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SEC Proposes Action Regarding Cross-Border Application of Certain Security-Based Swap Rules

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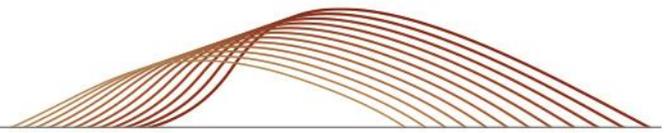
On May 10, 2019, the Securities and Exchange Commission (“SEC”) issued proposed rule amendments and interpretive guidance aimed at improving the regulatory framework for cross-border security-based swaps transactions and harmonizing the SEC’s security-based swaps regulatory regime with that of the Commodity Futures Trading Commission (“CFTC”) governing swaps.¹

The SEC’s proposal focuses on four key areas:

1. the application of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) to transactions “arranged, negotiated, or executed” by personnel located in the U.S.;
2. the requirements imposed on non-U.S. resident security-based swap dealers and major security-based swap participants (“nonresident SBS Entities”) to provide certification and opinion of counsel that the SEC may access their books and records and conduct onsite inspections;
3. the cross-border application of statutory disqualification provisions; and
4. the questionnaires and employment applications that security-based swap dealers and major security-based swap participants (“SBS Entities”) must maintain with respect to certain foreign associated persons.

Application of Dodd-Frank Act Title VII to Certain Transactions “Arranged, Negotiated, or Executed” by U.S. Personnel

The SEC has proposed interpretative guidance relating to the definition of “arranged” or “negotiated” in determining which transactions count towards de minimis thresholds, which in turn helps to determine whether non-U.S. persons must register as security-based swap dealers. The proposed guidance states that Title VII’s security-based swap dealer registration requirements would not be triggered by U.S. personnel providing “market color” (i.e., background information regarding pricing or market conditions), provided that those personnel do not receive transaction-based compensation or exercise client responsibility for the transactions. Additionally, the SEC has proposed two alternative exceptions to Rule 3a71-3(b)(1)(iii)(C) of the Securities Exchange Act of 1934 (the “Exchange Act”), which requires



non-U.S. persons to count transactions with non-U.S. counterparties towards the de minimis thresholds associated with security-based swap dealer registration when U.S. personnel arrange, negotiate, or execute those transactions. Both proposed exceptions are subject to the satisfaction of certain conditions designed to strike a balance between protecting the interests associated with Title VII security-based swap dealer registration and the potentially negative consequences associated with the existing counting rule. Finally, the SEC is soliciting comments on whether to provide additional conditional exceptions from certain other requirements under Title VII that otherwise would apply to transactions “arranged, negotiated, or executed” by U.S. personnel.

Certification and Opinion of Counsel Requirements

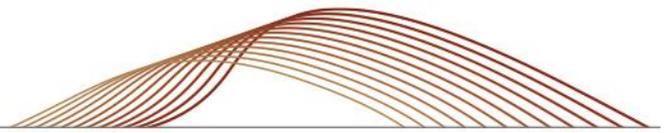
The SEC has proposed guidance regarding the application of the certification and opinion of counsel requirement found in Exchange Act Rule 15Fb2-4(c)(1), which addresses registration of nonresident SBS Entities. Rule 15Fb2-4(c)(1) requires that nonresident SBS Entities certify and provide an opinion of counsel that the SEC can access their books and records and conduct onsite inspections and examinations. Certain market participants have raised questions regarding the coexistence of this requirement with various foreign regulations, including foreign blocking statutes and privacy and secrecy laws, however. In response to such concerns, the SEC’s proposal endeavors to limit the scope of Rule 15Fb2-4(c)(1)’s requirements when such impediments and barriers are present. Additionally, the SEC is proposing to amend Exchange Act Rule 15Fb2-1 to provide nonresident SBS Entities with additional time to submit the requisite documentation.

Cross-Border Application of Statutory Disqualification Provisions

Section 15F(b)(6) of the Exchange Act prohibits an SBS Entity from permitting an associated person subject to a statutory disqualification to effect or be involved in effecting security-based swaps on behalf of the SBS Entity if the entity knew or reasonably should have known of the statutory disqualification. In connection with this prohibition, SEC Rule of Practice 194 outlines the process through which an SBS Entity may ask the SEC to grant relief from this statutory disqualification prohibition on a case-by-case basis. To more closely harmonize the SEC’s rules with the CFTC’s approach, the SEC has proposed an amendment to SEC Rule of Practice 194 that provides an exclusion from the prohibition for SBS Entities if an associated person is (i) not a U.S. person and (ii) not involved in effecting security-based swap transactions with or for counterparties that are U.S. persons, other than transactions conducted through a foreign branch of a U.S. person counterparty. The exclusion would not be available to an SBS Entity if the associated person is currently subject to an order from a domestic or foreign regulatory authority prohibiting that associated person from participating in the U.S. or foreign financial markets.

Questionnaires and Employment Applications

The SEC previously proposed Exchange Act Rule 18a-5 to establish recordkeeping standards that would require each standalone or bank SBS Entity to make and keep current a questionnaire or application for employment for each associated person. In response to concerns raised by market participants, the SEC now has proposed two exceptions to the rule. The first states that an SBS Entity does not need to make or keep current such questionnaires or employment applications if the entity is excluded from the statutory disqualification prohibition in Exchange Act Section 15F(b)(6). The second exception provides that a questionnaire or application for employment executed by a non-U.S. associated person may exclude certain information if its receipt, creation, or maintenance would violate applicable law in the foreign jurisdiction where the person is employed or located.



Public Comment Period

The SEC currently is seeking public comment on the proposed rule amendments and interpretive guidance. The full text of the SEC's proposed rules and interpretations can be found [here](#). Comments on the SEC's proposals may be submitted on or before July 23, 2019.

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¹ Press Release, SEC, SEC Proposes Actions to Improve Cross-Border Application of Security-Based Swap Requirements (May 10, 2019), <https://www.sec.gov/news/press-release/2019-69>.

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