

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-93412; File No. S7-09-21]

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 Kingdom of Spain

October 22, 2021

I. Overview

The Spanish Comisión Nacional del Mercado de Valores (“CNMV”) has submitted a “substituted compliance” application requesting that the Securities and Exchange Commission (“Commission”) determine, pursuant to the Securities Exchange Act of 1934 (“Exchange Act”) rule 3a71-6,¹ that security-based swap dealers and major security-based swap participants (“SBS Entities”) subject to regulation in the Kingdom of Spain (“Spain”) conditionally may satisfy requirements under the Exchange Act by complying with comparable Spanish and European Union (“EU”) requirements.² The CNMV sought substituted compliance in connection with certain Exchange Act requirements related to risk control, internal supervision, chief compliance officer, antitrust, counterparty protection, recordkeeping, reporting, and notification.³ The

¹ 17 CFR 240.3a71-6.

² See Letter from Rodrigo Buenaventura, Chair, CNMV, dated August 20, 2021 (“CNMV Application”). The CNMV Application is available on the Commission’s website at: <https://www.sec.gov/page/exchange-act-substituted-compliance-and-listed-jurisdiction-applications-security-based-swap>.

³ Risk control requirements include requirements related to internal risk management, trade acknowledgment and verification, portfolio reconciliation and dispute resolution, portfolio compression, and trading relationship documentation; internal supervision, chief compliance officer, and antitrust requirements include requirements related to diligent supervision, conflicts of interest, information gathering, chief compliance officers, and antitrust considerations; counterparty protection requirements include requirements related to disclosure of material risks and characteristics, disclosure of material incentives or conflicts of interest, “know your counterparty,” suitability of recommendations, fair and balanced communications, disclosure of daily marks, and disclosure of clearing rights; and recordkeeping, reporting, and notification

CNMV Application incorporated comparability analyses between the relevant requirements in Exchange Act section 15F⁴ and the rules and regulations thereunder and applicable Spanish and EU law, as well as information regarding Spanish and EU supervisory and enforcement frameworks.

On August 20, 2021, the Commission issued a notice of the CNMV Application, accompanied by a proposed order to grant substituted compliance with conditions in connection with the CNMV Application (“proposed Order”).⁵ The proposed Order incorporated a number of conditions to tailor the scope of substituted compliance consistent with the prerequisite that relevant Spanish and EU requirements produce regulatory outcomes that are comparable to relevant requirements under the Exchange Act.

As discussed below, the Commission is adopting a final order (“Order”) that has been modified from the proposal in certain respects to address commenter concerns and to make clarifying changes.

II. Substituted Compliance Framework and Prerequisites

A. Substituted compliance framework and purpose

As the Commission has discussed previously,⁶ Exchange Act rule 3a71-6 provides a framework whereby non-U.S. SBS Entities may satisfy certain requirements under Exchange Act

requirements include requirements related to making and keeping current certain prescribed records, preservation of records, reporting, and notification.

⁴ 15 U.S.C. 78o-10.

⁵ See Exchange Act Release No. 92716 (Aug. 20, 2021), 86 FR 47668 (Aug. 26, 2021) (“Spanish Substituted Compliance Notice and Proposed Order”).

⁶ See, e.g., Exchange Act Release No. 90378 (Nov. 9, 2020), 85 FR 72726 (Nov. 13, 2020) (“German Substituted Compliance Notice and Proposed Order”); Exchange Act Release No. 90765 (Dec. 22, 2020), 85 FR 85686 (Dec. 29, 2020) (“German Substituted Compliance Order”); Exchange Act Release No. 92647 (Aug. 12, 2021), 86 FR 46500 (Aug. 18, 2021) (“German Substituted Compliance Notice and Proposed Amended Order”); Exchange Act Release No.

section 15F by complying with comparable regulatory requirements of a foreign jurisdiction.⁷ Because substituted compliance does not constitute exemptive relief, but instead provides an alternative method by which non-U.S. SBS Entities may comply with applicable Exchange Act requirements, the non-U.S. SBS Entities would remain subject to the relevant requirements under section 15F. The Commission accordingly will retain the authority to inspect, examine, and supervise those SBS Entities' compliance and take enforcement action as appropriate. Under the substituted compliance framework, failure to comply with the applicable foreign requirements and other conditions to a substituted compliance order would lead to a violation of the applicable requirements under the Exchange Act and potential enforcement action by the Commission (as opposed to automatic revocation of the substituted compliance order).

Under rule 3a71-6, substituted compliance potentially is available in connection with certain section 15F requirements,⁸ but is not available in connection with antifraud prohibitions and certain other requirements under the Federal securities laws.⁹ SBS Entities in Spain

93411 (Oct. 22, 2021) (“German Amended Substituted Compliance Order”); Exchange Act Release No. 90766 (Dec. 22, 2020), 85 FR 85720 (Dec. 29, 2020) (“French Substituted Compliance Notice and Proposed Order”); Exchange Act Release No. 91477 (Apr. 5, 2021), 86 FR 18341 (Apr. 8, 2021) (“French Substituted Compliance Re-Opening Release”); Exchange Act Release No. 92484 (July 23, 2021), 86 FR 41612 (Aug. 2, 2021) (“French Substituted Compliance Order”); Exchange Act Release No. 91476 (Apr. 5, 2021), 86 FR 18378 (Apr. 8, 2021) (“UK Substituted Compliance Notice and Proposed Order”); Exchange Act Release No. 92529 (July 30, 2021), 86 FR 43318 (August 6, 2021) (“UK Substituted Compliance Order”); Exchange Act Release No. 92632 (Aug. 10, 2021), 86 FR 45770 (Aug. 16, 2021) (“Swiss Substituted Compliance Notice and Proposed Order”); Exchange Act Release No. 93284 (Oct. 8, 2021), 86 FR 57455 (Oct. 15, 2021) (“Swiss Substituted Compliance Order”); Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47668.

⁷ See Exchange Act Release No. 77617 (Apr. 14, 2016), 81 FR 29960, 30079 (May 13, 2016) (“Business Conduct Adopting Release”).

⁸ 17 CFR 240.3a71-6(d).

⁹ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47669 n.10 (addressing unavailability under Rule 3a71-6 of substituted compliance for information-related requirements under Exchange Act section 15F, as well as for provisions related to anti-fraud, transactions with counterparties that are not eligible contract participants, segregation of customer assets, required

accordingly must comply directly with those requirements notwithstanding the availability of substituted compliance for other requirements.

The substituted compliance framework reflects the cross-border nature of the security-based swap market, and is intended to promote efficiency and competition by helping to address potential duplication and inconsistency between relevant U.S. and foreign requirements.¹⁰ In practice, substituted compliance may be expected to help SBS Entities leverage their existing systems and practices to comply with relevant Exchange Act requirements in conjunction with their compliance with relevant foreign requirements. Market participants began to count security-based swap transactions towards the thresholds for registration with the Commission as an SBS Entity on August 6, 2021. Security-based swap dealers and major security-based swap participants who met or exceeded one of the relevant *de minimis* thresholds for registration by the end of August are required to be registered with the Commission by November 1, 2021, or December 1, 2021, respectively.¹¹ Substituted compliance should assist relevant non-U.S. security-based swap market participants in preparing for registration.

clearing upon counterparty election, regulatory reporting and public dissemination, SBS Entity registration, and registration of offerings).

¹⁰ See generally Business Conduct Adopting Release, 81 FR 30073 (stating that the cross-border nature of the security-based swap market poses special regulatory challenges, in that relevant U.S. requirements “have the potential to lead to requirements that are duplicative of or in conflict with applicable foreign business conduct requirements, even when the two sets of requirements implement similar goals and lead to similar results”).

¹¹ See “Key Dates for Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants,” available at <https://www.sec.gov/page/key-dates-registration-security-based-swap-dealers-and-major-security-based-swap-participants>.

B. Specific prerequisites

1. Comparability of regulatory outcomes

Rule 3a71-6, adopted by the Commission in 2016, describes the requirements for the Commission to make a substituted compliance determination. Under the rule, the Commission must determine that the analogous foreign requirements are comparable to otherwise applicable requirements under the Exchange Act (i.e., the relevant requirements in the Exchange Act and the rules and regulations thereunder), after accounting for factors such as “the scope and objectives of the relevant foreign regulatory requirements” and “the effectiveness of the supervisory compliance program administered, and the enforcement authority exercised” by the foreign authority.¹² The comparability assessments are to be based on a “holistic approach” that “will focus on the comparability of regulatory outcomes rather than predicating substituted compliance on requirement-by-requirement similarity.”¹³

¹² Exchange Act rule 3a71-6(a)(2)(i).

¹³ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47670; see also Business Conduct Adopting Release, 81 FR 30078-79 (recognizing that “different regulatory systems may be able to achieve some or all of those regulatory outcomes by using more or fewer specific requirements than the Commission, and that in assessing comparability the Commission may need to take into account the manner in which other regulatory systems are informed by business and market practices in those jurisdictions”). The Commission’s assessment of a foreign authority’s supervisory and enforcement effectiveness—as part of the broader comparability analysis—would be expected to consider not only overall oversight activities, but also oversight specifically directed at conduct and activity relevant to the substituted compliance determination. “For example, it would be difficult for the Commission to make a comparability determination in support of substituted compliance if oversight is directed solely at the local activities of foreign security-based swap dealers, as opposed to the cross-border activities of such dealers.” Business Conduct Adopting Release, 81 FR 30079 (footnote omitted). In the Spanish Substituted Compliance Notice and Proposed Order, the Commission preliminarily concluded that this comparability prerequisite was met in connection with a number of requirements under the Exchange Act, in some cases with the addition of conditions to help ensure the comparability of regulatory outcomes.

2. Memoranda of understanding

Exchange Act rule 3a71-6(a)(2)(ii) further predicates the availability of substituted compliance on the Commission and the foreign financial regulatory authority or authorities having entered into a memorandum of understanding and/or other arrangement with the relevant foreign financial regulatory authority or authorities “addressing supervisory and enforcement cooperation and other matters arising under the substituted compliance determination.”¹⁴ The CNMV Application asked the Commission to permit certain entities regulated and supervised by the CNMV and/or the Bank of Spain to use substituted compliance. Accordingly, the Commission recently entered into a memorandum of understanding with the CNMV and the Bank of Spain.¹⁵ Moreover, because the CNMV, Bank of Spain, and European Central Bank (“ECB”) share responsibility for supervising compliance with certain provisions of EU and Spanish law, the Commission and the ECB also have entered into a memorandum of understanding to address cooperation matters related to substituted compliance.¹⁶ Those memoranda of understanding or other arrangements must be in place before Covered Entities may use substituted compliance to satisfy obligations under the Exchange Act.¹⁷

¹⁴ Exchange Act rule 3a71-6(a)(2)(ii).

¹⁵ The Commission expects to publish a copy of the memorandum of understanding on its website at www.sec.gov under the “Substituted Compliance” tab, which is located on the “Security-Based Swap Markets” page in the Division of Trading and Markets section of the site.

¹⁶ The memorandum of understanding sets forth the conditions under which the Commission may request, share, use, and protect from unauthorized disclosure supervisory and enforcement information that is owned by the ECB. The memorandum of understanding also serves as a framework for consultation, cooperation, and exchange of information between the Commission and the ECB in the supervision, enforcement, and oversight of Spanish firms that are registered with the Commission as SBS Entities. A copy of the memorandum of understanding is available on the Commission’s website at https://www.sec.gov/files/8162021-executed-ecb-mou-redacted-annex-secured_0.pdf.

¹⁷ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47669 n.12.

3. “Adequate assurances”

A foreign financial regulatory authority may submit a substituted compliance application only if the authority provides “adequate assurances” that no law or policy would impede the ability of any entity that is directly supervised by the authority and that may register with the Commission “to provide prompt access to the Commission to such entity’s books and records or to submit to onsite inspection or examination by the Commission.”¹⁸ In the Spanish Substituted Compliance Notice and Proposed Order, the Commission stated that the CNMV had satisfied this prerequisite in the Commission’s preliminary view, taking into account information and representations that the CNMV provided regarding certain Spanish and EU requirements that are relevant to the Commission’s ability to inspect, and access the books and records of, firms using substituted compliance pursuant to the Order.¹⁹ The Commission received no comments on this preliminary view and has not changed its view.

Commission rule 0-13²⁰ addresses procedures for filing substituted compliance applications. The rule provides that the Commission will publish a notice when a completed application has been submitted and that any person may submit to the Commission “any information that relates to the Commission action requested in the application.”²¹

¹⁸ See Exchange Act rule 3a71-6(c)(3).

¹⁹ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47669 n.13.

²⁰ 17 CFR 240.0-13.

²¹ See Commission rule 0-13(h). The Commission may take final action on a substituted compliance application no earlier than 25 days following publication of the notice in the Federal Register.

III. Scope of and Conditions to Substituted Compliance under the Order

A. Comparability considerations

In considering the CNMV's request for substituted compliance, the Commission viewed requirements under the Exchange Act and requirements under Spanish and EU law to maintain similar approaches with respect to achieving regulatory goals in several respects, though they follow differing approaches or incorporate disparate elements in certain other respects. The Commission considered those similarities and differences when analyzing comparability and developing its views, while recognizing that differences in approach do not necessarily preclude substituted compliance in light of the Commission's holistic, outcomes-oriented framework for assessing comparability. In this context, the Commission recognized that other regulatory regimes will have exclusions, exceptions, and exemptions that may not align perfectly with the corresponding requirements under the Exchange Act. Where the Commission found that the Spanish regime produces comparable outcomes notwithstanding those particular differences, the Commission has made a positive determination on substituted compliance.²² Where the Commission found that those exclusions, exemptions, and exceptions lead to outcomes that are not comparable, the Commission has not provided for substituted compliance.²³ When a Covered Entity seeks to rely on substituted compliance to satisfy particular requirements under the Exchange Act, non-compliance with the applicable Spanish requirements would lead to a

²² See paras. (b) through (e) of the Order (internal risk management, trade acknowledgment and verification, portfolio reconciliation and dispute reporting, portfolio compression, trading relationship documentation, internal supervision, chief compliance officers, disclosure of material risks and characteristics, disclosure of material incentives or conflicts of interest, "know your counterparty," suitability, fair and balanced communications, daily mark disclosure, recordkeeping, reporting, and notification requirements).

²³ See Parts V.B (antitrust requirements), VI.B (clearing rights disclosure and certain "know your counterparty" requirements), and VII.B (certain recordkeeping requirements), infra.

violation of those Exchange Act requirements and potential enforcement action by the Commission (as opposed to automatic revocation of the Order).

B. Covered Entities

1. Proposed approach

Under the proposed Order, the definition of “Covered Entity” specified which entities could make use of substituted compliance. Consistent with the availability of substituted compliance under Exchange Act rule 3a71-6, the proposed definition would limit the availability of substituted compliance to registered SBS Entities that are not U.S. persons. In addition, to help ensure that firms that rely on substituted compliance are subject to relevant Spanish and EU requirements and oversight, the proposed definition would require a Covered Entity to be an investment firm or credit institution authorized by the CNMV and the ECB to provide investment services or perform investment activities in Spain. In addition, the proposed definition would require a Covered Entity to be a significant institution supervised by the CNMV and the ECB (with the participation of the Bank of Spain).²⁴

2. Commenter views and final provisions

Commenters did not address the proposed “Covered Entity” definition, and the Commission is issuing the definition as proposed.²⁵ Substituted compliance accordingly is available only to non-U.S. SBS Entities that have the relevant Spanish and EU regulatory permission and are subject to Spanish and EU oversight. Because the Covered Entity definition requires the firm to be “authorized by the CNMV...to provided investment services and/or

²⁴ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47670.

²⁵ See para. (f)(1) of the Order.

perform investment activities in” Spain, only firms for whom the CNMV is the competent authority to grant such permission are able to qualify as Covered Entities.²⁶

C. General conditions to substituted compliance

1. Proposed approach

The proposed Order incorporated a number of additional general conditions and other prerequisites, to help ensure that the relevant Spanish and EU requirements that form the basis for substituted compliance in practice will apply to the Covered Entity’s security-based swap business and activities, and to promote the Commission’s oversight over entities that avail themselves of substituted compliance:

- “Subject to and complies with” applicability condition – For each relevant section of the proposed Order, a positive substituted compliance determination would be predicated on the Covered Entity being subject to and complying with the applicable Spanish and EU requirements needed to establish comparability.²⁷

²⁶ Firms authorized as investment firms or credit institutions by authorities of other EU Member States, whose authorization to provide investment services and/or perform investment activities in Spain derives from the single market “passport” under EU law, are not able to qualify as Covered Entities under the Order.

²⁷ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47671 and n.31. The Commission stated, as an example, that this proposed condition would not be satisfied when the comparable Spanish or EU requirements would not apply to the security-based swap activities of a third-country branch of a Spanish SBS Entity. In that event, the Covered Entity would not be “subject to” those requirements, and the Covered Entity could not rely on substituted compliance in connection with those activities. Moreover, an SBS Entity’s “voluntary” compliance with the relevant Spanish requirements also would not suffice for these purposes. Substituted compliance reflects an alternative means by which an SBS Entity may comply with applicable requirements under the Exchange Act, and thus mandates that the SBS Entity be subject to the requirements needed to establish comparability and face consequences arising from any failure to comply with those requirements. The comparability assessment takes into account the effectiveness of the supervisory compliance program administered and the enforcement authority exercised by the CNMV, the Bank of Spain, and the ECB, and Spanish and EU requirements would not be expected to promote comparable outcomes when compliance merely is “voluntary.”

- Activities as MiFID “investment services or activities” – The Covered Entity’s security-based swap activities would have to constitute “investment services or activities” for purposes of applicable provisions under the Markets in Financial Instruments Directive, Directive 2014/65/EU (“MiFID”), Spanish requirements that implement MiFID, and/or other EU and/or Spanish requirements adopted pursuant to those provisions, and must fall within the scope of the Covered Entity’s authorization from the CNMV and the ECB.²⁸
- Counterparties as MiFID “clients” – The Covered Entity’s counterparty (or potential counterparty) must be a “client” (or potential “client”) for purposes of applicable provisions under MiFID, Spanish requirements that implement MiFID, and/or other EU and Spanish requirements adopted pursuant to those provisions.²⁹
- Security-based swaps as MiFID “financial instruments” – The relevant security-based swap must be a “financial instrument” for purposes of applicable provisions under MiFID, Spanish requirements that implement MiFID, and/or other EU and Spanish requirements adopted pursuant to those provisions.³⁰
- Covered Entity as CRD “institution” – The Covered Entity must be an “institution” for purposes of applicable provisions under the Capital Requirements Directive, Directive

²⁸ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47671 and n.32. Under this condition, a Covered Entity’s security-based swap activities would have to constitute “investment services or activities” only to the extent that the relevant part of the Order requires the Covered Entity to be subject to and comply with a provision of MiFID, Spanish requirements that implement MiFID, and/or related EU and/or Spanish requirements. If the relevant part of the Order does not require the Covered Entity to be subject to and comply with one of those provisions, then the Covered Entity’s security-based swap activities would not have to constitute “investment services or activities” to be able to use substituted compliance under that part of the Order.

²⁹ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47671 and n.33.

³⁰ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47671 and n.34.

2013/36/EU (“CRD”), Spanish requirements that implement CRD, and/or other EU and Spanish requirements adopted pursuant to those provisions.³¹

- Counterparties as EMIR “counterparties” – If an applicable provision under the European Market Infrastructure Regulation, Regulation (EU) 648/2012 (“EMIR”), Commission Delegated Regulation (EU) 149/2013 (“EMIR RTS”), Delegated Regulation (EU) 2016/2251 (“EMIR Margin RTS”), and/or other EU requirements adopted pursuant to those provisions applies only to the Covered Entity’s activities with specified types of counterparties, and if the counterparty is not any of the specified types of counterparties, the Covered Entity must comply with the applicable provision as if the counterparty were the specified type of counterparty. In addition, the proposed Order would provide that a Covered Entity could not satisfy a condition requiring compliance with those EMIR-based provisions by complying with third country requirements that EU authorities may determine to be equivalent to EMIR.³²
- Security-based swap status under EMIR – The relevant security-based swap must be, for purposes of applicable provisions under EMIR, EMIR RTS, EMIR Margin RTS, and/or other EU requirements adopted pursuant to those provisions, either (i) and “OTC derivative” or “OTC derivative contract,” as defined in EMIR article 2(7), that has not

³¹ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47671 and n.35.

³² See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47671 and nn.36-37. The Commission proposed that, if the Covered Entity reasonably determines that the counterparty would be a financial counterparty if it were established in the EU and authorized by appropriate EU authority (including Member State authorities), it must treat the counterparty as if the counterparty were a financial counterparty, rather than as another type of counterparty to which the relevant EMIR-based requirements apply. EMIR article 2(8) defines a “financial counterparty” as including investment firms, credit institutions, insurers, and certain other types of businesses that have been authorized in accordance with EU directives.

been cleared by a central counterparty and otherwise is subject to the provisions of EMIR article 11, EMIR RTS articles 11 through 15, and EMIR Margin RTS article 2; or (ii) cleared by a central counterparty that is authorized or recognized to clear derivatives contracts by a relevant authority in the EU.³³

- Memoranda of understanding – The Commission and the CNMV and the Bank of Spain must have an applicable memorandum of understanding or other arrangement addressing cooperation with respect to the Order at the time the Covered Entity makes use of substituted compliance. Because the CNMV, Bank of Spain, and ECB share responsibility for supervising compliance with some of the provisions of EU and Spanish law addressed by the proposed Order, at the time the Covered Entity makes use of substituted compliance the Commission and the ECB also must have a supervisory and enforcement memorandum of understanding and/or other arrangement addressing cooperation with respect to the Order as it pertains to information owned by the ECB.³⁴
- Notice of reliance on substituted compliance – To assist the Commission’s oversight of firms that avail themselves of substituted compliance, a Covered Entity would be required to notify the Commission of its intent to use substituted compliance.³⁵ In the notice, the Covered Entity would need to identify each specific substituted compliance

³³ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47671 and n.38.

³⁴ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47671 and nn.39-41. The Commission, CNMV and Bank of Spain have entered into a memorandum of understanding to address substituted compliance cooperation. The Commission and the ECB also have entered into a memorandum of understanding to address substituted compliance cooperation with respect to information owned by the ECB. See also *supra* notes 15 through 17 and accompanying text. The proposed Order would require Covered Entities to ensure that these memoranda of understanding remain in place at the time the Covered Entity relies on substituted compliance.

³⁵ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47672 and n.42.

determination for which the Covered Entity intends to apply substituted compliance.³⁶ If a Covered Entity elects not to apply substituted compliance with respect to a specific substituted compliance determination, it must instead comply directly with the relevant Exchange Act requirements. Further, except in the case of the counterparty protection requirements and linked recordkeeping requirements discussed below, the Commission has determined that the Exchange Act requirements subject to substituted compliance determinations in the proposed Order are entity-level requirements. The Commission thus proposed that, if a Covered Entity elects to apply substituted compliance to these

³⁶ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47672 and n.43. The Commission stated that, if the Covered Entity intends to rely on all the substituted compliance determinations in a given paragraph of the proposed Order, it can cite that paragraph in the notice. For example, if the Covered Entity intends to rely on the substituted compliance determinations for Exchange Act risk control requirements in paragraph (b) of the proposed Order, it would indicate in the notice that it is relying on the determinations in paragraph (b). However, if the Covered Entity intends to rely on the internal risk management, trade acknowledgement and verification, and portfolio reconciliation and dispute resolution determinations, but not the portfolio compression and trading relationship documentation determinations, it would need to indicate in the notice that it is relying on paragraphs (b)(1) through (3) of the proposed Order. In this case, paragraphs (b)(4) and (b)(5) of the proposed Order (the portfolio compression and trading relationship documentation determinations, respectively) would be excluded from the notice and the Covered Entity would need to comply with Exchange Act portfolio compression and trading relationship documentation requirements. Further, as discussed below in Part VII, the recordkeeping, reporting, and notification determinations in the proposed Order were structured to provide Covered Entities with a high level of flexibility in selecting specific requirements within those requirements for which they want to rely on substituted compliance. For example, paragraph (e)(1)(i) of the proposed Order set forth the Commission's preliminary substituted compliance determinations with respect to the requirements of Exchange Act rule 18a-5, 17 CFR 240.18a-5. These proposed determinations were set forth in proposed paragraphs (e)(1)(i)(A) through (M). If a Covered Entity intends to rely on some but not all of the determinations, it would need to identify in the notice the specific determinations in this paragraph it intends to rely on (e.g., paragraphs (e)(1)(i)(A), (B), (C), (D), (G), (H), (I), and (M)). For any determinations excluded from the notice, the Covered Entity would need to comply with the Exchange Act rule 18a-5 requirement.

entity-level requirements, it must do so at the entity level.³⁷ The Covered Entity must promptly update the notice if it intends to modify its reliance on substituted compliance.³⁸

- Notification related to changes in capital category – Covered Entities with a prudential regulator would need to apply substituted compliance with respect to the requirements of Exchange Act rule 18a-8(c) and the requirements of Exchange Act rule 18a-8(h) as applied to Exchange Act rule 18a-8(c).³⁹ Exchange Act rule 18a-8(c) generally requires every security-based swap dealer with a prudential regulator that files a notice of adjustment of its reported capital category with the Federal Reserve Board, the Office of the Comptroller of the Currency, or the Federal Deposit Insurance Corporation to give notice of this fact to the that same day by transmitting a copy to the Commission of the notice of adjustment of reported capital category in accordance with Exchange Act rule 18a-8(h).⁴⁰ Exchange Act rule 18a-8(h) sets forth the manner in which every notice or report required to be given or transmitted pursuant to Exchange Act rule 18a-8 must be made. While Exchange Act rule 18a-8(c) is not linked to an Exchange Act capital requirement, it is linked to capital requirements in the U.S. promulgated by the prudential regulators. In its application, the CNMV cited various Spanish provisions as providing

³⁷ See Part III.E, infra; Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47672 and n.44.

³⁸ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47672 and n.45. A Covered Entity would modify its reliance on substituted compliance, and thus trigger the requirement to update its notice, if it adds or subtracts substituted compliance determinations on which it is relying or completely discontinues its reliance on substituted compliance.

³⁹ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47672.

⁴⁰ 17 CFR 240.18a-8(c) and (h).

similar outcomes to the notifications requirements of Exchange Act rule 18a-8.⁴¹ This general condition would be designed to clarify that a prudentially regulated Covered Entity must provide the Commission with copies of any notifications regarding changes in the Covered Entity's capital situation required by Spanish law. The intent is to align the notification requirement with the EU and Spanish capital requirements applicable to the Covered Entity.

2. Commenter views and final provisions

In the proposed Order, the Commission proposed to require Covered Entities to comply with only EMIR-based trade acknowledgement and verification and trading relationship documentation requirements, and not with MiFID-based trade acknowledgement and verification and trading relationship documentation requirements, in response concerns expressed by commenters on prior substituted compliance orders.⁴² Commenters on those prior orders had requested that the Commission delete from those orders proposed conditions that would require firms using substituted compliance for trade acknowledgment and verification and trading relationship documentation requirements to comply with MiFID-based requirements.⁴³

⁴¹ See Act on Regulation, Supervision, and Solvency of Credit Institutions, Law 10/2014, of June 26 ("LOSSEC") articles 116, 119, 121, and 122; and Spanish Securities Market Act, Royal Legislative Decree 4/2015, of October 23 ("SSMA") articles 276bis, 276ter, 276quáter, and 276quinquies.

⁴² See French Substituted Compliance Re-Opening Release, 86 FR 18341-43; German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46503.

⁴³ See Letter from Kyle Brandon, Managing Director, Head of Derivatives Policy, Securities and Financial Markets Association, dated Jan. 25, 2021 ("France SIFMA Letter"), at 3-6 (cited in French Substituted Compliance Re-opening Release, 86 FR 18341-42 and nn.5-6; German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46503 and nn.26-27); Letter from Etienne Barel, Deputy Chief Executive Officer, French Banking Federation, dated Jan. 25, 2021 ("FBF Letter"), at 2 (cited in French Substituted Compliance Re-opening Release, 86 FR 18341-42 and nn.5-6). These comment letters are available on the Commission's website at <https://www.sec.gov/comments/s7-22-20/s72220.htm>.

Commenters argued that those MiFID-based conditions in practice would prevent SBS Entities with branches in other EU countries from relying on substituted compliance for those requirements, and that compliance with proposed EMIR conditions would be sufficient to produce the requisite regulatory outcomes. The Commission amended the prior orders to address these concerns, but only with the addition of the EMIR counterparties general condition and a related condition pertaining to EMIR. By requiring a Covered Entity to treat its counterparty as a type of counterparty that would trigger the application of the relevant EMIR-based requirements, the condition will require the Covered Entity to perform the relevant obligations pursuant to those EMIR-based requirements and thus act in a way that is comparable to Exchange Act requirements. Absent the condition, the Commission would not find comparability with regard to the categories of counterparties, such as U.S. persons and natural persons, to which EMIR is not applicable for the entity-level requirements and, accordingly, would not have been able to make a positive substituted compliance determination for those entity-level requirements. The EMIR counterparties general condition was intended to help ensure that, with the heightened reliance on EMIR-based requirements, there will be no opportunity for gaps that may prevent the EMIR-based requirements in practice from producing outcomes consistent with those of the Exchange Act.⁴⁴

The Commission invited commenters on the proposed Order to address whether the responses to any of the questions that the Commission asked in connection with proposals to make positive substituted compliance determinations in respect of regulatory requirements and frameworks in Germany, France and the United Kingdom would differ if those questions applied to Spanish regulatory requirements and frameworks. The Commission also requested comment

⁴⁴ See German Substituted Compliance Notice and Proposed Amended Order, 86 FR 46503.

on any differences between Spanish regulatory requirements and frameworks and the German, French, or UK requirements and frameworks that formed the basis for the Commission’s conditional grant of substituted compliance for Germany, France, and the United Kingdom.⁴⁵

A commenter on the German Substituted Compliance Notice and Proposed Amended Order⁴⁶ stated that the EMIR counterparties general condition would override exemptions and exclusions from EMIR for certain public sector counterparties, such as multilateral development banks, and would expand the application of EMIR to counterparties who are not “undertakings,” such as natural persons.⁴⁷ That commenter noted that compliance with the condition would require the Covered Entity to “assess whether these counterparties who are not subject to EMIR would be so subject as if it were the type of counterparty specified by EMIR as well as, in many cases, enter into documentation with those counterparties compliant with EMIR.”⁴⁸ The commenter noted that these counterparties would be confused why an order of the Commission “now deprives them of an exception or exemption under EU law that has for some time applied to them” and would be reluctant to enter into new documentation to enable a Covered Entity to satisfy the Commission’s substituted compliance order.⁴⁹ The Commission did not intend for the condition to require compliance with EMIR-based requirements under circumstances where neither those requirements nor the Exchange Act would apply. To clarify this intended scope,

⁴⁵ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47687-90.

⁴⁶ See Letter from Kyle Brandon, Managing Director, Head of Derivatives Policy, Securities Industry and Financial Markets Association, dated Sept. 13, 2021 (“Germany SIFMA Letter”). The Germany SIFMA Letter is available on the Commission’s website at <https://www.sec.gov/comments/s7-08-21/s70821.htm>.

⁴⁷ See Germany SIFMA Letter at 2.

⁴⁸ See Germany SIFMA Letter at 3.

⁴⁹ See Germany SIFMA Letter at 3.

the Commission modified the EMIR counterparties general condition in the German Amended Substituted Compliance Order to clarify that this condition applies only to the extent that an Exchange Act section or rule cited in the relevant part of the Order applies to the security-based swap activities with that counterparty.⁵⁰ The Commission made conforming changes the UK Substituted Compliance Order and the French Substituted Compliance Order.⁵¹

Returning to the Commission’s consideration of the same EMIR regulatory framework in Spain, one commenter stated that proposed Order “reflects a thoughtful, holistic approach to substituted compliance.”⁵² The commenter noted in particular that the Commission’s comparability assessments and the conditions and limitations in the proposed Order were consistent with the UK Substituted Compliance Order, French Substituted Compliance Order, and the German Substituted Compliance Notice and Proposed Amended Order, and as a result concluded that the proposed Order “would facilitate an orderly implementation of the Commission’s [security-based swap] regulatory regime among market participants across different jurisdictions without creating undue complexity or disparity.”⁵³ In the context of the EMIR counterparties general condition, the Commission agrees that consistency among substituted compliance orders that require firms to be subject to and comply with EMIR and laws derived from EMIR, where feasible, would facilitate orderly implementation of substituted compliance. The Commission thus is changing the EMIR counterparties general condition in the

⁵⁰ See German Amended Substituted Compliance Order, Exchange Act Release No. 93411.

⁵¹ See German Amended Substituted Compliance Order, Exchange Act Release No. 93411.

⁵² See Letter from Julia Bayón, Head of Business Legal and Vice-Secretary of the Board, Santander, dated Sept. 20, 2021 (“Santander Letter”). The Santander Letter is available on the Commission’s website at <https://www.sec.gov/comments/s7-09-21/s70921.htm>.

⁵³ See Santander Letter at 1.

Order to reflect the same changes made in the German Amended Substituted Compliance Order.⁵⁴ The Commission believes this change will promote consistency among substituted compliance orders that require firms to be subject to and comply with EMIR and laws derived from EMIR, consistent with the commenter's concern and with the Commission's request for comment on differences between the Spanish, German, French, and UK regulatory requirements and frameworks.

The Commission also is amending the general condition in paragraph (a)(6) of the Order to clarify that the condition applies only if the relevant EMIR-based requirement applies to OTC derivatives that have not been cleared by a central counterparty, as some provisions of EMIR cited in the Order, such as EMIR articles 39(4) and (5), are not limited in their application to non-centrally cleared OTC derivatives.

The Commission continues to believe that the remaining general conditions are structured appropriately to predicate a positive substituted compliance determination on the applicability of relevant Spanish and EU requirements needed to establish comparability, as well as on the continued effectiveness of the requisite memoranda of understanding, and the provision of appropriate notices to the Commission. The Commission is issuing these remaining general conditions as proposed, and substituted compliance accordingly is available only when the Covered Entity satisfies all applicable general conditions.⁵⁵

⁵⁴ See para. (a)(5) of the Order.

⁵⁵ See paras. (a)(1) through (a)(4), (a)(6) through (a)(9), and (a)(11) of the Order.

D. European Union cross-border matters

1. Proposed approach

The proposed Order also included general conditions to address the cross-border application of MiFID, the Markets in Financial Instruments Regulation, Regulation (EU) 600/2014 (“MiFIR”), and the Market Abuse Regulation, Regulation (EU) 596/2014 (“MAR”), along with EU and Spanish requirements adopted pursuant to those laws.⁵⁶ For some requirements under MiFID and MiFIR (and other EU and Member State requirements adopted pursuant to MiFID and MiFIR), EU law allocates the responsibility for supervising and enforcing those requirements to authorities of the Member State where an entity provides certain services.⁵⁷ Similarly, for some requirements under MAR (and other EU and Member State requirements adopted pursuant to MAR), EU law allocates the responsibility for supervising and enforcing those requirements to authorities of potentially multiple Member States. To help ensure that the prerequisites to substituted compliance with respect to supervision and enforcement are satisfied in fact, when the proposed Order conditioned substituted compliance on the Covered Entity being subject to and complying with those MiFID- and MiFIR-related requirements, the proposed Order would permit substituted compliance only if the CNMV is the authority responsible for supervision and enforcement of those MiFID- and MiFIR-related requirements in relation to the particular service provided by the Covered Entity. When the proposed Order conditioned substituted compliance on the Covered Entity being subject to and complying with those MAR-related requirements, the proposed Order would permit substituted

⁵⁶ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47672 and nn.48-50.

⁵⁷ See MiFID article 35(8).

compliance only if one of the authorities responsible for supervision and enforcement of those requirements is the CNMV.

2. Commenter views and final provisions

Commenters did not address the European Union cross-border conditions. The Commission continues to believe that requiring that the CNMV have responsibility for applicable MiFID, MiFIR, and MAR provisions will help ensure that the supervision and enforcement prerequisites to substituted compliance are satisfied.⁵⁸ In the Commission's view, these conditions are structured appropriately to permit the use of substituted compliance only when the CNMV is responsible for supervising a Covered Entity's compliance with a relevant provision of MiFID, MiFIR, MAR, or related EU or Spanish requirements. Additionally, the conditions help ensure that applicable MiFID, MiFIR, and MAR provisions are interpreted and applied in a consistent manner by an entity that is party to the memorandum of understanding and/or other arrangement that are a prerequisite to substituted compliance. Accordingly, the Commission is issuing the conditions as proposed.⁵⁹

E. Substituted compliance for entity-level and transaction-level requirements

1. Proposed approach

For entity-level Exchange Act requirements,⁶⁰ the proposed Order would require a Covered Entity to choose either to apply substituted compliance pursuant to the proposed Order

⁵⁸ See Business Conduct Adopting Release, 81 FR 30080.

⁵⁹ See para. (a)(10) of the Order.

⁶⁰ Entity-level requirements relevant to the proposed Order relate to internal risk management, trade acknowledgment and verification, portfolio reconciliation and dispute resolution, portfolio compression, trading relationship documentation, internal supervision, chief compliance officers, counterparty protection, recordkeeping (other than requirements linked to counterparty protection requirements), reporting, and notification. See Exchange Act Release No. 78011 (June 8, 2016) 81 FR 39808, 39827 (June 17, 2016) ("TAV Adopting Release"); Business Conduct Adopting

with respect to all security-based swap business subject to the relevant Spanish and EU requirements or to comply directly with the Exchange Act with respect to all such business; a Covered Entity would not be able to choose to apply substituted compliance pursuant to the proposed Order for some of the business subject to the relevant Spanish or EU requirements and comply directly with the Exchange Act for another part of the business that is subject to the relevant Spanish and EU requirements.⁶¹ Additionally, for entity-level Exchange Act requirements, if the Covered Entity also has security-based swap business that is not subject to the relevant Spanish and/or EU requirements, the proposed Order would require the Covered Entity either to comply directly with the Exchange Act for that business or to comply with the terms of another applicable substituted compliance order.⁶² For transaction-level Exchange Act requirements,⁶³ a Covered Entity may decide to apply substituted compliance for some of its security-based swap business and to comply directly with the Exchange Act (or comply with another applicable substituted compliance order) for other parts of its security-based swap business.⁶⁴

Release, 81 FR 30064; Exchange Act Release No. 87005 (June 19, 2019) 84 FR 68550, 68596 (Dec. 16, 2019) (“Books and Records Adopting Release”); Exchange Act Adopting Release No. 87782 (Dec. 18, 2019) 85 FR 6359, 6378 (Feb. 4, 2020) (“Risk Mitigation Adopting Release”).

⁶¹ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47672-73 and n.51.

⁶² See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47673 and n.53. In the context of the EMIR counterparties condition in paragraph (a)(5) of the proposed Order, a Covered Entity would be required to choose: (1) to apply substituted compliance pursuant to the proposed Order—including compliance with paragraph (a)(5) as applicable—for a particular set of entity-level requirements with respect to all of its business that would be subject to the relevant EMIR-based requirement if the counterparty were the relevant type of counterparty; or (2) to comply directly with the Exchange Act with respect to such business.

⁶³ Transaction-level requirements relevant to the proposed Order are the counterparty protection requirements and the recordkeeping requirements related to those counterparty protection requirements. See Business Conduct Adopting Release, 81 FR 30065.

⁶⁴ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47673 and n.54.

2. Commenter views and final provisions

Commenters did not address the proposed approach to substituted compliance for entity-level and transaction-level requirements. The Commission continues to believe that the proposed scope of substituted compliance strikes the right balance between providing Covered Entities flexibility to tailor the application of substituted compliance to their business needs and ensuring that substituted compliance is consistent with the Commission's classification of the relevant Exchange Act requirements as either entity-level or transaction-level requirements. The Commission accordingly is issuing the Order with the proposed approach to substituted compliance for entity-level and transaction-level requirements.

IV. Substituted Compliance for Risk Control Requirements

A. Proposed approach

The CNMV Application requested substituted compliance in connection with risk control requirements under the Exchange Act relating to:

- Internal risk management—Internal risk management system requirements pursuant to Exchange Act section 15F(j)(2) and relevant aspects of Exchange Act rule 15Fh-3(h)(2)(iii)(I).⁶⁵ Those provisions address the obligation of SBS Entities to follow policies and procedures reasonably designed to help manage the risks associated with their business activities.⁶⁶

⁶⁵ The CNMV did not request substituted compliance in connection with Exchange Act rule 18a-1(f) or Exchange Act rule 18a-2(c), which include additional internal risk management system requirements for non-prudentially regulated SBS Entities subject to the Commission's capital and margin requirements.

⁶⁶ See Exchange Act Release No. 68071 (Oct. 18, 2012), 77 FR 70214, 70250 (Nov. 23, 2012) (proposing capital and margin requirements for SBS Entities and discussing certain risk management requirements); Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47673 and n.56.

- Trade acknowledgment and verification—Trade acknowledgment and verification requirements pursuant to Exchange Act section 15F(i) and Exchange Act rule 15Fi-2.⁶⁷ Those provisions help avoid legal and operational risks by requiring definitive written records of transactions and for procedures to avoid disagreements regarding the meaning of transaction terms.⁶⁸
- Portfolio reconciliation and dispute reporting—Portfolio reconciliation and dispute reporting requirements pursuant to Exchange Act section 15F(i) and Exchange Act rule 15Fi-3.⁶⁹ Those provisions require that counterparties engage in portfolio reconciliation and resolve discrepancies in connection with uncleared security-based swaps and promptly notify the Commission and applicable prudential regulators regarding certain valuation disputes.⁷⁰
- Portfolio compression—Portfolio compression requirements pursuant to Exchange Act section 15F(i) and Exchange Act rule 15Fi-4.⁷¹ Those provisions require that SBS Entities have procedures addressing bilateral offset, bilateral compression and multilateral compression in connection with uncleared security-based swaps.⁷²

⁶⁷ 17 CFR 240.15Fi-2.

⁶⁸ See TAV Adopting Release, 81 FR 39808, 39809, 39820; Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47673 and n.58.

⁶⁹ 17 CFR 240.15Fi-3.

⁷⁰ See Risk Mitigation Adopting Release, 85 FR 6359, 6360-61; Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47673 and n.60.

⁷¹ 17 CFR 240.15Fi-4.

⁷² See Risk Mitigation Adopting Release, 85 FR 6361; Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47673 and n.62.

- Trading relationship documentation—Trading relationship documentation requirements pursuant to Exchange Act section 15F(i) and Exchange Act rule 15Fi-5.⁷³ Those provisions require that SBS Entities have procedures to execute written security-based swap trading relationship documentation with their counterparties prior to, or contemporaneously with, executing certain security-based swaps.⁷⁴

Taken as a whole, these risk control requirements help to promote market stability by mandating that SBS Entities follow practices that are appropriate to manage the market, credit, counterparty, operational, and legal risks associated with their security-based swap businesses. In considering conditional substituted compliance for the risk control portion of the CNMV Application, the Commission preliminarily concluded that the relevant Spanish and EU requirements would produce regulatory outcomes that are comparable to those associated with the above risk control requirements, by subjecting Covered Entities to risk mitigation and documentation practices that are appropriate to the risks associated with their security-based swap businesses.⁷⁵

Substituted compliance under the proposed Order was to be subject to certain additional conditions to help ensure the comparability of outcomes. First, substituted compliance under the proposed Order was to be conditioned on Covered Entities being subject to the Spanish and EU provisions that in the aggregate establish a framework that produces outcomes comparable to those associated with these risk control requirements under the Exchange Act.⁷⁶ Second,

⁷³ 17 CFR 240.15Fi-5.

⁷⁴ See Risk Mitigation Adopting Release, 85 FR 6361; Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47673 and n.64.

⁷⁵ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47674.

⁷⁶ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47674 and n.65.

substituted compliance in connection with trading relationship documentation requirements would not extend to disclosures regarding legal and bankruptcy status that are required by Exchange Act rule 15Fi-5(b)(5) when the counterparty is a U.S. person.⁷⁷ Finally, substituted compliance in connection with portfolio reconciliation and dispute reporting requirements would be conditioned on the Covered Entity providing the Commission with reports regarding disputes between counterparties on the same basis as the Covered Entity provides those reports to competent authorities pursuant to EU law.⁷⁸

B. Commenter views and final provisions

One commenter supported the Commission's proposal to make the positive substituted compliance determinations in the proposed Order,⁷⁹ including positive substituted compliance determinations for internal risk management, trade acknowledgment and verification, portfolio reconciliation and dispute reporting, portfolio compression and trading relationship documentation requirements. The Commission continues to conclude that, taken as a whole, relevant Spanish and EU requirements would produce regulatory outcomes that are comparable to those associated with these risk control requirements, by subjecting Covered Entities to risk mitigation and documentation practices that are appropriate to the risks associated with their security-based swap businesses. While the Commission recognizes certain differences between Spanish and EU requirements and the applicable risk control requirements under the Exchange Act, in the Commission's view those differences on balance should not preclude substituted compliance for these requirements, as the relevant Spanish and EU requirements taken as a

⁷⁷ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47674 and nn.66-67.

⁷⁸ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47674 and nn.68-70.

⁷⁹ See Santander Letter at 1.

whole help to produce comparable regulatory outcomes.⁸⁰ Accordingly, the Commission is making positive substituted compliance determinations in connection with internal risk management, trade acknowledgment and verification, portfolio reconciliation and dispute reporting, portfolio compression and trading relationship documentation requirements and is issuing the risk control section of the Order as proposed.⁸¹

To help ensure the comparability of outcomes, and consistent with the proposed Order, substituted compliance for risk control requirements is subject to certain conditions. Substituted compliance for internal risk management, trade acknowledgment and verification, portfolio reconciliation and dispute reporting, portfolio compression and trading relationship documentation requirements is conditioned on the Covered Entity being subject to, and complying with, relevant Spanish and EU requirements.⁸² In addition, substituted compliance for trading relationship documentation does not extend to disclosures regarding legal and bankruptcy status that are required by Exchange Act rule 15Fi-5(b)(5) when the counterparty is a U.S. person.⁸³ Finally, substituted compliance in connection with portfolio reconciliation and

⁸⁰ The comparability analysis requires consideration of Exchange Act requirements as a whole against analogous Spanish and EU requirements as a whole, recognizing that U.S. and non-U.S. regimes may follow materially different approaches in terms of specificity and technical content. This “as a whole” approach – which the Commission is following in lieu of requiring requirement-by-requirement similarity – further means that the conditions to substituted compliance should encompass all Spanish and EU requirements that establish comparability with the applicable regulatory outcome, and helps to avoid ambiguity in the application of substituted compliance.

⁸¹ See para. (b) of the Order.

⁸² See paras. (b)(1) through (5) of the Order.

⁸³ See para. (b)(5) of the Order. The Exchange Act rule 15Fi-5, 17 CFR 240.15Fi-5, disclosures address information regarding: (1) the status of the SBS Entity or its counterparty as an insured depository institution or financial counterparty, and (2) the possibility that in certain circumstances the SBS Entity or its counterparty may be subject to the insolvency regime set forth in Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act or the Federal Deposit Insurance Act, which may affect rights to terminate, liquidate, or net security-based swaps. See Risk Mitigation Adopting Release, 85 FR 6374. Documentation requirements

dispute reporting requirements is conditioned on the Covered Entity providing the Commission with reports regarding disputes between counterparties on the same basis as the Covered Entity provides those reports to competent authorities pursuant to EU law.⁸⁴ A Covered Entity that is unable to comply with an applicable condition—and thus is not eligible to use substituted compliance for the particular set of Exchange Act risk control requirements related to that condition—nevertheless may use substituted compliance for another set of Exchange Act requirements addressed in the Order if it complies with the conditions to the relevant parts of the Order.

under applicable Spanish and EU law do not address the disclosure of information related to insolvency procedures under U.S. law. However, the absence of such disclosures would not appear to preclude a comparable regulatory outcome when the counterparty is not a U.S. person, as the insolvency-related consequences that are the subject of the disclosure would not apply to non-U.S. counterparties in most cases. Moreover, EMIR Margin RTS article 2 requires counterparties to establish, apply, and document risk management procedures providing for or specifying the terms of agreements entered into by the counterparties, including applicable governing law for non-centrally cleared derivatives. When counterparties enter into a netting or collateral exchange agreement, they also must perform an independent legal review of the enforceability of those agreements.

⁸⁴ See para. (b)(3)(ii) of the Order. This condition promotes comparability with the Exchange Act rule requiring reports to the Commission regarding significant valuation disputes, while leveraging Spanish and EU reporting provisions to avoid the need for Covered Entities to create additional reporting frameworks. When it proposed the requirement for all SBS Entities to report valuation disputes, the Commission recognized that valuation inaccuracies may lead to uncollateralized credit exposure and the potential for loss in the event of default. See Exchange Act Release No. 84861 (Dec. 19, 2018), 84 FR 4614, 4621 (Feb. 15, 2019). It thus is important that the Commission be informed regarding valuation disputes affecting SBS Entities. The principal difference between the Exchange Act and EU valuation dispute reporting requirements concerns the timing of notices. Under Exchange Act rule 15Fi-3, SBS Entities must promptly report to the Commission valuation disputes in excess of \$20 million that have been outstanding for three or five business days (depending on the counterparty type). Under EMIR RTS article 15(2), firms must report at least monthly, to competent authorities, disputes between counterparties in excess of €15 million and outstanding for at least 15 business days. The Commission is mindful that the EU provision does not provide for notice as quickly as rule 15Fi-3(c), but in the Commission’s view, on balance this difference would not be inconsistent with the conclusion that the two sets of risk control requirements—taken as a whole—produce comparable regulatory outcomes.

Under the Order, substituted compliance for risk control requirements (relating to internal risk management, trade acknowledgment and verification, portfolio reconciliation and dispute reporting, portfolio compression, and trading relationship documentation) is not subject to a condition that the Covered Entity apply substituted compliance for related recordkeeping requirements in Exchange Act rules 18a-5 and 18a-6. A Covered Entity that applies substituted compliance for one or more risk control requirements, but does not apply substituted compliance for the related recordkeeping requirements in Exchange Act rules 18a-5 and 18a-6, will remain subject to the relevant provisions of Exchange Act rules 18a-5 and 18a-6. Those rules require the Covered Entity to make and preserve records of its compliance with Exchange Act risk control requirements and of its security-based swap activities required or governed by those requirements. A Covered Entity that applies substituted compliance for a risk control requirement, but complies directly with related recordkeeping requirements in rules 18a-5 and 18a-6, therefore must make and preserve records of its compliance with the relevant conditions of the Order and of its security-based swap activities required or governed by those conditions and/or referenced in the relevant parts of rules 18a-5 and 18a-6.

V. Substituted Compliance for Internal Supervision and Compliance Requirements

A. Proposed approach

The CNMV Application requested substituted compliance in connection with requirements under the Exchange Act relating to:

- Internal supervision—Diligent supervision is required pursuant to Exchange Act rule 15Fh-3(h) and Exchange Act section 15F(j)(5) requires conflict of interest systems and procedures. These provisions generally require that SBS Entities establish, maintain, and enforce supervisory policies and procedures that reasonably are designed to prevent violations of applicable law, and implement certain systems and procedures related to

conflicts of interest. Exchange Act section 15F(j)(4)(A) additionally requires systems and procedures to obtain necessary information to perform functions required under section 15F.⁸⁵

- Chief compliance officers—Chief compliance officer requirements are set out in Exchange Act section 15F(k) and Exchange Act rule 15Fk-1.⁸⁶ These provisions in general require that SBS Entities designate individuals with the responsibility and authority to establish, administer, and review compliance policies and procedures; to resolve conflicts of interest; and to prepare and certify an annual compliance report to the Commission.⁸⁷
- Antitrust requirements—Additional requirements related to antitrust prohibitions specified by Exchange Act section 15F(j)(6).⁸⁸

Taken as a whole, these internal supervision, chief compliance officer, and additional Exchange Act section 15F(j) requirements help to promote SBS Entities' use of structures, processes, and responsible personnel reasonably designed to promote compliance with applicable law; to identify and cure instances of non-compliance; and to manage conflicts of interest. In considering conditional substituted compliance for this portion of the CNMV Application, the Commission preliminarily concluded that the relevant Spanish and EU requirements would produce regulatory outcomes that are comparable to those associated with Exchange Act internal

⁸⁵ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47674 and n.71.

⁸⁶ 17 CFR 240.15Fk-1.

⁸⁷ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47674 and n.73.

⁸⁸ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47674 and n.74. Section 15F(j)(6) prohibits firms from adopting any process or taking any action that results in any unreasonable restraint of trade or imposing any material anticompetitive burden on trading or clearing.

supervision⁸⁹ and chief compliance officer requirements by providing that Covered Entities have structures and processes that reasonably are designed to promote compliance with applicable law and to identify and cure instances of non-compliance and manage conflicts of interest.⁹⁰

Substituted compliance under the proposed Order was to be subject to certain conditions to help ensure the comparability of outcomes. First, substituted compliance for internal supervision and chief compliance officer requirements under the proposed Order was to be conditioned on Covered Entities being subject to the Spanish and EU requirements that in the aggregate establish a framework that produces outcomes comparable to those associated with these internal supervision, chief compliance officer, conflict of interest, and information-related requirements under the Exchange Act.⁹¹ Second, substituted compliance in connection with internal supervision requirements would be conditioned on Covered Entities complying with applicable Spanish and EU internal supervision requirements as if those provisions also require the Covered Entity to comply with applicable requirements under the Exchange Act and the other applicable conditions of the proposed Order.⁹² This condition was intended to reflect that,

⁸⁹ The proposed Order would provide for substituted compliance in connection with internal supervision provisions of Exchange Act rule 15Fh-3(h), the requirement in Exchange Act section 15F(j)(4)(A) to have systems and procedures to obtain necessary information to perform functions required under Exchange Act section 15F; and the conflict of interest provisions of Exchange Act section 15F(j)(5). The internal supervision portion of the proposed Order did not extend to the portions of rule 15Fh-3(h) that mandate supervisory policies and procedures in connection with: the internal risk management provisions of Exchange Act section 15F(j)(2) (which were addressed by paragraph (b)(1) of the proposed Order in connection with internal risk management); the information-related provisions of Exchange Act sections 15F(j)(3) and (j)(4)(B) (for which substituted compliance is not available); or the antitrust provisions of Exchange Act section 15F(j)(6) (for which the Commission did not propose to provide substituted compliance). See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47675 n.75.

⁹⁰ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47675.

⁹¹ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47676 and n.86.

⁹² See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47675 and n.77. In other words, the proposed Order would require that the Covered Entity's supervisory and compliance

even with substituted compliance, Covered Entities still directly would be subject to a number of requirements under the Exchange Act and to conditions of the Order, all of which fall outside the ambit of Spanish and EU internal supervision requirements.⁹³ Finally, for similar reasons, substituted compliance in connection with chief compliance officer requirements would be subject to the conditions⁹⁴ that compliance reports required pursuant to Commission Delegated Regulation (EU) 2017/565 (“MiFID Org Reg”) article 22(2)(c) must: (1) be provided to the Commission at least annually and in the English language; (2) include a certification signed by the chief compliance officer or senior officer of the Covered Entity that, to the best of the certifier’s knowledge and reasonable belief and under penalty of law, the report is accurate and complete in all material respects; (3) address the Covered Entity’s compliance with applicable

program cover applicable requirements under the Exchange Act and other applicable conditions of the Order.

⁹³ While the Spanish and EU regulatory framework in general reasonably appears to promote Covered Entities’ compliance with applicable Spanish and EU laws, those requirements do not appear to promote Covered Entities’ compliance with requirements under the Exchange Act that are not subject to substituted compliance, or to promote Covered Entities’ compliance with the applicable conditions to the proposed Order. These residual Exchange Act requirements could, for example, relate to requirements for which substituted compliance is not available, requirements for which the Order does not make a positive substituted compliance determination, security-based swap business for which the Covered Entity is unable to satisfy the conditions of the Order, and/or requirements or security-based swap business for which the Covered Entity decides not to use substituted compliance. The condition was designed to allow Covered Entities to use their existing internal supervision and compliance frameworks to comply with the relevant Exchange Act requirements and proposed Order conditions, rather than having to establish separate special-purpose internal supervision frameworks.

⁹⁴ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47675-76 and nn.80-85. Although certain Spanish and EU requirements address a Covered Entity’s use of internal compliance reports, those requirements do not require it to submit compliance reports to the Commission. These conditions would allow a Covered Entity to leverage the compliance reports that it otherwise must produce, by extending those reports to address compliance with the conditions of the proposed Order. The Commission stated that, in practice, a Covered Entity may satisfy these conditions by identifying relevant Exchange Act requirements and proposed Order conditions and reporting on the implementation and effectiveness of its controls with regard to compliance with those requirements and conditions.

requirements under the Exchange Act and other applicable conditions of the proposed Order;⁹⁵ (4) be provided to the Commission no later than 15 days following the earlier of the submission of the report to the Covered Entity's management body or the time the report is required to be submitted to the management body;⁹⁶ and (5) together cover the entire period that the Covered Entity's annual compliance report referenced in Exchange Act section 15F(k)(3) and Exchange Act rule 15Fk-1(c) would be required to cover.⁹⁷

Finally, the Commission preliminarily concluded that allowing an alternative means of compliance with Exchange Act antitrust requirements would not lead to comparable outcomes, and the proposed Order did not provide for substituted compliance in connection with those requirements.⁹⁸

⁹⁵ MiFID Org Reg article 22(2)(c) particularly requires that a Covered Entity's compliance function "report to the management body, on at least an annual basis, on the implementation and effectiveness of the overall control environment for investment services and activities, on the risks that have been identified and on the complaints-handling reporting as well as remedies undertaken or to be undertaken[.]" Under the proposed condition, those reports, as submitted to the Commission and the Covered Entity's management body, also would address the Covered Entity's compliance with applicable Exchange Act requirements and other applicable conditions of the proposed Order (in addition to addressing the Covered Entity's compliance with applicable Spanish and EU provisions).

⁹⁶ This deadline was intended to promote timely notice of compliance matters in a manner comparable to Exchange Act requirements, while also accounting for the annual deadline required under MiFID Org Reg article 22(2)(c) as well as the possibility that the Covered Entity may submit reports ahead of this annual deadline.

⁹⁷ This requirement would prevent a Covered Entity from notifying the Commission just prior to the due date of its annual Exchange Act compliance report that it will use substituted compliance for chief compliance officer requirements and then providing the Commission a Spanish compliance report that covers only a part of the year that would have been covered in the Exchange Act report.

⁹⁸ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47676 and n.86.

B. Commenter views and final provisions

One commenter supported the Commission's proposal to make the positive substituted compliance determinations in the proposed Order,⁹⁹ including positive substituted compliance determinations for internal supervision and chief compliance officer requirements. The Commission continues to conclude that, taken as a whole, relevant Spanish and EU requirements would produce regulatory outcomes that are comparable to those associated with Exchange Act internal supervision and chief compliance officer requirements by providing that Covered Entities have structures and processes that reasonably are designed to promote compliance with applicable law and to identify and cure instances of non-compliance and manage conflicts of interest. While the Commission recognizes certain differences between Spanish and EU requirements and the applicable internal supervision and chief compliance officer requirements under the Exchange Act, in the Commission's view those differences on balance should not preclude substituted compliance for these requirements, as the relevant Spanish and EU requirements taken as a whole help to produce comparable regulatory outcomes by requiring Covered Entities to have structures and processes reasonably designed to promote compliance with applicable law, identify and cure instances of non-compliance, and manage conflicts of interest. Accordingly, the Commission is making positive substituted compliance determinations in connection with internal supervision and chief compliance officer requirements and is issuing the internal supervision and compliance section of the Order as proposed.¹⁰⁰

To help ensure the comparability of outcomes, and consistent with the proposed Order, substituted compliance for internal supervision and chief requirements is subject to certain

⁹⁹ See Santander Letter at 1.

¹⁰⁰ See para. (c) of the Order.

conditions. Substituted compliance for both sets of requirements is conditioned on the Covered Entity being subject to, and complying with, relevant Spanish and EU requirements.¹⁰¹ In addition, substituted compliance for internal supervision requirements (1) is conditioned on the Covered Entity's compliance with applicable Spanish and EU internal supervision requirements as if those provisions also require the Covered Entity to comply with applicable requirements under the Exchange Act and the other applicable conditions of the proposed Order¹⁰² and (2) does not extend to certain specified internal supervision requirements.¹⁰³ Finally, substituted compliance in connection with chief compliance officer requirements is subject to the conditions that compliance reports required pursuant to MiFID Org Reg article 22(2)(c) must: (1) be provided to the Commission at least annually and in the English language; (2) include a certification¹⁰⁴ signed by the chief compliance officer or senior officer of the Covered Entity

¹⁰¹ See paras. (c)(1) through (3) of the Order.

¹⁰² See paras. (c)(1)(ii) and (c)(4) of the Order. The Order provides that the Covered Entity must comply with relevant Spanish and EU provisions as if those provisions address applicable conditions of the Order connected to requirements for which the Covered Entity is relying on substituted compliance. That part of the condition does not apply to parts of the Order for which the Covered Entity does not rely on substituted compliance. In other words, a Covered Entity's reliance on substituted compliance under para. (c)(4) requires that the Covered Entity's supervisory and compliance programs cover applicable provisions under the Exchange Act and other applicable conditions of the Order.

¹⁰³ See para. (c)(1)(iii) of the Order. In particular, the Order does not extend to the portions of rule 15Fh-3(h) that mandate supervisory policies and procedures in connection with: the internal risk management provisions of Exchange Act section 15F(j)(2) (which are addressed by paragraph (b)(1) of the Order in connection with internal risk management); the information-related provisions of Exchange Act sections 15F(j)(3) and (j)(4)(B) (for which substituted compliance is not available); or the antitrust provisions of Exchange Act section 15F(j)(6) (for which the Commission is not making a positive substituted compliance determination).

¹⁰⁴ The Commission recognizes that Covered Entities preparing multiple Spanish compliance reports each year may find it difficult to submit to those reports to the Commission throughout the year, each with a chief compliance officer or senior officer certification and a section addressing the Covered Entity's compliance with U.S. requirements. However, on balance the Commission continues to believe that these elements are necessary to achieve a regulatory outcome comparable to the Exchange Act.

that, to the best of the certifier's knowledge and reasonable belief and under penalty of law, the report is accurate and complete in all material respects; (3) address the Covered Entity's compliance with applicable requirements under the Exchange Act and other applicable conditions of the proposed Order; (4) be provided to the Commission no later than 15 days¹⁰⁵ following the earlier of the submission of the report to the Covered Entity's management body or the time the report is required to be submitted to the management body; and (5) together cover the entire period that the Covered Entity's annual compliance report referenced in Exchange Act section 15F(k)(3) and Exchange Act rule 15Fk-1(c) would be required to cover.¹⁰⁶ A Covered Entity that is unable to comply with an applicable condition—and thus is not eligible to use substituted compliance for the particular set of Exchange Act risk control requirements related to that condition—nevertheless may use substituted compliance for another set of Exchange Act requirements addressed in the Order if it complies with the conditions to the relevant parts of the Order.

Under the Order, substituted compliance for internal supervision and chief compliance officer requirements is not subject to a condition that the Covered Entity apply substituted compliance for related recordkeeping requirements in Exchange Act rules 18a-5 and 18a-6. A

¹⁰⁵ The Commission continues to believe that it is appropriate for the Commission to receive compliance reports shortly after their submission to the management body. Providing these reports to the Commission near the times that the Covered Entity submits them to the management body also will better align with the Spanish and EU regulatory framework, which permits a Covered Entity to prepare and submit to the management body multiple compliance reports throughout the year. The Commission views 15 days as providing a reasonable time to translate reports, if needed, and convey them to the Commission.

¹⁰⁶ See para. (c)(2)(ii) of the Order. The Commission continues to believe that these conditions are necessary to promote comparable regulatory outcomes, particularly in light of the granular approach to substituted compliance, and to ensure that the compliance report covers applicable Exchange Act requirements and proposed Order conditions if the Covered Entity uses substituted compliance for chief compliance officer requirements, whether or not the Covered Entity relies on substituted compliance for internal supervision.

Covered Entity that applies substituted compliance for internal supervision and/or chief compliance officer requirements, but does not apply substituted compliance for the related recordkeeping requirements in Exchange Act rules 18a-5 and 18a-6, will remain subject to the relevant provisions of Exchange Act rules 18a-5 and 18a-6. Those rules require the Covered Entity to make and preserve records of its compliance with Exchange Act internal supervision and chief compliance officer requirements and of its security-based swap activities required or governed by those requirements. A Covered Entity that applies substituted compliance for internal supervision and/or chief compliance officer requirements, but complies directly with related recordkeeping requirements in rules 18a-5 and 18a-6, therefore must make and preserve records of its compliance with the relevant conditions of the Order and of its security-based swap activities required or governed by those conditions and/or referenced in the relevant parts of rules 18a-5 and 18a-6.

Finally, for the reasons discussed in the proposed Order,¹⁰⁷ the Order does not extend to antitrust provisions under the Exchange Act.

VI. Substituted Compliance for Counterparty Protection Requirements

A. Proposed approach

The CNMV requested substituted compliance in connection with counterparty protection requirements under the Exchange Act relating to:

- Disclosure of material risks and characteristics and material incentives or conflicts of interest—Exchange Act rule 15Fh-3(b) requires that SBS Entities disclose to certain counterparties to a security-based swap certain information about the material risks and

¹⁰⁷ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47676 and n.86. The Commission is not taking any position regarding the applicability of the section 15F(j)(6) antitrust prohibitions in the cross-border context. Non-U.S. SBS Entities should assess the applicability of those prohibitions to their security-based swap businesses.

characteristics of the security-based swap, as well as material incentives or conflicts of interest that the SBS Entity may have in connection with the security-based swap. These provisions address the need for security-based swap market participants to have information that is sufficient to make informed decisions regarding potential transactions involving particular counterparties and particular financial instruments.¹⁰⁸

- “Know your counterparty”—Exchange Act rule 15Fh-3(e) requires a security-based swap dealer to establish, maintain, and enforce written policies and procedures to obtain and retain certain information regarding a counterparty that is necessary for conducting business with that counterparty. This provision accounts for the need that SBS Entities obtain essential counterparty information necessary to promote effective compliance and risk management.¹⁰⁹
- Suitability—Exchange Act rule 15Fh-3(f) requires a security-based swap dealer that recommends to certain counterparties a security-based swap or trading strategy involving a security-based swap, to undertake reasonable diligence to understand the potential risks and rewards associated with the recommendation and to have a reasonable basis to believe that the recommendation is suitable for the counterparty. This provision accounts for the need to guard against security-based swap dealers making unsuitable recommendations.¹¹⁰
- Fair and balanced communications—Exchange Act rule 15Fh-3(g) requires that SBS Entities communicate with counterparties in a fair and balanced manner based on

¹⁰⁸ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47676 and n.87.

¹⁰⁹ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47676 and n.88.

¹¹⁰ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47676 and nn.89-90.

principles of fair dealing and good faith. These provisions promote complete and honest communications as part of SBS Entities' security-based swap businesses.¹¹¹

- Daily mark disclosure—Exchange Act rule 15Fh-3(c) requires that SBS Entities provide daily mark information to certain counterparties. These provisions address the need for market participants to have effective access to daily mark information necessary to manage their security-based swap positions.¹¹²
- Clearing rights disclosure—Exchange Act rule 15Fh-3(d) requires that SBS Entities provide certain counterparties with information regarding clearing rights under the Exchange Act.¹¹³

Taken as a whole, the counterparty protection requirements under section 15F of the Exchange Act help to “bring professional standards of conduct to, and increase transparency in, the security-based swap market and to require [SBS Entities] to treat parties to these transactions fairly.”¹¹⁴ The proposed Order provided for conditional substituted compliance in connection

¹¹¹ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47676 and n.91.

¹¹² See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47676 and n.92.

¹¹³ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47676 and n.93. Exchange Act section 3C(g)(5) provides certain rights for counterparties to select the clearing agency at which a security-based swap is cleared. For all security-based swaps that an SBS Entity enters into with certain counterparties, the counterparty has the sole right to select the clearing agency at which the security-based swap is cleared. For security-based swaps that are not subject to mandatory clearing (pursuant to Exchange Act sections 3C(a) and (b)) and that an SBS Entity enters into with certain counterparties, the counterparty also may elect to require clearing of the security-based swap. Substituted compliance is not available in connection with these provisions.

¹¹⁴ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47677 and n.94; Business Conduct Adopting Release, 81 FR 30065. For non-U.S. SBS Entities, the counterparty protection requirements under Exchange Act section 15F(h) apply only to the SBS Entity's transactions with U.S. counterparties (apart from certain transactions conducted through a foreign branch of the U.S. counterparty), or to transactions arranged, negotiated, or executed by personnel located in a U.S. branch or office. See Exchange Act rule 3a71-3(c), 17 CFR 240.3a71-3(c) (exception from business conduct requirements for a security-based swap dealer's “foreign

with disclosure of material risks and characteristics, disclosure of material incentives or conflicts of interest, “know your counterparty,” suitability, fair and balanced communications, and daily mark disclosure requirements.¹¹⁵ In proposing to provide conditional substituted compliance for these counterparty protection requirements, the Commission preliminarily concluded that the relevant Spanish and EU requirements produce regulatory outcomes that are comparable to these requirements under Exchange Act section 15F(h), by subjecting Covered Entities to obligations that promote standards of professional conduct, transparency, and the fair treatment of parties.

As proposed, substituted compliance for these requirements would be subject to certain conditions to help ensure the comparability of outcomes. First, under the proposed Order, substituted compliance for disclosure of material risks and characteristics, disclosure of material incentives or conflicts of interest, “know your counterparty,” suitability, and fair and balanced communications requirements would be conditioned on Covered Entities being subject to, and complying with, relevant Spanish and EU requirements.¹¹⁶ Second, the proposed Order additionally would condition substituted compliance for suitability requirements on the counterparty being a “professional client” as defined in MiFID (rather than a “retail client” or an elective “professional client”¹¹⁷) and not a “special entity” as defined in Exchange Act section

business”); see also Exchange Act rule 3a71-3(a)(3), (8) and (9) (definitions of “transaction conducted through a foreign branch,” “U.S. business” and “foreign business”).

¹¹⁵ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47677.

¹¹⁶ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47677 and nn.97-99.

¹¹⁷ Annex II of MiFID describes which clients are “professional clients.” Section I of Annex II describes the types of clients considered to be professional clients unless the client elects non-professional treatment; these clients are per se professional clients. Section II of Annex II describes the types of clients who may be treated as professional clients on request; these clients are elective professional clients. See MiFID Annex II. Retail clients are those that are not professional clients. See MiFID article 4(1)(11).

15F(h)(2)(C) and Exchange Act rule 15Fh-2(d).¹¹⁸ The Commission continues to believe that, absent such a condition the MiFID-based suitability requirements would not be expected to produce a counterparty protection outcome that is comparable with the outcome produced by the suitability requirements under the Exchange Act.¹¹⁹ Finally, in the proposed Order the Commission preliminarily viewed certain types of EU daily portfolio reconciliation requirements as comparable to Exchange Act daily mark disclosure requirements.¹²⁰ These daily portfolio reconciliation requirements apply to portfolios of a financial counterparty or a non-financial counterparty subject to the clearing obligation in EMIR in which counterparties have 500 or more OTC derivatives contracts outstanding with each other.¹²¹ The Commission preliminarily viewed EU portfolio reconciliation requirements for other types of portfolios, which may be reconciled less frequently than each business day or may not require disclosure to counterparties, as not comparable to Exchange Act daily mark requirements.¹²² Accordingly, the proposed Order would condition substituted compliance for daily mark requirements on the Covered

¹¹⁸ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47677.

¹¹⁹ The Commission recognizes that Exchange Act rules permit security-based swap dealers, when making a recommendation to an “institutional counterparty,” to satisfy some elements of the suitability requirement if the security-based swap dealer reasonably determines that the counterparty or its agent is capable of independently evaluating relevant investment risks, the counterparty or its agent represents in writing that it is exercising independent judgment in evaluating recommendations, and the security-based swap dealer discloses to the counterparty that it is acting as counterparty and is not undertaking to assess the suitability of the recommendation for the counterparty. See Exchange Act rule 15Fh-3(f)(2). However, the institutional counterparties to whom this alternative applies are only a subset of the “professional clients” to whom more narrowly tailored suitability requirements apply under MiFID. The institutional counterparty alternative under the Exchange Act remains available, in accordance with its terms, for recommendations that are not eligible for, or for which a Covered Entity does not rely on, substituted compliance under the Order.

¹²⁰ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47677-78.

¹²¹ See EMIR RTS article 13(3)(a)(i); EMIR article 10.

¹²² See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47677-78.

Entity being required to reconcile, and in fact reconciling, the portfolio containing the relevant security-based swap on each business day pursuant to relevant EU requirements.¹²³

The proposed Order would not provide substituted compliance in connection with Exchange Act requirements for SBS Entities to disclose a counterparty's clearing rights under Exchange Act section 3C(g)(5).¹²⁴ The CNMV Application cited certain EU provisions related to a counterparty's clearing rights in the European Union. However, those provisions do not require disclosure of Exchange Act section 3C(g)(5) clearing rights, and the Commission preliminarily viewed the EU clearing provisions as not comparable to Exchange Act clearing rights disclosure requirements.¹²⁵

B. Commenter views and final provisions

One commenter supported the Commission's proposal to make the positive substituted compliance determinations in the proposed Order,¹²⁶ including positive substituted compliance determinations for disclosure of material risks and characteristics, disclosure of material incentives or conflicts of interest, "know your counterparty," suitability, fair and balanced

¹²³ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47677-78. This approach would avoid reliance on Spanish and EU trade reporting or mark-to-market (or mark-to-model) requirements. The Spanish and EU mark-to-market (or mark-to-model) requirements direct certain types of derivatives counterparties to mark-to-market (or mark-to-model) uncleared transactions each day but do not require disclosure of those marks to counterparties. Moreover, though Spanish and EU trade reporting requirements direct certain derivatives counterparties to report to a EU trade repository updated daily valuations for each OTC derivative contract, in practice U.S. counterparties may encounter challenges when attempting to access daily marks reported to multiple EU trade repositories with which they may not otherwise have business relationships. In addition, the information may be less current, given the time necessary for reporting and for the trade repository to make the information available.

¹²⁴ Though the requirement to disclose a counterparty's Exchange Act section 3C(g)(5) clearing rights is eligible for substituted compliance, the section 3C(g)(5) clearing rights themselves are not.

¹²⁵ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47678 and n.102.

¹²⁶ See Santander Letter at 1.

communications, and daily mark disclosure requirements. The Commission continues to conclude that, taken as a whole, relevant Spanish and EU requirements would produce regulatory outcomes that are comparable to those associated with these counterparty protection requirements, by subjecting Covered Entities to obligations that promote standards of professional conduct, transparency, and the fair treatment of parties. The Commission recognizes that there are certain differences between relevant Spanish and EU requirements and Exchange Act disclosure, “know your counterparty,” suitability, and communications requirements, but in the Commission’s view those differences, when coupled with the conditions in the proposed Order, are not so material as to be inconsistent with substituted compliance within the requisite outcomes-oriented framework. Accordingly, the Commission is making positive substituted compliance determinations in connection with disclosure of material risks and characteristics, disclosure of material incentives or conflicts of interest, “know your counterparty,” suitability, fair and balanced communications, and daily mark disclosure requirements.¹²⁷ The Commission is amending the substituted compliance determination for “know your counterparty” requirements for the reasons discussed below, and is issuing the remainder of the counterparty protection section of the Order as proposed.

The Commission is amending paragraph (d)(3) of the Order to replace the requirements of Directive (EU) 2015/849 (“MLD”) and the Spanish Anti-Money Laundering Act, Law 10/2010, of April 28 (“SMLA”) with provisions of MiFID, MiFID Org Reg, SSMA and Royal Decree 217/2008, of February 15 (“RD 217/2008”).¹²⁸ Exchange Act rule 15Fh-3(e)(3) is one of

¹²⁷ See para. (d) of the Order.

¹²⁸ See para. (d)(3) of the Order. Paragraph (d)(3) of proposed Order cited the following MLD-based requirements: MLD articles 11 and 13; SMLA articles 3(1) and (2), 4, 5, 6, 7(1) through (4), 7(7), 7(8), and 8; MLD articles 8(3) and 8(4)(a) as applied to internal policies, controls and procedures

three prongs of the Exchange Act “know your counterparty requirements,” and requires a security-based swap dealer to establish, maintain, and enforce written policies and procedures to obtain and retain a record of information regarding the authority of any person acting for its counterparty. Before making a positive substituted compliance determination, Exchange Act rule 3a71-6 requires the Commission to determine that foreign requirements are comparable to the otherwise applicable Exchange Act requirements, after accounting for factors such as the effectiveness of the supervisory compliance program administered, and the enforcement authority exercised, by the foreign authority in respect of the relevant requirements, as well as to enter into a memorandum of understanding and/or other arrangement with the relevant foreign financial regulatory authority or authorities addressing supervisory and enforcement cooperation and other matters arising under the substituted compliance determination.¹²⁹ The customer due diligence provisions in the proposed Order’s MLD and SMLA requirements are relevant to the Exchange Act “know your counterparty” requirements relating to records of the authority of a person acting on behalf of the counterparty. However, in Spain supervision and enforcement of these MLD and SMLA requirements are within the jurisdiction of the Servicio Ejecutivo de la Comisión de Prevención del Blanqueo de Capitales e Infracciones Monetarias (“SEPBLAC”) and the Comisión de Prevención del Blanqueo de Capitales e Infracciones Monetarias (“COPBLAC”). The CNMV and the Bank of Spain do work closely with the SEPBLAC and COPBLAC, but the substituted compliance memorandum of understanding between the

regarding recordkeeping of customer due diligence activities; and SMLA article 26 as applied to policies and procedures regarding recordkeeping of customer due diligence activities. The Commission is replacing these requirements with MiFID article 16(6), MiFID Org Reg articles 72, 74, 75, and applicable parts of Annex I, SSMA article 194(1), and RD 217/2008 article 32(1) and (10).

¹²⁹ See Parts II.B.1 and II.B.2, supra.

Commission and the CNMV and the Bank of Spain, finalized after publication of the Spanish Substituted Compliance Notice and Proposed Order, does not provide for ongoing sharing of supervisory and enforcement information regarding these MLD and SMLA requirements, as neither the SEPBLAC nor the COPBLAC is a party to the memorandum of understanding.

Other requirements based on MiFID, as applied by the CNMV, are, however, comparable to the Exchange Act requirement to establish, maintain, and enforce written policies and procedures to obtain and retain a record of information regarding the authority of any person acting for its counterparty.¹³⁰ The CNMV, rather than SEPBLAC or COPBLAC, is responsible for supervision and enforcement of these MiFID-based requirements and the memorandum of understanding would provide for ongoing sharing of supervisory and enforcement information regarding these requirements. Accordingly, the Commission is replacing the MLD and SMLA requirements listed in paragraph (d)(3) of the proposed Order with these MiFID-based requirements.

¹³⁰ MiFID article 16(6), implemented in Spain in SSMA article 194(1) and RD 217/2008 article 32(1) and (10), requires a Covered Entity to arrange for records to be kept of all services, activities, and transactions undertaken by it that are sufficient to enable the CNMV to fulfill its supervisory and enforcement mandates, and in particular to determine that the Covered Entity has complied with all obligations including those with respect to clients or potential clients and to the integrity of the market. MiFID Org Reg articles 74 and 75 require Covered Entities to record and keep at the CNMV's disposal certain information about client orders and decisions to deal. Annex IV of MiFID Org Reg describes that required client information and includes a requirement to make a record of the "name and designation of any relevant person acting on behalf of the client." The CNMV commented that this requirement to make a record regarding persons acting on behalf of the client "implies that the investment firm or credit institution for internal control reasons, must obtain documentation of the powers/authorization of the person to be represented which is verifiable by the CNMV." See Memorandum of Correspondence with Santiago Yraola, Deputy Director of International Affairs, CNMV, dated Sept. 24, 2021 ("CNMV Memorandum"), at 2. Moreover, the CNMV confirmed that in supervising compliance with this requirement, it requires Covered Entities to provide records of the power of attorney or public deed establishing the authority of client representatives. See CNMV Memorandum at 2. Finally, MiFID Org Reg article 72 and Annex I require the Covered Entity to maintain records in the medium, form, and format that allow the CNMV to access the records readily and to easily ascertain any amendments, and that make it impossible to manipulate or alter the records.

To help ensure the comparability of outcomes, and consistent with the proposed Order, substituted compliance for these counterparty protection requirements is subject to certain conditions. First, substituted compliance for disclosure of material risks and characteristics,¹³¹ disclosure of material incentives or conflicts of interest,¹³² “know your counterparty,”¹³³ suitability,¹³⁴ and fair and balanced communications¹³⁵ requirements is conditioned on Covered Entities being subject to, and complying with, relevant Spanish and EU requirements. Second, substituted compliance for suitability requirements is conditioned on the counterparty being a “professional client” as defined in MiFID (rather than a “retail client” or an elective “professional client”) and not a “special entity” as defined in Exchange Act section 15F(h)(2)(C) and Exchange Act rule 15Fh-2(d).¹³⁶ Third, substituted compliance for daily mark disclosure requirements is conditioned on the Covered Entity being required to reconcile, and in fact reconciling, the portfolio containing the relevant security-based swap on each business day pursuant to relevant EU requirements.¹³⁷ A Covered Entity that is unable to comply with an applicable condition—and thus is not eligible to use substituted compliance for the particular set of Exchange Act counterparty protection requirements related to that condition—nevertheless

¹³¹ See para. (d)(1) of the Order.

¹³² See para. (d)(2) of the Order.

¹³³ See para. (d)(3) of the Order.

¹³⁴ See para. (d)(4)(i) of the Order.

¹³⁵ See para. (d)(5) of the Order.

¹³⁶ See para. (d)(4)(ii) of the Order.

¹³⁷ See para. (d)(6) of the Order. A Covered Entity must be required to reconcile, and in fact reconcile, the portfolio containing the security-based swap for which substituted compliance is used, on each business day pursuant to EMIR articles 11(1)(b) and 11(2) and EMIR RTS article 13. A Covered Entity may not use substituted compliance for daily mark disclosure requirements if the relevant security-based swap is in a portfolio that these EU requirements do not require to be reconciled on each business day.

may use substituted compliance for another set of Exchange Act requirements addressed in the Order if it complies with the conditions to the relevant parts of the Order.

Under the Order, substituted compliance for counterparty protection requirements (relating to disclosure of information regarding material risks and characteristics, disclosure of information regarding material incentives or conflicts of interest, “know your counterparty,” suitability, fair and balanced communications and daily mark disclosure) is not subject to a condition that the Covered Entity apply substituted compliance for related recordkeeping requirements in Exchange Act rules 18a-5 and 18a-6. A Covered Entity that applies substituted compliance for one or more counterparty protection requirements, but does not apply substituted compliance for the related recordkeeping requirements in Exchange Act rules 18a-5 and 18a-6, will remain subject to the relevant provisions of Exchange Act rules 18a-5 and 18a-6. Those rules require the Covered Entity to make and preserve records of its compliance with Exchange Act counterparty protection requirements and of its security-based swap activities required or governed by those requirements. A Covered Entity that applies substituted compliance for a counterparty protection requirement, but complies directly with related recordkeeping requirements in rules 18a-5 and 18a-6, therefore must make and preserve records of its compliance with the relevant conditions of the Order and of its security-based swap activities required or governed by those conditions and/or referenced in the relevant parts of rules 18a-5 and 18a-6.

Finally, for the reasons discussed in the proposed Order, the Order does not extend to clearing rights disclosure provisions under the Exchange Act.¹³⁸

¹³⁸ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47678.

VII. Substituted Compliance for Recordkeeping, Reporting, Notification, and Securities Count Requirements

A. CNMV request and associated analytic considerations

The CNMV Application in part requested substituted compliance for requirements applicable to SBS Entities with a prudential regulator under the Exchange Act relating to:

- Record Making—Exchange Act rule 18a-5 requires prescribed records to be made and kept current.¹³⁹
- Record Preservation—Exchange Act rule 18a-6 requires preservation of records.¹⁴⁰
- Reporting—Exchange Act rule 18a-7 requires certain reports.¹⁴¹
- Notification—Exchange Act rule 18a-8 requires notification to the Commission when certain financial or operational problems occur.¹⁴²
- Daily Trading Records—Exchange Act section 15F(g) requires SBS Entities to maintain daily trading records.¹⁴³

Taken as a whole, the recordkeeping, reporting, and notification requirements that apply to SBS Entities with a prudential regulator are designed to promote the prudent operation of the

¹³⁹ 17 CFR 240.18a-5. The CNMV Application discusses Spanish and EU recordmaking requirements. See CNMV Application Appendix B, Category: Recordkeeping and Reporting Requirements; Subcategory: Record creation, at 1-27, 55-57.

¹⁴⁰ 17 CFR 240.18a-6. The CNMV Application discusses Spanish and EU record preservation requirements. See CNMV Application Appendix B, Category: Recordkeeping and Reporting; Subcategory: Record Preservation at 28-58.

¹⁴¹ 17 CFR 240.18a-7. The CNMV Application discusses Spanish and EU requirements that address firms' obligations to make certain reports. See CNMV Application Appendix B, Category: Reports and Notifications at 59-62.

¹⁴² 17 CFR 240.18a-8. The CNMV Application discusses Spanish and EU requirements that address firms' obligations to make certain notifications. See CNMV Application Appendix B category 2 at 62-65.

¹⁴³ The CNMV Application discusses Spanish and EU requirements that address firms' record preservation obligations related to records that firms are required to create, as well as additional records such as records of communications. See CNMV Application Appendix B, Category: Recordkeeping and Reporting Requirements; Subcategory: Record Creation at 2-3.

firm's security-based swap activities, assist the Commission in conducting compliance examinations of those activities, and alert the Commission to potential financial or operational problems that could impact the firm and its customers.

B. Commenter views and final provisions

1. General considerations

In proposing to provide conditional substituted compliance in connection with this part of the CNMV Application, the Commission preliminarily concluded that the relevant EU and Spanish requirements, subject to conditions and limitations, would produce regulatory outcomes that are comparable to the outcomes associated with the vast majority of the recordkeeping, reporting, notification, and securities count requirements under the Exchange Act applicable to SBS Entities pursuant to Exchange Act rules 18a-5, 18a-6, 18a-7, 18a-8, and Exchange Act section 15F(g) (collectively, the recordkeeping, reporting, and notification requirements”).¹⁴⁴ Substituted compliance for the recordkeeping, reporting, and notification requirements accordingly is conditioned on Covered Entities being subject to and complying with the EU and Spanish provisions that in the aggregate establish a framework that produces outcomes comparable to those associated with the analogous recordkeeping, reporting, and notification requirements under the Exchange Act.¹⁴⁵

The proposed structure of the substituted compliance determinations with respect to the recordkeeping, reporting, and notification requirements would have provided Covered Entities

¹⁴⁴ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47678-85, 47693-95.

¹⁴⁵ See paras. (e)(1)(i)(A), (e)(1)(i)(B), (e)(1)(i)(C), (e)(1)(i)(D), (e)(1)(i)(E), (e)(1)(i)(F)(I), (e)(1)(i)(G), (e)(1)(i)(H), (e)(1)(i)(I)(I), (e)(1)(i)(J)(I), (e)(1)(i)(K)(I), (e)(2)(i)(A), (e)(2)(i)(B), (e)(2)(i)(C), (e)(2)(i)(D), (e)(2)(i)(E), (e)(2)(i)(F)(I), (e)(2)(i)(G)(I), (e)(2)(i)(H), (e)(2)(i)(I), (e)(2)(i)(J), (e)(2)(i)(K)(I), (e)(2)(i)(L), (e)(2)(i)(M), (e)(3)(i), (e)(4)(i)(A), (e)(4)(i)(B)(I), and (e)(5) of the Order.

with greater flexibility to select distinct requirements within the broader rules for which they want to apply substituted compliance.¹⁴⁶ This would not preclude a Covered Entity from applying substituted compliance for the entire rule (subject to conditions and limitations). However, it would permit the Covered Entity to apply substituted compliance with respect to certain requirements of a given rule and to comply directly with the remaining requirements. This more granular approach to the recordkeeping, reporting, and notification rules was intended to permit Covered Entities to leverage existing recordkeeping and reporting systems that are designed to comply with the broker-dealer recordkeeping and reporting requirements on which the recordkeeping, reporting, and notification requirements applicable to SBS Entities are based. For example, it may be more efficient for a Covered Entity to comply with certain Exchange Act requirements within a given recordkeeping, reporting, or notification rule (rather than apply substituted compliance) because it can utilize systems that its affiliated broker-dealer has implemented to comply with them. This proposed approach was consistent with the approach taken by the Commission in the French Substituted Compliance Order and UK Substituted Compliance Order.¹⁴⁷

As applied to Exchange Act rules 18a-5 and 18a-6, this approach of providing greater flexibility resulted in preliminary substituted compliance determinations with respect to the different categories of records these rules require SBS Entities to make, keep current, and/or preserve.¹⁴⁸ The objective of these rules – taken as a whole – is to assist the Commission in

¹⁴⁶ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47678-79, 47693-95.

¹⁴⁷ See French Substituted Compliance Order, 86 FR 41649; UK Substituted Compliance Order, 86 FR 43360.

¹⁴⁸ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47679.

monitoring and examining for compliance with substantive Exchange Act requirements applicable to SBS Entities (e.g., business conduct requirements) as well as to promote the prudent operation of these firms.¹⁴⁹ The Commission believes the comparable Spanish recordkeeping rules achieve these outcomes with respect to compliance with substantive Spanish requirements for which preliminary positive substituted compliance determinations were being made in the proposed Order (e.g., the preliminary positive substituted compliance determinations with respect to the majority of the Exchange Act business conduct requirements). At the same time, the recordkeeping rules address different categories of records through distinct requirements within the rules. Each requirement with respect to a specific category of records (e.g., paragraph (b)(1) of Exchange Act rule 18a-5 addressing trade blotters) can be viewed in isolation as a distinct recordkeeping rule. Therefore, the Commission made preliminary substituted compliance determinations at this level of Exchange Act rules 18a-5 and 18a-6.¹⁵⁰ The Commission did not receive comment on this granular approach and is adopting it as proposed.¹⁵¹

Second, the Commission did not make a preliminary positive substituted compliance determination with respect to a discrete provision of the recordkeeping, reporting, and notification requirements if it was fully or partially linked to a substantive Exchange Act requirement for which substituted compliance was not available or for which a preliminary positive substituted compliance determination was not being made.¹⁵² In particular, a

¹⁴⁹ See, e.g., Exchange Act Release No. 71958 (Apr. 17, 2014), 79 FR 25194, 25199-200 (May 2, 2014).

¹⁵⁰ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47679.

¹⁵¹ See paras. (e)(1)(i) and (e)(2)(ii) of the Order.

¹⁵² See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47679 (discussing this limitation).

preliminary positive substituted compliance determination was not made, in full or in part, for recordkeeping, reporting, or notification requirements linked to the following Exchange Act rules for which substituted compliance is not available or a preliminary positive substituted compliance determination was not made: (1) Exchange Act rule 15Fh-4; (2) Exchange Act rule 15Fh-5; (3) Exchange Act rule 15Fh-6; (4) Exchange Act rule 18a-4; (5) Regulation SBSR; (6) Form SBSE and its variations; (7) Exchange Act rule 15Fh-1; and (8) Exchange Act rule 15Fh-2. This proposed approach was consistent with the approach taken by the Commission in the French Substituted Compliance Order and UK Substituted Compliance Order.¹⁵³ The Commission did not receive comment on these limitations and the Order includes them.¹⁵⁴

Third, the Commission conditioned substituted compliance with discrete provisions of the recordkeeping, reporting, and notification requirements that were fully or partially linked to a substantive Exchange Act requirement for which substituted compliance was available on the Covered Entity applying substituted compliance with respect to the linked Exchange Act requirement.¹⁵⁵ In particular, substituted compliance for a provision of the recordkeeping, reporting, and notification requirements that is linked to the following Exchange Act rules was conditioned on the SBS Entity applying substituted compliance to the linked substantive Exchange Act rule: (1) Exchange Act rule 15Fh-3, , except paragraphs (a) and (d) for which substituted compliance was not requested; (2) Exchange Act rule 15Fi-2; (3) Exchange Act rule 15Fi-3; (4) Exchange Act rule 15Fi-4; (5) Exchange Act rule 15Fi-5; and (6) Exchange Act rule

¹⁵³ See French Substituted Compliance Order, 86 FR 41650; UK Substituted Compliance Order, 86 FR 45778.

¹⁵⁴ See para. (e) of the Order.

¹⁵⁵ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47679 (discussing this condition).

15Fk-1. The Commission did not receive comment on these conditions and the Order includes them.¹⁵⁶

Fourth, the Commission conditioned substituted compliance with Exchange Act rule 18a-7 on Covered Entities filing periodic unaudited financial and operational information with the Commission or its designee in the manner and format required by Commission rule or order.¹⁵⁷ The Commission did not receive comment on this condition and the Order includes it.¹⁵⁸

Fifth, the proposed Order conditioned substituted compliance with Exchange Act rule 18a-8 on Covered entities simultaneously sending a copy of any notice required to be sent by Spanish or EU law to the Commission in the manner specified on the Commission's website and including with the transmission the contact information of an individual who can provide further information about the matter that is the subject of the notice.¹⁵⁹ The Commission did not receive comment on these conditions and the Order includes them.¹⁶⁰

Sixth, the proposed Order included a condition that Covered Entities must promptly furnish to a representative of the Commission upon request an English translation of any record, report, or notification of the Covered Entity that is required to be made, preserved, filed, or

¹⁵⁶ See para. (e) of the Order.

¹⁵⁷ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47683 (discussing this condition). See also Exchange Act Release No. 93335 (Oct. 14, 2021) (order specifying the manner and format of filing unaudited financial and operational information by Covered Entities relying on substituted compliance determinations with respect to Exchange Act rule 18a-7).

¹⁵⁸ See para. (e)(3) of the Order.

¹⁵⁹ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47683-84 (discussing this condition).

¹⁶⁰ See para. (e)(4)(ii)(A) of the Order.

subject to examination pursuant to Exchange Act section 15F of this Order.¹⁶¹ The Commission did not receive a comment on this condition and the Order includes it.¹⁶²

2. Citations to EU and Spanish Law

The Commission received a comment recommending changes to the proposed Order to refine the scope of Spanish law provisions that would operate as conditions to substituted compliance.¹⁶³ The Commission reviewed each of the Spanish law citations that the commenter recommended removing from the proposed Order for relevance to the comparable Exchange Act requirement while also keeping in mind that each EU or Spanish law citation was included in the CNMV Application intentionally. The Commission's conclusion and reasoning with respect to the commenter's recommendations are discussed in further detail below.

The commenter recommended removing references to SSMA articles 276bis, 276ter, 276quater, and 276quinquies from paragraphs (e)(1)(i)(F)(I), and (e)(2)(i)(A), (B), and (C) of the proposed Order. The commenter stated that SSMA articles 276bis, 276ter, 276quater, and 276quinquies set out requirements regarding notifications to the CNMV about certain violations under Spanish law and are unrelated to the Commission's recordkeeping requirements addressed by paragraphs (e)(1)(i)(F)(I), and (e)(2)(i)(A), (B), and (C). Instead, the commenter states, SSMA articles 276bis, 276ter, 276quater, and 276quinquies should be, and are, included in paragraph (e)(4)(i), which addresses the Commission's notification requirements. The Commission agrees with the commenter's reasoning and is therefore removing references to

¹⁶¹ See Spanish Substituted Compliance Notice and Proposed Order, 86 FR 47685 (discussing this condition).

¹⁶² See para. (e)(7) of the Order.

¹⁶³ See Santander Letter at 1-2.

SSMA articles 276bis, 276ter, 276quater, and 276quinquies from paragraphs (e)(1)(i)(F)(I), and (e)(2)(i)(A), (B), and (C) of the Order.¹⁶⁴

In addition, as discussed in Part VI.B. above, MLD and SMLA are supervised by SEPBLAC and COPBLAC which are not signatories to the supervisory and enforcement memorandum of understanding with the Commission. Accordingly, paragraphs (e)(1)(i)(G), (e)(1)(i)(I), and (e)(2)(i)(F) of the Order no longer require a Covered Entity to be subject to and comply with MLD articles 11 and 13 and SMLA articles 3-7 and instead require the Covered Entity to be subject to and comply with comparable MiFID-based requirements.¹⁶⁵

No other comments were received regarding any other Spanish law provisions that would operate as conditions to substituted compliance. Accordingly, the Commission is issuing these remaining conditions as proposed.

VIII. Supervisory and Enforcement Considerations

A. Proposed approach

Exchange Act rule 3a71-6(a)(2)(i) provides that the Commission’s assessments regarding the comparability of foreign requirements in part should take into account “the effectiveness of the supervisory program administered, and the enforcement authority exercised” by the foreign financial regulatory authority. This provision is intended to help ensure that substituted compliance is not predicated on rules that appear high-quality on paper if market participants in practice are allowed to fall short of their obligations, while also recognizing that differences among supervisory and enforcement regimes should not be assumed to reflect flaws in one

¹⁶⁴ Compare paras. (e)(1)(i)(F)(I), and (e)(2)(i)(A), (B), and (C) of the proposed Order, with paras. (e)(1)(i)(F)(I), and (e)(2)(i)(A), (B), and (C) of the Order.

¹⁶⁵ Compare paras. (e)(1)(i)(G), (e)(1)(i)(I), and (e)(2)(i)(F) of the proposed Order, with paras. (e)(1)(i)(G), (e)(1)(i)(I), and (e)(2)(i)(F) of the Order.

regime or another.¹⁶⁶ The CNMV Application accordingly included information regarding the supervisory and enforcement framework applicable to derivatives markets and market participants in Spain.

In proposing to grant substituted compliance in connection with the CNMV Application, the Commission preliminarily concluded that the relevant supervisory and enforcement considerations were consistent with substituted compliance. That preliminary conclusion took into account information regarding the CNMV and the Bank of Spain (together, the “Spanish Authorities”) and the ECB’s roles and practices in supervising investment firms and credit institutions located in Spain, as well as their enforcement-related authority and practices.¹⁶⁷

B. Commenter views and final provisions

Commenters did not address the Commission’s preliminary conclusions regarding supervisory and enforcement considerations, and the Commission continues to conclude that the relevant supervisory and enforcement considerations in Spain are consistent with substituted compliance. In particular, based on the available information regarding the Spanish Authorities’ and the ECB’s authority and practices to oversee market participants’ compliance with applicable requirements and to take action in the event of violations, the Commission remains of the view that, consistent with rule 3a71-6, comparability determinations reflect Spain and EU requirements as they apply in practice.

To be clear, the supervisory and enforcement considerations addressed by rule 3a71-6 do not mandate that the Commission make judgments regarding the comparative merits of U.S. and foreign supervisory and enforcement frameworks, or to require specific findings regarding the

¹⁶⁶ See French Substituted Compliance Notice and Proposed Order, 85 FR 85734.

¹⁶⁷ Id. at 85734-36.

supervisory and enforcement effectiveness of a foreign regime. The rule 3a71-6 considerations regarding supervisory and enforcement effectiveness instead address whether comparability analyses related to substituted compliance reflect requirements that market participants must follow, and for which market participants are subject to enforcement consequences in the event of violations. Those considerations are satisfied here.

IX. Conclusion

IT IS HEREBY DETERMINED AND ORDERED, pursuant to rule 3a71-6 under the Exchange Act, that a Covered Entity (as defined in paragraph (f)(1) of this Order) may satisfy the requirements under the Exchange Act that are addressed in paragraphs (b) through (e) of this Order so long as the Covered Entity is subject to and complies with relevant requirements of the Kingdom of Spain and the European Union and with the conditions of this Order, as amended or superseded from time to time.

(a) General conditions.

This Order is subject to the following general conditions, in addition to the conditions specified in paragraphs (b) through (e):

(1) Activities as MiFID “investment services or activities.” For each condition in paragraphs (b) through (e) of this Order that requires the application of, and the Covered Entity’s compliance with, provisions of MiFID; provisions of SSMA and/or RD 217/2008 that implement MiFID; and/or other EU and Spanish requirements adopted pursuant to those provisions, the Covered Entity’s relevant security-based swap activities constitute “investment services” or “investment activities,” as defined in MiFID article 4(1)(2) and in SSMA article 140, and fall within the scope of the Covered Entity’s authorization from the CNMV and the ECB to provide investment services and/or perform investment activities in the Kingdom of Spain.

(2) Counterparties as MiFID “clients.” For each condition in paragraphs (b) through (e) of this Order that requires the application of, and the Covered Entity’s compliance with, provisions of MiFID; provisions of SSMA and/or RD 217/2008 that implement MiFID; and/or other EU and Spanish requirements adopted pursuant to those provisions, the relevant counterparty (or potential counterparty) to the Covered Entity is a “client” (or potential “client”), as defined in MiFID article 4(1)(9) and in the First Additional Provision of Royal Decree Law 14/2018, of 28 September.

(3) Security-based swaps as MiFID “financial instruments.” For each condition in paragraphs (b) through (e) of this Order that requires the application of, and the Covered Entity’s compliance with, provisions of MiFID; provisions of SSMA and/or RD 217/2008 that implement MiFID; and/or other EU and Spanish requirements adopted pursuant to those provisions, the relevant security-based swap is a “financial instrument,” as defined in MiFID article 4(1)(15) and in the Annex to SSMA.

(4) Covered Entity as CRD/CRR “institution.” For each condition in paragraph (b) through (e) of this Order that requires the application of, and the Covered Entity’s compliance with, the provisions of CRD; provisions of LOSSEC, RD 84/2015, BoS Circular 2/2016, SSMA, and/or RD 217/2008 that implement CRD; CRR; and/or other EU and Spanish requirements adopted pursuant to those provisions, the Covered Entity is an “institution,” as defined in CRD article 3(1)(3) and CRR article 4(1)(3), and either a credit institution, as defined in LOSSEC article 1 (in the case of a provision of LOSSEC, RD 84/2015, and/or BoS Circular 2/2016), or an investment firm, as defined in SSMA article 138 (in the case of a provision of SSMA and/or RD 217/2008 that implements CRD).

(5) Counterparties as EMIR “counterparties.” For each condition in paragraphs (b) through (e) of this Order that requires the application of, and the Covered Entity’s compliance with, provisions of EMIR, EMIR RTS, EMIR Margin RTS, and/or other EU requirements adopted pursuant to those provisions, if the relevant provision applies only to the Covered Entity’s activities with specified types of counterparties, and if the counterparty to the Covered Entity is not any of the specified types of counterparty, the Covered Entity complies with the applicable condition of this Order:

(i) As if the counterparty were the specified type of counterparty; in this regard, if the Covered Entity reasonably determines that the counterparty would be a financial counterparty if it were established in the EU and authorized by an appropriate EU authority, it must treat the counterparty as if the counterparty were a financial counterparty;

(ii) Without regard to the application of EMIR article 13; and

(iii) Only to the extent that an Exchange Act section or rule cited in paragraphs (b) through (e) of this Order applies to the security-based swap activities with that counterparty.

(6) Security-based swap status under EMIR. For each condition in paragraphs (b) through (e) of this Order that requires the application of, and the Covered Entity’s compliance with, provisions of EMIR, EMIR RTS, EMIR Margin RTS, and/or other EU requirements adopted pursuant to those provisions, if the relevant provision applies to the Covered Entity’s OTC derivatives or OTC derivative contracts that have not been cleared by a central counterparty, then either:

(i) The relevant security-based swap is an “OTC derivative” or “OTC derivative contract,” as defined in EMIR article 2(7), that has not been cleared by a central counterparty and

otherwise is subject to the provisions of EMIR article 11, EMIR RTS articles 11 through 15, and EMIR Margin RTS article 2; or

(ii) The relevant security-based swap has been cleared by a central counterparty that is authorized or recognized to clear derivatives contracts by a relevant authority in the EU.

(7) Memorandum of Understanding with the Spanish Authorities. The Commission and the CNMV and the Bank of Spain have a supervisory and enforcement memorandum of understanding and/or other arrangement addressing cooperation with respect to this Order at the time the Covered Entity complies with the relevant requirements under the Exchange Act via compliance with one or more provisions of this Order.

(8) Memorandum of Understanding Regarding ECB-Owned Information. The Commission and the ECB have a supervisory and enforcement memorandum of understanding and/or other arrangement addressing cooperation with respect to this Order as it pertains to information owned by the ECB at the time the Covered Entity complies with the relevant requirements under the Exchange Act via compliance with one or more provisions of this Order.

(9) Notice to Commission. A Covered Entity relying on this Order must provide notice of its intent to rely on this Order by notifying the Commission in writing. Such notice must be sent to the Commission in the manner specified on the Commission's website. The notice must include the contact information of an individual who can provide further information about the matter that is the subject of the notice. The notice must also identify each specific substituted compliance determination within paragraphs (b) through (e) of this Order for which the Covered Entity intends to apply substituted compliance. A Covered Entity must promptly provide an amended notice if it modifies its reliance on the substituted compliance determinations in this Order.

(10) European Union Cross-Border Matters.

(i) If, in relation to a particular service provided by a Covered Entity, responsibility for ensuring compliance with any provision of MiFID or MiFIR or any other EU or Spanish requirement adopted pursuant to MiFID or MiFIR listed in paragraphs (b) through (e) of this Order is allocated to an authority of the Member State of the European Union in whose territory a Covered Entity provides the service, the CNMV must be the authority responsible for supervision and enforcement of that provision or requirement in relation to the particular service.

(ii) If responsibility for ensuring compliance with any provision of MAR or any other EU requirement adopted pursuant to MAR listed in paragraphs (b) through (e) of this Order is allocated to one or more authorities of a Member State of the European Union, one of such authorities must be the CNMV.

(11) Notification Requirements Related to Changes in Capital. A Covered Entity that is prudentially regulated relying on this Order must apply substituted compliance with respect to the requirements of Exchange Act rule 18a-8(c) and the requirements of Exchange Act rule 18a-8(h) as applied to Exchange Act rule 18a-8(c).

(b) Substituted compliance in connection with risk control requirements.

This Order extends to the following provisions related to risk control:

(1) Internal risk management. The requirements of Exchange Act section 15F(j)(2) and related aspects of Exchange Act rule 15Fh-3(h)(2)(iii)(I), provided that

(i) The Covered Entity is subject to and complies with the requirements of:

(A) MiFID articles 16 and 23; SSMA articles 193, 194, 208bis, 220bis, 221, 222, 223, and 224; and RD 217/2008 articles 30, 30bis, 30ter, 30quáter, 30quinquies, 30sexies, 32, 41, 42, 43, 44, 45, 46, 47, 48, 61, 66, 67, 68, 69, 70, 71, 72, 72bis, 72ter, 73, 74, 74bis, 74ter, 75, 75bis,

76, 76bis, and 79; and, if the Covered Entity is a credit institution, also BoS Circular 2/2016 article 43 and RD 84/2015 article 22;

(B) MiFID Org Reg articles 21 through 37, 72 through 76 and Annex IV;

(C) CRD articles 74, 76, 79 through 87, 88(1), 91(1) and (2), 91(7) through (9), 92, 94, and 95; SSMA articles 182(1) and (2) and 183(1) and (2); and RD 217/2008 article 35; and, if the Covered Entity is a credit institution, also LOSSEC articles 24, 25, 26, 27, 28, 29, 32, 33, 34, 36, 37, and 38; RD 84/2015 articles 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 41, 42, 43, 44, 46, 47, 48, 49, 50, 51, 52, 53, and 54; and BoS Circular 2/2016 articles 26, 27, 28, 29, 30, 31, 32, 33(4), 34, 35, 36, 37, 38, 39, 40, 41, 46, 47, 48, 49, 50, 51, 52, and 60; and, if the Covered Entity is an investment firm, also SSMA articles 183(3), 184, 184bis, 185, 185bis, 186, 188, 189(1) through (3) and (5), 189bis, 189ter, and 192bis; and RD 217/2008 articles 14(1)(f), 20, 20bis, 21, 22, 24, 31, 31bis, 36, 38, 39(1) and (2), 40, 88, 90, 91, 92, 93, 94, 95, 96, 97(1) through (3), and 98;

(D) CRR articles 286 through 288 and 293; and

(E) EMIR Margin RTS article 2;

(ii) If the Covered Entity is an investment firm, the Covered Entity is not exempt from certain provisions of RD 217/2008 pursuant to RD 217/2008 article 87(2) and/or (3) and/or exempt from SSMA article 189 pursuant to SSMA article 189(6) and/or (7); and

(iii) If the Covered Entity is an investment firm, the Covered Entity establishes, maintains, and implements policies and procedures for management of residual risk associated with the use of recognized credit risk mitigation techniques described in RD 217/2008 article 103(1)(c).

(2) Trade acknowledgement and verification. The requirements of Exchange Act rule 15Fi-2, provided that the Covered Entity is subject to and complies with the requirements of EMIR article 11(1)(a) and EMIR RTS article 12.

(3) Portfolio reconciliation and dispute reporting. The requirements of Exchange Act rule 15Fi-3, provided that:

(i) The Covered Entity is subject to and complies with the requirements of EMIR article 11(1)(b) and EMIR RTS articles 13 and 15; and

(ii) The Covered Entity provides the Commission with reports regarding disputes between counterparties on the same basis as it provides those reports to competent authorities pursuant to EMIR RTS article 15(2).

(4) Portfolio compression. The requirements of Exchange Act rule 15Fi-4, provided that the Covered Entity is subject to and complies with the requirements of EMIR RTS article 14.

(5) Trading relationship documentation. The requirements of Exchange Act rule 15Fi-5, other than paragraph (b)(5) to that rule when the counterparty is a U.S. person, provided that the Covered Entity is subject to and complies with the requirements of EMIR article 11(1)(a), EMIR RTS article 12, and EMIR Margin RTS article 2.

(c) Substituted compliance in connection with internal supervision and compliance requirements and certain Exchange Act section 15F(j) requirements.

This Order extends to the following provisions related to internal supervision and compliance and Exchange Act section 15F(j) requirements:

(1) Internal supervision. The requirements of Exchange Act rule 15Fh-3(h) and Exchange Act sections 15F(j)(4)(A) and (j)(5), provided that:

(i) The Covered Entity is subject to and complies with the requirements identified in paragraph (c)(3) of this Order and complies with the other conditions in that paragraph;

(ii) The Covered Entity complies with paragraph (c)(4) of this Order; and

(iii) This paragraph (c) does not extend to the requirements of paragraph (h)(2)(iii)(I) to rule 15Fh-3 to the extent those requirements pertain to compliance with Exchange Act sections 15F(j)(2), (j)(3), (j)(4)(B) and (j)(6), or to the general and supporting provisions of paragraph (h) to rule 15Fh-3 in connection with those Exchange Act sections.

(2) Chief compliance officers. The requirements of Exchange Act section 15F(k) and Exchange Act rule 15Fk-1, provided that:

(i) The Covered Entity is subject to and complies with the requirements identified in paragraph (c)(3) of this Order and complies with the other conditions in that paragraph;

(ii) All reports required pursuant to MiFID Org Reg article 22(2)(c) must also:

(A) Be provided to the Commission at least annually, and in the English language;

(B) Include a certification signed by the chief compliance officer or senior officer (as defined in Exchange Act rule 15Fk-1(e)(2)) of the Covered Entity that, to the best of the certifier's knowledge and reasonable belief and under penalty of law, the report is accurate and complete in all material respects;

(C) Address the Covered Entity's compliance with:

(i) Applicable requirements under the Exchange Act; and

(ii) The other applicable conditions of this Order in connection with requirements for which the Covered Entity is relying on this Order;

(D) Be provided to the Commission no later than 15 days following the earlier of:

(i) The submission of the report to the Covered Entity's management body; or

(ii) The time the report is required to be submitted to the management body; and

(E) Together cover the entire period that the Covered Entity's annual compliance report referenced in Exchange Act section 15F(k)(3) and Exchange Act rule 15Fk-1(c) would be required to cover.

(3) Applicable supervisory and compliance requirements. (i) Paragraphs (c)(1) and (c)(2) are conditioned on the Covered Entity being subject to and complying with the following requirements:

(A) MiFID articles 16 and 23; SSMA articles 193, 194, 208bis, 220bis, 221, 222, 223, and 224; and RD 217/2008 articles 30, 30bis, 30ter, 30quáter, 30quinquies, 30sexies, 32, 41, 42, 43, 44, 45, 46, 47, 48, 61, 66, 67, 68, 69, 70, 71, 72, 72bis, 72ter, 73, 74, 74bis, 74ter, 75, 75bis, 76, 76bis, and 79; and, if the Covered Entity is a credit institution, also BoS Circular 2/2016 article 43 and RD 84/2015 article 22;

(B) MiFID Org Reg articles 21 through 37, 72 through 76 and Annex IV;

(C) CRD articles 74, 76, 79 through 87, 88(1), 91(1) and (2), 91(7) through (9), 92, 94, and 95; SSMA articles 182(1) and (2) and 183(1) and (2); and RD 217/2008 article 35; and, if the Covered Entity is a credit institution, also LOSSEC articles 24, 25, 26, 27, 28, 29, 32, 33, 34, 36, 37, and 38; RD 84/2015 articles 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 41, 42, 43, 44, 46, 47, 48, 49, 50, 51, 52, 53, and 54; and BoS Circular 2/2016 articles 26, 27, 28, 29, 30, 31, 32, 33(4), 34, 35, 36, 37, 38, 39, 40, 41, 46, 47, 48, 49, 50, 51, 52, and 60; and, if the Covered Entity is an investment firm, also SSMA articles 183(3), 184, 184bis, 185, 185bis, 186, 188, 189(1) through (3) and (5), 189bis, 189ter, and 192bis; and RD 217/2008 articles 14(1)(f), 20, 20bis, 21, 22, 24, 30, 31, 31bis, 36, 38, 39(1) and (2), 40, 88, 90, 91, 92, 93, 94, 95, 96, 97(1) through (3), and 98;

(D) CRR articles 286 through 288 and 293; and

(E) EMIR Margin RTS article 2.

(ii) Paragraphs (c)(1) and (c)(2) also are conditioned on the Covered Entity's compliance with the following conditions:

(A) If the Covered Entity is an investment firm, the Covered Entity is not exempt from certain provisions of RD 217/2008 pursuant to RD 217/2008 article 87(2) and/or (3) and/or exempt from SSMA article 189 pursuant to SSMA article 189(6) and/or (7); and

(B) If the Covered Entity is an investment firm, the Covered Entity establishes, maintains, and implements policies and procedures for management of residual risk associated with the use of recognized credit risk mitigation techniques described in RD 217/2008 article 103(1)(c).

(4) Additional condition to paragraph (c)(1). Paragraph (c)(1) further is conditioned on the requirement that the Covered Entity complies with the provisions specified in paragraph (c)(3) as if those provisions also require compliance with:

(i) Applicable requirements under the Exchange Act; and

(ii) The other applicable conditions of this Order in connection with requirements for which the Covered Entity is relying on this Order.

(d) Substituted compliance in connection with counterparty protection requirements.

This Order extends to the following provisions related to counterparty protection:

(1) Disclosure of information regarding material risks and characteristics. The requirements of Exchange Act rule 15Fh-3(b) relating to disclosure of material risks and characteristics of one or more security-based swaps subject thereto, provided that the Covered Entity, in relation to that security-based swap, is subject to and complies with the requirements of MiFID article 24(4); SSMA articles 209(1) and (3) and 210(1); RD 217/2008 articles 65 and 77(1); and MiFID Org Reg articles 48-50.

(2) Disclosure of information regarding material incentives or conflicts of interest. The requirements of Exchange Act rule 15Fh-3(b) relating to disclosure of material incentives or conflicts of interest that a Covered Entity may have in connection with one or more security-based swaps subject thereto, provided that the Covered Entity, in relation to that security-based swap, is subject to and complies with the requirements of either:

(i) MiFID article 23(2) and (3); RD 217/2008 article 61(2) and (3); and MiFID Org Reg articles 33-35;

(ii) MiFID article 24(9); MiFID Delegated Directive article 11(5); and SSMA articles 220ter, 220quáter, and 220quinquies; RD 217/2008 articles 62, 63, and 64; or

(iii) MAR article 20(1) and MAR Investment Recommendations Regulation articles 5 and 6.

(3) “Know your counterparty.” The requirements of Exchange Act rule 15Fh-3(e), as applied to one or more security-based swap counterparties subject thereto, provided that the Covered Entity, in relation to the relevant security-based swap counterparty, is subject to and complies with the requirements of MiFID article 16(2) and (6); SSMA articles 193(2)(a) and 194(1); RD 217/2008 articles 30 and 32(1) and (10); MiFID Org Reg articles 21, 22, 25, 26, 72, 74, 75 and applicable parts of Annexes I and IV; CRD articles 74(1) and 85(1); SSMA articles 182(1) and 193(3)(b); and RD 217/2008 article 35 and, if the Covered Entity is a credit institution, also LOSSEC article 29(1); RD 84/2015 articles 43 and 52(1); BoS Circular 2/2016 article 28; and, if the Covered Entity is an investment firm, also SSMA article 189bis and RD 217/2008 article 96(1).

(4) Suitability. The requirements of Exchange Act rule 15Fh-3(f), as applied to one or more recommendations of a security-based swap or trading strategy involving a security-based swap subject thereto, provided that:

(i) The Covered Entity, in relation to the relevant recommendation, is subject to and complies with the requirements of MiFID articles 24(2) and (3) and 25(1) and (2); SSMA articles 208ter(1) and (2), 209(2), 212, 213, and 220sexies; RD 217/2008 articles 66, 71, 72, 72bis, 72ter, 73, 74, 74bis, 74ter, 75, 75bis, 76bis, and 80; CNMV Technical Guide 4/2017; and MiFID Org Reg articles 21(1)(b) and (d), 54, and 55; and

(ii) The counterparty to which the Covered Entity makes the recommendation is a “professional client” mentioned in MiFID Annex II section I and in SSMA article 205 and RD 217/2008 article 58 and is not a “special entity” as defined in Exchange Act section 15F(h)(2)(C) and Exchange Act rule 15Fh-2(d).

(5) Fair and balanced communications. The requirements of Exchange Act rule 15Fh-3(g), as applied to one or more communications subject thereto, provided that the Covered Entity, in relation to the relevant communication, is subject to and complies with the requirements of:

(i) Either MiFID articles 24(1) and (3) and SSMA articles 208 and 209(2) or MiFID article 30(1) and SSMA article 207(4); and

(ii) MiFID articles 24(4) and (5); SSMA articles 209(1) and (3) and 210(1); RD 217/2008 article 77; MiFID Org Reg articles 46-48; MAR articles 12(1)(c), 15 and 20(1); and MAR Investment Recommendations Regulation articles 3 and 4.

(6) Daily mark disclosure. The requirements of Exchange Act rule 15Fh-3(c), as applied to one or more security-based swaps subject thereto, provided that the Covered Entity is required

to reconcile, and does reconcile, the portfolio containing the relevant security-based swap on each business day pursuant to EMIR articles 11(1)(b) and 11(2) and EMIR RTS article 13.

(e) Substituted compliance in connection with recordkeeping, reporting, and notification requirements.

This Order extends to the following provisions that apply to a Covered Entity related to recordkeeping, reporting, and notification:

(1)(i) Make and keep current certain records. The requirements of the following provisions of Exchange Act rule 18a-5, provided that the Covered Entity complies with the relevant conditions in this paragraph (e)(1)(i) and with the applicable conditions in paragraph (e)(1)(ii):

(A) The requirements of Exchange Act rule 18a-5(b)(1), provided that the Covered Entity is subject to and complies with the requirements of MiFID Org Reg articles 74, 75, and Annex IV; MiFIR article 25(1);

(B) The requirements of Exchange Act rule 18a-5(b)(2), provided that the Covered Entity is subject to and complies with the requirements of MiFID Delegated Directive article 2; MiFID Org Reg articles 72, 74 and 75; EMIR article 39(4); RD 217/2008 article 41;

(C) The requirements of Exchange Act rule 18a-5(b)(3), provided that the Covered Entity is subject to and complies with the requirements of CRR article 103; MiFID articles 16(6), 25(5), and 25(6); MiFID Org Reg articles 59, 74, 75 and Annex IV; MiFIR article 25(1); EMIR articles 9(2) and 11(1)(a); SSMA articles 194(1), 218, and 211; and RD 217/2008 articles 3, 32(1), and 82;

(D) The requirements of Exchange Act rule 18a-5(b)(4), provided that the Covered Entity is subject to and complies with the requirements of MiFID Org Reg article 59; EMIR articles

9(2) and 11(1)(a); MiFID articles 16(6), 25(5), and 25(6); SSMA articles 194(1), 218, and 211; and RD 217/2008 articles 3, 32(1), and 82;

(E) The requirements of Exchange Act rule 18a-5(b)(5), provided that the Covered Entity is subject to and complies with the requirements of MiFID Org Reg articles 74, 75, and Annex IV; and MiFIR article 25(1);

(F) The requirements of Exchange Act rules 18a-5(b)(6) and (b)(11), provided that:

(I) The Covered Entity is subject to and complies with the requirements of CRR articles 103, 105(3), and 105(10); CRD article 73; MiFID articles 16(6), 25(5), 25(6); MiFID Delegated Directive article 2; MiFID Org Reg articles 59, 74, 75, and Annex IV; MiFIR article 25(1); EMIR articles 9(2), 11(1)(a), and 39(4); SSMA articles 194(1), 218, 211; and RD 217/2008 articles 3, 32(1), 41, and 82; and

(2) The Covered Entity applies substituted compliance for the requirements of Exchange Act rule 15Fi-2 pursuant to this Order;

(G) The requirements of Exchange Act rule 18a-5(b)(7), provided that the Covered Entity is subject to and complies with the requirements of MiFIR article 25(1); MiFID article 25(2); MiFID Org Reg article 74 and section 1 of Annex 4; and SSMA article 213; (H) The requirements of Exchange Act rule 18a-5(b)(8), provided that the Covered Entity is subject to and complies with the requirements of MiFID Org Reg articles 21(1)(d), 35; CRD articles 88, 91(1), 91(8); MiFID articles 9(1) and 16(3); SSMA articles 193(2)(b) and 208bis; LOSSEC articles 24(1) and 29(2); and BoS Circular 2/2016 Rule 32(1);

(I) The requirements of Exchange Act rule 18a-5(b)(13), regarding one or more provisions of Exchange Act rules 15Fh-3 or 15Fk-1 for which substituted compliance is available under this Order, provided that:

(I) The Covered Entity is subject to and complies with the requirements of MiFID Org Reg articles 72, 73, 74, 75, and Annexes I and IV; MiFID articles 16(6) and 25(2); EMIR article 39(5); SSMA articles 194(1) and 213; and RD 217/2008 article 32(1) and (10), in each case with respect to the relevant security-based swap or activity;

(2) With respect to the portion of Exchange Act rule 18a-5(b)(13) that relates to one or more provisions of Exchange Act rule 15Fh-3 for which substituted compliance is available under this Order, the Covered Entity applies substituted compliance for such business conduct standard(s) of Exchange Act rule 15Fh-3 pursuant to this Order, as applicable, with respect to the relevant security-based swap or activity; and

(3) With respect to the portion of Exchange Act rule 18a-5(b)(13) that relates to Exchange Act rule 15Fk-1, the Covered Entity applies substituted compliance for Exchange Act section 15F(k) and Exchange Act rule 15Fk-1 pursuant to this Order;

(J) The requirements of Exchange Act rule 18a-5(b)(14)(i) and (ii), provided that:

(1) The Covered Entity is subject to and complies with the requirements of EMIR article 11(1)(b) and EMIR RTS article 15(1)(a); and

(2) The Covered Entity applies substituted compliance for Exchange Act rule 15Fi-3 pursuant to this Order; and

(K) The requirements of Exchange Act rule 18a-5(b)(14)(iii), provided that:

(1) The Covered Entity is subject to and complies with the requirements of EMIR article 11(1)(b) and EMIR RTS article 15(1)(a), in each case with respect to such security-based swap portfolio(s); and

(2) The Covered Entity applies substituted compliance for Exchange Act rule 15Fi-4 pursuant to this Order.

(ii) Paragraph (e)(1)(i) is subject to the following further conditions:

(A) Paragraphs (e)(1)(i)(A) through (C) and (G) are subject to the condition that the Covered Entity preserves all of the data elements necessary to create the records required by the applicable Exchange Act rules cited in such paragraphs and upon request furnishes promptly to representatives of the Commission the records required by those rules;

(B) A Covered Entity may apply the substituted compliance determination in paragraph (e)(1)(i)(I) to records of compliance with Exchange Act rule 15Fh-3(b), (c), (e), (f) and (g) in respect of one or more security-based swaps or activities related to security-based swaps; and

(C) This Order does not extend to the requirements of Exchange Act rule 18a-5(b)(9), (b)(10) or (b)(12).

(2)(i) *Preserve certain records.* The requirements of the following provisions of Exchange Act rule 18a-6, provided that the Covered Entity complies with the relevant conditions in this paragraph (e)(2)(i) and with the applicable conditions in paragraph (e)(2)(ii):

(A) The requirements of Exchange Act rule 18a-6(a)(2), provided that the Covered Entity is subject to and complies with the requirements of MiFID Org Reg articles 72, 74, 75, and Annex IV; CRR article 103; MiFIR article 25(1); EMIR article 9(2); MiFID articles 16(6) and 69(2); CRD article 73; MiFID Delegated Directive article 2; SSMA articles 194(1), 234; and RD 217/2008 articles 32(1) and 41;

(B) The requirements of Exchange Act rule 18a-6(b)(2)(i), provided that the Covered Entity is subject to and complies with the requirements of MiFID Org Reg articles 72, 74, 75, and Annex IV; CRR article 103; MiFIR article 25(1); EMIR article 9(2); MiFID articles 16(6) and 69(2); CRD article 73; MiFID Delegated Directive article 2; SSMA articles 194(1), 234; and RD 217/2008 articles 32(1) and 41;

(C) The requirements of Exchange Act rule 18a-6(b)(2)(ii), provided that the Covered Entity is subject to and complies with the requirements of CRR article 103; MiFID Org Reg articles 72, 73, 74, 75, 76, Annex I and Annex IV; MiFIR article 25(1); EMIR article 9(2); CRD article 73; MiFID articles 16(6), 16(7); MiFID Delegated Directive article 2; SSMA articles 194(1) through (3); and RD 217/2008 articles 32(1) through (8) and 41;

(D) The requirements of Exchange Act rule 18a-6(b)(2)(iii), provided that the Covered Entity is subject to and complies with the requirements of EMIR article 9(2); MiFID Org Reg articles 72(1) and 73; MiFID article 16(6); SSMA articles 194(1); and RD 217/2008 article 32(1);

(E) The requirements of Exchange Act rule 18a-6(b)(2)(iv), provided that the Covered Entity is subject to and complies with the requirements of MiFID Org Reg articles 72(1) and 73; MiFIR article 25(1); EMIR article 9(2); MiFID article 16(6); SSMA articles 194(1); and RD 217/2008 article 32(1);

(F) The requirements of Exchange Act rule 18a-6(b)(2)(vii), regarding one or more provisions of Exchange Act rules 15Fh-3 or 15Fk-1 for which substituted compliance is available under this Order, provided that:

(1) The Covered Entity is subject to and complies with the requirements of EMIR article 9(2); MiFID Org Reg articles 72, 74, and 75 and Annexes I and IV; MiFID article 16(6); SSMA articles 194(1); and RD 217/2008 article 32(1) and (10), in each case with respect to the relevant security-based swap or activity;

(2) With respect to the portion of Exchange Act rule 18a-6(b)(2)(vii) that relates to one or more provisions of Exchange Act rule 15Fh-3 for which substituted compliance is available under this Order, the Covered Entity applies substituted compliance for such business conduct

standard(s) of Exchange Act rule 15Fh-3 pursuant to this Order, as applicable, with respect to the relevant security-based swap or activity; and

(3) With respect to the portion of Exchange Act rule 18a-6(b)(2)(vii) that relates to Exchange Act rule 15Fk-1, the Covered Entity applies substituted compliance for Exchange Act section 15F(k) and Exchange Act rule 15Fk-1 pursuant to this Order;

(G) The requirements of Exchange Act rule 18a-6(c), provided that:

(I) The Covered Entity is subject to and complies with the requirements of MiFID Org Reg articles 21(1)(f) and 72(1); MiFID article 16(6); SSMA articles 194(1); and RD 217/2008 article 32(1); and

(2) This Order does not extend to the requirements of Exchange act rule 18a-6(c) relating to Forms SBSE, SBSE-A, SBSE-C, SBSE-W, all amendments to these forms, and all other licenses or other documentation showing the registration of the Covered Entity with any securities regulatory authority or the U.S. Commodity Futures Trading Commission;

(H) The requirements of Exchange Act rule 18a-6(d)(1), provided that the Covered Entity is subject to and complies with the requirements of MiFID Org Reg articles 35 and 72(1); CRD articles 88, 91(1), 91(8); MiFID article 9(1), 16(3), 16(6); LOSSEC articles 24(1) and 29(1) and (2); SSMA articles 193(2)(b), 194(1), and 208bis; RD 217/2008 articles 30, 31, and 32(1); and BoS Circular 2/2016 Rule 32(1);

(I) The requirements of Exchange Act rule 18a-6(d)(2)(ii), provided that the Covered Entity is subject to and complies with the requirements of EMIR article 9(2); MiFID Org Reg articles 72(1) and 72(3); MiFID article 16(6); SSMA articles 194(1); and RD 217/2008 article 32(1);

(J) The requirements of Exchange Act rule 18a-6(d)(3)(ii), provided that the Covered Entity is subject to and complies with the requirements of MiFID Org Reg articles 21(1)(f), 72, 73, and Annex I; MiFID article 16(6); SSMA articles 194(1); and RD 217/2008 article 32(1);

(K) The requirements of Exchange Act rule 18a-6(d)(4) and (d)(5), provided that:

(I) The Covered Entity is subject to and complies with the requirements of EMIR article 9(2); MiFID Org Reg articles 24, 25(2), 72(1) and 73; MiFID articles 16(2), 16(6), and 25(5); SSMA articles 193(2)(a), 194(1), and 218; and RD 217/2008 articles 30(2), 32(1), and 82; and

(2) The Covered Entity applies substituted compliance for Exchange Act rules 15Fi-3, 15Fi-4, and 15Fi-5 pursuant to this Order;

(L) The requirements of Exchange Act rule 18a-6(e), provided that the Covered Entity is subject to and complies with the requirements of MiFID Org Reg articles 21(2), 58, 72(1) and 72(3); MiFID articles 16(5), 16(6); SSMA articles 193(3) and 194(1); and RD 217/2008 article 32(1); and

(M) The requirements of Exchange Act rule 18a-6(f), provided that the Covered Entity is subject to and complies with the requirements of MiFID Org Reg article 31(1); MiFID article 16(5); and SSMA article 193(3).

(ii) Paragraph (e)(2)(i) is subject to the following further conditions:

(A) A Covered Entity may apply the substituted compliance determination in paragraph (e)(2)(i)(F) to records related to Exchange Act rule 15Fh-3(b), (c), (e), (f) and (g) in respect of one or more security-based swaps or activities related to security-based swaps; and

(B) This Order does not extend to the requirements of Exchange Act rule 18a-6(b)(2)(v), (b)(2)(vi), or (b)(2)(viii).

(3) *File Reports.* The requirements of Exchange Act rule 18a-7(a)(2) and the requirements of Exchange Act rule 18a-7(j) as applied to the requirements of Exchange Act rule 18a-7(a)(2), provided that:

(i) The Covered Entity is subject to and complies with the requirements of CRR articles 99, 394, 430 and Part Six: Title II and Title III; CRR Reporting ITS annexes I, II, III, IV, V, VIII, IX, X, XI, XII and XIII, as applicable; and

(ii) The Covered Entity files periodic unaudited financial and operational information with the Commission or its designee in the manner and format required by Commission rule or order and presents the financial information in the filing in accordance with generally accepted accounting principles that the Covered Entity uses to prepare general purpose publicly available or available to be issued financial statements in Spain.

(4)(i) *Provide Notification.* The requirements of the following provisions of Exchange Act rule 18a-8, provided that the Covered Entity complies with the relevant conditions in this paragraph (e)(4)(i) and with the applicable conditions in paragraph (e)(4)(ii):

(A) The requirements of Exchange Act rule 18a-8(c) and the requirements of Exchange Act rule 18a-8(h) as applied to the requirements of Exchange Act rule 18a-8(c), provided that the Covered Entity is subject to and complies with the requirements of LOSSEC articles 116, 119, 121, and 122; and SSMA articles 276bis, 276ter, 276quáter, and 276quinquies;

(B) The requirements of Exchange Act rule 18a-8(d) and the requirements of Exchange Act rule 18a-8(h) as applied to the requirements of Exchange Act rule 18a-8(d), provided that:

(1) The Covered Entity is subject to and complies with the requirements of LOSSEC articles 116, 119, 121, and 122; and SSMA articles 276bis, 276ter, 276quáter, and 276quinquies; and

(2) This Order does not extend to the requirements of Exchange Act rule 18a-8(d) to give notice with respect to books and records required by Exchange Act rule 18a-5 for which the Covered Entity does not apply substituted compliance pursuant to this Order;

(ii) Paragraph (e)(4)(i) is subject to the following further conditions:

(A) The Covered Entity:

(1) Simultaneously sends a copy of any notice required to be sent by Spanish law cited in this paragraph of the Order to the Commission in the manner specified on the Commission's website; and

(2) Includes with the transmission the contact information of an individual who can provide further information about the matter that is the subject of the notice; and

(B) This Order does not extend to the requirements of paragraph (g) of rule 18a-8 or to the requirements of Exchange Act rule 18a-8(h) as applied to such requirements.

(5) *Daily Trading Records.* The requirements of Exchange Act section 15F(g), provided that the Covered Entity is subject to and complies with the requirements of SSMA Article 194(1); and RD 217/2008 Article 32(1).

(6) *Examination and Production of Records.* Notwithstanding the forgoing provisions of paragraph (e) of this Order, this Order does not extend to, and Covered Entities remain subject to, the requirement of Exchange Act section 15F(f) to keep books and records open to inspection by any representative of the Commission and the requirement of Exchange Act rule 18a-6(g) to furnish promptly to a representative of the Commission legible, true, complete, and current copies of those records of the Covered Entity that are required to be preserved under Exchange Act rule 18a-6, or any other records of the Covered Entity that are subject to examination or

required to be made or maintained pursuant to Exchange Act section 15F that are requested by a representative of the Commission.

(7) *English Translations.* Notwithstanding the forgoing provisions of paragraph (e) of this Order, to the extent documents are not prepared in the English language, Covered Entities must promptly furnish to a representative of the Commission upon request an English translation of any record, report, or notification of the Covered Entity that is required to be made, preserved, filed, or subject to examination pursuant to Exchange Act section 15F of this Order.

(f) Definitions.

(1) “Covered Entity” means an entity that:

(i) Is a security-based swap dealer or major security-based swap participant registered with the Commission;

(ii) Is not a “U.S. person,” as that term is defined in rule 3a71-3(a)(4) under the Exchange Act; and

(iii) Is an investment firm or a credit institution authorized by the CNMV and the ECB to provide investment services and/or perform investment activities in the Kingdom of Spain; and

(iv) Is a significant institution supervised by the CNMV and the ECB (with the participation of the BoS).

(2) “MiFID” means the “Markets in Financial Instruments Directive,” Directive 2014/65/EU, as amended from time to time.

(3) “MiFID Org Reg” means Commission Delegated Regulation (EU) 2017/565, as amended from time to time.

(4) “MiFID Delegated Directive” means Commission Delegated Directive (EU) 2017/593, as amended from time to time.

(5) “MiFIR” means Regulation (EU) 600/2014, as amended from time to time.

(6) “EMIR” means the “European Market Infrastructure Regulation,” Regulation (EU) 648/2012, as amended from time to time.

(7) “EMIR RTS” means Commission Delegated Regulation (EU) 149/2013, as amended from time to time.

(8) “EMIR Margin RTS” means Commission Delegated Regulation (EU) 2016/2251, as amended from time to time.

(9) “CRD” means Directive 2013/36/EU, as amended from time to time.

(10) “CRR” means Regulation (EU) 575/2013, as amended from time to time.

(11) “CRR Reporting ITS” means Commission Implementing Regulation (EU) 680/2014, as amended from time to time.

(12) “MAR” means the “Market Abuse Regulation,” Regulation (EU) 596/2014, as amended from time to time.

(13) “MAR Investment Recommendations Regulation” means Commission Delegated Regulation (EU) 2016/958, as amended from time to time.

(14) “CNMV” means the Spanish Comisión Nacional del Mercado de Valores.

(15) “BoS” means the Spanish Banco de España.

(16) “ECB” means the European Central Bank.

(17) “Accounting Directive” means Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013, as amended from time to time.

(18) “BRRD” means Bank Recovery and Resolution Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014, as amended from time to time.

(19) “SSMA” means the Spanish Securities Market Act, Royal Legislative Decree 4/2015, of October 23, as amended from time to time.

(20) “RD 217/2008” means Royal Decree 217/2008, of February 15, as amended from time to time.

(21) “LOSSEC” means the Act on Regulation, Supervision, and Solvency of Credit Institutions, Law 10/2014, of June 26, as amended from time to time.

(22) “RD 84/2015” means Royal Decree 84/2015, of February 13, as amended from time to time.

(23) “BoS Circular 2/2016” means Circular 2/2016, of February 2, of the Bank of Spain, as amended from time to time.

(24) “Prudentially regulated” means a Covered Entity that has a “prudential regulator” as that term is defined in Exchange Act section 3(a)(74).

By the Commission.

Eduardo A. Aleman,

Deputy Secretary.