

# SEC Proposes How to Apply Security-Based Swap Rules to Non-US Persons When Using US Personnel

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On April 29, 2015, the Securities and Exchange Commission (SEC) proposed new rules<sup>1</sup> that would address how registration, SEC Regulation SBSR and other SEC requirements for security-based swap transactions would apply to a non-U.S. person's security-based swap activities in the United States. The comment period on the proposal will close 60 days after the proposal is published in the Federal Register.

Under the proposal, neither mandatory clearing nor mandatory trade execution would be required for a security-based swap transaction between two non-U.S. persons solely because one or both counterparties arrange, negotiate or execute the security-based swap using personnel located in the United States. However, the SEC proposed to require a non-U.S. person using U.S. personnel to arrange, negotiate or execute a security-based swap transaction to include the transaction in determining whether the non-U.S. person is required to register with the SEC as a security-based swap dealer.<sup>2</sup>

The proposal also would subject the "U.S. business" of a registered security-based swap dealer to the SEC's proposed external business conduct standards for security-based swaps while excepting "foreign business" from those standards.<sup>3</sup> "U.S. business" would be defined to include transactions entered into or offered to be entered into by or on behalf of a non-U.S. security-based swap dealer with a U.S. person (other than a transaction conducted through a foreign branch of the U.S. person) or any transaction arranged, negotiated or executed by personnel of the foreign security-based swap dealer or of its agent located in a U.S. branch or office. The "U.S. business" definition also would include transactions made by or on behalf of a U.S. security-based swap dealer, wherever it occurs, except for transactions conducted through a foreign branch of the U.S. security-based swap dealer with a non-U.S. person or another U.S. person that is itself engaged in a transaction conducted through a foreign branch. "Foreign business" would be any business that is not defined as "U.S. business."

The SEC's proposal would apply Regulation SBSR's security-based swap reporting and public dissemination requirements<sup>4</sup> (and would specify who is required to report) to any transaction that is (i) executed on a platform having its principal place of business in the U.S.; (ii) effected by or through a registered broker-dealer, including a registered security-based swap execution facility; or (iii) connected with a non-U.S. person's security-based swap dealing activity and is arranged, negotiated or executed by personnel located in a U.S. branch or office. The SEC asks for comment on whether there should be exemptive relief from the public dissemination requirement for a transaction guaranteed by a U.S. person where the counterparty is not a U.S. person, registered security-based swap dealer or registered major security-based swap participant.

The SEC's proposal grapples with the same scenario of a non-U.S. person using U.S. personnel to arrange, negotiate or execute a transaction that the staff of the Commodity

<sup>1</sup> 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, SEC Release No. 34-74834 (April 29, 2015), available at <http://www.sec.gov/rules/proposed/2015/34-74834.pdf>.

<sup>2</sup> The SEC requires security-based swap dealers to register with the SEC if their security-based swap dealing activities exceed certain *de minimis* threshold calculations. See Exchange Act Rule 3a71-2(a)(1)(i).

<sup>3</sup> See Section 15F(h) of the Exchange Act; Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants, Exchange Act Release No. 64766 (proposed June 29, 2011), 76 Fed. Reg. 42396 (July 18, 2011).

<sup>4</sup> See 17 C.F.R. §§ 242.900-909.

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Futures Trading Commission (CFTC) has said should require certain “transaction-level” rules to apply to a non-U.S. swap dealer transacting with another non-U.S. person.<sup>5</sup> In some respects — most notably the application of mandatory clearing and trade execution requirements — the SEC proposes to veer

in a different direction than the current CFTC approach. Without further harmonization between the agencies, those who participate in both the swaps and security-based swap markets may need to apply two different sets of principles to their cross-border derivatives activities.

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<sup>5</sup> See Division of Swap Dealer and Intermediary Oversight Advisory No. 13-69 (November 14, 2013), available at <http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/13-69.pdf>. CFTC staff has issued no-action relief delaying the effectiveness of its interpretive advisory until September 30, 2015. See CFTC Letter No. 14-140 (November 14, 2014), available at <http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/14-140.pdf>.