Cross-Border Security-Based Swaps

SEC Issues Final Rules on Cross-Border Security-Based Swap Activity in the United States

EXECUTIVE SUMMARY

On February 10, 2016, the SEC issued a release with final rules, amendments and interpretations on certain cross-border security-based swap activities under Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Final Release”). The Final Release, which is yet to be published in the Federal Register, requires a non-U.S. person to include transactions connected with its security-based swap dealing activity that are arranged, negotiated or executed by personnel of the non-U.S. person located in a U.S. branch or office, or by the personnel of the non-U.S. person’s agent located in a U.S. branch or office, toward the non-U.S. person’s determination of its status as a security-based swap dealer under Title VII. The SEC clarifies in the Final Release that “arrange,” “negotiate” and “execute” refer to client-facing sales and trading activities and not to back office, document preparation or other ministerial activities.

The SEC’s approach in the Final Release is consistent with its adoption of a “territorial approach” to security-based swap dealer registration under Title VII (and with the proposing release of April 2015) but does not address a number of matters such as application of the external business conduct, regulatory reporting and public dissemination, and mandatory trade execution and clearing requirements to non-U.S. persons. The SEC has indicated that it will address these matters through subsequent releases.
I. BACKGROUND

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") gives the Securities and Exchange Commission (the "SEC") and the Commodity Futures Trading Commission (the "CFTC") extensive authority to regulate over-the-counter derivative products, markets and market participants. Under Title VII of Dodd-Frank, the SEC has authority over security-based swap ("SBS") transactions and participants in the SBS market and the CFTC has authority over swap transactions, swap markets and swap market participants.

Among other matters, the Title VII regime requires security-based swap dealers ("SBSDs") and major security-based swap participants ("MSBSPs," and together with SBSDs, "SBS Entities") to register with the SEC and comply with an extensive regulatory framework.

Dodd-Frank also limits the extraterritorial reach of the agencies' regulatory authority. In the case of the SEC, Section 772(b) of Dodd-Frank added Section 30(c) to the Securities Exchange Act of 1934 (the "Exchange Act"), providing that "[n]o provision of [the Exchange Act that was added by Title VII] . . . shall apply to any person insofar as such person transacts a business in [SBSs] without the jurisdiction of the United States, unless such person transacts such business in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate to prevent the evasion of any provision of [the Exchange Act that was added by Title VII]."


On May 1, 2013, the SEC issued a release proposing rules and guidance regarding the cross-border application of certain SBS provisions under the Exchange Act (the "2013 Proposing Release"). The 2013 Proposing Release reflected the SEC’s position that Section 30(c) of the Exchange Act adopted a "territorial approach" to Title VII. In the context of the global SBS market, the SEC believed that a territorial approach would be one which looked to the full range of activities described in Dodd-Frank as well as the concerns Congress intended Title VII to address, irrespective of the location of the entity engaging in the activity or bearing the risk.

Consistent with this approach, the SEC noted its preliminary belief in the 2013 Proposing Release that SBS dealing activity carried out by a non-U.S. person through a branch, office, affiliate, or an agent acting on its behalf in the United States might raise concerns under Title VII, even if some or all of the participants in such activities were non-U.S. persons. The 2013 Proposing Release would have applied the requirements of the Exchange Act that were added by Title VII to any SBS “transaction[s] conducted within the United States.”

The proposed rules under the 2013 Proposing Release defined an SBS “transaction conducted within the United States” as an “SBS transaction that is solicited, negotiated, executed or booked within the United
States, by or on behalf of either counterparty to the transaction, regardless of the location, domicile, or residence status of either counterparty to the transaction."^4

B. THE CFTC’S 2013 STAFF ADVISORY

In November 2013, the CFTC issued a Staff Advisory addressing the applicability of the CFTC’s transaction-level requirements to swaps arranged, negotiated or executed by personnel or agents located in the United States, where such personnel or agents are acting for non-U.S. swap dealers. The CFTC believes that it “has a strong supervisory interest in swap dealing activities that occur within the United States, regardless of the status of the counterparties” and that a non-U.S. swap dealer “regularly using personnel or agents located in the United States to arrange, negotiate, or execute a swap with a non-U.S. person generally would be required to comply with” the CFTC’s transaction-level requirements. The CFTC subsequently published a request for comment on the Staff Advisory and extended no-action relief on the Staff Advisory until the earlier of September 30, 2016, or the effective date of any CFTC action in response to its request for comment. ^7

C. THE SEC’S APRIL 2015 PROPOSING RELEASE

The SEC’s release of April 29, 2015 (the “U.S. Activity Proposing Release”)^8 sought, among other things, to address the treatment of SBS transactions between two non-U.S. persons where one or both of the non-U.S. persons conducts dealing activities in the United States. The U.S. Activity Proposing Release proposed to:

- require non-U.S. persons that use U.S. personnel to arrange, negotiate or execute an SBS transaction in connection with their SBS dealing activity to include such SBS transaction in determining whether the non-U.S. person would be required to register as an SBSD with the SEC,
- subject such SBS transaction to Title VII’s external business conduct standards, and
- amend Regulation SBSR to require information regarding such SBS transactions to be reported to a registered SBS data repository and publicly disseminated.

D. THE SEC’S 2016 FINAL RELEASE AND POLICY CONSIDERATIONS

The rules under the Final Release (the “Final Rules”), consistent with the U.S. Activity Proposing Release, require a non-U.S. person that uses U.S. personnel to arrange, negotiate or execute an SBS transaction in connection with the non-U.S. person’s SBS dealing activity to include such SBS transaction in determining whether the non-U.S. person would be required to register as an SBSD with the SEC. Unlike the U.S. Activity Proposing Release, however, the Final Rules do not address issues such as the application of business conduct standards, reporting requirements and clearing and trade execution requirements. The SEC has indicated that these issues will be addressed through subsequent releases.

In the Final Release, the SEC also has reiterated several economic and other policy considerations for adopting the Final Rules as proposed. The SEC has noted, among other things, that:
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- because the SBSD definition focuses on a person’s activity and not solely on the amount of risk created by the activity, SBS dealing activity within the United States need not create counterparty credit risk in the United States for there to be a nexus sufficient to warrant SBSD registration;
- apart from the mitigation of counterparty and operational risks, Title VII SBSD requirements advance other policy objectives such as enhancing market integrity and transparency;
- permitting an unregistered non-U.S. person to engage in SBS dealing activities within the United States without complying with the transactional reporting or other requirements of Title VII would impair the SEC’s ability to monitor market manipulation or other abusive conduct;
- given that a significant proportion of SBS dealing activity is carried out by the foreign affiliates of U.S. financial groups and the potential reputational effect that an affiliate’s failure can have on other affiliates in the same corporate group, such SBS dealing activity within the United States may pose a risk of contagion to U.S. financial markets;
- the SEC is seeking to minimize the competitive effects of disparate regulatory treatment that could arise if non-U.S. persons could deal with non-U.S. persons through U.S. personnel without triggering the Title VII SBSD requirements; and
- the SEC is concerned that treating dealing activity by non-U.S. persons in the United States as exempt could fragment SBS activity into two pools—one for U.S. persons and non-U.S. persons whose obligations under an SBS are guaranteed by a U.S. person and the other for non-U.S. persons.

In analyzing the relevant economic considerations and baselines for the SBS market, the SEC estimates:

- approximately 50 entities will register as SBSDs, of which approximately 22 will be non-U.S. persons;
- approximately 155 entities will incur assessment costs to determine if they are SBSDs, of which approximately 57 will be non-U.S. persons; and
- 55 firms may register as SBSDs and MSBSPs, of which approximately 35 would also be registered as swap dealers with the CFTC.

II. CALCULATION OF THE DE MINIMIS AMOUNT

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In general, SEC rules provide that a person is not required to register as an SBSD if the aggregate effective notional amount of SBS transactions entered into in connection with the person’s dealing activity together with the dealing activity of certain affiliates, over the preceding 12 months, did not exceed a specified “de minimis amount.” The de minimis amount is $3 billion, in the case of credit default swaps, or $150 million in the case of other SBS transactions; however, in order to facilitate the orderly implementation of Title VII, the de minimis threshold will be $8 billion for credit default swaps and $400 million for other SBS transactions during a phase-in period ending between three and five years after an SBS data repository first receives SBS data. During this phase-in period, SEC staff will study the SBS market within the new regulatory framework, and report on the operation of the SBSD and MSBSP definitions.9
Consistent with the U.S. Activity Proposing Release, the Final Rules amend Rule 3a71-3(b)(1)(iii) of the Exchange Act to require a non-U.S. person engaged in SBS dealing activity to include in its *de minimis* calculations any transactions connected with its SBS dealing activity that it arranges, negotiates or executes using its personnel located in a U.S. branch or office, or using the personnel of its agent located in a U.S. branch or office. If a non-U.S. person, in connection with SBS dealing activity, engages in market-facing activity using personnel located in the United States, the SEC believes that such non-U.S. person is performing activities that fall within the SBS definition.

The Final Rules are in addition to the rules provided in the 2014 Final Release which require non-U.S. persons to include the following transactions in their SBSD *de minimis* calculations, even where such non-U.S. persons are not engaging in SBS dealing activity using personnel located in the United States:

- transactions with U.S. counterparties,
- transactions with non-U.S. counterparties that are conduit affiliates,¹⁰ and
- transactions with non-U.S. counterparties where such non-U.S. counterparties have a right of recourse against a U.S. person under the SBS transaction.¹¹

In the Final Release, the SEC has clarified a number of key elements of the Final Rules. These clarifications are largely consistent with the interpretations provided in the U.S. Activity Proposing Release.

1. **“Arranging, Negotiating, or Executing” an SBS Transaction**

Consistent with the rules proposed under the U.S. Activity Proposing Release, the new Final Rule 3a71-3(b)(1)(iii)(C) would apply only to transactions connected with a non-U.S. person’s SBS dealing activity that its personnel (or the personnel of its agent) located in the United States arrange, negotiate or execute. In the Final Release, the SEC reiterated its view in the U.S. Activity Proposing Release that it intends the terms “arrange” and “negotiate” to indicate market-facing activity of sales or trading personnel in connection with a particular SBS transaction, including interactions with counterparties or their agents. The SEC has also clarified that it intends the term “execute” to refer to “the market-facing act that, in connection with [an SBS] transaction, causes the person to become irrevocably bound under the [SBS] under applicable law.” The SEC indicated in the Final Release that market participants do not need to look beyond those personnel who are involved in, or directing, market-facing activity in connection with a particular SBS transaction. Accordingly, if a non-U.S. person’s personnel (or that of its agent) located in a U.S. branch or office do not engage in market-facing activities with respect to a specific SBS transaction, the non-U.S. person would not have to include that SBS transaction in its *de minimis* calculation. For example, where a person designs an SBS but does not communicate with the counterparty in connection with the SBS transaction and does not execute trades in the SBS, the SEC considers that person not to have engaged in market-facing activities with respect to that SBS transaction.
The SEC specifically noted that the Final Rules would include negotiation of the specific economic terms of an SBS transaction with a counterparty but not the preparation of underlying documentation (including the negotiation of a master agreement and related documentation) or the performance of ministerial or clerical tasks in connection with the transaction.

The SEC also clarified that the Final Rules do not require persons engaged in dealing activity to consider the location of personnel booking the transaction. According to the SEC, the task of entering a transaction on a non-U.S. person’s books once the transaction has been executed by market-facing personnel is a ministerial task and does not appear to involve the type of market-facing activity that reflects an involvement in the U.S. financial market that would indicate that the non-U.S. person may be likely to raise the types of regulatory concerns addressed by the Title VII dealer requirements, particularly if both counterparties to the transaction are non-U.S. persons and all relevant market-facing activity occurs outside the United States.

Consistent with the U.S. Activity Proposing Release, the SEC noted that the Final Rules also apply in situations where non-U.S. persons direct other personnel to arrange, negotiate or execute an SBS transaction. Accordingly, the sales and trading personnel of a non-U.S. person who are located in the United States cannot avoid the application of the Final Rules by simply directing other personnel to carry out dealing activity. The SEC also clarified that the Final Rules apply to personnel located in a U.S. branch or office that specify the trading strategy or techniques carried out through algorithmic trading or automated electronic execution of SBS transactions, even if the related server is located outside the United States. The SEC declined to create an exception for transactions executed on an anonymous electronic platform in which a counterparty has personnel in the United States but where there is no human contact within the United States related to the transaction.

In an important change from the 2013 Proposing Release, the SEC clarified that the non-U.S. person engaged in SBS dealing activity would not be required to consider the location of its counterparty’s operations, or the operations of its counterparty’s agents, in determining whether an SBS transaction should be included in its own de minimis calculations.

2. “Located in a U.S. Branch or Office”

The Final Rules only apply to transactions connected with a non-U.S. person’s SBS dealing activity that are arranged, negotiated or executed by personnel located in a U.S. branch or office – whether directly using the non-U.S. person’s own personnel or by using the personnel of an agent. Consistent with the U.S. Activity Proposing Release, the SEC noted that SBS transactions would only be included in de minimis calculations if the transactions were arranged, negotiated or executed by personnel who are assigned to, on an ongoing or temporary basis, or regularly working in a U.S. branch or office. A non-U.S. person will not need to consider the activities of personnel who are only incidentally present in the United States, such as participation in negotiations of the terms of an SBS by an employee of the
non-U.S. person located in a foreign office who happens to be traveling within the United States. On the other hand, the use of sales or trading personnel located in a U.S. branch or office to respond to inquiries from non-U.S. counterparties outside of business hours in the counterparties’ home jurisdiction would be counted under the Final Rules.

The SEC acknowledged that this approach may lead market participants to perform a “trade-by-trade” analysis to determine the location of relevant personnel performing market-facing activities in connection with the transaction. However, the SEC noted that a non-U.S. person carrying out this analysis should be able to identify, for ongoing compliance purposes, the specific sales and trading personnel whose involvement in market-facing activity would require an SBS transaction to be included in the de minimis calculation. Alternatively, such non-U.S. person may establish policies and procedures that would facilitate compliance with the Final Rules by requiring SBS dealing activity to be arranged, negotiated and executed solely by personnel located outside the United States. The SEC believes that some market participants may already have begun identifying such personnel, including in response to the CFTC’s Staff Advisory.

Consistent with the U.S. Activity Proposing Release, in the Final Release the SEC interpreted the term “personnel” in a manner consistent with the definition of an “associated person of a security-based swap dealer” under Section 3(a)(70) of the Exchange Act, regardless of whether such non-U.S. person or such non-U.S. person’s agent was itself an SBSD. This definition is substantially similar to the definition of an “associated person of a broker or dealer” under Section 3(a)(18) of the Exchange Act. According to the SEC, the definition is intended to encompass a broad range of relationships that can be used by firms to engage in and effect securities transactions and does not depend solely on whether a natural person is a technically an “employee” of the entity in question. Accordingly, the SEC expects to examine whether a particular entity is able to control or supervise the actions of an individual in determining whether such person is to be considered as “personnel” of a U.S. branch, office, or agent of an SBSD. The SEC stated that this is particularly relevant in the context of a financial group that engages in an SBS dealing business, where personnel of one affiliate may operate under the direction of, or report to, personnel of another affiliate within the group.

Consistent with its views expressed in prior releases, the SEC reaffirms in the Final Release that if a financial group uses one entity to perform the sales and trading functions of its SBS dealing business and another to book the resulting SBS transactions, the SEC will view the booking entity as the SBS dealing entity, rather than the intermediary that acts as an agent on behalf of the booking entity to originate the SBS transactions. It should be noted, however, that since SBSs are defined as “securities” under the Exchange Act, the activities of the intermediary that acts as an agent may require “broker” registration under the Exchange Act.
3. Exception for Transactions Involving Certain International Organizations

In the Final Release, the SEC excepted the International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, their agencies and pension plans, and other similar international organizations and their agencies and pension plans, from the requirement to count an SBS transaction with another non-U.S. person towards their *de minimis* thresholds when they use personnel located in the United States to arrange, negotiate or execute the SBS transaction. In the 2014 Final Release, the SEC had taken the view that the status of these international organizations excluded them from the definition of "U.S. persons" under Title VII.

B. EXCEPTION FOR CLEARED ANONYMOUS TRANSACTIONS

Current rules permit a non-U.S. person (other than a conduit affiliate) to exclude from its *de minimis* calculations SBS transactions that the non-U.S. person enters into anonymously on an execution facility or national securities exchange and that are cleared through a clearing agency. Consistent with the U.S. Activity Proposing Release, the Final Rules amend the rules under the 2014 Final Release to make this exception in favor of anonymous transactions unavailable for SBS transactions which are arranged, negotiated or executed by personnel of a non-U.S. person located in the United States, or by personnel of the agent of such non-U.S. person located in a U.S. branch or office. Accordingly, an anonymous transaction which is arranged, negotiated or executed by personnel of a non-U.S. person (or by personnel of the agent of such non-U.S. person) located in the United States would have to be counted toward the *de minimis* calculations for such non-U.S. person.

III. COMPLIANCE DATE FOR THE FINAL RULES

In its release regarding registration requirements for SBS Entities, the SEC established the latest of the following as the registration compliance date (the "Registration Compliance Date"):

- six months after the date of publication in the *Federal Register* of a final rule release adopting rules establishing capital, margin and segregation requirements for SBS Entities;
- the compliance date of final rules establishing recordkeeping and reporting requirements for SBS Entities;
- the compliance date of final rules establishing business conduct requirements under Exchange Act sections 15F(h) and 15F(k); or
- the compliance date for final rules establishing a process for a registered SBS Entity to make an application to the SEC to allow an associated person who is subject to a statutory disqualification to effect or be involved in effecting SBS transactions on the SBS Entity’s behalf.

In addition, the SEC noted that, for purposes of complying with the registration and other requirements, persons engaged in SBS dealing activity are not required to begin calculating whether their transactions meet or exceed the *de minimis* thresholds established until two months prior to the Registration Date.
Compliance Date (the “SBS Entity Counting Date”). Accordingly, a person engaged in SBS dealing activity will not be required to include in its *de minimis* threshold calculations any SBS transactions entered into prior to the SBS Entity Counting Date. However, given the potential complexities of implementing the Final Rules, the SEC believes it is appropriate to establish a compliance date solely for Final Rule 3a71-3(b)(1)(iii)(C) of the later of (a) 12 months following publication in the *Federal Register* or (b) the SBS Entity Counting Date.
ENDNOTES

1. See “Security-Based Swap Transactions Connected With a Non-U.S. Person’s Dealing Activity That Are Arranged, Negotiated, or Executed by Personnel Located in a U.S. Branch or Office or in a U.S. Branch or Office of an Agent; Security-Based Swap Dealer De Minimis Exception,” Exchange Act Release No. 77104 (February 10, 2016), available here.

2. For more information regarding the registration process, see our Memorandum to Clients, dated August 18, 2015, entitled “SEC Adopts Final Rules on Registration of Security-Based Swap Dealers and Major Security-Based Swap Participants.”


5. See CFTC Staff Advisory No. 13-69, “Division of Swap Dealer and Intermediary Oversight Advisory: Applicability of Transaction-Level Requirements to Activity in the United States” (November 14, 2013).

6. Id. at p. 2.


8. See Application of Certain Title VII Requirements to Security-Based Swap Transactions Connected With a Non-U.S. Person’s Dealing Activity That Are Arranged, Negotiated, or Executed by Personnel Located in a U.S. Branch or Office or in a U.S. Branch or Office of an Agent, Exchange Act Release No. 74834 (April 29, 2015), 80 FR 27443 (May 13, 2015) available here. For more information regarding the U.S. Activity Proposing Release, see pp. 27 et seq. of our Memorandum to Clients, dated September 10, 2015, entitled “Recently Adopted and Proposed Rules under Title VII.”

9. For more information regarding the classification of entities as SBSDs, see our Memorandum to Clients, dated June 8, 2012, entitled “CFTC and SEC Issue Final Rules and Guidance to Further Define the Terms ‘Swap Dealer,’ ‘Security-Based Swap Dealer,’ ‘Major Swap Participant,’ ‘Major Security-Based Swap Participant’ and ‘Eligible Contract Participant.’”

10. A “conduit affiliate” is defined as a non-U.S. person that is directly or indirectly majority-owned by one or more U.S. persons and that, in the regular course of business, enters into SBS transactions with one or more other non-U.S. persons or with foreign branches of U.S. persons that are registered SBSDs, for the purpose of hedging or mitigating risks faced by, or otherwise taking positions on behalf of, one or more U.S. affiliates (other than U.S. affiliates registered as SBSDs or MSBPs) and enters into offsetting SBS transactions or other arrangements with such U.S. affiliates to transfer the risks and benefits of those SBS transactions. See Rule 3a71–3(a)(1).

11. Pursuant to the 2014 Final Release, a “right of recourse” against a U.S. person exists if the counterparty has a conditional or unconditional legally enforceable right, in whole or in part, to receive payments, or otherwise collect from, the U.S. person in connection with the non-U.S. person’s obligations under the SBS transaction. This definition has several important distinctions from a traditional unconditional guarantee:

- the right of recourse may be conditional (e.g., the right of recourse may be conditional on the counterparty bringing suit against the primary obligor first or upon the primary obligor’s insolvency);
ENDNOTES (CONTINUED)

- the right of recourse does not have to be in full but may only be for a portion of the obligation; and
- the right of recourse may be several and does not have to be joint and several.

12 Consistent with this analysis, the SEC indicates in the Final Release that the Final Rules would not encompass an SBS transaction solely because a U.S.-based attorney was involved in the negotiations.

13 An SBS transaction is considered to be anonymous for the purposes of this exception if the counterparty to the transaction is unknown to the non-U.S. person prior to the transaction. For example, an SBS transaction would not be anonymous if a person submitted the transaction to an SBS execution facility after accepting a request for a quotation from a known counterparty or a known group of potential counterparties, even if the process of submitting the transaction did not itself involve a named counterparty.

14 The SEC has proposed rules with respect to business conduct standards for SBS Entities, capital, margin, segregation and recordkeeping requirements for SBS Entities and recordkeeping and reporting requirements for SBS Entities. See our Memorandum to Clients, dated July 8, 2011, entitled “SEC Issues Proposed Rules Regarding Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants” and our Memorandum to Clients, dated November 19, 2012, entitled “SEC Proposes Rules Regarding Capital, Margin and Collateral Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants.”
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