
SEC Proposes Rules for Cross-Border Security-Based Swap Activities

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The Securities and Exchange Commission (“SEC” or “Commission”) voted unanimously today to propose rules and interpretive guidance for the application of its regulations under Title VII of the Dodd-Frank Act¹ to cross-border security-based swaps (“SBS”). Although the SEC has issued a number of proposed rules to regulate the SBS markets, none of them addresses extraterritoriality. Today’s comprehensive proposal describes the regulatory requirements that will apply when a transaction occurs in part within and in part outside the United States or involves U.S. persons.² The proposal is complex and lengthy (the release, which has not yet been published, is over 1,000 pages) and addresses ten areas of SBS regulation: (1) registration of SBS dealers and major SBS participants; (2) data repositories; (3) clearing agencies; (4) SBS execution facilities; (5) regulatory reporting; (6) public dissemination of trade data; (7) mandatory clearing; (8) mandatory trading; (9) indemnification of data repositories; and (10) antifraud.

Generally, SBS would be subject to SEC regulation if they are entered into with a U.S. person or otherwise conducted within the United States. The proposal would define the term “U.S. person” in a narrow and territorial manner. In addition, the proposal outlines a “substituted compliance” framework under which a non-U.S. person could satisfy the SEC’s Title VII requirements in a particular area by complying with comparable requirements in its home jurisdiction. The SEC expects to undertake substituted compliance determinations (which may be requested by affected parties singly or in groups) by looking at comparable regulatory outcomes, and not through a line-by-line rule comparison. The Commission intends to review how the jurisdiction supervises and enforces compliance with its rules when determining whether to permit substituted compliance. Importantly, the SEC will retain examination and enforcement authority even if substituted compliance is allowed. Commissioner Walter called this a “common sense” approach, and recently confirmed SEC Chair Mary Jo White noted that market participants need to know which rules to follow and that this proposal will serve as the road map.

The SEC developed its proposal, which offers a narrower definition of U.S. person and a less prescriptive and broader approach to substituted compliance, in part by learning from the extraterritoriality proposal of the Commodity Futures Trading Commission (“CFTC”). As noted by

Commissioner Gallagher, there have been many public reports stating that the CFTC's proposal is an aggressive attempt to extend its authority into foreign jurisdiction. In particular, he noted that key non-U.S. regulators, including from the European Commission, the United Kingdom, France, and Japan have urged the CFTC not to take action that would risk fragmenting and damaging the derivatives market, arguing instead for an approach grounded in principles of regulatory equivalence.

Comments on the proposal will be due 90 days after its publication in the Federal Register.

Separately, the SEC also voted unanimously to reopen the public comment period for all SBS-related rules that have not yet been finalized. This second round of comments will be due 60 days from publication of the Commission's order in the Federal Register. The Commission also expects to publish a policy statement describing the expected order for all new Title VII SBS rules to take effect. The SEC anticipates that the public's experience with the CFTC's implementation of its swap rulemakings will inform the comments on the outstanding SBS proposals.

¹ Public Law 111-203, 124 Stat. 1376 (2010).

² The SEC's press release is available at <http://www.sec.gov/news/press/2013/2013-77.htm>.

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