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## SEC Proposes Rules to Oversee Non-US Firms' Swap Activity in the United States

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On April 29, 2015, the US Securities and Exchange Commission (SEC) proposed new rules to enhance its oversight of non-US firms' security-based swap activity in the United States. The proposal, if adopted, will have important implications for any global derivatives business.

Under the proposed rules, security-based swap transactions between two non-US person counterparties that involve market-facing dealer activity conducted by personnel located in the United States would be subject to certain requirements under Title VII of the Dodd-Frank Act. The new proposal is less expansive than the original proposal in that it appears to construe the "arranging, negotiating, or executing" of a non-US transaction more narrowly than originally proposed. It also would not subject these transactions to clearing and exchange-trading mandates. At the same time, however, these transactions would be included in the *de minimis* threshold, subject to reporting and dissemination requirements, and, if the non-US firm is a registered security-based swap dealer, subject to the external business conduct standards in Title VII.

Dodd-Frank tasked the SEC with regulatory authority over security-based swaps and the Commodity Futures Trading Commission (CFTC) with

authority over all other swaps. Both the SEC and the CFTC have considered when Title VII should apply to cross-border transactions. In June 2014, the SEC adopted final rules related to the cross-border application of the security-based swap provisions under Title VII. Those final rules focus on the definition of “US person” and the definitions of “security-based swap dealer” and “major security-based swap participant” in the cross-border context. However, in adopting those rules the SEC deferred consideration of whether Title VII applies to a security-based swap transaction between two non-US person counterparties where the security-based swap is arranged, negotiated or executed by personnel of one or both counterparties located in the United States.

The newly proposed SEC rules now seek to address this question. Under the new proposal, the application of Title VII centers on the market-facing dealing activity of personnel of a non-US person or its agent that are located in the United States. If a non-US person uses personnel located in a US branch or office to arrange, negotiate or execute a security-based swap transaction, certain Title VII requirements would apply to the transaction, even where the other counterparty is also a non-US person. These transactions would be subject to both trade reporting and public dissemination requirements. In addition, they would be included in the *de minimis* threshold calculations to determine whether non-US persons are subject to the SEC’s security-based swap dealer registration requirements and oversight. However, these transactions would not be subject to mandatory clearing or trade execution. Additionally, if the non-US firm is a registered security-based swap dealer, the external business conduct standards in Title VII would apply to such dealing activity by personnel in the United States. The SEC expressed the view that this approach would strike an appropriate balance between enhanced regulatory oversight, market transparency and investor protection for dealer activity within the

United States and recognition that the risks in a transaction between non-US counterparties reside offshore.

The SEC noted that its proposed rule followed extensive discussion with the CFTC and emphasized the need for consistency and the goal of coordinated rules where appropriate. However, the SEC also warned that the markets regulated by the SEC and CFTC often display different characteristics that may warrant different approaches in the agencies' respective rules. The SEC stressed that it would continue to coordinate with the CFTC, which has published interpretive guidance and a policy statement, rather than a formal rulemaking, regarding the cross-border reach of the swaps provisions of Title VII. Subsequent to the CFTC guidance, CFTC staff issued an advisory taking the position that swaps between a non-US swap dealer and other non-US person would be subject to all transaction-based regulatory requirements if personnel located in the United States regularly arranged, negotiated or executed the swaps on behalf of the non-US swap dealer. In January 2014, the CFTC requested comments regarding whether it should formally adopt the staff advisory. Later that year, the CFTC extended no-action relief to non-US swap dealers from certain transaction-level requirements through September 2015.

In light of the soon-to-expire no-action relief, the CFTC may take this opportunity to address the issue in a manner that harmonizes its approach with the SEC action taken on Wednesday.

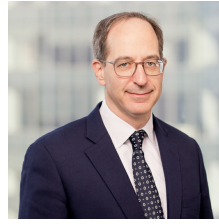
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