certain Entity-Level Requirements*, 78 FR 78923 (December 27, 2013) at 78926.

[82] *Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants – Cross-Border Application of the Margin Requirements*, 81 FR 34817, 34836-34837(May 31, 2016).

[83] *Id.*

[84] *Id*.

With respect to the EU Application, the process leading to the Commission's Comparability Determination involved Commission staff reviewing relevant EU laws, rules, and regulations cited in the EU Application, including relevant French and German provisions implementing EU laws, rules, and regulations into the national regulatory frameworks of the two EU Member States. Staff verified the assertions and citations contained in the EU Application regarding the specific EU Capital Rules and EU Financial Reporting Rules to the relevant EU laws, rules, and regulations.[85] Where necessary, staff obtained English language translations of French and German implementing provisions to further confirm statements in the EU Application or to confirm the full implementation of EU directives in the applicable EU Member State's laws and regulatory framework.

Commission staff also evaluated the comparability of the EU Capital Rules and EU Financial Reporting Rules with the CFTC Capital Rules and CFTC Financial Reporting Rules with respect to the following areas: (i) the process of establishing minimum capital requirements for EU nonbank SDs and how such process addresses risk, including market risk and credit risk of the EU nonbank SD's on-balance sheet and off-balance sheet exposures; (ii) the types of equity and debt instruments that qualify as regulatory capital in meeting an EU nonbank SD's minimum capital requirements; (iii) the financial reports and other financial information submitted by an EU nonbank SD to its relevant competent authorities, and whether such information provides the competent authorities with the means necessary to effectively monitor the financial condition of the EU nonbank SD; and (iv) the regulatory notices and other communications between an EU nonbank SD and its relevant competent authorities that address

[85] Staff also reviewed various documents relevant to the proposed Comparability Determination and proposed Comparability Order published by the competent authorities in English and/or French.

potential adverse financial or operational issues that may impact the firm.[86] With respect to the ability of the relevant competent authorities to supervise and enforce compliance with the EU Capital Rules and EU Financial Reporting Rules, the Commission's assessment included a review of the competent authorities' surveillance program for monitoring compliance by EU nonbank SDs with the EU Capital Rules and EU Financial Reporting Rules, and the disciplinary process imposed on firms that fail to comply with such requirements.[87] Contrary to the position articulated by Better Markets regarding the nature of the comparability assessment, the Commission believes that the principles-based, holistic assessment of the EU Capital Rules and EU Financial Reporting Rules against the CFTC Capital Rules and CFTC Financial Reporting Rules, as outlined above and discussed in detail in Section II below, was sufficiently rigorous for purposes of determining if the EU laws and regulations are comparable in purpose and effect to the CEA and Commission regulations.

Better Markets further asserted that even under a principles-based, holistic approach, the EU capital and financial reporting requirements for EU nonbank SDs do not satisfy the test for an order granting substituted compliance because the EU's regulatory framework governing capital and financial reporting is not comparable to the corresponding CFTC requirements.[88] Better Markets cited the Commission's inclusion of conditions in the proposed Comparability Order as demonstrating the Commission's need "to compensate for the acknowledged gaps in the EU framework" and as a "de facto admission that the regulations are not comparable and that the

[86] 2023 Proposal, at 41784-41805.

[87] *Id*. at 41805-41807.

[88] Better Markets Letter at pp. 3-4.

[EU Application] should be denied."[89] Better Markets claimed that the Commission proposed 12 filing requirements that must be met as a condition for the comparability determination, and stated that the Commission was not conducting a comparability assessment, but was engaging in a "de facto rewriting" of the EU's laws and rules in the form of conditions.[90]

The Commission disagrees that the inclusion of conditions in the Comparability Order precludes a finding of comparability with respect to the EU Capital Rules and EU Financial Reporting Rules. The Commission's comparability assessment process, consistent with the holistic approach, contemplates the potential need for a Comparability Order to contain conditions. Specifically, Commission Regulation 23.106(a)(5) states that the Commission may impose any terms and conditions it deems appropriate in issuing a Comparability Order, including conditions with respect to capital adequacy and financial reporting requirements of non-U.S. nonbank SDs.[91]

The process employed in this Comparability Determination is consistent with the Commission's established approach to conducting comparability assessments. Upon a finding of comparability, the Commission's policy generally is that eligible entities may comply with a substituted compliance regime subject to the conditions the Commission places on its finding, and subject to the Commission's retention of its examination authority and its enforcement

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[89] *Id.* at pp. 2 and 4.

[90] *Id.* at p. 2.

[91] 17 CFR 23.106(a)(5), which provides that "[i]n issuing a Capital Comparability Determination, the Commission may impose any terms and conditions it deems appropriate, including certain capital adequacy and financial reporting requirements on swap dealers…" (Emphasis added).

Commission Regulation 23.106(a)(3) establishes the Commission's standard of review for performing a Comparability Determination and provides that the Commission may consider all relevant factors, including whether the relevant foreign jurisdiction's capital adequacy and financial reporting requirements achieve comparable outcomes to the Commission's corresponding capital adequacy and financial reporting requirements for SDs. 17 CFR 23.106(a)(3)(ii).

authority.[92] In this regard, the Commission has stated that certain conditions included in a Comparability Order may be designed to ensure the Commission's direct access to books and records required to be maintained by an SD registered with the Commission.[93] Other conditions may address areas where the foreign jurisdiction lacks analogous requirements.[94] The inclusion of conditions in a Comparability Order was contemplated as an integral part of the Commission's holistic, principles-based approach to conducting comparability assessments and is not inconsistent with a grant of substituted compliance.

In particular, Commission Regulation 23.106(a)(5) states the Commission's authority to impose conditions in issuing a Comparability Determination in connection with the CFTC Capital Rules and the CFTC Financial Reporting Rules. As further discussed below, the conditions proposed in the 2023 Proposal are clearly of the nature contemplated by Commission Regulation 23.106(a)(5).

The Commission also does not believe that the inclusion of the conditions in the Comparability Order reflects a "rewriting" of the EU laws and regulations as asserted by Better Markets. Consistent with the Commission's policy described above, a majority of the conditions contained in the Comparability Order are designed to ensure that: (i) the EU nonbank SD is eligible for substituted compliance based on the laws and regulations of the EU and the relevant EU Member States that were reviewed by the Commission in performing the comparability assessment, and (ii) the Commission and NFA receive timely financial information and notices to effectively monitor an EU nonbank SD's compliance with the Comparability Order and to

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[92] 85 FR 57462 at 57520. *See also* Guidance at 45342–45344 and *Comparability Determination for the European Union: Certain Transaction Level Requirements*, 78 FR 78878 (December 27, 2013) at 78880.

[93] *Comparability Determination for the European Union: Certain Transaction Level Requirements*, 78 FR 78878 (December 27, 2013) at 78880.

[94] Guidance at 45343.

assess the ongoing safety and soundness of the EU nonbank SD. Specifically, there are 26 conditions in the final Comparability Order. Seven conditions set forth criteria that an EU nonbank SD must meet to be eligible for substituted compliance pursuant to the Comparability Order.[95] The seven conditions ensure that only EU nonbank SDs that are within the scope of, and comply with, the EU Capital Rules and EU Financial Reporting Rules that were part of the Commission's comparability assessment may apply for substituted compliance.

Ten additional conditions require EU nonbank SDs within the scope of the Comparability Order to provide notice to the Commission and NFA of certain defined events,[96] and a further two conditions require EU nonbank SDs to file with the Commission and NFA copies of certain unaudited and audited financial reports that the firms provide to their respective competent authorities.[97] In addition, two additional conditions reflect administrative matters necessary to

[95] The seven criteria provide that the EU nonbank SD: (i) is not subject to capital rules of a U.S. prudential regulator (Condition 1); (ii) is organized and domiciled in France or Germany (Condition 2); (iii) is licensed as a credit institution or an investment firm in an EU Member State (Condition 3); (iv) is subject to CRR and CRD as implemented in France or Germany, as applicable (Condition 4); (v) satisfies at all times applicable CRR capital ratios and leverage ratios, satisfies CRD capital conservation buffer ratios, and maintains a liquidity risk management program as required under CRD (Condition 5); (vi) is subject to and complies with the EU financial reporting requirements that are part of the Commission's comparability assessment (Condition 6); and (vii) is subject to prudential supervision by an EU Member State's supervisory authority with jurisdiction to enforce the requirements of the EU Capital Rules and the EU Financial Reporting Rules (Condition 7).

[96] The ten conditions require an EU nonbank SD to provide notice to the Commission in the event that the firm: (i) is informed by the relevant competent authority that it failed to comply with any component of the EU Capital Rules or EU Financial Reporting Rules (Condition 16); (ii) fails to maintain a minimum level of common equity tier 1 capital equal to or in excess of the equivalent of $20 million (Condition 17); (iii) breaches its combined capital buffer requirement and is required to file a capital conservation plan with the relevant competent authority(Condition 18); (iv) is required by a competent authority to maintain additional capital or additional liquidity (Condition 19); (v) fails to meet the required MREL requirement (Condition 20); (vi) experiences a 30 percent or more decrease in its excess regulatory capital (Condition 21); (vii) fails to make or keep current financial books and records (Condition 22); (viii) fails to post or collect margin for uncleared swaps and non-cleared security-based swaps with one or more counterparties in amounts that exceed defined limits (Condition 23); (ix) changes its fiscal year-end date (Condition 24); and (x) is subject to material changes to the EU Capital Rules, EU Financial Reporting Rules, or the supervisory authority of the ECB or relevant Member State competent authority (Condition 25).

[97] The two conditions provide that an EU nonbank SD must file with the Commission and NFA: (i) a copy of SEC Form X-17A-5 ("FOCUS Report") that the EU nonbank SD files with the U.S. Securities and Exchange Commission ("SEC") or English language copies of certain financial reporting templates that the EU nonbank SD is required to submit to the relevant competent authorities pursuant to the CRR Reporting ITS or the ECB FINREP

implement the substituted compliance framework.[98] Lastly, five conditions impose obligations on EU nonbank SDs that align with certain of the Commission's requirements for nonbank SDs. The five conditions require an EU nonbank SD to: (i) maintain a minimum of $20 million of common equity tier 1 capital (Condition 8); (ii) prepare and keep current financial books and records (Condition 10); (iii) file a monthly schedule of the firm's financial positions on Schedule 1 of Appendix B to Subpart E of Part 23 of the Commission's regulations (Condition 13); (iv) file a monthly report listing the custodians holding margin posted by, and collected by, the EU nonbank SD, the amount of margin held by each custodian, and the aggregate amount of margin required to be posted and collected by the EU nonbank SD (Condition 15); and (v) submit, with each filing of financial information, a statement by an authorized representative that, to the best knowledge and belief of the person making the representation, the information is true and correct (Condition 14).

As the substance of these conditions demonstrates, the primary objective of a majority of the conditions is not to compensate for regulatory gaps in the EU capital and financial reporting framework but rather to ensure that the Commission and NFA receive information to conduct ongoing monitoring of EU nonbank SDs for compliance with relevant capital and financial reporting requirements. As discussed above, in issuing the Comparability Order, the Commission is not ceding its supervisory and enforcement authorities. The Comparability Order

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regulation, as applicable (Condition 11); and (ii) English language copies of its annual audited financial statements and management report that are required to be prepared and published pursuant to the Accounting Directive as implemented in the national laws of France and Germany (Condition 12).

[98] One of the administrative conditions provides that an EU nonbank SD must provide a notice to the Commission of its intent to comply with the Comparability Order and the EU Capital Rules and EU Financial Reporting Rules in lieu of the CFTC Capital Rules and CFTC Financial Reporting Rules. The notice must include the EU nonbank SD's representation that the firm is organized and domiciled in an EU Member State, is a licensed investment firm or a credit institution, and is subject to, and complies with, the EU Capital Rules and the EU Financial Reporting Rules (Condition 9). The second administrative condition provides that an EU nonbank SD must file any documents with the Commission and NFA via electronic transmission (Condition 26).

permits EU nonbank SDs to satisfy the Commission's capital and financial reporting requirements by complying with certain laws and/or regulations of the EU that have been found to be comparable to the Commission's laws and/or regulations in purpose and effect. The Commission and NFA, however, have a continuing obligation to conduct ongoing oversight, including potential examination, of EU nonbank SDs that operate under a Comparability Order to ensure compliance with the Comparability Order, including its conditions. To that effect, the notice and financial reporting conditions set forth in the Comparability Order provide the Commission and NFA with information necessary to monitor for such compliance and to evaluate the operational condition and ongoing financial condition of EU nonbank SDs. The Commission may also initiate an enforcement action against an EU nonbank SD that fails to comply with the conditions of the Comparability Order.[99]

Furthermore, to the extent that a condition imposes a new obligation on EU nonbank SDs, the imposition of such condition is also consistent with Commission Regulation 23.106 and the Commission's established policy with regards to comparability determinations. As discussed above, the Commission contemplated that even in circumstances where the Commission finds two regulatory regimes comparable, the Commission may impose requirements on entities relying on substituted compliance where the Commission determines that the home jurisdiction's regime lacks comparable and comprehensive regulation on a specific issue.[100] The

[99] As the Commission stated in the 2023 Proposal, a non-U.S. nonbank SD that operates under a Comparability Order issued by the Commission remains subject to the Commission's examination and enforcement authority. Specifically, the Commission may initiate an enforcement action against a non-U.S. nonbank SD that fails to comply with its home-country capital adequacy and/or financial reporting requirements cited in a Comparability Order. *See* 2023 Proposal at 41777. *See also*, 17 CFR 23.106(a)(4)(ii), which provides that the Commission may examine all nonbank SDs, regardless of whether the nonbank SDs rely on substituted compliance, and that the Commission may initiate an enforcement action under the Commission's capital and financial reporting regulations against a non-U.S. nonbank SD that fails to comply with a foreign jurisdiction's capital adequacy and financial reporting requirements.

[100] Guidance at 45343.

Commission's authority to impose such conditions is set out in Commission Regulation 23.106(a)(5), which states that the Commission may impose "any terms and conditions it deems appropriate, including certain capital adequacy and financial reporting requirements [on SDs]."[101]

Better Markets further stated that, if the Commission grants substituted compliance with regard to materially different regulatory requirements, it must make a well-supported, evidence-based determination that those different requirements nevertheless will, in fact, lead to comparable regulatory outcomes.[102] Better Markets further asserted that "[a] determination that a foreign jurisdiction's nonbank SDs rules would produce comparable regulatory outcomes is the beginning, not the end, of the CFTC's obligation to ensure that the activities of the foreign nonbank SD entities do not pose risks to the U.S. financial system. As time goes on, regulatory requirements that, in theory, are expected to produce one regulatory outcome may, in practice, produce a different one. And, of course, the regulatory requirements may themselves be changed in a variety of ways. Finally, the effectiveness of an authority's supervision and enforcement program can become weakened for any number of reasons – the CFTC cannot assume that an enforcement program that is presently effective will continue to be effective."[103] Better Markets further asserted that to fulfill its obligation to protect the U.S. financial system, the Commission must ensure, on an ongoing basis, that each grant of substituted compliance remains appropriate over time by requiring, at a minimum, each Comparability Order, and each MOU with a foreign regulatory authority, to impose an obligation on the applicant, as appropriate, to: (i) periodically

[101] 17 CFR 23.106(a)(5).

[102] Better Markets at p. 8.

[103] *Id*.

apprise the Commission of the activities and results of its supervision and enforcement programs, to ensure that they remain sufficiently robust to deter and address violations of the law; and (ii) immediately apprise the Commission of any material changes to the regulatory regime, including changes to rules or changes to how rules are interpreted, applied, or enforced.[104] Finally, Better Markets stated that if the Commission proceeds to finalize the Comparability Order, it must, at a minimum, ensure that the conditions are robustly maintained and enforced.[105]

Although the Commission disagrees that the EU Capital Rules and the EU Financial Reporting Rules, as a whole, are materially different or do not achieve comparable outcomes, the Commission concurs that granting substituted compliance should be the result of a well-supported comparability assessment. Consistent with that view, the Commission believes that this final Comparability Determination articulates the Commission's analysis in sufficient detail and provides an appropriate explanation of how the foreign jurisdiction's requirements are comparable in purpose and effect with the Commission's requirements, and lead to comparable regulatory outcomes with the Commission's requirements. Specifically, Section III of the 2023 Proposal and Section II of the final Comparability Determination reflect, among other observations, the Commission's detailed analysis with respect to each of the elements for consideration listed in Commission Regulation 23.106(a)(3).

The Commission also concurs that the availability of substituted compliance is conditioned upon a non-US nonbank SD's ongoing compliance with the terms and conditions of the final Comparability Order, and the Commission's ongoing assessment that the EU Capital Rules and EU Financial Reporting Rules remain comparable in purpose and effect with the

[104] *Id.* at pp. 8-9.

[105] *Id*. at p. 14.

CFTC Capital Rules and CFTC Financial Reporting Rules. As noted above, and discussed in more detail in Sections II.D. and E. below, EU nonbank SDs are subject to notice and financial reporting requirements under the final Comparability Order that provide Commission and NFA staff with the ability to monitor the EU nonbank SDs' ongoing compliance with the conditions set forth in the final Comparability Order. In addition, the final Comparability Order requires an EU nonbank SD, or an entity acting on its behalf, to inform the Commission of changes to the relevant EU Capital Rules and EU Financial Reporting Rules so that the Commission may assess the continued effectiveness of the Comparability Order in ensuring that the EU laws and regulations have the comparable regulatory objectives of the CEA and Commission regulations of ensuring the safety and soundness of nonbank SDs.[106] Commission staff will also monitor the EU nonbank SDs directly as part of its supervisory program and will discuss with the firms any proposed or pending revisions to specific laws and rules cited in the final Comparability Order. Lastly, in addition to assessing the effectiveness of the Comparability Order as a result of revisions or proposed revisions to the EU laws, regulations, or supervisory regime, the Commission further notes that future material changes to the CFTC Capital Rules or CFTC Financial Reporting Rules, or the Commission's or NFA's supervisory programs, may necessitate an amendment to the Comparability Determination and Comparability Order to reflect those changes.[107]

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[106] Condition 25 of the final Comparability Order requires an EU nonbank SD, or an entity acting on its behalf, to notify the Commission of any material changes to the information submitted in its application, including, but not limited to, proposed and final material changes to the EU Capital Rules or EU Financial Reporting Rules and proposed and final material changes to the ECB's or the relevant EU Member State competent authority's supervisory authority or supervisory regime over EU nonbank SDs. The Commission notes that it made certain non-substantive, clarifying changes to the language of final Condition 25 as compared to proposed Condition 25.

[107] 2023 Proposal at 41785 (n. 135).

Another commenter, Harrington, stated that the Commission must condition the Comparability Order on an "outright prohibition against regulated entities providing [swap contracts that include a "flip clause"]."[108] Harrington has elsewhere referred to a description of a "flip clause" as a provision in swap contracts with structured debt issuers that reverses or "flips" the priority of payment obligations owed to the swap counterparty on the one hand and the noteholders on the other, following a specified event of default.[109] Based on Harrington's description, flip clauses present a risk to the SD in synthetic transactions where payments under a swap contract are secured with the same collateral that would serve to cover payments under the notes issued by a structured debt issuer. In such circumstances, an "event of default" by the SD would cause the SD's priority of payment from the collateral under a swap to "flip" to a more junior priority position, including for mark-to-market gains on "in the money" swaps.[110] Harrington argued that each swap contract with a flip clause generates a "gaping credit exposure" for EU or other non-U.S. SDs.[111] Harrington recognized, however, that the CFTC margin requirements for uncleared swap transactions address his concerns associated with the inclusion of a flip clause.[112] Nonetheless, according to Harrington, risks arise in circumstances

[108] Harrington 08/28/2023 Letter at p. 3. Harrington submitted the Harrington 08/28/2023 Letter as a supplement to a previously submitted comment letter, dated October 20, 2022 ("Harrington 10/20/2022 Letter"), filed in connection with the Commission's *Notice of Proposed Order and Request for Comment on an Application for a Capital Comparability Determination From the Financial Services Agency of Japan*, 87 FR 48092, (August 8, 2022)).

[109] *William J. Harrington, Submission to the U.S. Securities and Exchange Commission Re: File No. S7-08-12* (Nov. 19, 2018) at p. 8.

[110] For additional information on the legal mechanics of a flip clause, *see* Lehman Brothers Special Financing Inc v. Bank of America N.A., No. 18-1079 (2nd Cir. 2020).

[111] Harrington 08/28/2023 Letter at p. 6.

[112] Harrington 10/20/2022 Letter at p. 3 (noting that the requirement for SDs to post and collect variation margin for swap contracts with a securitization or structured debt issuer "generates the immense benefit of inducing U.S. securitization and structured debt issuers to forswear all swap contracts, both with and without a flip clause").

when non-U.S. margin rules exempt SDs from margin obligations in connection with swaps with a structured debt issuer.[113]

The Commission recognizes that given some definitional differences and differences in the activity thresholds with respect to the scope of application of the CFTC margin requirements and non-U.S. margin requirements, some transactions that are subject to the CFTC margin requirements for uncleared swaps may not be subject to margin requirements in another jurisdiction. In connection with this Comparability Determination, however, the Commission notes that both under the CFTC Capital Rules and the EU Capital Rules, uncollateralized exposures from uncleared swap transactions would generate a higher counterparty credit risk amount than the exposures resulting from transactions under which the counterparties have posted collateral.[114] Accordingly, the Commission does not believe that the respective sets of rules adopt a conflicting approach or lead to a disparate outcome with respect to the capital treatment of uncollateralized uncleared swap exposures that would warrant a finding of non-comparability of the CFTC Capital Rules and the EU Capital Rules.

With regards to Harrington's general recommendations, also included in his comments in connection with the adoption of the CFTC Capital Rules, that the Commission impose additional capital charges for swap contracts with a flip clause,[115] the Commission notes that any change in its approach, if deemed appropriate, would be addressed separately from the Comparability

[113] Harrington 10/20/2022 Letter at p. 3 (arguing that "non-U.S. swap margin rules de facto exempt a swap provider from collecting or posting variation margin under a new contract with most securitization and structured debt issuers").

[114] 12 CFR 217.34 and 12 CFR 217.132 (indicating that nonbank SDs may recognize the risk-mitigating effects of financial collateral for collateralized derivatives contracts) and CRR, Articles 274-275 (similarly indicating that EU nonbank SDs are allowed to recognize the risk-mitigating effect of collateral by deducting the amount of collateral from the replacement cost component of the exposure value calculation).

[115] Harrington 10/20/2022 Letter at p. 24.

Determination. As the Commission stated in adopting the CFTC Capital Rules, over time the Commission may consider adjusting the capital charges applicable to nonbank SDs that engage in bespoke swap transactions, including contracts involving flip clauses, as a result of its experience and as market developments may warrant.[116] If the Commission proceeds with adjustments to the CFTC Capital Rules, the Commission may reconsider the comparability between the CFTC Capital Rules and the EU Capital Rules in light of these changes.

II. Final Capital and Financial Reporting Comparability Determination and Comparability Order

The following section provides the Commission's comparative analysis of the EU Capital Rules and the EU Financial Reporting Rules with the corresponding CFTC Capital Rules and CFTC Financial Reporting Rules, as described in the 2023 Proposal, further modified to address comments received. As emphasized in the 2023 Proposal, the capital and financial reporting regimes are complex structures comprised of a number of interrelated regulatory components.[117] Differences in how jurisdictions approach and implement these regimes are expected, even among jurisdictions that base their requirements on the principles and standards set forth in the BCBS framework.

The Commission performed the analysis by assessing the comparability of the EU Capital Rules for EU nonbank SDs as set forth in the EU Application and in the English language translation of certain applicable EU laws and regulations with the Commission's Bank-Based Approach for nonbank SDs. The Commission understands that three of the four EU nonbank

[116] 85 FR 57462 at 57475. As stated in the adopting release to the CFTC Capital Rules, the Commission considered that its rules were appropriately calibrated to account for a wide variety of possible uncleared swap transactions, including bespoke transactions involving flip clauses or other unique features. *See id*.

[117] *See* 2023 Proposal at 41785. BofA Securities Europe SA, Citigroup Global Markets Europe AG and Morgan Stanley Europe SE remain subject to the bank-based capital requirements established by CRR and CRD.

SDs addressed by the EU Application, as of the date of the final Comparability Determination, are subject to a bank-based capital approach under the EU Capital Rules. A fourth entity, which at the time of issuance of the 2023 Proposal was subject to the regulatory framework applicable to the other three entities, began applying, as of March 31, 2024, different capital and financial reporting requirements, applicable to smaller investment firms in the EU.[118] The Applicants have not described, and the Commission has not assessed, the EU or Member State capital and financial reporting requirements for smaller investment firms. Accordingly, when the Commission makes its final determination herein about the comparability of the EU Capital Rules with the CFTC Capital Rules, the determination pertains to the comparability of the EU Capital Rules with the Bank-Based Approach under the CFTC Capital Rules.

The Commission notes that any material changes to the information submitted in the EU Application, including, but not limited to, proposed and final material changes to the EU Capital Rules or EU Financial Reporting Rules, as well as any proposed and final material changes to the applicable supervisory authority or supervisory regime, will require notification to the Commission and NFA pursuant to Condition 25 of the final Comparability Order.[119] Therefore, if there are subsequent material changes to the EU Capital Rules, EU Financial Reporting Rules, or the supervisory authority or supervisory regime, the Commission will review and assess the impact of such changes on the final Comparability Determination and Comparability Order as they are then in effect, and may amend or supplement the Comparability Order as appropriate.[120]

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[118] As noted above, Goldman Sachs Paris was required by its applicable regulatory authority to start applying the capital and financial reporting requirements established by IFR and IFD as of March 31, 2024.

[119] *See* Condition 25 of the final Comparability Order. The Commission notes that it made certain non-substantive, clarifying changes to the language of final Condition 25 as compared to proposed Condition 25.

[120] *See* 2023 Proposal at 41785. As stated in the 2023 Proposal, the Commission may also amend or supplement the final Comparability Order to address any material changes to the CFTC Capital Rules and CFTC Financial Reporting Rules, including rule amendments to capital rules of the Federal Reserve Board that are incorporated into

A. Regulatory Objectives of CFTC Capital Rules and CFTC Financial Reporting Rules and EU Capital Rules and EU Financial Reporting Rules

1. Preliminary Determination

As reflected in the 2023 Proposal and discussed above, the Commission preliminarily determined that the overall objectives of the EU Capital Rules and the CFTC Capital Rules are comparable in that both sets of rules are intended to ensure the safety and soundness of nonbank SDs by establishing regulatory regimes that require nonbank SDs to maintain a sufficient amount of qualifying regulatory capital to absorb losses, including losses from swaps and other trading activities, and to absorb decreases in the value of firm assets and increases in the value of firm liabilities without the nonbank SDs becoming insolvent.[121] The Commission further noted that the EU Capital Rules and CFTC Capital Rules are based on, and consistent with, the BCBS framework, which was designed to ensure that banking entities hold sufficient levels of capital to absorb losses and decreases in the value of firm assets and increases in the value of firm liabilities without the banks becoming insolvent.[122]

The Commission also preliminarily found that the EU Capital Rules are comparable in purpose and effect to the CFTC Capital Rules given that both regulatory approaches compute the

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the CFTC Capital Rules' Bank-Based Approach under Commission Regulation 23.101(a)(1)(i), that are adopted after the final Comparability Order is issued. *See id.* (n. 135).

The Commission is aware that the EU is in the process of adopting changes to the EU Capital Rules to implement the final elements of the Basel standards. *See* European Parliament, Legislative Observatory https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2021/0342(COD)&l=en. The Commission will monitor progress on the regulatory changes and may amend or supplement the Comparability Order, as appropriate.

[121] *See* 2023 Proposal at 41786.

[122] The BCBS's mandate is to strengthen the regulation, supervision and practices of banks with the purpose of enhancing financial stability. *See Basel Committee Charter* available on the Bank for International Settlement website: www.bis.org/bcbs/charter.htm. *See* 2023 Proposal at 41786.

minimum capital requirements based on the level of a nonbank SD's on-balance sheet and off-balance sheet exposures, with the objective and purpose of ensuring that the nonbank SD's capital is adequate to absorb losses or decreases in the value of firm assets or increases in the value of firm liabilities resulting from such exposures. The Commission observed that the EU Capital Rules and CFTC Capital Rules provide for a comparable approach to the calculation of market risk and credit risk exposures using standardized or internal model-based approaches.[123] In addition, as discussed in the 2023 Proposal, the EU Capital Rules' and CFTC Capital Rules' requirements for identifying and measuring on-balance sheet and off-balance sheet exposures under standardized or internal model-based approaches are also consistent with the requirements set forth under the BCBS framework for identifying and measuring on-balance sheet and off-balance sheet exposures.[124]

Finally, the Commission preliminarily noted that the EU Capital Rules and CFTC Capital Rules further achieve comparable outcomes and are comparable in purpose and effect in that both sets of rules limit the types of capital instruments that qualify as regulatory capital to cover the on-balance sheet and off-balance sheet risk exposures to high quality equity capital and qualifying subordinated debt instruments that meet conditions designed to ensure that the holders of the debt have effectively subordinated their claims to other creditors of the nonbank SD.[125] As discussed in the 2023 Proposal and in Section II.B. below, both the EU Capital Rules and the CFTC Capital Rules define high quality capital by the degree to which the capital represents permanent capital that is contributed, or readily available to a nonbank SD, on an unrestricted

[123] 2023 Proposal at 41794-41795.

[124] *Id.*

[125] 2023 Proposal at 41788.

basis to absorb unexpected losses, including losses from swaps trading and other activities, without the nonbank SD becoming insolvent.[126]

The Commission further stated that it preliminarily found the EU Financial Reporting Rules to be comparable in purpose and effect to the CFTC Financial Reporting Rules as both the EU and CFTC require nonbank SDs to file periodic financial reports, including unaudited financial reports and an annual audited financial report, detailing their financial operations and demonstrating their compliance with minimum capital requirements.[127] As discussed in the 2023 Proposal, in addition to providing the CFTC and EU competent authorities with information necessary to comprehensively assess the financial condition of a nonbank SD on an ongoing basis, the financial reports further provide the CFTC and EU competent authorities with information regarding potential changes in a nonbank SD's risk profile by disclosing changes in account balances reported over a period of time.[128] Such changes in account balances may indicate, among other things, that the nonbank SD has entered into new lines of business, has increased its activity in an existing line of business relative to other activities, or has terminated a previous line of business.[129]

In assessing the comparability between the CFTC Financial Reporting Rules and the EU Financial Reporting Rules, the Commission noted that the prompt and effective monitoring of the financial condition of nonbank SDs through the receipt and review of periodic financial reports supports the Commission and EU competent authorities in meeting their respective objectives of ensuring the safety and soundness of nonbank SDs. In this regard, the Commission

[126] *Id*.

[127] *Id*. at 48100.

[128] *Id*.

[129] *Id.*

stated that the early identification of potential financial issues provides the Commission and EU authorities with an opportunity to address such issues with the nonbank SD before they develop to a state where the financial condition of the firm is impaired such that it may no longer hold a sufficient amount of qualifying regulatory capital to absorb decreases in the value of firm assets, absorb increases in the value of firm liabilities, or cover losses from its business activities, including the firm's swap dealing activities and obligations to swap counterparties.[130]

2. Comment Analysis and Final Determination

In response to the Commission's request for comment, Better Markets identified certain differences between the CFTC Capital Rules and Financial Reporting Rules and the EU Capital Rules and Financial Reporting Rules and stated that the differences mandated denial of the request for a comparability determination.[131] Better Markets further stated that the imposition of conditions to achieve comparability between the regimes implicitly concedes that the regimes are not comparable, and is suboptimal and undesirable, as it creates a set of capital and reporting requirements that EU nonbank SDs must abide by and that the CFTC must monitor.[132]

As described herein and in the 2023 Proposal, Commission staff has engaged in a detailed, comprehensive study and evaluation of the EU capital and financial reporting framework and has confirmed that its understanding of the elements and application of the framework is accurate. The Commission has also concluded, based on its evaluation, that the EU framework includes a comprehensive oversight program for monitoring EU nonbank SD's compliance with relevant EU Capital Rules.

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[130] *Id*.

[131] Better Markets Letter at p. 13.

[132] *Id*.

Furthermore, as discussed in Section I.E. above, the conditions set forth in the Comparability Order are generally intended to ensure that: (i) only EU nonbank SDs that are subject to the laws and regulations assessed under the Comparability Determination are eligible for substituted compliance; (ii) the EU nonbank SDs are subject to supervision by the relevant competent authority; and (iii) the EU nonbank SDs provide information to the Commission and NFA that is relevant to the ongoing supervision of their operations and financial condition. Considering this thorough analysis and the ongoing requirement for EU nonbank SDs to provide information to the Commission and NFA demonstrating compliance with the Comparability Order, the Commission is confident that it is capable of effectively conducting, together with NFA, oversight of the EU nonbank SDs consistent with the conduct of oversight of U.S.-domiciled nonbank SDs. In light of the Commission's ultimate conclusion that the EU capital and financial reporting requirements are comparable based on the standards articulated in Commission Regulation 23.106(a)(3), the Commission believes that a failure to issue a Comparability Determination and Comparability Order would in fact be "suboptimal and undesirable" as it would impose duplicative requirements that would result in increased costs for registrants and market participants without a commensurate benefit from an oversight perspective.

As discussed in Sections I.B. and E. above, and detailed herein, the Commission finds that the CFTC Capital Rules and Financial Reporting Rules and the EU Capital Rules and Financial Reporting Rules are comparable in purpose and effect, and have overall comparable objectives, notwithstanding the identified differences. In this regard, the Commission notes that, as described above, instead of conducting a line-by-line assessment or comparison of the EU Capital and Financial Reporting Rules and the CFTC Capital and Financial Reporting Rules, it

has applied in the assessment set forth in the determination and order, a principles-based, holistic approach in assessing the comparability of both regimes, consistent with the standard of review it adopted in Commission Regulation 23.106(a)(3). Based on that principles-based, holistic assessment, the individual elements of which are described in more detail in Sections II.B. through II.F. below, the Commission has determined that both sets of rules are designed to ensure the safety and soundness of nonbank SDs and achieve comparable outcomes. As such, the Commission adopts the Comparability Determination and Comparability Order as proposed with respect to the analysis of the regulatory objectives of the CFTC Capital Rules and Financial Reporting Rules and the EU Capital and Financial Reporting Rules.

B. Nonbank Swap Dealer Qualifying Capital

1. Preliminary Determination

As discussed in the 2023 Proposal, the Commission preliminarily determined that the EU Capital Rules are comparable in purpose and effect to CFTC Capital Rules with regard to the types and characteristics of a nonbank SD's equity that qualifies as regulatory capital in meeting its minimum requirements.[133] The Commission explained that the EU Capital Rules and the CFTC Capital Rules for nonbank SDs both require a nonbank SD to maintain a quantity of high-quality and permanent capital that, based on the firm's activities and on-balance sheet and off-balance sheet exposures, is sufficient to absorb losses and decreases in the value of firm assets and increases in the value of firm liabilities without resulting in the firm becoming insolvent.[134] The Commission observed that the EU Capital Rules and the CFTC Capital Rules permit nonbank SDs to recognize comparable forms of equity capital and qualifying subordinated debt

[133] *See* 2023 Proposal at 41788.

[134] *Id*.

instruments toward meeting minimum capital requirements, with both the EU Capital Rules and the CFTC Capital Rules emphasizing high quality capital instruments.[135]

In support of its preliminary Comparability Determination, the Commission noted that the CFTC Capital Rules require a nonbank SD electing the Bank-Based Approach to maintain regulatory capital in the form of common equity tier 1 capital, additional tier 1 capital, and tier 2 capital in amounts that meet certain stated minimum requirements set forth in Commission Regulation 23.101.[136] Common equity tier 1 capital is generally composed of an entity's common stock instruments, and any related surpluses, retained earnings, and accumulated other comprehensive income, and is a more conservative or permanent form of capital that is last in line to receive distributions in the event of the entity's insolvency.[137] Additional tier 1 capital is generally composed of equity instruments such as preferred stock and certain hybrid securities that may be converted to common stock if triggering events occur and may have a preference in distributions over common equity tier 1 capital in the event of an insolvency.[138] Total tier 1 capital is composed of common equity tier 1 capital and further includes additional tier 1 capital. Tier 2 capital includes certain types of instruments that include both debt and equity characteristics such as qualifying subordinated debt.[139] Subordinated debt must meet certain conditions to qualify as tier 2 capital under the CFTC Capital Rules.[140]

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[135] *Id*.

[136] 17 CFR 23.101(a)(1)(i) and 2023 Proposal at 41786-41787. The terms "common equity tier 1 capital," "additional tier 1 capital," and "tier 2 capital" are defined in the bank holding company regulations of the Federal Reserve Board. 12 CFR 217.20.

[137] 12 CFR 217.20(b).

[138] 12 CFR 217.20(c).

[139] 12 CFR 217.20(d).

[140] Subordinated debt must meet requirements set forth in SEC Rule 18a-1d. Specifically, subordinated debt instruments must have a term of at least one year (with the exception of approved revolving subordinated debt agreements which may have a maturity term that is less than one year), and contain terms that effectively

The preliminary Comparability Determination also noted that the EU Capital Rules require an EU nonbank SD to maintain an amount of regulatory capital (*i.e.*, equity capital and qualifying subordinated debt) equal to or greater than 8 percent of the EU nonbank SD's total risk exposure, which is calculated as the sum of the firm's: (i) capital charges for market risk; (ii) risk-weighted exposure amounts for credit risk; (iii) capital charges for settlement risk; (iv) credit valuation adjustment ("CVA") risk of over-the-counter ("OTC") derivatives instruments; and (v) capital charges for operational risk. The EU Capital Rules limit the composition of regulatory capital to common equity tier 1 capital, additional tier 1 capital, and tier 2 capital in a manner consistent with the BCBS framework. Specifically, the EU Capital Rules provide that an EU nonbank SD's regulatory capital may be composed of: (i) common equity tier 1 capital instruments, which generally include the EU nonbank SD's common equity (stock), retained earnings, and accumulated other comprehensive income; (ii) additional tier 1 capital instruments, which includes other forms of capital instruments and certain long-term convertible debt instruments; and (iii) tier 2 capital instruments, which include other reserves, hybrid capital instruments, and certain qualifying subordinated term debt.[141] Capital instruments that qualify as common equity tier 1 capital under the EU Capital Rules include instruments that: (i) are issued directly by the EU nonbank SD; (ii) are paid in full and not funded directly or indirectly by the EU nonbank SD; and (iii) are perpetual.[142] In addition, the principal amount of the common equity tier 1 capital instruments may not be reduced or repaid, except in the liquidation of the EU nonbank SD or the repurchase of shares pursuant to the permission of the appropriate regulatory

subordinate the rights of lenders to receive any payments, including accrued interest, to other creditors of the firm. 17 CFR 23.101(a)(1)(i)(B) and 17 CFR 240.18a-1d.

[141] 2023 Proposal at 41787.

[142] *Id.* and CRR, Articles 26 and 28.

authority.[143] Furthermore, to qualify as additional tier 1 capital, the capital instruments must meet certain conditions including: (i) the instruments are issued directly by the EU nonbank SD and paid in full; (ii) the instruments are not owned by the EU nonbank SD or its subsidiaries; (iii) the purchase of the instruments is not funded directly or indirectly by the EU nonbank SD; (iv) the instruments rank below tier 2 instruments in the event of the insolvency of the EU nonbank SD; (v) the instruments are not secured or guaranteed by the EU nonbank SD or an affiliate; (vi) the instruments are perpetual and do not include an incentive for the EU nonbank SD to redeem them; and (vii) distributions under the instruments are pursuant to defined terms and may be cancelled under the full discretion of the EU nonbank SD.[144] Lastly, subordinated debt instruments must meet certain conditions to qualify as tier 2 regulatory capital under the EU Capital Rules, including that the: (i) loans are not granted by the EU nonbank SD or its subsidiaries; (ii) claims on the principal amount of the subordinated loans under the provisions governing the subordinated loan agreement rank below any claim from eligible liabilities instruments (*i.e.*, certain non-capital instruments), meaning that they are effectively subordinated to claims of all non-subordinated creditors of the EU nonbank SD; (iii) subordinated loans are not secured, or subject to a guarantee that enhances the seniority of the claim, by the EU nonbank SD, its subsidiaries, or affiliates; (iv) loans have an original maturity of at least five years; and (v) provisions governing the loans do not include any incentive for the principal amount to be repaid by the EU nonbank SD prior to the loans' maturity.[145]

[143] *Id.*

[144] *Id.* and CRR, Article 50-52.

[145] *Id.* and CRR, Article 63.

Based on its comparative assessment, the Commission preliminarily found that the types and characteristics of the equity instruments that qualify as common equity tier 1 capital and additional tier 1 capital under the EU Capital Rules are comparable to the types and characteristics of equity instruments comprising common equity tier 1 capital and additional tier 1 capital under the CFTC Capital Rules.[146] Specifically, the Commission noted that the EU Capital Rules' common equity tier 1 capital and additional tier 1 capital, and the CFTC Capital Rules' common equity tier 1 capital and additional tier 1 capital are comparable in that these forms of equity capital have similar characteristics (*e.g.*, the equity must be in the form of high-quality, committed, and permanent capital) and represent contributed equity capital that generally has no priority to the distribution of firm assets or income with respect to other shareholders or creditors of the firm, which allows a nonbank SD to use this equity to absorb decreases in the value of firm assets, absorb increases in the value of firm liabilities, and cover losses from business activities, including the firm's swap dealing activities.[147]

The Commission also found subordinated debt under the EU Capital Rules comparable to tier 2 capital under the CFTC Capital Rules.[148] Specifically, the Commission noted that the qualifying conditions imposed on subordinated debt instruments are comparable under the EU Capital Rules and the CFTC Capital Rules in that they are designed to ensure that the debt has qualities supporting its recognition by a nonbank SD as equity for capital purposes, including by effectively subordinating the debt lenders' claims for repayment on the debt to other creditors of the nonbank SD and by limiting or restricting repayment of the subordinated loans if such

[146] *See* 2023 Proposal at 41788.

[147] *Id*.

[148] *Id*.

repayments result in the nonbank SD's equity falling below certain defined thresholds.[149] The Commission preliminarily concluded that these terms and conditions provided assurances that the subordinated debt is appropriate to be recognized as regulatory capital available to a nonbank SD to meet its obligations and to absorb business losses and decreases in the value of firm assets and increases in the value of firm liabilities.[150]

2. Comment Analysis and Final Determination

The Commission did not receive comments regarding its preliminary determination that the EU Capital Rules are comparable in purpose and effect to the CFTC Capital Rules with regard to the types and characteristics of a nonbank SD's equity and subordinated debt that qualifies as regulatory capital in meeting its minimum requirements. In conclusion, the Commission finds that the EU Capital Rules and the CFTC Capital Rules, are comparable in purpose and effect, and achieve comparable regulatory outcomes, with respect to the types of capital instruments that qualify as regulatory capital. Both the EU Capital Rules and the CFTC Capital Rules limit regulatory capital to permanent and conservative forms of capital, including common equity, capital surpluses, retained earnings, and subordinate debt where debt holders effectively subordinate their claims to repayment to all other creditors of the nonbank SD in the event of the firm's insolvency. Limiting regulatory capital to the above categories of equity and debt instruments promotes the safety and soundness of the nonbank SD by helping to ensure that the regulatory capital is not withdrawn or converted to other equity instruments that may have rights or priority with respect to payments, such as dividends or distributions in insolvency, over other creditors, including swap counterparties. The Commission, therefore, is adopting the

[149] *Id*.

[150] *Id*.

Comparability Order as proposed with respect to the types and characteristics of equity and subordinated debt that qualifies as regulatory capital to meet minimum capital requirements under the EU Capital Rules.

C. Nonbank Swap Dealer Minimum Capital Requirement

1. Introduction to Nonbank Swap Dealer Minimum Capital Requirements

As reflected in the 2023 Proposal, the CFTC Capital Rules require a nonbank SD electing the Bank-Based Approach to maintain regulatory capital that satisfies each of the following criteria: (i) an amount of common equity tier 1 capital of at least $20 million; (ii) an aggregate amount of common equity tier 1 capital, additional tier 1 capital, and tier 2 capital equal to or greater than 8 percent of the nonbank SD's total risk-weighted assets, provided that common equity tier 1 capital comprises at least 6.5 percent of the 8 percent; (iii) an aggregate of common equity tier 1 capital, additional tier 1 capital, and tier 2 capital in an amount equal to or in excess of 8 percent of the nonbank SD's uncleared swap margin amount;[151] and (iv) the amount of capital required by NFA.[152]

[151] 17 CFR 23.101(a)(1)(i). *See also*, 2023 Proposal at 41781. The term "uncleared swap margin" is defined in Commission Regulation 23.100 to generally mean the amount of initial margin that a nonbank SD would be required to collect from each counterparty for each outstanding swap position of the nonbank SD. 17 CFR 23.100. A nonbank SD must include all swap positions in the calculation of the uncleared swap margin amount, including swaps that are exempt or excluded from the scope of the Commission's uncleared swap margin regulations. A nonbank SD must compute the uncleared swap margin amount in accordance with the Commission's margin rules for uncleared swaps. 17 CFR 23.154.

[152] 17 CFR 23.101(a)(1)(i)(D). *See also* 2023 Proposal at 41781. Commission Regulation 23.101(a)(1)(i)(D) sets forth one of the minimum thresholds that a nonbank SD must meet as the "the amount of capital required by a registered futures association." As previously noted, NFA is currently the only entity that is registered with the Commission as a futures association. NFA has adopted the Commission's capital requirements as its own requirements, and has not adopted any additional or stricter minimum capital requirements. *See*, NFA rulebook, Financial Requirements Section 18 Swap Dealer and Major Swap Participant Financial Requirements, available at *nfa.futures.org*.

In comparison, the EU Capital Rules require an EU nonbank SD to maintain a fixed amount of minimum initial capital of EUR 5 million of common equity tier 1 capital.[153] The EU Capital Rules, consistent with the BCBS framework, further require each EU nonbank SD to maintain sufficient levels of capital to satisfy the following, expressed as a percentage of the EU nonbank SD's "total risk exposure amount" (*i.e.*, the sum of the EU nonbank SD's risk-weighted assets and exposures): (i) a common equity tier 1 capital ratio of 4.5 percent; (ii) a tier 1 capital ratio of 6 percent; and (iii) a total capital ratio of 8 percent. Furthermore, EU nonbank SDs must maintain a capital conservation buffer composed of common equity tier 1 capital in an amount equal to 2.5 percent of the firm's total risk exposure. The common equity tier 1 capital used to meet the capital conservation buffer must be separate and in addition to the 4.5 percent of common equity tier 1 capital required to meet its core 8 percent capital requirement.[154] As explained in the 2023 Proposal, the "total risk exposure amount" is calculated as the sum of the EU nonbank SD's: (i) capital requirements for market risk; (ii) risk-weighted exposure amounts for credit risk; (iii) capital requirements for CVA risk of OTC derivatives; and (iv) capital requirements for operational risk.[155] Capital charges for market risk and credit risk are computed based on an EU nonbank SD's on-balance sheet and off-balance sheet exposures, weighted according to risk.[156]

2. Preliminary Determination and Comment Analysis

While noting certain differences in the minimum capital requirements and calculation of regulatory capital between the EU Capital Rules and the CFTC Capital Rules, the Commission

[153] 2023 Proposal at 41793-41794.

[154] *See* 2023 Proposal at 41782.

[155] *Id*. at 41790.

[156] *Id*.

preliminarily found that the EU Capital Rules and CFTC Capital Rules achieve, subject to the conditions in the proposed Comparability Determination and proposed Comparability Order, comparable outcomes by requiring a nonbank SD to maintain a minimum level of qualifying regulatory capital and subordinated debt to absorb losses from the firm's business activities, including its swap dealing activities, and decreases in the value of the firm's assets and increases in the firm's liabilities without the nonbank SD becoming insolvent.[157] As further discussed below, the Commission's preliminary finding of comparability was based on a principles-based, holistic comparative analysis of the three minimum capital requirement thresholds of the CFTC Capital Rules' Bank-Based Approach referenced above and the respective elements of the EU Capital Rules' requirements.

a. Fixed Amount Minimum Capital Requirement

As noted above, prong (i) of the CFTC Capital Rules requires each nonbank SD electing the Bank-Based Approach to maintain a minimum of $20 million of common equity tier 1 capital. The CFTC's $20 million fixed-dollar minimum capital requirement is intended to ensure that each nonbank SD maintains a level of regulatory capital, without regard to the level of the firm's dealing and other activities, sufficient to meet its obligations to swap market participants given the firm's status as a CFTC-registered nonbank SD and to help ensure the safety and soundness of the nonbank SD.[158] Also as noted above, the EU Capital Rules contain a requirement that an EU nonbank SD maintain a fixed amount of minimum initial capital of EUR 5 million of common equity tier 1 capital.[159]

[157] *Id*. at 41795.

[158] 85 FR 57462 at 57492.

[159] 2023 Proposal at 41793-41794.

The Commission, in the 2023 Proposal, recognized that the $20 million fixed-dollar minimum capital required under the CFTC Capital Rules is substantially higher than the EUR 5 million. Therefore, the Commission preliminarily proposed a condition to require each EU nonbank SD to maintain, at all times, an amount of common equity tier 1 capital in EUR, as defined in Article 26 of CRR, that is equivalent to $20 million.[160]

One commenter, Better Markets, argued that the establishment in the EU Capital Rules of a base level requirement that is substantially lower than the CFTC Capital Rules' fixed amount minimum requirement "demonstrates a fatal lack of comparability."[161] Better Markets further asserted that the proposed condition requiring that EU nonbank SDs maintain a minimum level common equity tier 1 capital equivalent to $20 million is evidence, in and of itself, that the EU Capital Rules are not comparable to the CFTC Capital Rules.[162]

As noted above, the Commission recognized the material difference in the requirement under the EU Capital Rules and the CFTC Capital Rules with respect to the $20 million minimum dollar amount of regulatory capital a nonbank SD is required to maintain. The Commission's proposed condition, however, effectively addresses this difference by providing that an EU nonbank SD may not avail itself of substituted compliance unless it maintains a minimum amount of common equity tier 1 capital denominated in EUR that is equivalent to $20 million. Furthermore, the imposition of conditions in a Comparability Order, as discussed in Section I.E. above, is authorized by Commission Regulation 23.106(a)(5), which provides that

[160] *Id.* The Commission also noted that the three current EU nonbank SDs subject to the EU Capital Rules maintain common equity tier 1 capital denominated in EUR in amounts substantially in excess of the equivalent of $20 million based on financial filings made with the Commission. *Id.* (note 261.)

[161] Better Markets Letter at p. 11.

[162] *Id*.

the Commission may issue terms and conditions as it deems appropriate. In addition, as further noted in Section I.E. above, the Guidance also provides that the Commission may impose conditions as part of the substituted compliance process to address a lack of comparable and comprehensive regulation in a home jurisdiction.[163] In this connection, the Commission concludes that requiring EU nonbank SDs to maintain an amount of regulatory capital in the form of common equity tier 1 items, as defined in Article 26 of CRR, equal to or in excess of the equivalent of $20 million will impose an equally stringent standard to the analogue requirement under the CFTC Capital Rules and will appropriately address the substantially lower minimum fixed amount capital requirement under the EU Capital Rules.

In conclusion, the Commission finds that the EU Capital Rules and the CFTC Capital Rules, with the imposition of the condition for EU nonbank SDs to maintain a minimum level of common equity tier 1 capital in an amount equivalent to at least $20 million, are comparable in purpose and effect and achieve comparable outcomes with respect to capital requirements based on a minimum dollar amount. The requirement for a nonbank SD with limited swap dealing or other business activities to maintain a minimum level of regulatory capital equivalent to $20 million helps to ensure the firm's safety and soundness by allowing it to absorb decreases in firm assets, absorb increases in firm liabilities, and meet obligations to swap counterparties, other creditors, and market participants, without the firm becoming insolvent.

b. Minimum Capital Requirement Based on Risk-Weighted Assets

Prong (ii) of the CFTC Capital Rules' minimum capital requirements described above requires each nonbank SD electing the Bank-Based Approach to maintain an aggregate of common equity tier 1 capital, additional tier 1 capital, and tier 2 capital in an amount equal to or

[163] Guidance at 45343.

greater than 8 percent of the nonbank SD's total risk-weighted assets, with common equity tier 1 capital comprising at least 6.5 percent of the 8 percent.[164] Risk-weighted assets are a nonbank SD's on-balance sheet and off-balance sheet market risk and credit risk exposures, including exposures associated with proprietary swap, security-based swap, equity, and futures positions, weighted according to risk. The requirements and capital ratios set forth in prong (ii) are based on the Federal Reserve Board's capital requirements for bank holding companies and are consistent with the BCBS framework. The requirement for each nonbank SD to maintain regulatory capital in an amount that equals or exceeds 8 percent of the firm's total risk-weighted assets is intended to help ensure that the nonbank SD's level of capital is sufficient to absorb decreases in the value of the firm's assets and increases in the value of the firm's liabilities, and to cover unexpected losses resulting from the firm's business activities, including losses resulting from uncollateralized defaults from swap counterparties, without the nonbank SD becoming insolvent.[165]

The EU Capital Rules contain capital requirements for EU nonbank SDs that the Commission preliminarily found comparable in purpose and effect to the requirements in prong (ii) of the CFTC Capital Requirements.[166] Specifically, the EU Capital Rules require an EU nonbank SD to maintain: (i) common equity tier 1 capital equal to at least 4.5 percent of the EU nonbank SD's total risk exposure amount; (ii) total tier 1 capital (*i.e.*, common equity tier 1 capital plus additional tier 1 capital) equal to at least 6 percent of the EU nonbank SD's total risk exposure amount; and (iii) total capital (*i.e.*, an aggregate amount of common equity tier 1

[164] 17 CFR 23.101(a)(1)(i)(B).

[165] *See generally* 85 FR 57462 at 57530.

[166] *See* 2023 Proposal at pp. 41794-41795.

capital, additional tier 1 capital, and tier 2 capital) equal to at least 8 percent of the EU nonbank SD's total risk exposure amount. The EU Capital Rules further require each EU nonbank SD to maintain an additional capital conservation buffer equal to 2.5 percent of the EU nonbank SD's total risk exposure amount, which must be met with common equity tier 1 capital. Thus, an EU nonbank SD is effectively required to maintain total qualifying regulatory capital in an amount equal to or in excess of 10.5 percent of the market risk, credit risk, CVA risk, settlement risk, and operational risk of the firm (*i.e.*, total capital requirement of 8 percent of risk-weighted assets and an additional 2.5 percent of risk-weighted assets as a capital conservation buffer), which is a higher capital ratio than the 8 percent required of nonbank SDs under prong (ii) of the CFTC Capital Rules.[167]

The Commission also preliminarily found that the EU Capital Rules and the CFTC Capital Rules are comparable with respect to the approaches used in the calculation of risk-weighted amounts for market risk and credit risk in determining the nonbank SD's risk-weighted assets.[168] In that regard, the Commission noted that both regimes require a nonbank SD to use standardized approaches to compute market risk and credit risk amounts, unless the firm is approved to use internal models.[169]

As the Commission observed, the standardized approaches to calculating risk-weighted asset amounts for market risk and credit risk under both the EU Capital Rules and the CFTC Capital Rules follow the same structure that is now the common global standard: (i) allocating assets to categories according to risk and assigning each a risk-weight; (ii) allocating

[167] *Id*. at 41782-41783. *See, also*, CRR Articles 26, 28, 50-52, 61-63 and 92, and CRD, Article 129.

[168] *See* 2023 Proposal at 41794.

[169] *Id*.

counterparties according to risk assessments and assigning each a risk factor; (iii) calculating gross exposures based on valuation of assets; (iv) calculating a net exposure allowing offsets following well defined procedures and subject to clear limitations; (v) adjusting the net exposure by the market risk-weights; and finally, (vi) for credit risk exposures, multiplying the sum of net exposures to each counterparty by their corresponding risk factor.[170]

More specifically, with respect to the calculation of standardized risk-weighted asset amounts for market risk, the Commission explained that the CFTC Capital Rules incorporate by reference the standardized market risk charges set forth in Commission Regulation 1.17 for FCMs and SEC Rule 18a-1 for nonbank security-based swap dealers ("SBSDs").[171] The standardized market risk charges under Commission Regulation 1.17 and SEC Rule 18a-1 are calculated as a standardized or table-based percentage of the market value or notional value of the nonbank SD's marketable securities and derivatives positions, with the percentages applied to the market value or notional value increasing as the expected or anticipated risk of the positions increases.[172] For example, CFTC Capital Rules require nonbank SDs to calculate standardized market risk-weighted asset amounts for uncleared swaps based on notional values of the swap positions multiplied by percentages set forth in the applicable rules.[173] In addition, market risk-weighted asset amounts for readily marketable equity securities are calculated by multiplying the fair market value of the securities by 15 percent.[174]

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[170] *Id*.

[171] *Id.* at 41789 and paragraph (3) of the definition of the term *BHC equivalent risk-weighted assets* in 17 CFR 23.100.

[172] *See* 2023 Proposal at 41789, 17 CFR 1.17(c)(5), and 17 CFR 240.18a-1(c)(1).

[173] 17 CFR 1.17(c)(5)(iii).

[174] 17 CFR 1.17(c)(5)(v), referencing SEC Rule 15c3-1(c)(2)(vi) (17 CFR 240.15c3-1(c)(2)(vi)).

Under the CFTC Capital Rules, the resulting total market risk-weighted asset amount is multiplied by a factor of 12.5 to cancel the effect of the 8 percent multiplication factor applied to all of the nonbank SD's risk-weighted assets under prong (ii) of the rules' minimum capital requirements described above. As a result, a nonbank SD is effectively required to hold qualifying regulatory capital equal to or greater than 100 percent of the amount of its market risk exposure amount.[175]

Comparable to the CFTC Capital Rules, the EU Capital Rules require an EU nonbank SD to calculate its standardized risk-weighted asset amounts for market risk by multiplying the notional or carrying amount of net positions by risk-weighting factors, which are based on the underlying market risk of each asset or exposure and increase as the expected risk of the positions increases.[176] The Commission further explained that an EU nonbank SD is required to calculate market risk requirements for debt instruments and equity instruments separately, by computing each category as the sum of specific risk and general risk of the positions.[177] As further discussed in the 2023 Proposal, the EU Capital Rules also require EU nonbank SDs to include in their risk-weighted assets market risk exposures to certain foreign currency and gold

[175] 17 CFR 23.100 (definition of *BHC equivalent risk-weighted assets*). As noted, a nonbank SD is required to maintain qualifying capital (*i.e.*, an aggregate of common equity tier 1 capital, additional tier 1 capital, and tier 2 capital) in an amount that equals or exceeds 8 percent of its risk-weighted assets. The regulations, however, require the nonbank SD to effectively maintain qualifying capital equal to or in excess of 100 percent of its market risk-weighted assets by requiring the nonbank SD to multiply its market-risk weighted assets by a factor of 12.5. For example, the market risk exposure amount for marketable equity securities with a current fair market value of $250,000 is $37,500 (market value of $250,000 x .15 standardized market risk factor). The nonbank SD is required to maintain regulatory capital equal to or in excess of full market risk exposure amount of $37,500 (risk exposure amount of $37,500 x 8 percent regulatory capital requirement equals $3,000; the regulatory capital requirement is then multiplied by a factor of 12.5, which effectively requires the nonbank SD to hold regulatory capital in an amount equal to at least 100 percent of the market risk exposure amount ($3,000 x 12.5 factor equals $37,500)).

[176] *See* 2023 Proposal at 41791.

[177] *Id*. and CRR, Article 326. As indicated in Article 326 of CRR, securitizations are treated as debt instruments for market risk requirements.

positions. Specifically, an EU nonbank SD with net positions in foreign exchange and gold that exceed 2 percent of the firm's total capital must calculate capital requirements for foreign exchange risk. [178] The capital requirement for foreign exchange risk under the standardized approach is 8 percent of the EU nonbank SD's net positions in foreign exchange and gold.[179] The EU Capital Rules further require EU nonbank SDs to include exposures to commodity positions in calculating the firm's risk-weighted assets. The standardized calculation of commodity risk exposures may follow one of three approaches depending on type of position or exposure. The first is the sum of a flat percentage rate for net positions, with netting allowed among tightly defined sets, plus another flat percentage rate for the gross position.[180] The other two standardized approaches are based on maturity-ladders, where unmatched portions of each maturity band (*i.e.*, portions that do not net out to zero) are charged at a step-up rate in comparison to the base charges for matched portions.[181]

With respect to standardized risk-weighted asset amounts for credit risk, the Commission explained that under the CFTC Capital Rules, a nonbank SD must compute its on-balance sheet and off-balance sheet exposures in accordance with the standardized risk-weighting requirements adopted by the Federal Reserve Board and set forth in Subpart D of 12 CFR 217 as if the SD itself were a bank holding company subject to Subpart D.[182] Standardized risk-weighted asset amounts for credit risk are computed by multiplying the amount of the exposure by defined

[178] *See* 2023 Proposal at 41791 and CRR, Article 351.

[179] *Id*.

[180] 2023 Proposal at 41791 and CRR, Article 360.

[181] 2023 Proposal at 41791 and CRR, Article 359-361.

[182] 17 CFR 23.101(a)(1)(i)(B) and paragraph (1) of the definition of the term *BHC equivalent risk-weighted assets* in 17 CFR 23.100. *See also* 2023 Proposal at 41789.

counterparty credit risk factors that range from 0 percent to 150 percent.[183] A nonbank SD with off-balance sheet exposures is required to calculate a risk-weighted amount for credit risk by multiplying each exposure by a credit conversion factor that ranges from 0 percent to 100 percent, depending on the type of exposure.[184]

In comparison, the Commission noted that the EU Capital Rules require an EU nonbank SD to calculate its standardized risk-weighted asset amounts for credit risk in a manner aligned with the Commission's Bank-Based Approach and the BCBS framework by taking the carrying value or notional value of each of the EU nonbank SD's on-balance sheet and off-balance sheet exposures, making certain additional credit risk adjustments, and then applying specific risk-weights based on the type of counterparty and the asset's credit quality.[185] For instance, high quality credit exposures, such as exposures to EU Member States' central banks, carry a zero percent risk-weight. Exposures to EU banks, other investment firms, or other businesses, however, may carry risk-weights between 20 percent and 150 percent depending on the credit ratings available for the entity or, for exposures to banks and investment firms, for its central government.[186] If no credit rating is available, the EU nonbank SD must generally apply a 100 percent risk-weight, meaning the total accounting value of the exposure is used.[187]

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[183] 12 CFR 217.32. Lower credit risk factors are assigned to entities with lower credit risk and higher credit risk factors are assigned to entities with higher credit risk. For example, a credit risk factor of 0 percent is applied to exposures to the U.S. government, the Federal Reserve Bank, and U.S. government agencies (12 CFR 217.32(a)(1)), and a credit risk factor of 100 percent is assigned to an exposure to foreign sovereigns that are not members of the Organization of Economic Co-operation and Development (12 CFR 217.32(a)(2)). *See also* discussion in 2023 Proposal at 41789.

[184] 12 CFR 217.33. *See also* discussion in 2023 Proposal at 41789.

[185] *See* 2023 Proposal at 41791 and CRR, Articles 111 and 113(1).

[186] *See* 2023 Proposal at 41791 and CRR, Articles 114-122.

[187] See 2023 Proposal at 41791 and CRR, Articles 121(2) and 122(2).

With respect to counterparty credit risk for derivatives positions, the Commission explained that under the CFTC Capital Rules, a nonbank SD may compute standardized credit risk exposures, using either the current exposure method ("CEM") or the standardized approach for measuring counterparty credit risk ("SA-CCR").[188] Both CEM and SA-CCR are non-model, rules-based approaches to calculating counterparty credit risk exposures for derivatives positions. Credit risk exposure under CEM is the sum of: (i) the current exposure (*i.e.*, the positive mark-to-market) of the derivatives contract; and (ii) the potential future exposure, which is calculated as the product of the notional principal amount of the derivatives contract multiplied by a standard credit risk conversion factor set forth in the rules of the Federal Reserve Board.[189] Credit risk exposure under SA-CCR is defined as the exposure at default amount of a derivatives contract, which is computed by multiplying a factor of 1.4 by the sum of: (i) the replacement costs of the contract (*i.e.*, the positive mark-to market); and (ii) the potential future exposure of the contract.[190] In comparison, the EU Capital Rules require an EU nonbank SD that is not approved to use credit risk models to calculate its exposure using the SA-CCR.[191] The exposure amount under the SA-CCR is computed, under both the EU Capital Rules and the Commission's

[188] 17 CFR 217.34 and 17 CFR 23.100 (defining the term *BHC risk-weighted assets* and providing that a nonbank SD that does not have model approval may use either CEM or SA-CCR to compute its exposures for OTC derivative contracts without regard to the status of its affiliate with respect to the use of a calculation approach under the Federal Reserve Board's capital rules). *See also* discussion in 2023 Proposal at 41789.

[189] 12 CFR 217.34.

[190] 12 CFR 217.132(c).

[191] *See* 2023 Proposal at 41791 and CRR, Articles 92(3)(f) and 273-280e. As noted in the 2023 Proposal, EU nonbank SDs with smaller-sized derivatives business may also use a "simplified standardized approach to counterparty credit risk" (CRR, Article 281) or an "original exposure method" (CRR, Article 282) as simpler methods for calculating exposure values. To use either of these alternative methods, an entity's on-and off-balance sheet derivatives business must be equal to or less than 10 percent of the entity's total assets and EUR 300 million or 5 percent of the entity's total assets and EUR 100 million, respectively. CRR, Article 273a.

Bank-Based Approach, as the sum of the replacement cost of the contract and the potential future exposure of the contract, multiplied by a factor of 1.4.[192]

EU Capital Rules also require an EU nonbank SD to include its exposures to settlement risk in its calculation of its risk-weighted assets.[193] Consistent with the BCBS framework, the risk-weighted asset amount for settlement risk for transactions settled on a delivery-versus-payment basis is computed by multiplying the price difference to which an EU nonbank SD is exposed as a result of an unsettled transaction by a percentage factor that varies from 8 percent to 100 percent based on the number of working days after the settlement due date during which the transaction remains unsettled.[194] The CFTC's Bank-Based Approach provides for a similar calculation methodology for risk-weighted asset amounts for unsettled transactions involving securities, foreign exchange instruments, and commodities.[195]

Consistent with the BCBS framework, an EU nonbank SD is also required to calculate a CVA risk-weighted asset amount for OTC derivative instruments to reflect the current market value of the credit risk of the counterparty to the EU nonbank SD.[196] Risk-weighted asset

[192] CRR, Article 274(2) and 12 CFR 217.132(c). *See also* discussion in 2023 Proposal at 41791.

[193] 2023 Proposal at 41791 and CRR, Article 378 (indicating that if transactions in which debt instruments, equities, foreign currencies and commodities excluding repurchase transactions and securities or commodities lending and securities or commodities borrowing are unsettled after their delivery due dates, an EU nonbank SD must calculate the price difference to which it is exposed).

[194] *Id*. The price difference to which an EU nonbank SD is exposed is the difference between the agreed settlement price for an instrument (*i.e*., a debt instrument, equity, foreign currency or commodity) and the instrument's current market value, where the difference could involve a loss for the firm. CRR, Article 378.

[195] 17 CFR 23.100 (definition of *BHC equivalent risk-weighted assets*), 12 CFR 217.38 and 12 CFR 217.136.

[196] 2023 Proposal at 41792 and CRR, Articles 381 and 382(1).

amounts for CVA risk can be calculated following similar methodologies as those described in Subpart E of the Federal Reserve Board's Part 217 regulations.[197]

As discussed in the 2023 Proposal, both the CFTC Capital Rules and the EU Capital Rules also provide that, if approved by NFA or the relevant competent authority, respectively, nonbank SDs may also use internal models to calculate market and/or credit risk exposures.[198] The Commission noted that the internal market and credit risk models under the EU Capital Rules and the CFTC Capital Rules are based on the BCBS framework and preliminarily found that such models must meet comparable quantitative and qualitative requirements covering the same risks, though with slightly different categorization, and including comparable model risk management requirements.[199] In this regard, the Commission observed that both rule sets address the same types of risk, with similar allowed methodologies and under similar controls.[200] The Commission also preliminarily determined that the EU Capital Rules and the CFTC Capital Rules are comparable with respect to the requirement that nonbank SDs account for operational risk in computing their minimum capital requirements.[201] In this connection, the Commission

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[197] CRR, Articles 383–384 and 12 CFR 217.132(e)(5) and (6). Under the CFTC's Bank-Based Approach, nonbank SDs calculating their credit risk-weighted assets using the regulations in Subpart D of the Federal Reserve Board's Part 217 regulations do not calculate CVA of OTC derivatives instruments.

[198] 2023 Proposal at 41789 and 41791, respectively, for discussions of NFA and competent authority model approvals.

In discussing approval requirements for credit risk models as part of the general overview of the EU Capital Rules, the Commission referred generally to counterparty credit risk exposures for "OTC derivatives transactions." *See* 2023 Proposal at 41783 (n. 119). For clarity, the Commission notes that the Internal Model Methodology for counterparty credit risk set out in CRR, Articles 283-294, can be used for the derivatives listed in Annex II of CRR, securities financing transactions, and long settlement transactions. CRR, Article 273.

[199]2023 Proposal at 41794-41795. For a discussion of the qualitative and quantitative requirements that models must meet under the CFTC Capital Rules and the EU Capital Rules, *see* 2023 Proposal at 41789-41790 and 41792-41793, respectively.

[200] *See* 2023 Proposal at 41794.

[201] *Id*. at 41795.

noted that the EU Capital Rules require an EU nonbank SD to calculate an operational risk exposure as a component of the firm's total risk exposure amount.[202] EU nonbank SDs may use either a standardized approach or, if the EU nonbank has obtained regulatory permission, an internal approach based on the firm's own measurement systems, to calculate their risk-weighted asset amounts for operational risk. The CFTC Capital Rules address operational risk both as a stand-alone, separate minimum capital requirement that a nonbank SD is required to meet under prong (iii) of the Bank-Based Approach and as a component of the calculation of risk-weighted assets for nonbank SDs that use Subpart E of the Federal Reserve Board's Part 217 regulations to calculate their credit risk-weighted assets via internal models.[203]

The Commission did not receive comments specifically addressing the Commission's comparative analysis of the minimum capital requirement based on risk-weighted assets. In conclusion, the Commission finds that the EU Capital Rules and the CFTC Capital Rules are comparable in purpose and effect with respect to the computation of minimum capital requirements based on a nonbank SD's risk-weighted assets. In this regard, the Commission finds that the EU Capital Rules and the CFTC Capital rules have a comparable approach to the computation of market risk exposure amounts and credit risk exposure amounts for on-balance sheet and off-balance sheet exposures, which are intended to ensure that a nonbank SD maintains a sufficient level of regulatory capital to absorb decreases in firm assets, absorb increases in firm liabilities, and meet obligations to counterparties and creditors, without the firm becoming insolvent.

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[202] *Id*. and CRR, Article 92(3).

[203] *Id*. and 17 CFR 23.101(a)(1)(i) and 17 CFR 23.100 (definition of *BHC equivalent risk-weighted assets*).

c. Minimum Capital Requirement Based on the Uncleared Swap Margin Amount

As noted above, prong (iii) of the CFTC Capital Rules' Bank-Based Approach requires a nonbank SD to maintain regulatory capital in an amount equal to or greater than 8 percent of the firm's total uncleared swap margin amount associated with its uncleared swap transactions to address potential operational, legal, and liquidity risks.[204]

The EU Capital Rules differ from the CFTC Capital Rules in that they do not impose a capital requirement on EU nonbank SDs based on a percentage of the margin for uncleared swap transactions.[205] In the 2023 Proposal, the Commission described, however, how certain EU capital and liquidity requirements may compensate for the lack of direct analogue to the 8 percent uncleared swap margin amount requirement.[206] Specifically, the Commission noted that under the EU Capital Rules the total risk exposure amount is computed as the sum of the EU nonbank SD's risk-weighted asset amounts for market risk, credit risk, settlement risk, CVA risk of OTC derivatives instruments, and operational risk.[207] Notably, the EU Capital Rules require that EU nonbank SDs, including firms that do not use internal models, calculate capital charges for operational risk as a separate component of the total risk exposure amount. The EU Capital Rules also impose separate liquidity requirements designed to ensure that the EU nonbank SDs can meet both short- and long-term obligations, in addition to the general requirement to

[204] More specifically, in establishing the requirement that a nonbank SD must maintain a level of regulatory capital in excess of 8 percent of the uncleared swap margin amount associated with the firm's swap transactions, the Commission stated that the intent of the uncleared swap margin amount was to establish a method of developing a minimum amount of capital for a nonbank SD to meet all of its obligations as an SD to market participants, and to cover potential operational risk, legal risk and liquidity risk, and not just the risks of its trading portfolio. 85 FR 57462 at 57485.

[205] *See* 2023 Proposal at 41795.

[206] *Id.*

[207] *Id*. and CRR, Article 92(3).

maintain processes and systems for the identification of liquidity risk.[208] In comparison, the Commission requires nonbank SDs to maintain a risk management program covering liquidity risk, among other risk categories, but does not have a distinct liquidity requirement.[209]

Addressing the Commission's request for comment on the comparability between the CFTC's capital requirement based on a percentage of the margin for uncleared swap transactions and the EU Capital Rules' requirements with respect to operational risk and liquidity risk, Better Markets asserted that the requirement for EU nonbank SDs to hold qualifying regulatory capital to cover operational risk is not comparable to the CFTC's requirement for nonbank SDs to hold qualifying capital in an amount equal to at least 8 percent of the nonbank SD's uncleared swap margin amount.[210] Better Markets further asserted that the Commission failed to provide an exhaustive analysis substantiating that the incorporation of an operational risk charge and the existence of separate liquidity requirements would genuinely yield an equivalent result.[211] Furthermore, Better Markets argued that the Commission should have undertaken "an examination to ascertain whether the EU nonbank SD's operational risk charge and liquidity

[208] *Id*. More specifically, the EU Capital Rules impose separate liquidity buffers and "stable funding" requirements designed to ensure that EU nonbank SDs can cover both long-term obligations and short-term payment obligations under stressed conditions for 30 days. CRR, Article 412–413. In addition, EU nonbank SDs are required to maintain robust strategies, policies, processes, and systems for the identification of liquidity risk over an appropriate set of time horizons, including intra-day. CRD, Article 86.

[209] *See* 2023 Proposal at 41795. Specifically, Commission Regulation 23.600(b) requires each SD to establish, document, maintain, and enforce a system of risk management policies and procedures designed to monitor and manage the risks related to swaps, and any products used to hedge swaps, including futures, options, swaps, security-based swaps, debt or equity securities, foreign currency, physical commodities, and other derivatives. The elements of the SD's risk management program are required to include the identification of risks and risk tolerance limits with respect to applicable risks, including operational, liquidity, and legal risk, together with a description of the risk tolerance limits set by the SD and the underlying methodology in written policies and procedures. 17 CFR 23.600.

[210] Better Markets Letter at p. 10.

[211] *Id*. at p. 11.

requirements capital would adequately cover [its] cumulative amounts of uncleared swaps margin."[212]

The Applicants offered a contrasting view, stating that, although the EU Capital Rules do not "have a direct analogue to the 8 percent uncleared swap margin requirement" under the CFTC Capital Rules, they have "various other measures that achieve the same regulatory objective of ensuring that a nonbank SD maintains an amount of capital that is sufficient to cover the full range of risks an EU nonbank SD may face."[213] In support of the statement, the Applicants discussed, among other measures, the various categories of risk charges that an EU nonbank SD is required to include in its total risk exposure amount, as well as the capital conservation buffer, leverage ratio floor, and liquidity requirements that the EU Capital Rules impose on EU nonbank SDs.[214]

The Commission finds that the additional categories of risk-weighted asset amounts that EU nonbank SDs are required to include in the total risk-weighted assets amount, as well as the various regulatory measures seeking to ensure that EU nonbank SDs hold sufficient capital to cover the full range of risks that they may face, support the comparability of the EU Capital Rules and the CFTC Capital Rules even in the absence of a separate capital requirement in the EU Capital Rules requiring EU nonbank SDs to have qualified capital equal to or greater than 8 percent of the amount of uncleared swap margin. The Commission notes that the minimum

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[212] *Id*.

[213] Applicants' Letter at p. 3.

[214] *Id*. at pp. 2-3. As discussed in the 2023 Proposal, the EU Capital Rules impose a 3 percent leverage ratio floor on EU nonbank SDs as an additional element of the capital requirements. Specifically, each EU nonbank SD is required to maintain tier 1 capital (*i.e.*, an aggregate of common equity tier 1 capital and additional tier 1 capital) equal to or in excess of 3 percent of the firm's total on-balance sheet and off-balance sheet exposures, including exposures on uncleared swaps, without regard to any risk-weighting. *See* 2023 Proposal at 41783 and CRR, Articles 92(1) and 429.

capital requirement based on a percentage of the nonbank SD's uncleared swap margin amount was conceived as a proxy, not an exact measure, for inherent risk in the SD's positions and operations, including operational risk, legal risk, and liquidity risk.[215] As the Commission noted in adopting the CFTC Capital Rules, although the amount of capital required of a nonbank SD under the uncleared swap margin calculation is directly related to the volume, size, complexity, and risk of the covered SD's positions, the minimum capital requirement is intended to cover a multitude of potential risks faced by the SD.[216] The Commission understands that other jurisdictions may adopt alternative measures to cover the same risks. As such, a strict comparison between the amounts that an EU nonbank SD holds to account for operational risk and liquidity risk pursuant to the EU Capital Rules and the amount of uncleared swap margin that an EU nonbank SD would have been required to hold pursuant to the CFTC Capital Rules is not warranted. As discussed in Section I.E. above, consistent with the approach adopted by the Commission in Commission Regulation 23.106, the Commission's analysis in ascertaining the comparability of a foreign jurisdiction's capital rules to the CFTC Capital Rules is focused on determining whether the foreign jurisdiction's rules have comparable regulatory objectives and achieve comparable outcomes. Following this standard of review, the Commission concludes that the various measures that the EU Capital Rules have established to help ensure that EU nonbank SDs hold sufficient capital to cover the full range of risks that they face have comparable objectives and achieve comparable outcomes as the CFTC Capital Rules.

In conclusion, the Commission finds that the EU Capital Rules and the CFTC Capital Rules are comparable in purpose and effect with respect to the requirement that a nonbank SD's

[215] 85 FR 57462 at 57497.

[216] 85 FR 57462 at 57485 and 57497.

minimum level of regulatory capital reflects potential operational risk exposures in addition to market risk and credit risk exposures. The Commission emphasizes that the intent of the minimum capital requirement based on a percentage of the nonbank SD's uncleared swap margin is to establish a minimum capital requirement that would help ensure that the nonbank SD meets its obligations as an SD to market participants, and to cover potential operational risk, legal risk, and liquidity risk in addition to the risks associated with its trading portfolio.[217] The EU Capital Rules address comparable risks albeit not through a requirement based on a EU nonbank SD's uncleared swap margin amount. In this regard, EU nonbank SDs are required to maintain a minimum level of regulatory capital based on an aggregate of the firm's total risk-weighted asset amounts for market risk, credit risk, and operational risk. Accordingly, the Commission has determined that, notwithstanding the differences in approaches, the EU Capital Rules and CFTC Capital Rules are comparable in purpose and effect in requiring nonbank SDs to maintain a minimum level of regulatory capital that addresses potential market risk, credit risk, and operational risk to help ensure the safety and soundness of the firm, and to ensure that the firm has sufficient capital to absorb decreases in firm assets, absorb increases in firm liabilities, and meet obligations to counterparties and creditors, without the firm becoming insolvent.

3. Final Determination

Based on its analysis of comments and its holistic assessment of the respective requirements discussed in Sections II.C.2.a., b., and c. above, the Commission adopts the Comparability Determination and Comparability Order as proposed with respect to the minimum capital requirements and calculation of regulatory capital, subject to the condition that EU nonbank SDs must maintain a minimum level of regulatory capital in the form of common equity

[217] *See* 2023 Proposal at 41788 (referencing 85 FR 57462).

tier 1 capital denominated in EUR that equals or exceeds the equivalent of $20 million U.S. dollars.[218]

D. Nonbank Swap Dealer Financial Reporting Requirements

1. Proposed Determination

The Commission detailed the requirements of the CFTC Financial Reporting Rules in the 2023 Proposal.[219] Specifically, the 2023 Proposal noted that the CFTC Financial Reporting Rules require nonbank SDs to file with the Commission and NFA periodic unaudited and annual audited financial reports.[220] The unaudited financial reports must include: (i) a statement of financial condition; (ii) a statement of income/loss; (iii) a statement demonstrating compliance with, and calculation of, the applicable regulatory minimum capital requirement; (iv) a statement of changes in ownership equity; (v) a statement of changes in liabilities subordinated to claims of general creditors; and (vi) such further material information necessary to make the required statements not misleading.[221] The annual audited financial reports must include the same financial statements that are required to be included in the unaudited financial reports, and must further include: (i) a statement of cash flows; (ii) appropriate footnote disclosures; and (iii) a reconciliation of any material differences between the financial statements contained in the annual audited financial reports and the financial statements contained in the unaudited financial

[218] The Commission also notes that, pursuant to Article 7 of CRR, the competent authority may exempt an entity subject to CRR from the applicable capital requirements, provided certain conditions are met. In such case, the relevant requirements would apply to the entity's parent entity, on a consolidated basis. As discussed in the 2023 Proposal, the Commission's assessment does not cover the application of Article 7 of CRR and therefore an entity that benefits from an exemption under Article 7 of CRR will not qualify for substituted compliance under the final Comparability Order. 2023 Proposal at 41793 (n. 257).

[219] 2023 Proposal at 41796-41797.

[220] *Id.* and 17 CFR 23.105(d) and (e).

[221] *Id.* and 17 CFR 23.105(d)(2).

reports prepared as of the nonbank SD's year-end date.[222] In addition, a nonbank SD must attach to each unaudited and audited financial report an oath or affirmation that to the best knowledge and belief of the individual making the affirmation the information contained in the financial report is true and correct.[223] The individual making the oath or affirmation must be a duly authorized officer if the nonbank SD is a corporation, or one of the persons specified in the regulation for business organizations that are not corporations.[224]

The CFTC Financial Reporting Rules also require a nonbank SD to file the following financial information with the Commission and NFA on a monthly basis: (i) a schedule listing the nonbank SD's financial positions reported at fair market value;[225] (ii) schedules showing the nonbank SD's counterparty credit concentration for the 15 largest exposures in derivatives, a summary of its derivatives exposures by internal credit ratings, and the geographic distribution of derivatives exposures for the 10 largest countries;[226] and (iii) for nonbank SDs approved to use internal capital models, certain model metrics, such as aggregate value-at-risk ("VaR"), a graph reflecting the daily intra-month VaR for each business line, and counterparty credit risk information.[227]

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[222] *Id.* and 17 CFR 23.105(e)(4).

[223] *Id.* and 17 CFR 23.105(f).

[224] *Id.*

[225] 2023 Proposal at 41800, Regulation 23.105(l), and Schedule 1 of Appendix B to Subpart E of Part 23 ("Schedule 1"). 17 CFR 23.105(l) and 17 CFR Appendix B to Subpart E of Part 23. Schedule 1 includes a nonbank SD's holding of U.S Treasury securities, U.S. government agency debt securities, foreign debt and equity securities, money market instruments, corporate obligations, spot commodities, and cleared and uncleared swaps, security-based swaps, and mixed swaps in addition to other position information.

[226] 2023 Proposal 41801 and schedules 2, 3 and 4, respectively, of Appendix B to Subpart E of Part 23.

[227] *Id.* and 17 CFR 23.105(k) and (l), and schedules 2, 3 and 4 of Appendix B to Subpart E of Part 23.

The CFTC Financial Reporting Rules further require a nonbank SD to provide the Commission and NFA with information regarding the custodianship of margin for uncleared swap transactions ("Margin Report").[228] The Margin Report must contain: (i) the name and address of each custodian holding initial margin or variation margin on behalf of the nonbank SD or its swap counterparties; (ii) the amount of initial and variation margin required by the uncleared margin rules held by each custodian on behalf of the nonbank SD and on behalf its swap counterparties; and (iii) the aggregate amount of initial margin that the nonbank SD is required to collect from, or post with, swap counterparties for uncleared swap transactions subject to the uncleared margin rules.[229]

A nonbank SD electing the Bank-Based Capital Approach is required to file the unaudited financial report, Schedule 1, schedules of counterparty credit exposures, and the Margin Report with the Commission and NFA no later than 17 business days after the applicable month-end reporting date.[230] A nonbank SD must file its annual report with the Commission and NFA no later than 60 calendar days after the end of its fiscal year.[231]

The 2023 Proposal also detailed relevant financial reporting requirements of the EU Financial Reporting Rules.[232] The EU Financial Reporting Rules require an EU nonbank SD to report information to the relevant competent authorities concerning its capital and financial condition sufficient to provide a comprehensive view of the firm's risk profile, including information on the firm's capital requirements, leverage ratio, large exposures, and liquidity

[228] *Id.* and 17 CFR 23.105(m).

[229] *Id.*

[230] *Id.*

[231] *Id.*

[232] 2023 Proposal at 41797-41798.

requirements.[233] The relevant competent authorities are tasked with prescribing the specific individual financial statements that EU nonbank SDs are required to submit. To ensure a level of consistency, the European Banking Authority ("EBA")[234] has developed implementing technical standards to specify uniform reporting templates and to determine the frequency of reporting by EU nonbank SDs ("CRR Reporting ITS").[235]

The implementing technical standards under the CRR Reporting ITS require an EU nonbank SD to prepare and deliver to its competent authorities common reporting ("COREP") on a quarterly basis.[236] COREP requires, among other things, calculations in relation to the EU nonbank SD's capital and capital requirements,[237] capital ratios and capital levels,[238] and market risk (collectively, "COREP Reports").[239] CRR Reporting ITS also specify the contents of the required financial reports ("FINREP") for certain EU nonbank SDs that report financial information on a consolidated basis. Additionally, the ECB has adopted a regulation setting forth a common minimum set of financial information that must be reported by credit institutions subject to CRR to their relevant competent authorities on the basis of the CRR Reporting ITS

[233] *Id.* and CRR Article 430(1).

[234] *Id.* The EBA is a regulatory agency of the EU that is tasked with establishing a single regulatory and supervisory framework for the banking sector in EU Member States. CRR, Article 430(7) provides that the EBA shall develop draft implementing technical standards to specify the uniform reporting formats and templates, the instructions and methodology on how to use the templates, the frequency and dates of reporting, and the definitions.

[235] *See Commission Implementing Regulation (EU) 2021/451 of 17 December 2020 laying down implementing technical standards for the application of Regulation (EU) No 575/2013 of the European Parliament and of the Council with regard to supervisory reporting of institutions and repealing Implementing Regulation (EU) No 680/ 2014*. *See also*, 2023 Proposal at 41797.

[236] *Id*.

[237] CRR, Article 430; Annex I, Template Numbers 1 and 2, CRR Reporting ITS.

[238] CRR, Article 430; Annex I, Template Number 3, CRR Reporting ITS.

[239] CRR, Article 430; Annex I, Template Numbers 18–25 (as applicable) CRR Reporting ITS.

("ECB FINREP Regulation").[240] Furthermore, each competent authority has discretion to require institutions subject to CRR to report additional supervisory information on the basis of the CRR and the CRR Reporting ITS, or pursuant to relevant national law.[241]

Under CRR Reporting ITS as complemented by the ECB FINREP Regulation, an EU nonbank SD is required to provide, among other items, the following to its relevant competent authorities: (i) on a quarterly basis, a balance sheet statement (or statement of financial position) that reflects the EU nonbank SD's financial condition;[242] (ii) on a quarterly basis, a statement of profit or loss;[243] (iii) on a quarterly basis, a breakdown of financial liabilities by product and by counterparty sector;[244] (iv) on a quarterly basis, a listing of subordinated financial liabilities;[245] and, (v) on an annual basis, a statement of changes in equity.[246] FINREP also requires an EU nonbank SD subject to the CRR Reporting ITS to provide its competent authorities with

[240] *See Regulation (EU) 2015/534 of the European Central Bank of March 17, 2015 on reporting of supervisory financial information*. The ECB FINREP Regulation complements the CRR Reporting ITS by imposing financial reporting requirements applying on an individual basis to entities subject to CRR, including EU nonbank SDs, whereas CRR, Article 430 and the CRR Reporting ITS impose financial reporting requirements on a consolidated basis. *See* 2023 Proposal at 41797.

[241] 2023 Proposal at 41797-41802.

[242] CRR, Article 430; Annex III, Template Numbers 1.1, 1.2, and 1.3 (for reporting according to International Financial Reporting Standards ("IFRS") and Annex IV, Template Numbers 1.1., 1.2, and 1.3 (for reporting according to national accounting frameworks), CRR Reporting ITS; and ECB FINREP Regulation, Articles 6, 7 and 13 (referring to Annex III and Annex IV of the CRR Reporting ITS, as applicable).

[243] CRR, Article 430; Annex III, Template Number 2 (for reporting according to IFRS) and Annex IV, Template Number 2 (for reporting according to national accounting frameworks), CRR Reporting ITS; and ECB FINREP Regulation, Articles 6, 7 and 13 (referring to Annex III and Annex IV of the CRR Reporting ITS, as applicable).

[244] CRR, Article 430; Annex III, Template Number 8.1 (for reporting according to IFRS) and Annex IV, Template Number 8.1(for reporting according to national accounting frameworks), CRR Reporting ITS; and ECB FINREP Regulation, Articles 6, 7 and 13 (referring to Annex III and Annex IV of the CRR Reporting ITS, as applicable).

[245] CRR, Article 430, Annex III, Template Number 8.2 (for reporting according to IFRS) and Annex IV, Template Number 8.3 (for reporting according to national accounting frameworks), CRR Reporting ITS; and ECB FINREP Regulation, Articles 6, 7 and 13 (referring to Annex III and Annex IV of the CRR Reporting ITS, as applicable).

[246] CRR, Article 430; Annex III, Template Number 46 (for reporting according to IFRS) and Annex IV, Template Number 46 (for reporting according to national accounting frameworks), CRR Reporting ITS; and ECB FINREP Regulation, Articles 6, 7 and 13 (referring to Annex III and Annex IV of the CRR Reporting ITS, as applicable).

additional financial information, including a breakdown of its loans and advances by product and type of counterparty,[247] as well as detailed information regarding its derivatives trading activities,[248] collateral, and guarantees.[249]

Furthermore, with the exception of certain "small" entities, EU nonbank SDs are required to prepare annual audited financial statements and a management report (together, "annual audited financial report") pursuant to Article 430 of CRR and the Accounting Directive.[250] The annual audited financial statements must comprise, at a minimum, a balance sheet, a profit and loss statement, and notes to the financial statements.[251] The auditor's audit report must include: (i) a specification of the financial statements subject to the audit and the financial reporting framework that was applied in their preparation; (ii) a description of the scope of the audit, which must specify the auditing standards used to conduct the audit; (iii) an audit opinion stating whether the financial statements give a true and fair view in accordance with the relevant

[247] CRR, Article 430; Annex III, Template Numbers 5.1 and 6.1 (for reporting according to IFRS) and Annex IV, Template Numbers 5.1 and 6.1, CRR Reporting ITS; and ECB FINREP Regulation, Articles 6, 7 and 13 (referring to Annex III and Annex IV of the CRR Reporting ITS, as applicable).

[248] CRR, Article 430; Annex III, Template Number 10 (for reporting according to IFRS) and Annex IV, Template Number 10 (for reporting according to national accounting frameworks), CRR Reporting ITS; and ECB FINREP Regulation, Articles 6, 7 and 13 (referring to Annex III and Annex IV of the CRR Reporting ITS, as applicable).

[249] CRR, Article 430; Annex III, Template Number 13 (for reporting according to IFRS) and Annex IV, Template Number 13 (for reporting according to national accounting frameworks), CRR Reporting ITS; and ECB FINREP Regulation, Articles 6, 7 and 13 (referring to Annex III and Annex IV of the CRR Reporting ITS, as applicable).

[250] Accounting Directive, Articles 4, 19 and 34; French MFC, Articles L.511–35 to L.511–38; German Commercial Code (Handelsgesetzbuch, ''HGB''), Section 316 et seq. The Accounting Directive provides that the audit requirement is not applicable to "small" entities defined as firms meeting the following requirements: (1) the firm's balance sheet is not more than EUR 4 million; (2) the firm's net turnover does not exceed more than EUR 8 million; or (3) the firm did not employ more than 50 employees during the financial year. *See* Article 3(2) and Article 34 of the Accounting Directive. The Applicants represented that the four EU nonbank SDs currently registered with the Commission do not meet the criteria to be classified as ''small'' entities and, therefore, are required to prepare audited annual financial reports. EU Application, p. 5.

[251] Accounting Directive, Article 4(1). The audit of the financial statements and management report is required to be performed by one or more statutory auditors or auditors approved by EU Member States to conduct audits of EU nonbank SDs. *Id*., Article 34(1). The annual audited financial report, together with the opinion and statements of the auditor, must be published. *Id*., Article 30.

financial reporting framework; and (iv) a reference to any matters emphasized by the auditor that did not qualify the audit opinion.[252]

Furthermore, as noted in the 2023 Proposal, the SEC has issued orders permitting an SEC-registered nonbank security-based swap dealer domiciled in France or Germany ("EU nonbank SBSD") to satisfy SEC Capital requirements via substituted compliance with applicable French and German capital and financial reporting.[253] The French Order and German Order conditioned substituted compliance for capital requirements on an EU nonbank SBSD complying with specified laws and regulations, including CRR, CRD, and BRRD, and also maintaining total liquid assets in an amount that exceeds the EU nonbank SBSD's total liabilities by at least $100 million and by at least $20 million after applying certain deductions to the value of the liquid assets to reflect market, credit, and other potential risks to the value of the assets.[254] The SEC's French Order and German Order granting substituted compliance for financial reporting to EU nonbank SBSDs, as supplemented by the SEC Order on Manner and Format of Filing Unaudited Financial and Operational Information, also require an EU nonbank SBSD to file an unaudited

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[252] *Id.* Article 35.

[253] *See Amended and Restated Order Granting Conditional Substituted Compliance in Connection with Certain Requirements Applicable to Non-U.S. Security-Based Swap Dealers and Major Security-Based Swap Participants Subject to Regulation in the Federal Republic of Germany; Amended Orders Addressing Non-U.S. Security-Based Swap Entities Subject to Regulation in the French Republic or the United Kingdom; and Order Extending the Time to Meet Certain Conditions Relating to Capital and Margin,* 86 FR 59797 (Oct. 28, 2021) ("German Order"); *Order Granting Conditional Substituted Compliance in Connection with Certain Requirements Applicable to Non-U.S. Security-Based Swap Dealers and Major Security-Based Swap Participants Subject to Regulation in the French Republic*, 86 FR 41612 (Aug. 8, 2021) ("French Order"); and *Order Specifying the Manner and Format of Filing Unaudited Financial and Operational Information by Security-Based Swap Dealers and Major Security-Based Swap Participants that are not U.S. Persons and are Relying on Substituted Compliance with Respect to Rule 18a–7*, 86 FR 59208 (Oct. 26, 2021) ("SEC Order on Manner and Format of Filing Unaudited Financial and Operational Information").

[254] The conditioning of the German Order and French Order on EU nonbank SBSDs maintaining a defined amount of liquid assets in an amount that exceeds the EU nonbank SBSD's total liabilities reflects that the SEC's capital rule for nonbank SBSDs is a liquidity-based requirement and not based on the Basel standards. 17 CFR 240.18a–1(a)(1).

FOCUS Report with the SEC on a monthly basis.[255] The FOCUS Report is required to include, among other statements and schedules: (i) a statement of financial condition; (ii) a statement of the EU nonbank SBSD's capital computation in accordance with home country Basel-based requirements; (iii) a statement of income/loss; and (iv) a statement of capital withdrawals.[256] An EU nonbank SBSD is required to file its FOCUS Report with the SEC within 35 calendar days of the month end.[257]

Based on its review of the EU Application and the relevant EU laws and regulations, the Commission preliminarily determined that, subject to the conditions specified in the 2023 Proposal and discussed below, the EU Financial Reporting Rules are comparable to CFTC Financial Reporting Rules in purpose and effect. The Commission noted that both sets of rules provide the relevant EU competent authorities, the Commission, and NFA with financial information to monitor a nonbank SD's compliance with capital requirements, and to assess a nonbank SD's overall safety and soundness.[258] Specifically, the Commission preliminarily found that the EU Financial Reporting Rules impose reporting requirements that are comparable with respect to overall form and content to the CFTC Financial Reporting Rules.[259] In this regard, both the CFTC Financial Reporting Rules and the EU Financial Reporting Rules require a nonbank SD to file statements of financial condition, statements of profit and loss, and statements of regulatory capital that, collectively, provide information for the relevant EU

[255] *See*, French Order and German Order. *See also*, SEC Order on Manner and Format of Filing Unaudited Financial and Operational Information.

[256] *See*, SEC Order on Manner and Format of Filing Unaudited Financial and Operational Information.

[257] *Id.*

[258] 2023 Proposal at 41798.

[259] *Id*.

competent authorities, Commission, and NFA to assess a nonbank SD's overall ability to absorb decreases in the value of firm assets, absorb increases in the value of firm liabilities, and cover losses from business activities, including swap dealing activities, without the firm becoming insolvent.[260]

The proposed conditions would ensure that the Commission and NFA receive appropriate and timely financial information from EU nonbank SDs to monitor the firms' compliance with EU capital requirements and to assess the firms' overall safety and soundness. The proposed conditions would require an EU nonbank SD to provide the Commission and NFA with copies of the relevant templates of the FINREP reports and COREP reports that correspond to the EU nonbank SD's statement of financial condition, statement of income/loss, and statement of regulatory capital, total risk exposure, and capital ratios. These templates consist of FINREP templates 1.1 (Balance Sheet Statement: assets), 1.2 (Balance Sheet Statement: liabilities), 1.3 (Balance Sheet Statement: equity), 2 (Statement of profit or loss), and 10 (Derivatives—Trading and economic hedges), and COREP templates 1 (Own Funds), 2 (Own Funds Requirements), and 3 (Capital Ratios). In addition, the Commission proposed to require EU nonbank SDs to submit to the Commission and NFA copies of the EU nonbank SD's annual audited financial report.[261]

The proposed conditions would also require the FINREP reports, COREP reports, and annual audited financial report to be translated into the English language.[262] The FINREP and

[260] *Id*.

[261] *Id*. at 41799.

[262] *Id*.

COREP reports also must have balances converted from euro to U.S. dollars.[263] The Commission further recognized that the requirement to translate balances denominated in euro to U.S. dollars on the annual audited financial report may have an unintended impact on the opinion expressed by the statutory auditor. The Commission, therefore, proposed to accept the annual audited financial report denominated in euro, but required the report to be translated into the English language.[264]

The proposed conditions also would require an EU nonbank SD to file with the Commission and NFA its: (i) FINREP reports and COREP reports within 35 calendar days of the end of each month; and (ii) annual audited financial report on the earliest of the date the report is filed with the competent authority, the date the report is published, or the date the report is required to be filed with the competent authority or the date the report is required to be published pursuant to the EU Financial Reporting Rules.[265]

The Commission also proposed a condition to require EU nonbank SDs to file with the Commission and NFA, on a monthly basis, Schedule 1 showing the aggregate securities,

[263] *Id*. In the 2023 Proposal, the Commission proposed that the translation of the annual audited financial report into the English language would not be required to be subject to the audit of the independent auditor. An EU nonbank SD would be required to report the exchange rate that it used to convert balances from euro to U.S. dollars to the Commission and NFA as part of the financial reporting.

[264] *Id*. at 41800.

[265] *Id*. at 41799. The Commission noted that the EU Financial Reporting Rules require EU nonbank SDs to submit the unaudited FINREP and COREP templates to their competent authorities on a quarterly basis, whereas the CFTC Financial Reporting Rules contain a more frequent reporting requirement by requiring nonbank SDs that elect the Bank-Based Approach to file unaudited financial information with the Commission and NFA on a monthly basis. In emphasizing the importance of financial statement reporting requirements for the Commission's and NFA's oversight and the Commission's experience in monitoring the financial conditions of registrants through the receipt of monthly financial statements, the Commission proposed to condition the Comparability Order on a more frequent reporting submission. *See id*.

commodities, and swap positions of the firm at fair market value as of the reporting date.[266] The Commission explained that Schedule 1 provides the Commission and NFA with detailed information regarding the financial positions that a nonbank SD holds as of the end of each month, including the firm's swaps positions, which allows the Commission and NFA to monitor the types of investments and other activities that the firm engages in and would assist the Commission and NFA in monitoring the safety and soundness of the firm.[267] The Commission proposed to require that Schedule 1 be filed by an EU nonbank SD along with the firm's monthly submission of selected FINREP and COREP templates.[268] The Commission also proposed to require that Schedule 1 be prepared in the English language with balances reported in U.S. dollars.

The Commission further proposed that, in lieu of filing FINREP and COREP reports, EU nonbank SDs that are registered with the SEC as EU nonbank SBSDs could satisfy this condition by filing with the CFTC and NFA, on a monthly basis, copies of the unaudited FOCUS Reports that the EU nonbank SDs are required to file with the SEC pursuant to the SEC French Order or SEC German Order, as supplemented by the SEC Order on Manner and Format of Filing Unaudited Financial and Operational Information. The filing of a FOCUS Report was proposed as an elective option for the EU nonbank SD, as an alternative to the filing of unaudited FINREP templates, COREP templates, and Schedule 1 that such firms would otherwise be required to file with the Commission and NFA pursuant to the proposed Comparability Order. In this connection, the Commission noted that three of the EU nonbank SDs registered with the SEC as

[266] *Id*. Schedule 1 includes a nonbank SD's holding of U.S Treasury securities, U.S. government agency debt securities, foreign debt and equity securities, money market instruments, corporate obligations, spot commodities, and cleared and uncleared swaps, security-based swaps, and mixed swaps in addition to other position information.

[267] *Id*. at 41800.

[268] *Id*.

EU nonbank SBSDs would be eligible to file copies of their monthly FOCUS Report with the Commission and NFA in lieu of the FINREP and COREP templates and Schedule 1. An EU nonbank SD electing to file copies of its monthly FOCUS Report would be required to submit the reports to the Commission and NFA within 35 calendar days of the end of each month.

Proposing that EU nonbank SDs that are registered with the SEC as EU nonbank SBSDs file the FOCUS Report in lieu of the FINREP and COREP templates and Schedule 1 as an elective option was consistent with Commission Regulation 23.105(d)(3), which at the time the 2023 Proposal was issued, provided that a nonbank SD or nonbank MSP that is also registered with the SEC as a broker or dealer, an SBSD, or a major security-based swap participant might elect to file a FOCUS Report in lieu of the financial reports required by the Commission. On April 30, 2024, the Commission amended Commission Regulation 23.105(d)(3) to mandate the filing of a FOCUS Report by such dually-registered entities, including dually-registered non-U.S. nonbank SDs, in lieu of the Commission's financial reports.[269] As such, the Commission is also adopting as final a revised Condition 11 to require that EU nonbank SDs registered as EU nonbank SBSDs comply with the requirement to file periodic financial statements by filing a copy of the FOCUS Report that the EU nonbank SDs are required to file with the SEC.

The Commission also proposed a condition to require an EU nonbank SD to submit with each set of selected FINREP and COREP templates, annual audited financial report, and the applicable Schedule 1, a statement by an authorized representative or representatives of the EU nonbank SD that, to the best knowledge and belief of the person(s), the information contained within each FINREP and COREP template, annual audited financial report, and Schedule 1, is

[269] *See Capital and Financial Reporting Requirements of Swap Dealers and Major Swap Participants*, 89 FR 45569 (May 23, 2024).

true and correct, including as it relates to the translation of the report into the English language and the conversion of balances in the reports to U.S. dollars.[270] The statement by an authorized representative or representatives of the EU nonbank SD was intended to be a substitute of the oath or affirmation required of nonbank SDs under Commission Regulation 23.105(f),[271] to ensure that reports filed with the Commission and NFA are prepared and submitted by firm personnel with knowledge of the financial reporting of the firm who can attest to the accuracy of the reporting, translation, and balances conversion.[272]

The Commission further proposed a condition that would require an EU nonbank SD to file a Margin Report with the Commission and NFA.[273] The Commission noted that a Margin Report would assist the Commission and NFA in their assessment of the safety and soundness of the EU nonbank SDs by providing information regarding the firm's swap book and the extent to which it has uncollateralized exposures to counterparties or has not met its financial obligations to counterparties. The Commission explained that this information, along with the list of custodians holding both the firms' and counterparties' collateral for swap transactions, would assist with identifying potential financial impacts to the nonbank SD resulting from defaults on its swap transactions. The Commission further proposed to require an EU nonbank SD to file the Margin Report with the Commission and NFA within 35 calendar days of the end of each month, which corresponds with the proposed timeframe for the EU nonbank SD to file the selected

[270] 2023 Proposal at 41800.

[271] 17 CFR 23.105(f). Commission Regulation 23.105(f) requires a nonbank SD to attach to each unaudited and audited financial report an oath or affirmation that to the best knowledge and belief of the individual making the affirmation the information contained in the financial report is true and correct. The individual making the oath or affirmation must be a duly authorized officer if the nonbank SD is a corporation, or one of the persons specified in the regulation for business organizations that are not corporations.

[272] *See* 2023 Proposal at 41800.

[273] *Id.*

FINREP and COREP templates or FOCUS Report, as applicable. The Commission also proposed to require the Margin Report to be prepared in the English language with balances reported in U.S. dollars.

The Commission's preliminary determination did not require an EU nonbank SD to file the model metrics and counterparty credit exposure information required by Commission Regulations 23.105(k) and (l),[274] in recognition that NFA's current SD risk monitoring program requires all SDs, including EU nonbank SDs, to file with NFA on a monthly basis certain risk metrics that are comparable with the risk metrics contained in Commission Regulation 23.105(k) and (l) and address the market risk and credit risk of the SD's positions.[275] Specifically, the Commission noted that NFA's monthly risk metric information includes: (i) VaR for interest rates, credit, foreign exchange, equities, commodities, and total VaR; (ii) total stressed VaR; (iii) interest rate, credit spread, foreign exchange market, and commodity sensitivities; (iv) total swaps current exposure both before and after offsetting against collateral held by the firm; and

[274] Commission Regulation 23.105(k) requires a nonbank SD that has obtained approval from the Commission or NFA to use internal capital models to submit to the Commission and NFA each month information regarding its risk exposures, including VaR, and requires certain credit risk exposure information from model and non-model approved firms. 17 CFR 23.105(k).

Commission Regulation 23.105(l) requires each nonbank SD to provide information to the Commission and NFA regarding its counterparty credit concentration for the 15 largest exposures in derivatives, a summary of its derivatives exposures by internal credit ratings, and the geographic distribution of derivatives exposures for the 10 largest countries in Schedules 2, 3, and 4, respectively. 17 CFR 23.105(l).

[275] 2023 Proposal at 41801. As previously noted, however, the current three EU nonbank SDs will be required to include credit risk information set forth in Schedules 2-4 of Appendix B to Subpart E in the monthly FOCUS Report that the firms will be required to file with the Commission under Condition 11 of the final Comparability Order. In addition, as previously noted, each EU nonbank SD will be required to file Schedule 1 under Condition 13 of the final Comparability Determination.

(v) a list of the 15 largest swaps counterparty current exposures before collateral and net of collateral.[276]

Furthermore, the Commission recognized that although the EU Financial Reporting Rules do not contain an analogue to the CFTC's requirements for nonbank SDs to file monthly model metric information and counterparty exposures information, the competent authorities have access to comparable information. More specifically, the Commission noted that, under the EU Financial Reporting Rules, the competent authorities have broad powers to request any information necessary for the exercise of their functions.[277] As such, the competent authorities would have access to information allowing them to assess the ongoing performance of risk models and to monitor the EU nonbank SD's credit exposures, which may be comprised of credit exposures to primarily other EU counterparties. In addition, the COREP reports, which EU nonbank SDs are required to file with the competent authority on a quarterly basis, include information regarding the EU nonbank SD's risk exposure amounts, including risk-weighted exposure amounts for credit risk.[278]

2. Comment Analysis and Final Determination

The Commission received comments regarding the comparability of financial reporting and specific comments addressing several of the financial reporting issues on which the Commission solicited feedback. Better Markets expressed a general disagreement with the Commission's preliminary finding of comparability, arguing that the number and variety of

[276] *See* 2023 Proposal at 41801 and NFA Financial Requirements, Section 17 – *Swap Dealer and Major Swap Participant Reporting Requirements*, and Notice to Members – *Monthly Risk Data Reporting for Swap Dealers* (May 30, 2017).

[277] *See* 2023 Proposal at 41801 and CRD, Article 65(3), French MFC, Article L.612-24, and SSM Regulation, Article 10 (indicating that competent authorities have broad information gathering powers).

[278] *See* 2023 Proposal at 41801 and CRR Reporting ITS, Annex I.

conditions regarding financial reporting are the most compelling evidence that the requirements are not comparable.[279] More generally, Better Markets asserted that the 2023 Proposal did not provide a sufficient analysis supporting the Commission's preliminary conclusion that the EU and the U.S. financial reporting frameworks would produce comparable outcomes.[280]

Better Markets also noted that the proposed comparability determination was conditioned on an EU nonbank SD submitting a statement by an authorized representative that to the best knowledge and belief of the person the information contained in reports submitted to the Commission is true and correct, in lieu of the oath or affirmation required by Commission Regulation 23.105(f).[281] Better Markets stated that there are material legal differences between a statement and the oath or affirmation required by the CFTC Financial Reporting Rules and argued that the Commission failed "to address, explain, or explore this explicit and significant difference."[282]

Better Markets also disagreed with the 2023 Proposal to the extent that the Commission proposed not to require EU nonbank SDs that have been approved by the relevant competent authority to use capital models to file the monthly model metric information required by Commission Regulation 23.105(k) with the Commission or NFA.[283] Commission Regulation 23.105(k) requires nonbank SDs that have been approved by the Commission or NFA to use models to compute market risk or credit risk for computing capital requirements to file certain information with the Commission and NFA on a monthly basis.[284] As noted above, the

[279] Better Markets Letter at p. 12.

[280] *Id*. at p. 9.

[281] *Id*. at p. 12.

[282] *Id*.

[283] *Id*. at p. 12.

[284] 17 CFR 23.105(k).

information required to be filed includes: (i) for nonbank SDs approved to use market risk models, a listing of any products that the nonbank SD excludes from the approved market risk model and the amount of the standardized market risk charge taken on such products; (ii) a graph reflecting, for each business line of the nonbank SD, the daily intra-month VaR; (iii) the aggregate VaR for the nonbank SD; (iv) certain credit risk information for swaps, mixed swaps and security-based swaps, including: (a) overall current exposure, (b) current exposure listed by counterparty for the 15 largest exposures, (c) the 10 largest commitments listed by counterparty, (d) maximum potential exposure listed by counterparty for the 15 largest exposures, (e) aggregate maximum potential exposure, (f) a summary report reflecting the SD's current and maximum potential exposures by credit rating category, and (g) a summary report reflecting current exposure for each of the top ten countries to which the nonbank SD is exposed.[285] Better Markets stated that by not requiring the information contained in Commission Regulation 23.105(k), the Commission was proposing to "take a back seat to the EU and blindly accept the assessments resulting from [the EU nonbank SDs'] use of internal models to calculate risk."[286]

With respect to Better Markets' statement that the number and variety of conditions regarding financial reporting are the most compelling evidence that the requirements are not comparable, the Commission disagrees that the inclusion of conditions in the Comparability Order demonstrates that the EU Financial Reporting Requirement are not comparable to CFTC Financial Reporting Requirements in achieving the overall objective of ensuring the safety and soundness of nonbank SDs. As discussed in Section I.E. above, the conditions impose obligations on EU nonbank SDs to provide information to the Commission and NFA necessary

[285] 17 CFR 23.105(k)(1).

[286] Better Markets Letter at pp. 12-13.

for the effective oversight of the EU nonbank SDs on an ongoing basis. As also discussed in Section I.E. above, Commission staff engaged in a thorough analysis of the EU Capital Rules and EU Financial Reporting Rules, which supports the Commission's conclusion that the respective regulatory frameworks would produce comparable outcomes.

The Commission also does not agree that its approach is effectively deferring model oversight to the EU authorities or that it is otherwise "blindly accept[ing]" the internal model-based assessments of the EU nonbank SDs. As noted above, pursuant to NFA rules, all registered SDs, including EU nonbank SDs, are required to submit to NFA, on a monthly basis, a list of specified risk metrics related to the SD's market risk and credit risk exposures.[287] Specifically, as discussed in Section II.D.1. above, the risk metrics include: (i) VaR for interest rates, credit, foreign exchange, equities, commodities, and total VaR; (ii) total stressed VaR; (iii) interest rate, credit spread, foreign exchange market, and commodity sensitivities; (iv) total swaps current exposure both before and after offsetting against collateral held by the firm; and (v) a list of the 15 largest swaps counterparty current exposures.[288] As part of its regulatory oversight program, NFA uses the risk metrics information to identify firms that may pose heightened risk and to allocate appropriate oversight resources. NFA also may request additional information from a nonbank SD to the extent it determines that information in the risk metrics or other financial filings warrants a need for additional follow-up. Furthermore, Commission staff

[287] NFA Rulebook, Financial Requirements, Section 17 Swap Dealer and Major Swap Participant Reporting Requirements, available here: https://www.nfa.futures.org/rulebooksql/rules.aspx?RuleID=SECTION%2017&Section=7, and NFA Notice to Members I-17-10, Monthly Risk Data Reporting Requirements for Swap Dealers (May 30, 2017) ("NFA Notice I-17-10"), available here: https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=4817.

[288] *See* 2023 Proposal at 41801 and NFA Financial Requirements, Section 17 - *Swap Dealer and Major Swap Participant Reporting Requirements*, and Notice to Members – *Monthly Risk Data Reporting for Swap Dealers* (May 30, 2017).

has access to the collected risks metrics information and participates in NFA's risk monitoring function by regularly exchanging information and discussing potential risks with NFA staff.

As the list of specified risk metrics discussed above indicates, although the information collected by NFA is not identical to the information required under Commission Regulation 23.105(k), there is a significant overlap in the data items. The Commission also notes that NFA, in its role of primary supervisor of nonbank SDs' risk management practices, has identified the risk data items listed in NFA Notice I-17-10 as the most relevant risk metrics to be collected for oversight purposes. As such, the Commission finds that the information required pursuant to NFA Notice I-17-10 would provide the Commission and NFA with key data allowing them to monitor nonbank SDs' risk exposures. In addition, the Commission has the ability to request additional information from its registrants, including EU nonbank SDs, at any time. Finally, the Commission notes that the relevant competent authorities, which will be conducting the initial approval and ongoing assessment of the performance of the EU nonbank SDs' internal models, under a regulatory framework that the Commission finds comparable to the CFTC Capital Rules, will have access to additional information that the competent authorities deem relevant in the conduct of such approval and assessment. The Commission, therefore, concludes that it is not necessary to require EU nonbank SDs relying on the final Comparability Order to submit the model metric information and credit risk information mandated by Commission Regulations 23.105(k) and (l).

The Commission also disagrees with Better Markets' assertion that there is a significant difference between the proposed condition that an EU nonbank SD provides a "statement" from an authorized representative and the CFTC's requirement for nonbank SDs to provide an "oath or affirmation" from an authorized representative with regards to the accuracy of the financial

reporting's content. For completeness, the Commission notes that the proposed condition requires that an authorized representative of the EU nonbank SD provide a statement that, to the best of the knowledge and belief of the representative, the information contained in the financial reports filed with the Commission and NFA is true and correct, including the applicable translation of the reports to the English language and the conversion of balances to U.S. dollars. The proposed condition was based on current Commission Regulation 23.105(f), which provides that a nonbank SD must attach to each unaudited and annual audited financial report filed with the Commission and NFA an oath or affirmation that to the best knowledge and belief of the individual making the oath or affirmation the information in the financial reports is true and correct. Similar to the intent of Commission Regulation 23.105(f), the purpose of the proposed condition is to obtain a formal attestation from a representative with the appropriate knowledge and authority that the information provided in the requisite financial reports is accurate and properly translated. The Commission's choice of language in using the term "statement" was not intended to make a legal distinction between this term and the terms "oath" or "affirmation," but rather, to select a generic term that is universally understood across jurisdictions to reflect the above-referenced purpose. In practice, the Commission does not believe that there is a material legal difference between the language of the proposed condition and the required oath or affirmation required under Commission Regulation 23.105(f). Instead, the Commission is of the view that the proposed condition would have the same legal effect as Commission Regulation 23.105(f) of providing the Commission with a stronger basis to take legal action if an EU nonbank SD files erroneous information.

Finally, the Applicants addressed the Commission's request for comment on the compliance dates for the reporting conditions that the proposed Comparability Order would

impose on EU nonbank SDs.[289] The Applicants requested that the Commission set the compliance date at least six months following the issue date of the final Comparability Order to allow EU nonbank SDs to adequately prepare for compliance with the reporting conditions imposed by the Comparability Order.[290]

The Commission believes that granting an additional period of time to allow EU nonbank SDs to develop and implement the necessary systems and processes for compliance with the Comparability Order is appropriate with respect to the new reporting obligations imposed on EU nonbank SDs under the final Order. For other reporting obligations, for which a process already exists, such as the reports that EU nonbank SDs currently submit to the Commission and NFA pursuant to CFTC Staff Letter 22-10,[291] prepare pursuant to the EU Financial Reporting Rules, and/or submit to the SEC (*i.e.*, FOCUS Reports), additional time for compliance does not appear necessary. Accordingly, the Commission is setting a compliance date of 180 calendar days from the date of publication of the final Comparability Order in the Federal Register for EU nonbank SDs to comply with final Condition 15, which requires the firms to file monthly Margin Reports with the Commission and NFA.

For purposes of clarity, the Commission also notes that EU nonbank SDs may present the financial information required to be provided to the Commission and NFA under the final

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[289] Applicants' Letter at p. 6.

[290] *Id*.

[291] CFTC Staff Letter No. 22-10, *Extension of Time-Limited No-Action Position for Foreign Based Nonbank Swap Dealers domiciled in Japan, Mexico, the United Kingdom, and the European Union*, issued by MPD on August 17, 2022. CFTC Staff Letter No. 22-10, which extended the expiration of CFTC Letter 21-20, provides that MPD would not recommend an enforcement action to the Commission if a non-U.S. nonbank SD covered by the letter, subject to certain conditions, complied with their respective home-country capital and financial reporting requirements in lieu of the Commission's capital and financial reporting requirements set forth in Commission Regulations 23.100 through 23.106, pending the Commission's determination of whether the capital and financial reporting requirements of certain foreign jurisdictions are comparable to the Commission's corresponding requirements.

Comparability Order in accordance with generally accepted accounting principles that the EU nonbank SD uses to prepare general purpose financial statements in its EU Member State. This clarification is consistent with proposed Condition 10, which the Commission adopts subject to a minor modification in the final Comparability Order, requiring an EU nonbank SD to prepare and keep current ledgers and other similar records "in accordance with accounting principles permitted by the relevant competent authority."[292] In taking the position that EU nonbank SDs may provide financial reporting prepared in accordance with the accounting standards applicable in their home jurisdiction, the Commission considered the nature of the financial reporting information required from nonbank SDs for purposes of monitoring their overall financial condition and compliance with capital requirements. Specifically, the Commission notes that the requirements for how nonbank SDs calculate their risk-weighted assets and capital ratio, in both the EU and the U.S., follow a rules-based approach consistent with the Basel standards, and, consequently, the Commission does not anticipate that a variation in the applicable accounting standards would materially impact this calculation.[293] In this regard, the Commission notes that

[292] 2023 Proposal at 48808. Proposed Condition 10 stated that EU nonbank SDs must prepare and keep current ledgers and other similar records "in accordance with accounting principles required by the relevant competent authority". To promote consistency across the Comparability Determinations the Commission is adopting with respect to several other jurisdictions and to reflect the fact that certain jurisdictions may not issue a formal approval of the accounting standards used by nonbank SDs, the Commission is replacing the adjective "required" with the adjective "permitted" in the reference to the accounting standards to be used by EU nonbank SDs.

[293] Furthermore, the Commission's approach to permitting EU nonbank SDs to maintain financial books and records, and to file financial reports and other financial information, prepared in accordance with local accounting standards is consistent with the SEC's final comparability determinations for non-U.S. SBSDs. German Order at 59812 and SEC Order on Manner and Format of Filing Unaudited Financial and Operational Information at 59219. Specifically, the SEC stated that the use of local reporting requirements will avoid non-U.S. SBSDs "having to perform and present two Basel capital calculations (one pursuant to local requirements and one pursuant to U.S. requirements)." SEC Order on Manner and Format of Filing Unaudited Financial and Operational Information at 59219. The SEC noted, in this regard, that the Basel standards are international standards that have been adopted in the U.S. and in jurisdictions where substituted compliance is available for capital under the SEC comparability determinations and that, therefore, requirements for how firms calculate capital pursuant to the Basel standards generally should be similar. *Id*. The Commission's approach to permitting EU nonbank SDs to maintain financial books and records, and file financial information, prepared in accordance with local accounting standards will also facilitate financial reporting by dually-registered EU nonbank SDs-EU nonbank SBSDs. In such case, dually-

EU nonbank SDs currently submit financial reports, including a statement of financial condition and a statement of regulatory capital, pursuant to CFTC Staff Letter 22-10.[294] The reports provide the Commission with appropriate information to assess the financial and operational condition of EU nonbank SDs, as well as the firms' compliance with the capital ratios imposed on EU nonbank SDs under the EU Capital Rules.

In summary, the Commission adopts the final Comparability Order and conditions substantially as proposed with respect to the comparability of the CFTC Financial Reporting Rules and EU Financial Reporting Requirements, subject to the amendment in Condition 10 to use the word "permitted" in reference to the applicable accounting standards and the amendment in Condition 11 to mandate the filing by EU nonbank SDs registered as EU nonbank SBSDs of a copy of the FOCUS Report that such dually-registered EU nonbank SDs are required to file with the SEC. The Commission also specifies, in final Conditions 11, 13, and 15, that the conversion of balances to U.S. dollars must be done using a commercially reasonable and observable euro/U.S. dollar spot rate as of the date of the respective report. Finally, the Commission also grants an additional compliance period for the new reporting obligations imposed on EU nonbank SDs under the final Order set forth below.

E. Notice Requirements

1. Proposed Determination

The Commission noted in the 2023 Proposal that the CFTC Financial Reporting Rules require nonbank SDs to provide the Commission and NFA with written notice of certain defined

registered entities would not have to perform multiple calculations under different accounting standards or submit two different FOCUS Reports.

[294] CFTC Staff Letter No. 22-10, *Extension of Time-Limited No-Action Position for Foreign Based Nonbank Swap Dealers domiciled in Japan, Mexico, the United Kingdom, and the European Union*, August 17, 2022.

events.[295] Commission Regulation 23.105(c) requires a nonbank SD to file written notice with the Commission and NFA of the following events: (i) the nonbank SD's regulatory capital is less than the minimum amount required; (ii) the nonbank SD's regulatory capital is less than 120 percent of the minimum amount required; (iii) the nonbank SD fails to make or to keep current required financial books and records; (iv) the nonbank SD experiences a reduction in the level of its excess regulatory capital of 30 percent or more from the amount last reported in a financial report filed with the Commission; (v) the nonbank SD plans to distribute capital to equity holders in an amount in excess of 30 percent of the firm's excess regulatory capital; (vi) the nonbank SD fails to post to, or collect from, a counterparty (or group of counterparties under common ownership or control) required initial and variation margin, and the aggregate amount of such margin equals or exceeds 25 percent of the nonbank SD's minimum capital requirement; (vii) the nonbank SD fails to post to, or collect from, swap counterparties required initial and variation margin, and the aggregate amount of such margin equals or exceeds 50 percent of the nonbank SD's minimum capital requirement; and (viii) the nonbank SD is registered with the SEC as an SBSD and files a notice with the SEC under applicable SEC Rules.[296]

The notices are part of the Commission's overall program of helping to ensure the safety and soundness of nonbank SDs and the swaps markets in general.[297] Notices provide the Commission and NFA with an opportunity to assess whether the occurrence of a notice event indicates the existence of actual or potential financial and/or operational issues at a nonbank SD, and, when necessary, allows the Commission and NFA to engage with the nonbank SD in an

[295] 2023 Proposal at 41802 and 17 CFR 23.105(c).

[296] 17 CFR 23.105(c).

[297] *Id*.

effort to minimize potential adverse impacts on swap counterparties and the larger swaps market.[298]

The EU capital and resolution framework, in turn, requires EU nonbank SDs to provide certain notices to their respective competent authorities concerning the firm's compliance with relevant laws and regulations.[299] Specifically, the Commission noted that the EU Financial Reporting Rules require an EU nonbank SD to provide notice within five business days to its relevant competent authority[300] if the firm fails to meet its combined capital buffer requirement, which at a minimum consists of a capital conservation buffer of 2.5 percent of the EU nonbank SD's total risk exposure amount.[301] To meet its capital buffer requirements, an EU nonbank SDs must hold common equity tier 1 capital in addition to the minimum common equity tier 1 ratio requirement of 4.5 percent of the firm's core capital requirement of 8 percent of the firm's total risk exposure amount.[302] The notice to the competent authority must be accompanied by a capital conservation plan that sets out how the EU nonbank SD will restore its capital levels.[303]

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[298] *See* 2023 Proposal at 41802.

[299] *Id*.

[300] *See* 2023 Proposal at 41802. As further discussed in Section II.F.1. below, the relevant prudential competent authority may either be the national competent authority with jurisdiction to oversee compliance with the EU Capital Rules and the EU Financial Reporting Rules or, for EU nonbank SDs that are authorized as credit institutions and qualify as "significant supervised entities," the ECB. *See generally* SSM Regulation and SSM Framework Regulation.

[301] 2023 Proposal at 41802 and CRD, Article 142; French MFC, Article L.511– 41–1–A; French Ministerial Order on Capital Buffers, Articles 61 to 64; and German KWG, Sections 10i(2) to (9). The combined capital buffer requirement is the total common equity tier 1 capital required to meet the requirement for the capital conservation buffer required by Article 129 of CRD, extended to include, as applicable, an institution-specific countercyclical buffer required by Article 130 of CRD, a G–SII buffer required by Article 131(4) of CRD, an O–SII buffer required by Article 131(5) of CRD, and a systemic risk buffer required by Article 133 of CRD. CRD, Article 128.

[302] *Id*. The EU Financial Reporting Rules effectively require an EU nonbank SD to provide notice if the firm's capital ratio of common equity tier 1 capital to risk-weighted assets falls below 7 percent (assuming that the only capital buffer the EU nonbank SD is subject to is the capital conservation buffer of 2.5 percent).

[303] 2023 Proposal at 41802 and CRD, Article 142(1); French Ministerial Order on Capital Buffers, Article 61; German KWG, Section 10i(6). The competent authority may extend the filing deadline, and require the EU

The capital conservation plan is required to include: (i) estimates of income and expenditures and a forecast balance sheet; (ii) measures to increase the capital ratios of the EU nonbank SD; (iii) a plan and timeframe for the increase in the capital of the EU nonbank SD with the objective of meeting fully the combined buffer requirement; and (iv) any other information that the competent authority considers to be necessary to assess the capital conservation plan.[304] The relevant competent authority is required to assess the capital conservation plan, and may approve the plan only if it considers that the plan would be reasonably likely to conserve or raise sufficient capital to enable the EU nonbank SD to meet its combined capital buffer requirement within a timeframe that the competent authority considers to be appropriate.[305] If the relevant competent authority does not approve the capital conservation plan, the competent authority may impose requirements for the EU nonbank SD to increase its capital to specified levels within a specified time or the competent authority may impose more restrictions on distributions.[306] In addition, an EU nonbank SD must immediately notify its relevant resolution authority in situations where the firm meets the combined capital buffer requirement, but fails to meet the combined buffer requirement when considered in addition to the applicable MREL

nonbank SD to file the capital conservation plan within 10 days of the firm identifying that it failed to meet the applicable capital buffer requirements.

[304] 2023 Proposal at 41802 and CRD, Article 142(2); French Ministerial Order on Capital Buffers, Article 62; German KWG, Section 10i(6).

[305] 2023 Proposal at 41802 and CRD, Article 142(3); French MFC, Article L.511– 41–1–1; French Ministerial Order on Capital Buffers, Article 63; German KWG, Section 10i(7).

[306] 2023 Proposal at 41802 and CRD, Article 142(4); French MFC, Article L.511– 41–1–A; French Ministerial Order on Capital Buffers, Article 64 and French Ministerial Order on Distribution Restrictions, Articles 2 to 9; German KWG, Section 10i(8).

requirements.[307] The EU nonbank SD must also notify the relevant resolution authority if it considers the firm to be failing or likely to fail.[308]

Furthermore, if an EU nonbank SD breaches its liquidity or MREL requirements, the EU authorities possess wide-ranging tools to deal with the firm's financial deterioration. Specifically, the competent authority may impose administrative penalties or other administrative measures, including prudential capital charges, if an EU nonbank SD's liquidity position repeatedly or persistently falls below the liquidity and stable funding requirements established at the national or EU level.

Emphasizing that the requirement for a nonbank SD to file notice with the Commission and NFA if the firm becomes undercapitalized or if the firm experiences a decrease of excess regulatory capital below defined levels is a central component of the Commission's and NFA's oversight program for nonbank SDs, the Commission proposed a condition to require EU nonbank SDs to file with the Commission and NFA copies of notices filed under Article 142 of CRD by EU nonbank SDs alerting competent authorities of a breach of the EU nonbank SD's combined capital buffer.[309] The Commission proposed to require that the notice be filed by the EU nonbank SD within 24 hours of the filing of the notice with the relevant competent authority.

The Commission, however, preliminarily determined that the requirement for an EU nonbank SD to provide notice of a breach of its capital buffer requirements to its competent authority is not sufficiently comparable in purpose and effect to the CFTC notice provisions

[307] 2023 Proposal at 41802-41803 and BRRD, Article 16a; French MFC, Article L.613–56 III and French Ministerial Order on Distribution Restrictions, Articles 7 and 8; German SAG, Article 58a.

[308] 2023 Proposal at 41803 and BRRD, Article 81(1); French MFC, Article L.613–49; German SAG, Section 138(1).

[309] *See* 2023 Proposal at 41803.

contained in Commission Regulation 23.105(c)(1) and (2),[310] which require a nonbank SD to provide notice to the Commission and to NFA if the firm fails to meet its minimum capital requirement or if the firm's regulatory capital falls below 120 percent of its minimum capital requirement ("Early Warning Level").[311] The Commission noted that, in its preliminary view, the requirement for an EU nonbank SD to provide notice of a breach of its capital buffer requirements does not achieve a comparable outcome to the CFTC's Early Warning Level requirement due to the difference in the thresholds triggering a notice requirement in the respective rule sets.[312] Therefore, the Commission proposed a condition to require an EU nonbank SD to file a notice with the Commission and NFA if the firm's capital ratio does not equal or exceed 12.6 percent.[313] The proposed condition would further require the EU nonbank SD to file the notice with the Commission and NFA within 24 hours of when the firm knows or should have known that its regulatory capital was below 120 percent of its minimum capital requirement.[314]

The Commission also noted that the EU Financial Reporting Rules also do not contain an explicit requirement for an EU nonbank SD to notify its competent authority if the firm fails to maintain current books and records, experiences a decrease in regulatory capital over levels previously reported, or fails to collect or post initial margin with uncleared swap counterparties that exceed certain threshold levels.[315] The EU Financial Reporting Rules also do not require an

[310] 17 CFR 23.105(c)(1) and (2).

[311] *See* 2023 Proposal at 41803.

[312] *Id*.

[313] *Id*. at 41803-41804.

[314] *Id*. at 41804.

[315] *Id*.

EU nonbank SD to provide the competent authority with advance notice of capital withdrawals initiated by equity holders that exceed defined amounts or percentages of the firm's excess regulatory capital.[316]

To ensure that the Commission and NFA receive prompt information concerning potential operational or financial issues that may adversely impact the safety and soundness of an EU nonbank SD, the Commission proposed to condition the Comparability Order to require EU nonbank SDs to file certain notices mandated by Commission Regulation 23.105(c) with the Commission and NFA as discussed below. Pursuant to the proposed conditions, an EU nonbank SD would be required to file a notice with the Commission and NFA if the firm fails to maintain current books and records with respect to its financial condition and financial reporting requirements.[317] The Commission stated that, in this context, books and records would include current ledgers or other similar records which show or summarize, with appropriate references to supporting documents, each transaction affecting the EU nonbank SD's asset, liability, income, expense, and capital accounts in accordance with the accounting principles accepted by the relevant competent authorities.[318] The Commission further stated that it preliminarily believed that the maintenance of current books and records is a fundamental and essential component of operating as a registered nonbank SD and that the failure to comply with such a requirement may indicate an inability of the firm to promptly and accurately record transactions and to ensure compliance with regulatory requirements, including regulatory capital requirements. As such, the Commission proposed to condition the proposed Order on an EU nonbank SD providing the

[316] *Id*.

[317] *Id*.

[318] *Id*.

Commission and NFA with a written notice within 24 hours if the firm fails to maintain books and records on a current basis.[319]

The Commission further proposed to condition the Comparability Order on an EU nonbank SD filing a notice with the Commission and NFA if: (i) a single counterparty, or group of counterparties under common ownership or control, fails to post required initial margin or pay required variation margin on uncleared swap and security-based swap positions that, in the aggregate, exceeds 25 percent of the EU nonbank SD's minimum capital requirement; (ii) counterparties fail to post required initial margin or pay required variation margin to the EU nonbank SD for uncleared swap and security-based swap positions that, in the aggregate, exceeds 50 percent of the EU nonbank SD's minimum capital requirement; (iii) an EU nonbank SD fails to post required initial margin or pay required variation margin for uncleared swap and security-based swap positions to a single counterparty or group of counterparties under common ownership and control that, in the aggregate, exceeds 25 percent of the EU nonbank SD's minimum capital requirement; and (iv) an EU nonbank SD fails to post required initial margin or pay required variation margin to counterparties for uncleared swap and security-based swap positions that, in the aggregate, exceeds 50 percent of the EU nonbank SD's minimum capital requirement. The Commission proposed to require this notice so that, in the event that such a notice is filed, the Commission and NFA may commence communication with the EU nonbank SD and the relevant competent authority to obtain an understanding of the facts that have led to the failure to exchange material amounts of initial margin and variation margin in accordance with the applicable margin rules, and to assess whether there is a concern regarding the financial condition of the firm that may impair its ability to meet its financial obligations to customers,

[319] *Id*.

counterparties, creditors, and general market participants, or otherwise adversely impact the firm's safety and soundness.[320]

The Commission also proposed to require that an EU nonbank SD file any notices required under the Order with the Commission and NFA in English and, where applicable, with any balances reported in U.S. dollars. The Commission stated that each notice required by the proposed Comparability Order had to be filed in accordance with instructions issued by the Commission or NFA.[321]

The Commission did not propose to require an EU nonbank SD to file notices with the Commission concerning withdrawals of capital or changes in capital levels as such information would be reflected in the financial statement reporting filed with the Commission and NFA as conditions of the order, and because the EU nonbank SD's capital levels are monitored by the relevant competent authority. As such, the Commission preliminarily considered that the separate reporting of the information to the Commission would be superfluous.[322]

2. Comments and Final Determination

With respect to the proposed requirements in Condition 21 that an EU nonbank SD file a notice with the Commission and NFA within 24 hours of when the firm knew or should have known that its regulatory capital fell below 120 percent of its minimum capital requirement, the Applicants asserted that the wording of the proposed condition raises practical challenges as it would require notification prior to the discovery of the relevant event.[323] The Applicants

[320] *Id.* at 41804-41805.

[321] *Id.*

[322] *Id.* at 41805.

[323] Applicants' Letter at p. 5.

recommended that the Commission amend the proposed condition to require notice within 24 hours of when the firm "knew" that its regulatory capital fell below 120 percent of the minimum capital requirement.[324] Similarly, with respect to proposed Condition 22, which would require an EU nonbank SD to file a notice with the Commission and NFA within 24 hours if the firm fails to make or keep current the financial books and records, the Applicants recommended that the Commission amend the condition to require that an EU nonbank SD file a notice within 24 hours "of when it knows it has failed to make or keep current the financial books and records."[325] In addition, with respect to proposed Condition 21, the Applicants asserted that, pursuant to the condition, an EU nonbank SD would calculate the Early Warning Level by applying a buffer of 20 percent in excess capital, in the form of common equity tier 1 capital, on top of the firm's capital conservation buffer, which, at a minimum, equals 2.5 percent of the firm's total risk exposure amount and must be met in the form of common equity tier 1 capital. In the Applicants' view, an aggregate notification trigger of 12.6 percent of total risk exposure amount would be too high. The Applicants recommended that the Commission set the notification trigger at 120 percent of the minimum total capital requirement.[326]

The Early Warning Level notice requirement is a central component of the Commission's and NFA's oversight programs. The Commission, however, recognizes that by requiring an EU nonbank SD to provide notice if its capital ratio falls below 120 percent of the firm's minimum capital requirement, as defined to comprise the applicable capital buffers, the Commission would be imposing a higher threshold level for the notice trigger than is currently applicable to nonbank

[324] *Id*.

[325] *Id*.

[326] Applicants' Supplemental Letter at p. 2.

SDs under the CFTC Capital Rules. To achieve the condition's goal of providing the Commission and NFA with information on decreases in capital that may indicate financial or operational challenges at the firm, the Commission is revising proposed Condition 21 to require instead that an EU nonbank SD provide notice to the Commission if it experiences a 30 percent or more decrease in its excess regulatory capital as compared to the last reported.[327] The condition is consistent with the requirement applicable to nonbank SDs under Commission Regulation 23.105(c)(4).[328] The Commission believes that this condition, combined with the condition requiring an EU nonbank SD to file with the Commission and NFA copies of notices filed with relevant competent authorities of a breach of the EU nonbank SD's combined capital buffer, will provide a timely opportunity to the Commission and NFA to initiate conversations and fact finding with an EU nonbank SD that may be experiencing operational or financial issues that may adversely impact the firm's ability to meet its obligations to market participants, including customers or swap counterparties.

In connection with the Applicants' general request that the Commission set the compliance date of the Comparability Order at least six months following the issuance of the final Order, the Commission believes, as stated above, that granting an additional period of time to allow EU nonbank SDs to establish and implement the necessary processes to comply with the notice reporting obligations imposed by the Comparability Order is appropriate with respect to certain notice obligations. Specifically, the Commission understands that establishing a system

[327] For clarity, by "excess regulatory capital," the Commission refers to the capital ratio by which the firm's capital exceeds the core capital ratio requirement of 8 percent of the firm's risk-weighted assets. For instance, if a firm maintains a capital ratio of 20 percent, its excess regulatory capital would be 12 percent. In this example, 30 percent of the excess regulatory capital would equal 3.6 percent.

[328] 17 CFR 23.105(c)(4).

and process for monitoring material decreases in excess regulatory capital as required by final Condition 21 or for monitoring failures to collect or post initial margin or variation margin for uncleared swap transactions that exceed specified thresholds for purposes of complying with final Condition 23 may take time.[329] Conversely, the Commission does not believe that additional time is necessary for implementing a system and process of providing a notice to the Commission and NFA in connection with the occurrence of events that EU nonbank SDs currently monitor and/or report to the relevant competent authority. The Commission is also of the view that, given the nature of the notice obligation, EU nonbank SDs should be in a position to comply with all other notice obligations, including those requiring EU nonbanks SDs to provide notice to the Commission and NFA if they fail to make or keep current financial books and records or if they fail to maintain regulatory capital in the form of common equity tier 1 equal or in excess of the U.S. dollar equivalent of $20 million, immediately upon effectiveness of the Comparability Order. Specifically, with respect to the requirement in Condition 22 that an EU nonbank SD notify the Commission and NFA if the firm fails to make or keep current the financial books and records, the Commission notes that maintaining current books and records of all financial transactions is a fundamental recordkeeping requirement for a registered nonbank SD, and is essential to provide management with the information necessary to ensure that transactions are timely and accurately reported and that the firm complies with capital and other

[329] With regards to Condition 23, the Commission also notes, for clarity that, in proposing a notice condition based on thresholds of "required" margin, the Commission's intent was to set the notice trigger by reference to margin amounts that are legally required to be exchanged under the applicable margin requirements. To determine the applicable margin requirements, the Commission will consider the framework set forth in Commission Regulation 23.160. To the extent EU nonbank SDs intending to rely on the Comparability Order have inquiries regarding the scope of uncleared swap margin transactions to be monitored for purposes of complying with final Condition 23, MPD will discuss such inquiries with the EU nonbank SD during the confirmation process referenced in final Condition 9 of the Comparability Order.

regulatory requirements. The Commission finds that it is necessary for a nonbank SD to maintain internal controls and procedures to affirmatively monitor that financial books and records are being maintained on a current basis. The Commission also notes that the language of Condition 22 is consistent with the timing standard of Commission Regulation 23.105(c)(3), while also granting additional time for the notice to be translated into English.[330] As such, the Commission is adopting Condition 22 as proposed. The Commission, however, is setting a compliance date of 180 calendar days after the publication of the final Comparability Order in the Federal Register with respect to the notice reporting obligations under final Conditions 21 and 23 of the Comparability Order.

With respect to the notice requirement in final Condition 23, the Applicants also recommended that the Commission clarify the term "minimum capital requirement," used in connection with the thresholds triggering a notice requirement.[331] In response, the Commission will amend the condition indicate that, in the context of final Condition 23, the EU nonbank SD's "minimum capital requirement" is the core capital requirement under the EU Capital Rules, excluding capital buffers.

Finally, the Applicants recommended that the Commission amend proposed Condition 25 to require that an EU nonbank SDs, or an entity acting on its behalf, notify the Commission and NFA of "material changes" to the EU Capital Rules or EU Financial Reporting Rules instead of "proposed or final material changes" to the EU Capital Rules or EU Financial Reporting

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[330] 17 CFR 23.105(c)(3).

[331] Applicants' Supplemental Letter at p. 2. The Applicants indicated that, in the context of proposed Condition 23, they understand the term "minimum capital requirement" to mean an amount equal to 8 percent of the EU nonbank SD's total risk exposure amount.

Rules.[332] Separately, the Applicants noted that the language of proposed Condition 25 is confusing in that it differentiates between rules that are "imposed on" and those that "apply to" EU nonbank SDs.[333] The Commission did not intend to distinguish between rules that are "imposed on" and rules that "apply to" EU nonbank SDs and will use instead the defined terms "EU Capital Rules" and "EU Financial Reporting Rules" to address the potential for confusion. The Commission, however, believes that it is necessary that the Commission and NFA receive an advance notice of potential material changes to the foreign jurisdiction's rules to allow the Commission a sufficient time to assess the potential impact of the proposed amendments and to address potential changes to the Comparability Determination and Comparability Order. As such, the Commission is adopting Condition 25 as proposed with regard to the required notice of "proposed and final material changes" to the EU Capital Rules and EU Financial Reporting Rules.

The Commission did not receive any comments with respect to the following proposed notice conditions: (i) the EU nonbank SD files notice with the Commission and NFA within 24 hours of being informed by the competent authority that the firm is not in compliance with any component of the EU Capital Rules or EU Financial Reporting Rules (proposed Condition 16); (ii) the EU nonbank SD files notice with the Commission and NFA within 24 hours if the firm fails to maintain regulatory capital in the form of common equity tier 1 capital, as defined in Article 26 of CRR, equal to or in excess of the U.S. dollar equivalent of $20 million (proposed Condition 17); (iii) the EU nonbank SD provides the Commission and NFA with notice within 24 hours of filing a capital conservation plan (proposed Condition 18); (iv) the EU nonbank SD

[332] Applicants' Letter at p. 5.

[333] Applicants' Supplemental Letter at p. 3.

files notice with the Commission and NFA within 24 hours of being required by its competent authority to maintain additional capital or additional liquidity requirements, or to restrict its business operations, or to comply with certain other additional requirements that the competent authority may impose pursuant to the EU Capital Rules and the EU Financial Reporting Rules (proposed Condition 19); (v) the EU nonbank SD files a notice with the Commission and NFA within 24 hours if it fails to maintain its MREL (proposed Condition 20); or (vi) the EU nonbank SD files notice of the competent authority approving a change in the firm's fiscal year-end date, which must be filed with the Commission and NFA at least 15 business days prior to the effective date of the change (proposed Condition 24).

With regard to the proposed condition requiring that the EU nonbank SD file a notice with the Commission and NFA within 24 hours of filing a capital conservation plan, the Commission will revise the condition to require that the notice be filed within 24 hours of when the EU nonbank SD breaches its combined capital buffer requirement and is required to file a capital conservation plan. Thus, the Commission will help ensure that the EU nonbank SD provides a timely notice within 24 hours of breaching its combined capital buffer requirement instead of 24 hours of filing the capital conservation plan, which may occur up to five business days after the breach of the combined buffer requirement.[334]

In conclusion, the Commission finds that the regulatory notice provisions of the EU Financial Reporting Rules and the CFTC Financial Reporting Rules, after consideration of the conditions imposed in the final Comparability Order, are comparable in purpose and effect, and

[334] The competent authority may also extend the filing deadline, and require the EU nonbank SD to file the capital conservation plan within 10 days of the firm identifying that it failed to meet the applicable capital buffer requirements. 2023 Proposal at 41802 and CRD, Article 142(1); French Ministerial Order on Capital Buffers, Article 61; German KWG, Section 10i(6).

achieve comparable outcomes, by providing timely notice to the relevant competent authority, and to the Commission and NFA, of specified events at a nonbank SD that may potentially indicate an ongoing issue with the safety and soundness of the firm and/or its ability to meet its obligations to swap counterparties, creditors, or other market participants without the firm becoming insolvent. As such, the Commission adopts the final Comparability Order and conditions as proposed with respect to the Commission's analysis of comparability of the EU and Commission's nonbank SD notice reporting requirements, subject to the revisions in final Conditions 18 and 21, and the clarifying changes to final Condition 25 discussed above. The Commission is also adopting a compliance date for certain notice reporting requirements as discussed above in the final Comparability Order.

F. Supervision and Enforcement

1. Preliminary Determination

In the 2023 Proposal, the Commission discussed the oversight of nonbank SDs, noting that the Commission and NFA conduct ongoing supervision of nonbank SDs to assess their compliance with the CEA, Commission regulations, and NFA rules by reviewing financial reports, notices, risk exposure reports, and other filings that nonbank SDs are required to file with the Commission and NFA.[335] The 2023 Proposal also noted that the Commission and NFA also conduct periodic examinations as part of the supervision of nonbank SDs, including routine onsite examinations of nonbank SDs' books, records, and operations to ensure compliance with CFTC and NFA requirements.[336] In this regard, as noted in Section I.E. above, Section 17(p) of the CEA requires NFA, as a registered futures association, to establish minimum capital and

[335] 2023 Proposal at 41805.

[336] *Id*.

financial requirements for nonbank SDs and to implement a program to audit and enforce compliance with such requirements.[337]

The Commission also discussed the financial reports and notices required under the CFTC Financial Reporting Rules, noting that the reports and notices provide the Commission and NFA with information necessary to: ensure the nonbank SD's compliance with minimum capital requirements; assess the firm's overall safety and soundness by being able to meet its financial obligations to customers, counterparties, creditors, and general market participants; and identify potential issues at a nonbank SD that may impact the firm's ability to maintain compliance with the CEA and Commission regulations.[338] As discussed in the 2023 Proposal, the Commission and NFA also have the authority to require a nonbank SD to provide any additional financial and/or operational information as the Commission or NFA may specify to monitor the safety and soundness of the firm.[339]

The Commission further noted that it has authority to take disciplinary actions against a nonbank SD for failing to comply with the CEA and Commission regulations. In this regard, Section 4b-1(a) of the CEA provides the Commission with exclusive authority to enforce the capital requirements imposed on nonbank SDs adopted under Section 4s(e) of the CEA.[340]

With respect to EU nonbank SDs, the Commission noted in the 2023 Proposal that oversight of the firm's compliance with the EU Capital Rules and the EU Financial Reporting Rules is conducted by the ECB and the relevant national competent authorities in EU Member

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[337] 7 U.S.C. 21(p).

[338] *Id.*

[339] Commission Regulation 23.105(h) (17 CFR 23.105(h)). *See also,* 2023 Proposal at 41805.

[340] 7 U.S.C. 6s(e).

States.[341] EU nonbank SDs that are registered as credit institutions and that qualify as "significant supervised entities" fall under the direct authority of the ECB and are supervised within the Single Supervisory Mechanism, or SSM.[342] Within the SSM, the ECB supervises firms for compliance with the EU Capital Rules and the EU Financial Reporting Rules through joint supervisory teams ("JSTs"), comprised of ECB staff and staff of the relevant national competent authorities.[343] EU nonbank SDs that are registered as credit institutions and that qualify as "less significant supervised entities,"[344] or EU nonbank SDs registered as investment firms that remain subject to the CRR/CRD framework regime, fall under the direct authority of the applicable national competent authorities. The ECB and the French Autorité de Contrôle Prudentiel et de Resolution ("ACPR") have supervision, audit, and investigation powers with respect to four EU nonbank SDs currently registered with the Commission.[345] The ECB's and

[341] 2023 Proposal at 41805-41807.

[342] *See generally* SSM Regulation and SSM Framework Regulation. The criteria for determining whether credit institutions are considered "significant supervised entities" include size, economic importance for the specific EU Member State or the EU economy, significance of cross-border activities, and request for or receipt of direct public financial assistance. SSM Regulation, Article 6 and SSM Framework Regulation, Articles 39–44 and 50–62, and discussion of the SSM in Section II.C. above.

[343] SSM Framework Regulation, Article 3.

[344] SSM Regulation, Article 6. Entities that qualify as "less significant supervised entities" are supervised by their national competent authorities in close cooperation with the ECB. With respect to the prudential supervision of these entities, the ECB has the power to issue regulations, guidelines or general instructions to the national competent authorities. SSM Regulation, Article 6(5)(a). At any time, the ECB can also decide to directly supervise any one of these less significant supervised entities to ensure that high supervisory standards are applied consistently. SSM Regulation, Article 6(5)(b).

[345] Three of the four EU nonbank SDs currently registered with the Commission (BofA Securities Europe S.A.; Citigroup Global Markets Europe AG; and Morgan Stanley Europe SE) are registered as credit institutions and qualify as "significant supervised entities" subject to the direct supervision of the ECB. One entity (Goldman Sachs Paris) is registered as an investment firm and subject to direct supervision by the French ACPR. Anticipating that Goldman Sachs Paris would continue to apply the CRR/CRD capital and financial reporting framework regime but become categorized as a "less significant supervised entity" that would remain under ACPR oversight, Commission staff reviewed the French law provisions granting supervisory and enforcement powers to the ACPR. As noted above, on March 31, 2024, Goldman Sachs Paris became subject to a different capital and financial reporting framework. Although the analysis included in this Comparability Determination no longer applies to Goldman Sachs Paris, the Commission is retaining the description of the ACPR's supervisory regime and powers in the final Comparability Determination to facilitate the analysis of potential future applications for substituted compliance that may involve entities subject to direct supervision by the ACPR. Accordingly, this Section describes the supervisory

ACPR's authorities include the power to require EU nonbank SDs to: (i) provide necessary information for the authorities to carry out their supervisory tasks;[346] (ii) examine the books and records of EU nonbank SDs; (iii) obtain written and oral explanations from the EU nonbank SD's management, staff, and other persons;[347] and (iv) conduct necessary inspections at the business premises of EU nonbank SDs and other group entities.[348] The competent authorities also monitor the capital adequacy of EU nonbank SDs through supervisory measures on an ongoing basis. The monitoring includes assessing the notices and the capital conservation plan discussed in Section II.E.1. above.

In addition to the tools described in Section II.E.1., the relevant competent authorities are also empowered with a variety of measures to address an EU nonbank SD's financial deterioration. Specifically, if an EU nonbank SD fails to meet its capital or liquidity thresholds, or if the competent authority has evidence that the EU nonbank SD is likely to breach its capital or liquidity thresholds in the next 12 months, the competent authority may order an EU nonbank SD to comply with additional requirements, including: (i) maintaining additional capital in excess of the minimum requirements, if certain conditions are met; (ii) requiring that the EU nonbank SD submit a plan to restore compliance with applicable capital or liquidity thresholds; (iii) imposing restrictions on the business or operations of the EU nonbank SD; (iv) imposing

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powers of the ECB and the French ACPR and refers to provisions establishing those powers. For the avoidance of doubt, if a future EU nonbank SD applicant that is subject to supervision by a national competent authority in an EU Member State other than France, seeks substituted compliance for some or all of the CFTC Capital Rules and CFTC Financial Reporting Rules, the EU nonbank SD applicant must submit an application to the Commission in accordance with Commission Regulation 23.106 (17 CFR 23.106) and provide, among other information, a description of the ability of the relevant EU Member State regulatory authority to supervise and enforce compliance with the relevant EU Member State's capital adequacy and financial reporting requirements.

[346] CRD, Article 65(3)(a); French MFC, Article L.612–24; and SSM Regulation, Article 10.

[347] CRD, Article 65(3)(b); French MFC, Article L.612–24; and SSM Regulation, Article 11.

[348] CRD, Article 65(3)(c); French MFC, Articles L.612–23 and L.612–26; and SSM Regulation, Article 12.

restrictions or prohibitions on distributions or interest payments to shareholders or holders of additional tier 1 capital instruments; (v) requiring additional or more frequent reporting requirements; and (vi) imposing additional specific liquidity requirements.[349] The competent authority may also withdraw an EU nonbank SD's authorization if the firm no longer meets its minimum capital requirements.[350] Although the relevant competent authorities generally have broad discretion as to what powers they may exercise, the EU Capital Rules and the EU Financial Reporting Rules specifically mandate that the competent authorities require EU nonbank SDs to hold increased capital when: (i) risks or elements of risks are not covered by the capital requirements imposed by the EU Capital Rules; (ii) the EU nonbank SD lacks robust governance arrangements, appropriate resolution and recovery plans, processes to manage large exposures or effective processes to maintain on an ongoing basis the amounts, types, and distribution of capital needed to cover the nature and level of risks to which it might be exposed and it is unlikely that other supervisory measures would be sufficient to ensure that those requirements can be met within an appropriate timeframe; (iii) the EU nonbank SD repeatedly fails to establish or maintain an adequate level of additional capital to cover the guidance communicated by the relevant competent authorities; or (iv) other entity-specific situations deemed by the relevant competent authority to raise material supervisory concerns.[351]

[349] CRD, Articles 102(1) and 104(1); French MFC, Articles L.511–41–3 and L.612–31 to L.612–33; SSM Regulation, Article 16.

[350] CRD Article 18; MiFID, Article 8c; French MFC, Articles L.532–6 and L.612–40; SSM Regulation, Article 14.

[351] CRD, Article 104 and 104a; French MFC, Article L.511–41–3; German KWG, Section 6c(1); and SSM Regulation, Articles 9 (indicating that the ECB shall have all the powers and obligations that national authorities have under EU law, unless otherwise provided in the SSM Regulation, and that the ECB may require, by way of instructions, that national competent authorities make use of their powers, where the SSM Regulation does not confer such powers to the ECB) and 16 (describing ECB's supervisory powers, including the power to require entities subject to its authority to hold capital in excess of the capital requirements imposed by relevant EU law).

The national competent authorities can also issue administrative penalties and other administrative measures if an EU nonbank SD (or its management) does not fully comply with its reporting requirements.[352] These penalties and measures include: (i) public statements identifying a firm or one or more of its managers as responsible for the breach; (ii) cease-and-desist orders; (iii) temporary bans against a member of the firm's management body or other manager; (iv) administrative monetary penalties against the firm of up to 10 percent of the total annual net turnover of the preceding year; (v) administrative monetary penalties of up to twice the amount of the profits gained or losses avoided because of the breach; or (vi) withdrawal of the firm's authorization.[353]

The ECB has the same powers to impose administrative monetary penalties for breaches of directly applicable EU laws and regulations.[354] In addition, the ECB can instruct the national competent authorities to open proceedings that may lead to the imposition of non-monetary penalties for breaches of directly applicable EU law and regulations, monetary and non-monetary penalties for breaches of EU Member State laws implementing relevant directives, and monetary and non-monetary penalties against natural persons for breaches of relevant EU laws and regulations.[355]

Based on its review of the Application and its analysis of the relevant laws and regulations, the Commission preliminarily found that the competent authorities have the necessary powers to supervise, investigate, and discipline EU nonbank SDs for compliance with

[352] CRD, Articles 65, 67(1)(e) to (i) and 67(2); French MFC, Article L.612–39 and L.612–40; German KWG, Sections 56(6) and (7), 60b(1) and (3).

[353] *Id.*

[354] SSM Regulation, Article 18.

[355] SSM Regulation, Article 9.

the applicable capital and financial reporting requirements, and to detect and deter violations of, and ensure compliance with, the applicable capital and financial reporting requirements in the EU.[356] Furthermore, the Commission noted that it retains supervision, examination, and enforcement authority over EU nonbank SDs that are covered by the Comparability Order.[357] Specifically, the Commission noted that a non-U.S. nonbank SD that operates under substituted compliance remains subject to the Commission's examination authority and may be subject to a Commission enforcement action if the firm fails to comply with a foreign jurisdiction's capital adequacy or financial reporting requirements.[358] The ability of the Commission to exercise its enforcement authority over an EU nonbank SD is not conditioned upon a finding by the competent authority of a violation of the EU Capital Rules or EU Financial Reporting Rules. In addition, as each EU nonbank SD is a member of NFA, the firm is subject to NFA membership rules, examination authority, and disciplinary process.[359]

2. Comment Analysis and Final Determination

The Commission did not receive comments directly related to its analysis set forth in the proposed Comparability Determination and Comparability Order, or on its preliminary determination that the EU competent authorities have the necessary powers to supervise, investigate, and discipline EU nonbank SDs for non-compliance with the applicable EU capital and financial reporting requirements. The Commission has reviewed its preliminary Comparability Determination and finds that the EU nonbank SDs are subject to a supervisory

[356] 2023 Proposal at 41807.

[357] 2023 Proposal at 41777.

[358] *Id. See also*, 17 CFR 23.106(a)(4)(ii), which provides that all nonbank SDs, regardless of whether they rely on a Comparability Order or Comparability Determination, remain subject to the Commission's examination and enforcement authority.

[359] 7 U.S.C. 21(p).

and enforcement framework that is comparable to the Commission's supervisory and enforcement framework for nonbank SDs. Specifically, the supervisory program of the EU is comparable in purpose and effect to Commission's supervisory program in that both programs are designed to monitor the safety and soundness of nonbank SDs through a combination of periodic financial reporting, notice reporting, and examination.

As detailed in Section II.F.1. above, EU nonbank SDs are subject to direct supervision by a prudential regulator.[360] For EU nonbank SDs subject to ECB supervision as "significant supervised entities," the examination is conducted by JSTs comprised of staff of the ECB and staff of the relevant national competent authority. For EU nonbank SDs that are "less significant supervised entities," the examination is conducted by the relevant national competent authority.

The Commission's assessment of the competent authorities' supervisory programs included an evaluation of the authorities' ability to supervise EU nonbank SDs based on applicable EU laws and regulations, as discussed in Section II.F.1. above. This evaluation included an assessment of the financial reporting that EU nonbank SDs are required to provide to the competent authority, the competent authority's ability to conduct examinations, including onsite inspections of EU nonbank SDs, and the competent authority's ability to impose sanctions or take other action to address noncompliance with applicable laws and regulations. Based upon its evaluation, the Commission preliminarily determined that the relevant EU laws and regulations are comparable in purpose and effect to the CEA and Commission regulations, and

[360] As noted above, the three current EU nonbank SDs qualify as "significant supervised entities" subject to the direct supervision of the ECB. The 2023 Proposal included an analysis of the supervisory regime and powers of the ACPR, in its capacity as a national competent authority with jurisdiction over Goldman Sachs Paris. Although, the final Comparability Determination and Comparability Order do not cover Goldman Sachs Paris, given the change in regulatory regime applicable to the firm, the Commission is retaining the description of the ACPR's supervisory regime and powers in the final Comparability Determination to facilitate the analysis of potential future applications for substituted compliance that may involve entities subject to direct supervision by the ACPR. *See supra* note 347.

that the competent authorities have appropriate power to supervise EU nonbank SDs for compliance with applicable EU Capital Rules and EU Financial Reporting Rules.

The Commission further determined, based on applicable EU laws and regulations, that the competent authorities have the ability to sanction EU nonbank SDs for failing to comply with regulatory requirements. Specifically, as discussed in Section II.F.1. above, the competent authorities have the power to impose penalties and other administrative measures,[361] and may order EU nonbank SD to hold increased capital in situations that raise supervisory concerns.[362] The competent authority may also withdraw an EU nonbank SD's authorization to operate if the firm no longer meets its minimum capital requirements.[363]

Furthermore, as discussed in this Comparability Determination, by issuing a Comparability Order, the Commission is not ceding its supervisory and enforcement authorities. EU nonbank SDs that are subject to a Comparability Order are registered with the Commission as SDs and are members of NFA, and, as such, are subject to the CEA, Commission regulations, and NFA membership rules and requirements. In this regard, EU nonbank SDs covered by a Comparability Order are required to directly provide the Commission with additional information upon the Commission's request to facilitate the ongoing supervision of such firms.[364] Further, Section 17 of NFA's SD Financial Requirements rule provides that each SD

[361] CRD, Articles 65, 67(1)(e) to (i) and 67(2); French MFC, Article L.612–39 and L.612–40; German KWG, Sections 56(6) and (7), 60b(1) and (3); SSM Regulation, Articles 9 and 18.

[362] CRD, Article 104 and 104a; French MFC, Article L.511–41–3; German KWG, Section 6c(1); and SSM Regulation, Articles 9 (indicating that the ECB shall have all the powers and obligations that national authorities have under EU law, unless otherwise provided in the SSM Regulation, and that the ECB may require, by way of instructions, that national competent authorities make use of their powers, where the SSM Regulation does not confer such powers to the ECB) and 16 (describing ECB's supervisory powers, including the power to require entities subject to its authority to hold capital in excess of the capital requirements imposed by relevant EU law).

[363] CRD Article 18; MiFID, Article 8c; French MFC, Articles L.532–6 and L.612–40; SSM Regulation, Article 14.

[364] 17 CFR 23.105(h).

member of NFA must file the financial, operational, risk management and other information required by NFA in the form and manner prescribed by NFA.[365] The ability to obtain information directly from EU nonbank SDs ensures that the Commission and NFA have access to the information necessary to monitor the financial condition of such firms and to assess the firms' compliance with applicable capital and financial reporting requirements. EU nonbank SDs covered by a Comparability Order remain subject to the Commission's examination and enforcement authority with respect to all elements of the CEA and Commission regulations, including capital and financial reporting.[366]

In addition, as detailed in Section I.E. above, the conditions set forth in the Comparability Order reflect the fact that the Commission and NFA have a continuing obligation to conduct ongoing oversight, including potential examination, of EU nonbank SDs to ensure compliance with the Comparability Order and with relevant CEA requirements and Commission regulations. Specifically, the conditions require EU nonbank SDs to file directly with the Commission and NFA financial reports and notices that are comparable to the financial reports and notices filed by nonbank SDs domiciled in the U.S. In addition to requiring EU nonbank SDs to maintain current books and records reflecting all transactions,[367] the conditions further require each EU nonbank SD covered by the Comparability Order to file directly with the Commission and NFA: (i) monthly and annual financial reports;[368] (ii) notice that the firm was informed by the competent authority that it is not in compliance with the EU Capital Rules and/or EU Financial

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[365] *NFA Financial Requirements, Section 17. Swap Dealer and Major Swap Participant Reporting Requirements*, ("NFA Section 17 Rule") available at NFA's website: https://www.nfa.futures.org/rulebooksql/index.aspx.

[366] 17 CFR 23.106(a)(4)(ii).

[367] Condition 10 of the final Comparability Order.

[368] Conditions 11 and 12 of the final Comparability Order.

Reporting Rules;[369] (iii) notice that the firm has experienced a decrease of 30 percent or more in its excess regulatory capital as compared to the last excess regulatory capital reported in filings with the Commission and NFA;[370] (iv) notice that the firm has breached its combined capital buffer requirement and is required to file a capital conservation plan with the relevant competent authority, indicating that the firm has breached its combined capital buffer requirement;[371] (v) notice that the firm has failed to maintain regulatory capital in the form of common equity tier 1 capital equal to or in excess of the U.S. dollar equivalent of $20 million;[372] and (vi) notice that the firm has failed to maintain current financial books and records.[373] The Comparability Order further requires the Applicants to provide notice to the Commission of any material changes to the information submitted in the application, including, but not limited to, proposed and final material changes to the EU Capital Rules or EU Financial Reporting Rules and proposed and final material changes to the competent authority's supervisory authority or supervisory regime over EU nonbank SDs.[374] The financial information and notices required to be filed directly with the Commission and NFA under the Comparability Order, and through the Commission's and NFA's direct authority to obtain additional information from EU nonbank SDs, will allow the Commission and NFA to conduct ongoing oversight of such firms to assess their overall safety and soundness.

[369] Condition 16 of the final Comparability Order.

[370] Condition 21 of the final Comparability Order.

[371] Condition 18 of the final Comparability Order.

[372] Condition 17 of the final Comparability Order.

[373] Condition 22 of the final Comparability Order.

[374] Condition 25 of the final Comparability Order.

Although Commission Regulation 23.106 does not condition the issuance of a Comparability Order on the Commission and the authority or authorities in the relevant foreign jurisdiction having entered into a formal MOU or similar arrangement, the Commission recognizes the benefit that such an arrangement may provide.[375] Specifically, although Commission staff may engage directly with EU nonbank SDs to obtain information regarding their financial and operational condition, it may not be able to exchange and discuss such firm-specific information[376] with the relevant competent authority or reach shared expectations on procedures for conducting on-site examinations in France or Germany.[377] Therefore, Commission staff will continue its engagement with ECB staff to negotiate and finalize an MOU or similar arrangement to facilitate the joint supervision of EU nonbank SDs.

III. Final Capital Comparability Determination and Comparability Order

A. Commission's Final Comparability Determination

Based on the EU Application and the Commission's review of applicable EU laws and regulations, as well as the review of comments submitted in response to the Commission's request for comment on the EU Application and the proposed Comparability Determination and Comparability Order, the Commission finds that the EU Capital Rules and the EU Financial

[375] In an enforcement-related context, the Commission is a signatory to the International Organization of Securities Commission's Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information ("MMOU", revised May 2012). The French Autorité des Marchés Financiers ("AMF") (the French market conduct regulatory authority with which the ACPR shares supervision authority over French financial firms, including EU nonbank SDs domiciled in France, as it regards business conduct matters), and the German Bundesanstalt für Finanzdienstleistungsaufsicht (the German financial sector regulatory authority whose staff participates in the SSM's JSTs that conduct prudential supervision of the two EU nonbank SDs domiciled in Germany) are signatories to the MMOU.

[376] The sharing of non-public information by CFTC staff would require assurances related to the use and treatment of such information in a manner consistent with Section 8(e) of the CEA, 7 U.S.C. 12(e).

[377] For French SDs, the Commission and the French AMF are signatories to a supervisory MOU that covers information sharing and examinations. *Memorandum of Understanding Concerning Cooperation and the Exchange of Information Related to the Supervision of Covered Firms* (October 26, 2023).

Reporting Rules, subject to the conditions set forth in the Comparability Order, achieve comparable outcomes and are comparable in purpose and effect to the CFTC Capital Rules and CFTC Financial Reporting Rules. In reaching this conclusion, the Commission recognizes that there are certain differences between the EU Capital Rules and CFTC Capital Rules and certain differences between the EU Financial Reporting Rules and the CFTC Financial Reporting Rules. The Comparability Order below is subject to conditions that are necessary to promote consistency in regulatory outcomes, or to reflect the scope of substituted compliance that would be available notwithstanding certain differences. In the Commission's view, the differences between the two rules sets are not inconsistent with providing a substituted compliance framework for certain EU nonbank SDs subject to the conditions specified in the Order below.

Furthermore, the Comparability Determination and Comparability Order are limited to the comparison of the EU Capital Rules to the Bank-Based Approach contained within the CFTC Capital Rules. As noted previously, the Applicants have not requested, and the Commission has not performed, a comparison of the EU Capital Rules to the Commission's NLA Approach or TNW Approach.

B. Order Providing Conditional Capital Comparability Determination for Certain EU Nonbank Swap Dealers

IT IS HEREBY DETERMINED AND ORDERED, pursuant to Commodity Futures Trading Commission ("CFTC" or "Commission") Regulation 23.106 (17 CFR 23.106) under the Commodity Exchange Act ("CEA") (7 U.S.C. 1 *et seq.*) that a swap dealer ("SD") organized and domiciled in the French Republic ("France") or the Federal Republic of Germany ("Germany" and collectively with France the "EU Member States") and subject to the Commission's capital and financial reporting requirements under Sections 4s(e) and (f) of the CEA (7 U.S.C. 6s(e) and

(f)) may satisfy the capital requirements under Section 4s(e) of the CEA and Commission Regulation 23.101(a)(1)(i) (17 CFR 23.101(a)(1)(i)) ("CFTC Capital Rules"), and the financial reporting rules under Section 4s(f) of the CEA and Commission Regulation 23.105 (17 CFR 23.105) ("CFTC Financial Reporting Rules"), by complying with certain specified requirements of the European Union ("EU") laws and regulations cited below and otherwise complying with the following conditions, as amended or superseded from time to time:

(1) The SD is not subject to regulation by a prudential regulator defined in Section 1a(39) of the CEA (7 U.S.C. 1a(39));

(2) The SD is organized under the laws of France or Germany ("EU Member State") and is domiciled in France or Germany, respectively ("EU nonbank SD");

(3) The EU nonbank SD is licensed as a "credit institution" or "investment firm" in an EU Member State;

(4) The EU nonbank SD is subject to and complies with: *Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and amending Regulation (EU) No 648/2012* ("Capital Requirements Regulation" or "CRR") and *Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC* ("Capital Requirements Directive" or "CRD") as implemented in the national laws of France and Germany (collectively, "EU Capital Rules");

(5) The EU nonbank SD satisfies at all times applicable capital ratio and leverage ratio requirements set forth in Article 92 of CRR, the capital conservation buffer requirements set forth in Article 129 of CRD, and applicable liquidity requirements set forth in Articles 412 and 413 of CRR, and otherwise complies with the requirements to maintain a liquidity risk management program as required under Article 86 of CRD;

(6) The EU nonbank SD is subject to and complies with: *Commission Implementing Regulation (EU) 2021/451 of 17 December 2020 laying down implementing technical standards for the application of Regulation (EU) No 575/2013 of the European Parliament and of the Council with regard to supervisory reporting of institutions and repealing Implementing Regulation (EU) No 680/2014* ("CRR Reporting ITS"); *Regulation (EU) 2015/534 of the European Central Bank of 17 March 2015 on reporting of supervisory financial information* ("ECB FINREP Regulation"); and *Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC* ("Accounting Directive") as implemented in the national laws of France and Germany (collectively and together with CRR and CRD as implemented in the national laws of France and Germany, "EU Financial Reporting Rules");

(7) The EU nonbank SD is subject to prudential supervision by an EU Member State supervisory authority with jurisdiction to enforce the requirements set forth by the

EU Capital Rules and the EU Financial Reporting Rules or the European Central Bank ("ECB"), as applicable ("competent authority");

(8) The EU nonbank SD maintains at all times an amount of regulatory capital in the form of common equity tier 1 capital as defined in Article 26 of CRR, equal to or in excess of the equivalent of $20 million in United States dollars ("U.S. dollars"). The EU nonbank SD shall use a commercially reasonable and observable euro/U.S. dollar exchange rate to convert the value of the euro-denominated common equity tier 1 capital to U.S. dollars;

(9) The EU nonbank SD has filed with the Commission a notice stating its intention to comply with the EU Capital Rules and the EU Financial Reporting Rules in lieu of the CFTC Capital Rules and the CFTC Financial Reporting Rules. The notice of intent must include the EU nonbank SD's representation that the firm is organized and domiciled in an EU Member State, is a licensed investment firm or a credit institution in an EU Member State, and is subject to, and complies with, the EU Capital Rules and EU Financial Reporting Rules. An EU nonbank SD may not rely on this Comparability Order until it receives confirmation from Commission staff, acting pursuant to authority delegated by the Commission under Commission Regulation 140.91(a)(11) (17 CFR 140.91(a)(11)), that the EU nonbank SD may comply with the applicable EU Capital Rules and EU Financial Reporting Rules in lieu of the CFTC Capital Rules and CFTC Reporting Rules. Each notice filed pursuant to this condition must be prepared in the English language and submitted to the Commission via email to the following address: MPDFinancialRequirements@cftc.gov;

(10) The EU nonbank SD prepares and keeps current ledgers and other similar records in accordance with accounting principles permitted by the relevant competent authority;

(11) The EU nonbank SD files with the Commission and with the National Futures Association ("NFA") a copy of templates 1.1 (Balance Sheet Statement: assets), 1.2 (Balance Sheet Statement: liabilities), 1.3 (Balance Sheet Statement: equity), 2 (Statement of profit or loss), and 10 (Derivatives—Trading and economic hedges) of the financial reports ("FINREP") that EU nonbank SDs are required to submit pursuant to CRR Reporting ITS, Annex III or IV, or the ECB FINREP Regulation, as applicable, and templates 1 (Own Funds), 2 (Own Funds Requirements) and 3 (Capital Ratios) of the common reports ("COREP") that EU nonbank SDs are required to submit pursuant to CRR Reporting ITS, Annex I. The FINREP and COREP templates must be translated into the English language and balances must be converted to U.S. dollars, using a commercially reasonable and observable euro/U.S. dollar spot rate as of the date of the report. The FINREP and COREP templates must be filed with the Commission and NFA within 35 calendar days of the end of each month. EU nonbank SDs that are registered as security-based swap dealers ("SBSDs") with the U.S. Securities and Exchange Commission ("SEC") must comply with this condition by filing with the Commission and NFA a copy of Form X–17A–5 ("FOCUS Report") that the EU nonbank SD is required to file with the SEC, or its designee, pursuant to an order granting conditional substituted compliance with respect to Securities Exchange Act of 1934 Rule 18a–7. The copy of the FOCUS Report must be filed

with the Commission and NFA within 35 calendar days after the end of each month in the manner, format and conditions specified by the SEC in *Order Specifying the Manner and Format of Filing Unaudited Financial and Operational Information by Security-Based Swap Dealers and Major Security-Based Swap Participants that are not U.S. Persons and are Relying on Substituted Compliance with Respect to Rule 18a-7*, 86 FR 59208 (Oct. 26, 2021);

(12) The EU nonbank SD files with the Commission and with NFA a copy of its annual audited financial statements and management report (together, "annual audited financial report") that are required to be prepared and published pursuant to Articles 4, 19, 30 and 34 of the Accounting Directive as implemented in the national laws of France and Germany. The annual audited financial report must be translated into the English language and balances may be reported in euro. The annual audited financial report must be filed with the Commission and NFA on the earliest of the date the report is filed with the competent authority, the date the report is published, or the date the report is required to be filed with the competent authority or the date the report is required to be published pursuant to the EU Financial Reporting Rules.

(13) The EU nonbank SD files Schedule 1 of Appendix B to Subpart E of Part 23 of the Commission's regulations (17 CFR 23 Subpart E – Appendix B) with the Commission and NFA on a monthly basis. Schedule 1 must be prepared in the English language with balances reported in U.S. dollars, using a commercially reasonable and observable euro/U.S. dollar spot rate as of the date of the report, and must be filed with the Commission and NFA within 35 calendar days of the

end of each month. EU nonbank SDs that are registered as SBSDs must comply with this condition by filing with the Commission and NFA a copy of the FOCUS Report that they file with the SEC or its designee as set forth in Condition 11;

(14) The EU nonbank SD submits with each set of FINREP and COREP templates, annual audited financial report, and Schedule 1 of Appendix B to Subpart E of Part 23 of the Commission's regulations a statement by an authorized representative or representatives of the EU nonbank SD that to the best knowledge and belief of the representative or representatives the information contained in the reports, including the translation of the reports into English and conversion of balances in the reports to U.S. dollars, is true and correct. The statement must be prepared in the English language;

(15) The EU nonbank SD files a margin report containing the information specified in Commission Regulation 23.105(m) (17 CFR 23.105(m)) ("Margin Report") with the Commission and with NFA within 35 calendar days of the end of each month. The Margin Report must be in the English language with balances reported in U.S. dollars, using a commercially reasonable and observable euro/U.S. dollar spot rate as of the date of the report;

(16) The EU nonbank SD files a notice with the Commission and NFA within 24 hours of being informed by the competent authority that the firm is not in compliance with any component of the EU Capital Rules or EU Financial Reporting Rules. The notice must be prepared in the English language;

(17) The EU nonbank SD files a notice within 24 hours with the Commission and NFA if it fails to maintain regulatory capital in the form of common equity tier 1 capital

as defined in Article 26 of CRR, equal to or in excess of the U.S. dollar equivalent of $20 million using a commercially reasonable and observable euro/U.S. dollar exchange rate. The notice must be prepared in the English language;

(18) The EU nonbank SD provides the Commission and NFA with notice within 24 hours of breaching its combined capital buffer requirement and being required to file a capital conservation plan with the relevant competent authority pursuant to the relevant EU Member State's provisions implementing Article 143 of CRD. The notice filed with the Commission and NFA must be prepared in the English language;

(19) The EU nonbank SD provides the Commission and NFA with notice within 24 hours if it is required by its competent authority to maintain additional capital or additional liquidity requirements, or to restrict its business operations, or to comply with other requirements pursuant to Articles 102(1) and 104(1) of CRD as implemented in the national laws of France or to Article 16 of *Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions*. The notice filed with the Commission and NFA must be prepared in the English language;

(20) The EU nonbank SD files a notice with the Commission and NFA within 24 hours if it fails to maintain its minimum requirement for own funds and eligible liabilities ("MREL"), if such requirement is applicable to the EU nonbank SD pursuant to *Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of*

credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council as implemented in the national laws of France and Germany. The notice filed with the Commission and NFA must be prepared in the English language;

(21) The EU nonbank SD files a notice with the Commission and NFA if it experiences a 30 percent or more decrease in its excess regulatory capital as compared to that last reported in the financial information filed pursuant to Condition 11. The notice must be prepared in the English language and filed within two business days of the firm experiencing the 30 percent or more decrease in excess regulatory capital;

(22) The EU nonbank SD files a notice with the Commission and NFA within 24 hours if it fails to make or keep current the financial books and records. The notice must be prepared in the English language;

(23) The EU nonbank SD files a notice with the Commission and NFA within 24 hours of the occurrence of any of the following: (i) a single counterparty, or group of counterparties under common ownership or control, fails to post required initial margin or pay required variation margin to the EU nonbank SD on uncleared swap and non-cleared security-based swap positions that, in the aggregate, exceeds 25 percent of the EU nonbank SD's minimum capital requirement; (ii) counterparties fail to post required initial margin or pay required variation margin to the EU nonbank SD for uncleared swap and non-cleared security-based swap

positions that, in the aggregate, exceeds 50 percent of the EU nonbank SD's minimum capital requirement; (iii) the EU nonbank SD fails to post required initial margin or pay required variation margin for uncleared swap and non-cleared security-based swap positions to a single counterparty or group of counterparties under common ownership and control that, in the aggregate, exceeds 25 percent of the EU nonbank SD's minimum capital requirement; or (iv) the EU nonbank SD fails to post required initial margin or pay required variation margin to counterparties for uncleared swap and non-cleared security-based swap positions that, in the aggregate, exceeds 50 percent of the EU nonbank SD's minimum capital requirement. For purposes of the calculation, the EU nonbank SD's minimum capital requirement is the core capital requirement under the EU Capital Rules, excluding capital buffers. The notice must be prepared in the English language;

(24) The EU nonbank SD files a notice with the Commission and NFA of a change in its fiscal year-end approved or permitted to go into effect by the relevant competent authority. The notice required by this paragraph will satisfy the requirement for a nonbank SD to obtain the approval of NFA for a change in fiscal year-end under Commission Regulation 23.105(g) (17 CFR 23.105(g)). The notice of change in fiscal year-end must be prepared in the English language and filed with the Commission and NFA at least 15 business days prior to the effective date of the EU nonbank SD's change in fiscal year-end;

(25) The EU nonbank SD or an entity acting on its behalf notifies the Commission of any material changes to the information submitted in the application for

Comparability Determination, including, but not limited to, proposed and final material changes to the EU Capital Rules or EU Financial Reporting Rules and proposed and final material changes to the ECB or the relevant EU Member State authority's supervisory authority or supervisory regime over EU nonbank SDs. The notice must be prepared in the English language; and

(26) Unless otherwise noted in the conditions above, the reports, notices, and other statements required to be filed by the EU nonbank SD with the Commission and NFA pursuant to the conditions of this Comparability Order must be submitted electronically to the Commission and NFA in accordance with instructions provided by the Commission or NFA.

IT IS ALSO HEREBY DETERMINED AND ORDERED that this Comparability Order becomes effective upon its publication in the Federal Register, with the exception of Conditions 15, 21, and 23, which will become effective 180 calendar days after publication of the Comparability Order in the Federal Register.

Issued in Washington, DC, on [Date], by the Commission.

Christopher Kirkpatrick,

Secretary of the Commission.