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Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

email: rules-comments@sec.gov
re: S7-01-13

Re: Proposed Regulation SCI

Dear Secretary Murphy:

We write on behalf of the Committee on Futures and Derivatives (the "Committee") of the New York City Bar Association (the "Association") to provide our comments to the Securities and Exchange Commission (the "SEC") with respect to recently proposed Regulation SCI.

The Association is an organization of over 23,000 members. Most of its members practice in the New York City area. However, the Association also has members in nearly every state and over 50 countries. The Committee consists of attorneys knowledgeable about the trading and regulation of futures contracts and over-the-counter derivative products, and it has a

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practice of publishing comments on legal and regulatory developments that have a significant impact on futures and derivatives markets.

Set forth below are the Committee's comments concerning proposed Regulation SCI and proposed Rules 13n-6 and 822 in the context of their possible application to security-based swap data repositories ("SB SDRs") and security-based swap execution facilities ("SB SEFs").

I. Proposed Rules 13n-6 and 822

Proposed Rule 13n-6, applicable to SB SDRs, and proposed Rule 822, applicable to SB SEFs, have substantially similar language with respect to the system compliance and integrity requirements for those entities. Each proposed rule requires the covered entity to (i) establish, maintain and enforce written policies and procedures reasonably designed to ensure that its systems provide adequate levels of capacity, resiliency and security; (ii) establish reasonable current and future capacity estimates; (iii) conduct periodic capacity stress tests of critical systems to determine such systems' ability to process transactions in an accurate, timely and efficient manner; (iv) develop and implement reasonable procedures to review and keep current its system development and testing methodology; (v) review the vulnerability of its systems and data center computer operations to internal and external threats, physical hazards and natural disasters; (vi) establish adequate contingency and disaster recovery plans; (vii) submit an objective review to the SEC on an annual basis; (viii) promptly notify the SEC of material systems outages and remedial measures; and (ix) notify the SEC before implementing material systems changes. We note that the proposed rules are principles-based and permit the covered entity to comply in a manner that best suits its own structure. We note also that proposed Rule 822 contains additional detail further delineating what the required policies and procedures should address for SB SEFs.

In both cases, the precursor for the proposed rules is the Automated Review Policy ("ARP"), which has been the SEC standard for systems maintenance since its adoption in 1989 and 1991.¹ Proposed Rule 13n-6 states that the "proposed requirements essentially codify and parallel the ARP requirements that have been in place for almost twenty years."² Proposed Rule 822 similarly states that "these [systems safeguard] standards are comparable to the standards applicable to SROs, including national securities exchanges and clearing agencies, pursuant to the Commission's Automation Review Policy standards."³

II. Proposed Rule SCI

With proposed Regulation SCI, the SEC seeks to update the ARP program with respect to self-regulatory organizations, alternative trading systems, plan processors, and certain exempt clearing agencies (collectively, "SCI entities") and seeks comment upon whether such updated

¹ SEC Release No. 34-69077 (March 8, 2013), p.3 ("Regulation SCI"); 78 F.R. 18084 (March 25, 2013) and 78 F.R. 30803 (May 23, 2013).

² See SEC Release No. 34-63347 (November 19, 2010); 75 F.R. 77306, 77332 (December 10, 2010).

³ See SEC Release No. 34-63825 (February 2, 2011); 76 F.R. 10948, 10987 (February 28, 2011).

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program should apply to SB SDRs and SB SEFs. Proposed Regulation SCI would, for the entities covered by the regulation: (i) require the establishment, maintenance and enforcement by the covered entity of written policies and procedures reasonably designed to ensure that the applicable systems and security standards have levels of capacity, integrity, resiliency, availability and security adequacy to maintain the covered entity's operational capability and promote the maintenance of fair and orderly markets; (ii) require the covered entity to establish policies and procedures regarding standards that result in systems designed, developed, tested, maintained, operated and surveilled in a manner that facilitates the successful collection, processing and dissemination of market data; (iii) require the covered entity to establish, maintain and enforce reasonably designed written policies and procedures to ensure that its systems operate in the manner intended, including in a manner that complies with the federal securities laws and rules and regulations thereunder and, as applicable, the entity's rules and governing documents; (iv) require the covered entity to take corrective action, including devoting adequate resources, to remedy disruptions, compliance issues or intrusions (collectively, "SCI events") as soon as reasonably practicable; (v) require covered entities to have backup and recovery capabilities sufficiently resilient and geographically diverse to ensure next business day resumption of trading following a wide scale disruption; (vi) require an annual review of the covered entity's compliance with proposed Regulation SCI and the reporting of such review to the SEC; (vii) require the covered entity, with respect to its business continuity and disaster recovery plans, including its backup systems, to require participation by designated members or participants in scheduled functional and performance testing of the operation of such plans at specified intervals, and to coordinate such required testing with other covered entities; (viii) require all SCI events to be reported to the SEC, and certain types of SCI events to be disseminated to a covered entity's members or participants; and (ix) establish semi-annual reporting obligations for planned material systems changes.⁴ These proposed requirements of proposed Regulation SCI are broader in scope than the requirements contained in proposed Rules 13n-6 and 822, but proposed Regulation SCI is largely principles-based with added specificity in certain areas.⁵

The SEC notes in proposed Regulation SCI that if it were to adopt proposed Rules 13n-6 and 822 and also adopt proposed Regulation SCI, there would be differences between the obligations imposed on SB SDRs and SB SEFs on the one hand and SCI entities, on the other and has requested comment as to whether or not that is desirable.⁶

III. Support for generally applicable and consistent principals-based rules, supplemented by specific rules, where warranted.

The Committee supports principles-based rules relating to systems compliance and integrity, and generally believes that principles applicable to one type of system should be applicable to all types of systems. As a result, the Committee does not believe that the SEC

⁴ Regulation SCI at p. 189.

⁵ *Id.*

⁶ *Id.* at p. 190.

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should promulgate principles-based rules that would apply different principles to different systems, unless such difference is clearly warranted by the facts and circumstances relating to and purpose of a particular system. To permit the principles applicable to one type of system to diverge from those applicable to another type of system may create regulatory favoritism and systems arbitrage, which would impair the creation and maintenance of orderly markets. Additionally, we believe that because technology continues to evolve at a rapid pace and because specific and technical rules may create conflicting standards, any attempt to provide specific and technical rules should be avoided, unless the context clearly warrants such specific and technical rules.

Our support for generally applicable and consistent rulemaking, is supported by the position Congress took when adopting Title VII of The Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”). Section 712 of the Dodd-Frank Act requires the SEC, before commencing any rulemaking or issuing an order relating to security-based swaps and related participants in the market, to consult with the Commodity Futures Trading Commission (the “CFTC”) and prudential regulators for the purposes of assuring regulatory consistency and comparability, to the extent possible.⁷ The CFTC has been given a substantially similar mandate.⁸ Also, when adopting rules under Section 712 of the Dodd-Frank Act the SEC, as well as the CFTC, must treat functionally or economically similar products or entities in a similar manner.⁹

The SEC has noted similarities between certain SCI entities and SB SDRs and SB SEFs, and has noted that (i) SB SDRs serve as information disseminators similar to plan processors in the equities and options markets, and (ii) SB SEFs function as trading markets similar to the national securities exchanges and alternative trading systems.¹⁰ These similarities support application of a standard set of rules, without a clear justification that a different set of rules is warranted.

IV. A note on CFTC regulation.

The SEC notes that if it were to adopt proposed Regulation SCI and proposed Rules 13n-6 and 822, the system safeguard rules applicable to SB SDRs and SB SEFs would diverge from those applicable to SCI entities, as well as from those the CFTC has adopted for SDRs and may adopt for SEFs.¹¹ The SEC also notes that, for example, for swap data repositories the CFTC requires same day recovery for critical swap data repositories whereas proposed Regulation SCI would require next business day recovery for trading services (and two-hour recovery for clearing and settlement services).¹² While we do not have a position on the appropriate time

⁷ Dodd-Frank Act, Section 712(a)(2).

⁸ Dodd-Frank Act, Section 712(a)(1).

⁹ Dodd-Frank Act, Section 712(a)(7)(A).

¹⁰ Regulation SCI at p. 191.

¹¹ Regulation SCI at p. 196. Subsequent to Regulation SCI, the CFTC adopted final system safeguard rules applicable to SEFs. *See*, 78 F.R. 33476 (June 4, 2013).

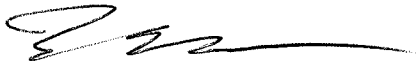
¹² Regulation SCI at p. 197 at n. 323.

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period for the recovery of a particular system, we do not believe that important market systems should have differing recovery requirements without a clear justification, particularly in light of a Congressional mandate in the Dodd-Frank Act to assure regulatory consistency and comparability, to the extent possible.

We appreciate the opportunity to present our views to you on this matter of importance to us as practitioners in the area of futures and derivatives and our members are available to discuss any of the above at your convenience.

Respectfully yours,



Thomas D' Ambrosio, Chair
The Committee on Futures and Derivatives,
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cc:

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§ These members of the Committee constitute the working group for this letter.

* These members of the Committee did not participate in the preparation of this comment letter.

The opinions expressed by members of the Committee in this letter are the individual opinions of the members and not necessarily the opinions of any organization with which they may be employed or affiliated.