

SEC Proposes Additional Cross-Border Rules for Security-Based Swaps

If finalized, the proposed rule would be the SEC's second major step toward finalizing the cross-border rules for security-based swaps under the Dodd-Frank Act.

On April 29, 2015, the US Securities and Exchange Commission (the SEC) proposed rules regarding (1) the security-based swap dealing activity of non-US persons that is arranged, negotiated or executed by personnel located in the United States, (2) the application of external business conduct requirements to the foreign business of security-based swap dealers and (3) the reporting and public dissemination requirements applicable to security-based swap transactions involving non-US persons that engage in activity in the US and to transactions effected by or through a broker-dealer (SEC Cross-Border Proposed Amendments Release).¹

This Client Alert summarizes the SEC Cross-Border Proposed Amendments Release.

Overview

Section 772(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the Dodd Frank Act) amends Section 30 of the Securities Exchange Act of 1934 (the Exchange Act)² to provide that “[n]o provision of [Title VII]...shall apply to any person insofar as such person transacts a business in security-based swaps without the jurisdiction of the United States,” unless that business is transacted in contravention of the SEC’s anti-evasion rules.³ With the SEC Cross-Border Proposed Amendments Release, the SEC seeks to further define what constitutes “within” versus “without” the jurisdiction of the United States for purposes of regulating security-based swap transactions.

The SEC Cross-Border Proposed Amendments Release would implement the following rules for security-based swap transactions:

- ***SBSD De Minimis Threshold Calculations for Non-US Persons:*** For purposes of determining whether a non-US person’s security-based swap dealing activity exceeds the *de minimis* threshold for security-based swap dealers (SBSDs), the proposed rules would require such non-US person to include in its calculations ***all*** security-based swap transactions ***connected with*** such non-US person’s security-based swap dealing activity that is arranged, negotiated or executed by personnel located in a US branch or office, including an agent.⁴ The SEC Cross-Border Proposed Amendments Release would extend this rule to capture any such security-based swap transactions that are cleared and executed on a registered security-based swap execution facility (SBSEF).⁵

- External Business Conduct Requirements for SBSDs: Under the proposed rules, the “US business” of foreign SBSDs would be subject to the SEC’s forthcoming (though not yet finalized or adopted) external business conduct requirements.⁶
- Regulation SBSR Regulatory Reporting and Public Dissemination: The proposed rules would subject the following security-based swap transactions to regulatory reporting and public dissemination under Regulation SBSR: (1) security-based swap transactions arranged, negotiated or executed by personnel of non-US persons (or their agents) located in the United States; (2) security-based swap transactions effected by or through a registered broker-dealer (including an SBSEF); and (3) security-based swap transactions executed on a platform having its principal place of business in the United States (as used herein, a US platform).⁷

2014 SEC Cross-Border Adopting Release

The SEC first adopted rules regarding the cross-border application of security-based swap regulations under Title VII of the Dodd Frank Act on June 25, 2014 (the SEC Cross-Border Adopting Release).⁸ The SEC Cross-Border Adopting Release was limited to rulemaking regarding: (1) the definition of a US person for purposes of the SEC’s regulations under Title VII of the Dodd Frank Act; (2) the cross-border application of the security-based swap dealer (SBSD) *de minimis* exception (including aggregation requirements); (3) the cross-border application of the major security-based swap participant (MSBSP) thresholds (including attribution requirements); (4) the process for submitting substituted compliance requests to the SEC; and (5) an interpretation of the SEC’s antifraud authority under Section 929P(b) of the Dodd Frank Act.⁹ Noticeably absent from the SEC Cross-Border Adopting Release was a finalized rule regarding the cross-border application of the SBSB definition to security-based swap transactions between two non-US persons in which one or both are engaging in security-based swap dealing activity that is “conducted within the United States.”¹⁰

Related CFTC Publications

The SEC joins the Commodity Futures Trading Commission (the CFTC) in adopting rules concerning the cross-border application of derivatives regulations promulgating under the Dodd Frank Act. In July 2013, the CFTC approved the final interpretive guidance (the CFTC Cross-Border Guidance) regarding the cross-border application of certain swap provisions of the Commodity Exchange Act (the CEA).¹¹ The CFTC Cross-Border Guidance defined the term “US person” and set out the cross-border application of the Dodd-Frank Act with respect to the determination of a swap dealer (SD) or a major swap participant (MSP) and with respect to compliance with regulatory requirements. The guidance also established a framework for substituted compliance determinations.¹²

On November 14, 2013, the CFTC issued a Staff Advisory (the CFTC Staff Advisory), separate from its formal interpretation in the CFTC Cross-Border Guidance, that would require non-US swap dealers to comply with transaction-level requirements if they regularly use personnel or agents located in the United States to arrange, negotiate or execute swap transactions with non-US persons.¹³ The CFTC has extended no-action relief related to the CFTC Staff Advisory until the earlier of (1) September 30, 2015 or (2) the effective date of any CFTC action in response to the CFTC’s request for comment regarding the CFTC Staff Advisory.¹⁴

We discuss herein similarities and divergences, where relevant, between the SEC and CFTC cross-border approach.

Comment Period

The SEC has requested comment on the SEC Cross-Border Proposed Amendments Release on or before July 13, 2015.

I. SBSD *De Minimis* Threshold Calculations for Non-US Persons

The SEC Cross-Border Proposed Amendments Release would clarify whether a non-US person's security-based swap dealing activity that is arranged, negotiated or executed (1) by such non-US person's personnel located in a US branch or office or (2) by personnel of such non-US person's agent, located in a US branch or office, would need to be counted for purposes of the SBSD determinations.¹⁵

SBSD *De Minimis* Calculations

Under rules adopted jointly by the CFTC and the SEC, a market participant is considered an SBSD if the participant's security-based swap dealing transactions conducted over the previous 12 months exceed certain *de minimis* thresholds.¹⁶ The SEC Cross-Border Adopting Release requires the following categories of security-based swap dealing activity to be included for purposes of determining whether a non-US person must register as an SBSD, regardless of **where** the security-based swap transaction occurs:

- A non-US person that is a conduit affiliate¹⁷ must include all of its US and non-US-facing security-based swap dealing activity in its *de minimis* calculations (regardless of whether or not such security-based swap was entered into as part of an offsetting transaction); and
- A non-US person that is **not** a conduit affiliate must include in its *de minimis* calculations its security-based swap dealing activity for transactions entered into with:
 - US persons (other than transactions with a foreign branch of an SBSD, or a foreign branch of a US bank that is not registered as an SBSD if the transaction occurs prior to sixty days following the effective date of the SBSD registration rules); and
 - Non-US person counterparties, if such counterparties have legally enforceable rights of recourse against a US affiliate of the non-US dealer in connection with the security-based swap (i.e., a guaranteed affiliate¹⁸ must include security-based swap dealing transactions entered into with US persons).

The SEC Cross-Border Proposed Amendments Release would add one additional category to the list of security-based swap transactions that must be counted for purposes of determining whether a non-US person is an SBSD:

- A non-US person that is **not** a conduit affiliate must include in its *de minimis* calculations any security-based swap transactions connected with such non-US person's security-based swap dealing activity that are arranged, negotiated or executed by personnel (whether of such non-US person or of its agent) located in a US branch or office (even if such transactions are executed anonymously on an execution facility or exchange and cleared through a clearing agency).¹⁹

Any security-based swap transaction falling within one of the above categories would be/must be included in a non-US person's *de minimis* calculations, which must also be **aggregated** with the qualifying security-based swap dealing activity of its: (1) US affiliates (including transactions conducted through a foreign branch); (2) guaranteed affiliates; (3) conduit affiliates; and (4) non-US affiliates trading with a US person (other than a foreign branch of an SBSD).²⁰

Comparison to CFTC *De Minimis* Thresholds for Non-US Persons

Note, that although the CFTC is considering whether a non-US SD would be required to comply with transactional requirements for transactions for which the non-US SD uses personnel or agents located in the US (whether affiliates or not of a US person) to arrange, negotiate, or execute swaps with non-US persons, the CFTC has not issued a request for comment in respect of whether such transactions would be counted towards the *de minimis* requirement.²¹ As a result, under the proposed rules, a non-US person that would **not** have to include for purposes of its SD *de minimis* calculations under the CFTC regulations swap dealing activity entered into with non-US persons but that is arranged, negotiated or executed by personnel (whether its own or an agent's) located in the United States, **would** have to include its security-based swap dealing activity in its SBSD *de minimis* calculations under the same scenario.

II. External Business Conduct Requirements for SBSDs

The SEC would also propose to address the applicability of external business conduct requirements to the US business and foreign business of registered SBSDs.²²

Exchange Act External Business Conduct Standards

Section 15F(h) of the Exchange Act requires the SEC to adopt rules specifying external business conduct standards for SBSDs in their dealings with counterparties, including counterparties that are “special entities.”²³ Though the SEC had previously proposed business conduct rules,²⁴ such rules have not yet been finalized. As previously proposed, similar to the CFTC external business conduct requirements, the external business conduct rules would require SBSDs to, among other things, provide certain disclosures to counterparties, adhere to certain standards of business conduct and segregate customer funds, securities and other assets.²⁵

Application of Forthcoming External Business Conduct Standards

The SEC Cross-Border Proposed Amendments Release would: (1) distinguish between the “US business” and “foreign business” of an SBSD and (2) propose an exception to compliance with external business conduct standards for the foreign business of an SBSD.²⁶ These provisions replace the “transaction conducted within the United States” language that the SEC previously proposed.²⁷

Proposed Definitions: The SEC has proposed the following definitions in proposed Rule 240.3a71-3:

- **US business:** With respect to a foreign (non-US) SBSD, “US business” means (1) any security-based swap transaction entered into, or offered to be entered into, by or on behalf of such foreign SBSD with a US person (other than a transaction conducted through a foreign branch of that person) or (2) any security-based swap transaction arranged, negotiated or executed by personnel of the foreign SBSD located in a US branch or office, or by personnel of the foreign SBSD’s agent located in a US branch or office.²⁸ With respect to a US SBSD, “US business” means any transaction by or on behalf of such US SBSD, wherever entered into or offered to be entered into, other than a transaction conducted through a foreign branch with a non-US person or with a US person counterparty that constitutes a transaction conducted through a foreign branch of the counterparty.²⁹
- **Foreign business:** The proposed rules define “foreign business” as those security-based swap transactions entered into that do not constitute the US business of a US or foreign SBSD.³⁰

Note that, even with respect to an SBSD’s foreign business, the SEC is **not** proposing to exempt SBSDs from any rules promulgated under the Exchange Act requiring SBSDs to conform with requirements such as capital, margin, conflicts of interest, risk management and limited recordkeeping requirements (also referred to by the SEC as “entity-level” requirements).³¹

Comparison to CFTC External Business Conduct Standards for SDs

The CFTC has imposed (and finalized) external business conduct standards on certain swap transactions entered into by non-US persons (referred to as “Category B” transaction-level requirements).³² Adopted in 2012, the CFTC external business conduct standards impose obligations on SDs meant to protect their non-SD, non-MSP counterparties.³³

In November 2013, the Division of Swap Dealer and Intermediary Oversight Advisory at the CFTC issued a Staff Advisory that would require non-US SDs to comply with transaction-level requirements if they regularly use personnel or agents located in the United States to arrange, negotiate or execute swap transactions with non-US persons (the CFTC Staff Advisory). The CFTC Staff Advisory noted that substituted compliance would be available for such requirements in accordance with the CFTC Cross-Border Guidance.³⁴ The CFTC requested comment on the issue in January 2014,³⁵ but has not yet taken formal action; non-US SDs benefit from no-action relief until September 30, 2015 (or until such formal action is taken by the CFTC, whichever is earlier).³⁶ CFTC transaction-level requirements include external business conduct requirements but would also include what has been referred to as “internal business conduct requirements”: required clearing and swap processing; margining and segregation for uncleared swaps; trade execution; swap trading relationship documentation; portfolio reconciliation and compression; real-time public reporting; trade confirmation; and daily trading records.

While the CFTC Staff Advisory position and the SEC rules proposed herein would capture the application of the external business conduct requirements to transactions that are executed, arranged and negotiated in the US (despite being booked by a foreign dealer), the proposed rules give further relief to the foreign business of US SBSDs from compliance with external business conduct requirements. The CFTC neither provides such relief nor provides for substituted compliance (other than in circumstances in which the foreign branch of a US bank SD booked such trade). To note, the market will need to wait for the clarification from the CFTC on the issue before being able to assess the impact of any divergence.

III. Regulation SBSR Regulatory Reporting and Public Dissemination

Under Regulation SBSR, security-based swaps entered into or guaranteed by SBSDs, MSBSPs or US persons, as well as security-based swaps accepted for clearing by US clearing agencies, must be reported to a registered security-based swap data repository (SBSDR). Subject to certain exclusions and exceptions, the SBSDR must in turn publicly disseminate such information. The regulatory reporting and public dissemination requirements prescribed by Regulation SBSR will be effective pending a proposed multi-year phased-in compliance period.³⁷

Effect of the SEC Cross-Border Amendments Release on Regulation SBSR: The SEC has proposed rules that would extend Regulation SBSR regulatory reporting and public dissemination requirements to also apply to (1) transactions that are arranged, negotiated or executed by personnel of non-US persons, or personnel of such non-US person’s agents, that are located in the United States and (2) transactions effected by or through a registered broker-dealer³⁸ (including an SBSEF).³⁹ The proposed rules would also set forth the relevant reporting side for transactions including non-US persons and would place the reporting obligation on the registered broker-dealer in which the security-based swap is effected by or through a registered broker-dealer, but in which neither side includes a US person.⁴⁰

Regulatory Reporting of Security-Based Swaps

Whether or not a security-based swap is subject to regulatory reporting under Regulation SBSR is generally determined by the US person and registration status of the sides of such security-based swap. “Side” is defined in Regulation SBSR to include both direct and indirect counterparties to a security-based

swap transaction, meaning that the reporting side of a security-based swap transaction could be determined based on the registration or US person status of a direct counterparty's guarantor.⁴¹

Covered Transactions

Regulation SBSR imposed reporting obligations for the following types of transactions:

- Any security-based swap with a direct counterparty that is a US person⁴²
- Any security-based swap conducted through a foreign branch of a US person⁴³
- Any security-based swap involving a US person guarantor (i.e., a US person is an indirect counterparty)⁴⁴
- Any security-based swap to which a SBSD or MSBSP is a direct or indirect counterparty⁴⁵

And has proposed to impose a reporting obligation for the following cleared transactions:

- Any over-the-counter security-based swap accepted for clearing by a US clearing agency⁴⁶
- Any security-based swap executed on a security-based swap execution facility or national securities exchange that will be submitted for clearing to a US clearing agency⁴⁷

The SEC Cross-Border Proposed Amendments Release would extend the cross-border application of Regulation SBSR reporting requirements to the following security-based swap transactions entered into by non-US persons:

- Any security-based swap executed on a US security-based swap execution facility or US national securities exchange⁴⁸
- Any security-based swap executed by or through a registered broker-dealer (including an SBSEF)⁴⁹
- Any security-based swap that (1) is connected with a non-US person's security-based swap dealing activity and (2) is arranged, negotiated or executed by personnel of such non-US person located in a US branch or office, or by personnel of an agent of such non-US person located in a US branch or office⁵⁰

This cross-border application is in addition to the rules in Regulation SBSR which already capture transactions in which there are no US direct or indirect counterparties but in which at least one direct or indirect counterparty is a SBSD.

Assigning of Reporting Sides

The SEC Cross-Border Proposed Amendments Release would assign the reporting sides with respect to the reporting obligations under Regulation SBSR in which non-US persons (directly or indirectly) enter into security-based swap transactions.

Hierarchy of Reporting Obligations: The reporting side would be determined according to the following hierarchy under the SEC Cross-Border Proposed Amendments Release:

- If one side of the security-based swap transaction includes a US person and the other side includes only non-US persons, the US person would ordinarily be the reporting side, except as set forth below.⁵¹
- If one side of the security-based swap transaction includes a US person and the other side includes a non-US person for whom the security-based swap transaction is a dealing security-based swap that is arranged, negotiated or executed by US-based personnel located in a US branch or office or personnel of an agent located in a US branch or office, the sides shall select the reporting side.⁵² For ease of reference, such transactions are referred to herein as “dealing swaps arranged, negotiated or executed by US-based personnel.”
- If both sides of the security-based swap transaction include a non-US person for whom the security-based swap transaction is a dealing swap arranged, negotiated or executed by US-based personnel, the sides shall select the reporting side.⁵³
- If one side of the security-based swap transaction includes only non-US persons and the other side includes a non-US person for whom the security-based swap transaction is a dealing swap arranged, negotiated or executed by US-based personnel, the latter shall be the reporting side.⁵⁴
- For security-based swaps effected by or through a registered broker-dealer (including an SBSEF), where (1) neither side includes a US person and (2) neither side includes a non-US person for whom the security-based swap transaction is a dealing swap arranged, negotiated or executed by US-based personnel, the registered broker-dealer shall be the reporting side.⁵⁵

Information Required to Be Reported

Under Regulation SBSR, the reporting side must report “primary” and “secondary” trade information to an SBSDR, though only primary trade information is subject to public dissemination.⁵⁶ For security-based swap transactions in which the registered broker-dealer is the reporting side, the SEC Cross-Border Proposed Amendments Release would expand the definition of “secondary trade information” to include the broker ID of that registered broker-dealer.⁵⁷

Duties of SBSDR Participants

Duty to Provide Ultimate Parent and Affiliate Information: Regulation SBSR places an obligation on **all** participants of an SBSDR (not just reporting sides) to provide to the SBSDR information sufficient to identify the participant’s ultimate parent(s) and any affiliate(s) that are also participants of the SBSDR and to promptly notify the SBSDR of any changes to reported parent or affiliate information.⁵⁸ Under the SEC Cross-Border Proposed Amendments Release, platforms, registered clearing agencies and registered broker-dealers (including SBSEFs) would be **excluded** from this obligation.⁵⁹

Policies and Procedures to Support Reporting Compliance: Under Regulation SBSR, SBSDs and MSBSPs are required to establish, maintain and enforce written policies and procedures to support security-based swap transaction reporting.⁶⁰ The SEC Cross-Border Proposed Amendments Release would extend this obligation to registered clearing agencies, platforms and registered broker-dealers (including SBSEFs) otherwise subject to the reporting obligations.⁶¹

Public Dissemination of Security-Based Swaps

As adopted, Regulation SBSR **excludes** from public dissemination information about an uncleared security-based swap transaction which does not include a US person, but does include a non-US SBSD or non-US MSBSP that is a direct counterparty or guarantor on either (or both) sides of the transaction.⁶² Note that such a security-based swap transaction would still be subject to the Regulation SBSR reporting

requirement. The SEC is soliciting comment on whether certain security-based swap transactions of non-US persons whose obligations under a security-based swap are guaranteed by a US person (*i.e.*, certain security-based swaps entered into by guaranteed affiliates) should also be exempt from the Regulation SBSR public dissemination requirement.⁶³

Comparison to CFTC Reporting Requirements

Section 2(a)(13)(G) of the CEA requires all swaps, whether cleared or uncleared, to be reported to a registered swap data repository (an SDR).⁶⁴ This regulatory reporting requirement (SDR reporting) is akin to the Regulation SBSR reporting requirement for security-based swaps.⁶⁵ Analogous to the Regulation SBSR public dissemination requirement for security-based swaps, the CFTC has also, pursuant to section 2(a)(13) of the CEA, promulgated regulations providing for the public availability of swap transaction and pricing data on a real-time basis (real-time public reporting).⁶⁶ Part 45 of the CEA mandates SDR reporting and real-time public reporting for all swaps executed on US-registered swap execution facilities (SEFs) and designated contract markets (DCMs), and all swaps accepted for clearing by a US clearing agency, regardless of the US person status of the counterparties.⁶⁷ The CFTC will interpret the CEA to provide for the availability of substituted compliance to non-US SDs and non-US MSPs (regardless of whether they are affiliates of or are guaranteed by US persons) for SDR reporting and real-time public reporting, but only for swaps with non-US counterparties and only if the CFTC has direct access to the relevant swap data that is stored at the foreign trade repository.⁶⁸

Unlike the SEC proposed rules, the CFTC reporting rules do not treat swap transactions arranged, negotiated or executed by personnel in the United States any differently than swaps between non-US person counterparties and the CFTC reporting rules do not distinguish between reporting counterparties as a result thereof. Importantly, however, both the CFTC reporting obligations and SEC's Regulation SBSR set forth a framework for substituted compliance, which may ultimately help both sets of regulations align for the most part.

IV. What is *Not* Included in the SEC Cross-Border Proposed Amendments Release

Mandatory Clearing and Trade Execution

Though the SEC had previously proposed rules imposing both mandatory clearing and trade execution requirements on "transactions conducted within the United States,"⁶⁹ security-based swap transactions between two non-US persons that are arranged, negotiated or executed in the United States would ***not*** be subject to mandatory clearing or trade execution requirements as proposed in the SEC Cross-Border Proposed Amendments Release.⁷⁰

Substituted Compliance

In the SEC Cross-Border Adopting Release, the SEC established a procedure for requesting substituted compliance determinations,⁷¹ but did not adopt any substantive requirements for such determinations.⁷² Though the SEC had previously proposed an approach to substituted compliance determinations with respect to each of the requirements proposed in the SEC Cross-Border Proposing Release, the previously proposed substituted compliance framework is noticeably absent from the SEC Cross-Border Proposed Amendments Release.⁷³

V. Conclusion

While closer to a final regulatory product, several moving pieces remain before the SEC finalizes a cross-border perspective under Title VII of the Dodd-Frank Act. However, in finalizing these rules, the SEC will

have taken its second major step towards finalizing the cross-border reach of the SEC rules under Title VII of the Dodd-Frank Act.

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Endnotes

- ¹ 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, 80 Fed. Reg. 27444 (proposed May 13, 2015) (to be codified at 17 C.F.R. pts. 240, 242), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2015-05-13/pdf/2015-10382.pdf> (SEC Cross-Border Proposed Amendments Release).
- ² 15 U.S.C. §§ 78a *et seq.*
- ³ See 15 U.S.C. § 78dd(c). The Dodd Frank Act added a similar, but different, provision regarding the cross-border applicability of the CFTC swap regulations under the Commodities Exchange Act (the CEA). See 7 U.S.C. § 2(i).
- ⁴ Proposed Rule 240.3a71-3(a)(6)-(9) and (c) (proposing amendment of 17 C.F.R. § 240.3a71-3).
- ⁵ Proposed Rule 240.3a71-5(c) (proposing amendment of 17 C.F.R. § 240.3a71-5).
- ⁶ Proposed Rule 240.3a71-3(c) (proposing amendment of 17 C.F.R. § 240.3a71-3).
- ⁷ Proposed Rule 908(a)(1)(iii)-(v) and (b)(5) (proposing amendment to 17 C.F.R. § 242.908).
- ⁸ Application of "Security-Based Swap Dealer" and "Major Security-Based Swap Participant" Definitions to Cross-Border Security-Based Swap Activities," 79 Fed. Reg. 47278 (Aug. 12, 2014) (to be codified at 17 C.F.R. pts. 240, 241, 250), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2014-08-12/pdf/R1-2014-15337.pdf> (SEC Cross-Border Adopting Release).
- ⁹ For further discussion, please refer to our *Client Alert* on the SEC Cross-Border Adopting Release. SEC Finalizes Partial Framework for the Cross-Border Application of its Derivatives Regulations, *Client Alert* No. 1722 (July 31, 2014), *available at* <https://www.lw.com/thoughtLeadership/LW-SEC-cross-border-derivatives-rule>.
- ¹⁰ See, e.g., SEC Cross-Border Adopting Release, 79 Fed. Reg. at 47281 n. 27.
- ¹¹ Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 45292 (July 26, 2013), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2013-07-26/pdf/2013-17958.pdf> (CFTC Cross-Border Guidance).
- ¹² For further discussion, please refer to our *Client Alert* on the CFTC Cross-Border Guidance. CFTC Issues its Last Word on the Cross-Border Application of Derivatives Regulations (For Now), *Client Alert* No. 1567 (July 25, 2013), *available at* <http://www.lw.com/thoughtLeadership/LW-CFTC-cross-border-derivative>.
- ¹³ 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" (Nov. 14, 2013), *available at* <http://www.cftc.gov/ucom/groups/public/@lrlettergeneral/documents/letter/13-69.pdf> (CFTC Staff Advisory). The CFTC has previously defined "transaction-level requirements" to include the following: (i) required clearing and swap processing; (ii) margining (and segregation) for uncleared swaps; (iii) mandatory trade execution; (iv) swap trading relationship documentation; (v) portfolio reconciliation and compression; (vi) real-time public reporting; (vii) trade confirmation; (viii) daily trading records; and (ix) external business conduct standards. CFTC Cross-Border Guidance, 78 Fed. Reg. at 45333.
- ¹⁴ Extension of No-Action Relief: Transaction-Level Requirements for Non-US Swap Dealers, CFTC Letter No. 14-140 (Nov. 14, 2014), *available at* <http://www.cftc.gov/ucom/groups/public/@lrlettergeneral/documents/letter/14-140.pdf> (CFTC No-Action Relief); see also Request for Comment on Application of Commission Regulations to Swaps Between Non-U.S. Swap Dealers and Non-U.S. Counterparties Involving Personnel or Agents of the Non-U.S. Swap Dealers Located in the United States, 79 Fed. Reg. 1347 (Jan. 8, 2014), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2014-01-08/pdf/2014-00080.pdf> (CFTC Request for Comment).
- ¹⁵ Proposing amendments to Exchange Act rules 3a71-3 and 3a71-5 (codified at 17 C.F.R. §§ 240.3a71-3 and 240.3a71-5).
- ¹⁶ Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," 77 Fed. Reg. 30596 (May 23, 2012) (to be codified at 17 C.F.R. pts. 1, 240), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2012-05-23/pdf/2012-10562.pdf>; 17 C.F.R. § 240.3a71-2.
- ¹⁷ The SEC Cross-Border Adopting Release defined a "conduit affiliate" as a non-US person that: (i) is directly or indirectly majority-owned by one or more US persons; and (ii) in the regular course of business, enters into security-based swaps with one or more other non-US persons, or with foreign branches of US SBSDs, for the purpose of hedging or mitigating risks faced by, or otherwise taking positions on behalf of, one or more US persons (other than US persons that are registered as SBSDs or MSBSPs) who are controlling, controlled by or under common control with the person, and enters into offsetting security-based swaps or other arrangements with such US persons to transfer risks and benefits of those security-based swap transactions. 17 C.F.R. § 240.3a71-3(a)(1)(i).
- ¹⁸ The SEC Cross-Border Adopting Release defined a "guaranteed affiliate" as a non-US person that engages in dealing activity for which its counterparty has rights of recourse against a US person that is controlling, controlled by or under common control with such non-US person. The SEC will interpret the term "right of recourse" as a conditional or unconditional legally enforceable right, in whole or in part, to receive payments from, or otherwise collect from, the US affiliate in connection with the non-US person's security-based swap obligations. Rule 240.3a71-3(b)(1)(iii)(B) (codified at 17 CFR § 240.3a71-3(b)(1)(iii)(B)); see SEC Cross-Border Adopting Release, 79 Fed. Reg. at 47316.
- ¹⁹ Proposed Rule 240.3a71-3(b)(1)(iii)(C) (proposing amendment of 17 C.F.R. § 240.3a71-3(b)(1)(iii)(C)).

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- ²⁰ Rule 240.3a71-3(b)(2) (codified at 17 C.F.R. § 240.3a71-3(b)(2)).
- ²¹ See CFTC Staff Advisory; CFTC No-Action Relief; CFTC Request for Comment.
- ²² Re-proposing Exchange Act rule 3a71-3(c) and proposing certain amendments to Exchange Act rule 3a71-3(a) (codified at 17 C.F.R. § 240.3a71-3).
- ²³ 15 U.S.C. § 78o-10(h)(6). The Exchange Act defines a “special entity” to be: (i) a Federal agency, (ii) a State, State agency, city, county, municipality or other political subdivision of a state; (iii) any employee benefit plan (as defined in 29 U.S.C. § 1002); any governmental plan (as defined in 29 U.S.C. § 1002); or (v) any endowment (including an endowment that is an organization described in Section 501(c)(3) of the Internal Revenue Code of 1986). 15 U.S.C. § 78o-10(h)(2)(C).
- ²⁴ See Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants, 76 Fed. Reg. 42396 (proposed July 18, 2011) (to be codified at 17 C.F.R. pt. 240), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2011-07-18/pdf/2011-16758.pdf> (SEC Business Conduct Proposing Release); SEC Cross-Border Proposed Amendments Release, 80 Fed. Reg. at 27473 n. 225.
- ²⁵ See SEC Cross-Border Proposing Release, 78 Fed. Reg. at 31009; *see also* SEC Cross-Border Proposed Amendments Release, 80 Fed. Reg. at 27473.
- ²⁶ Proposed Rule 240.3a71-3 (proposing amendment of 17 C.F.R. § 240.3a71-3).
- ²⁷ See, e.g., SEC Cross-Border Proposing Release, 78 Fed. Reg. at 30999.
- ²⁸ Proposed Rule 240.3a71-3(a)(8)(i) (proposing amendment of 17 C.F.R. § 240.3a71-3). The proposed rules would define “foreign security-based swap dealer” as an SBSB (as defined in 15 U.S.C. § 78c(a)(71) and the rules promulgated thereunder) that is not a US person. Proposed Rule 240.3a71-3(a)(7) (proposing amendment of 17 C.F.R. § 240.3a71-3).
- ²⁹ Proposed Rule 240.3a71-3(a)(8)(ii) (proposing amendment of 17 C.F.R. § 240.3a71-3). The proposed rules would define “US security-based swap dealer” as an SBSB (as defined in 15 U.S.C. § 78c(a)(71) and the rules promulgated thereunder) that is a US person. Proposed Rule 240.3a71-3(a)(6) (proposing amendment of 17 C.F.R. § 240.3a71-3).
- ³⁰ Proposed Rule 240.3a71-3(a)(9) (proposing amendment of 17 C.F.R. § 240.3a71-3).
- ³¹ SEC Cross-Border Proposed Amendments Release, 80 Fed. Reg. at 27475 n. 241; *see* 15 U.S.C. § 78o-10(h)(1)(B); SEC Cross-Border Proposing Release, 78 Fed. Reg. at 31011.
- ³² Business Conduct Standards for Swap Dealers and Major Swap Participants with Counterparties, 77 Fed. Reg. 9734, 9822-9829 (Feb. 17, 2012) (amending 17 CFR pts. 4, 23), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2012-02-17/pdf/2012-1244.pdf> (CFTC Business Conduct Standards).
- ³³ Under the CFTC Business Conduct Standards, SDs are required to, among other things, conduct due diligence on their counterparties to verify eligibility to trade, provide disclosure of material information about the swap to their counterparties, provide a daily mid-market mark for uncleared swaps and — when recommending a swap to a counterparty — make a determination as to the suitability of the swap for the counterparty based on reasonable diligence concerning the counterparty. See CFTC Cross-Border Guidance, 78 Fed. Reg. at 45335.
- ³⁴ CFTC Staff Advisory at 2.
- ³⁵ CFTC Request for Comment, 79 Fed. Reg. at 1348-49.
- ³⁶ CFTC No-Action Relief at 3-4.
- ³⁷ See Regulation SBSR Proposed Amendments Release. For further discussion of Regulation SBSR and the proposed phased-in compliance period, please refer to our *Client Alert* on Regulation SBSR. Regulation SBSR: The Compliance Guide to Reporting Security-Based Swaps, *Client Alert* No. 1811 (March 24, 2015), *available at* <https://www.lw.com/thoughtLeadership/LW-Regulation-SBSR>.
- ³⁸ Proposed Rule 900 would further amend the definition of “participant” to include a registered broker-dealer (including a registered security-based swap execution facility) that is required to report a security-based swap to that registered SBSB by Regulation SBSR Rule 901(a). Proposed Rule 900(u)(4) (proposing amendment of 17 C.F.R. § 242.900); *see also* Regulation SBSR – Reporting and Dissemination of Security-Based Swap Information, 80 Fed. Reg. 14740 (proposed March 19, 2015) (to be codified at 17 C.F.R. pt. 242), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2015-03-19/pdf/2015-03125> (Regulation SBSR Proposed Amendments Release).
- ³⁹ See Regulation SBSR – Reporting and Dissemination of Security-Based Swap Information, 80 Fed. Reg. 14564 (March 19, 2015) (to be codified at 17 C.F.R. pt. 242), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2015-03-19/pdf/2015-03124.pdf> (Regulation SBSR Adopting Release).
- ⁴⁰ Proposed Rule 901(a)(2)(ii)(E)(4) (proposing amendment of 17 C.F.R. § 242.901).
- ⁴¹ Rule 900(hh) (codified at 17 C.F.R. § 242.900(hh)). Regulation SBSR defines “indirect counterparty” to mean a guarantor of a direct counterparty’s performance of any obligation under a security-based swap such that the direct counterparty on the other side can exercise rights of recourse against the indirect counterparty in connection with the security-based swap. Rule 900(p) (codified at 17 C.F.R. § 242.900(p)).
- ⁴² Rule 908(a)(1)(i) (codified at 17 C.F.R. § 242.908(a)(1)(i)).
- ⁴³ Rule 908(a)(1)(i) (codified at 17 C.F.R. § 242.908(a)(1)(i)).

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- ⁴⁴ Rule 908(a)(1)(i) (codified at 17 C.F.R. § 242.908(a)(1)(i)).
- ⁴⁵ Rule 908(a)(2) (codified at 17 C.F.R. § 242.908(a)(2)).
- ⁴⁶ Proposed Rule 901(a)(2)(i) (Regulation SBSR Proposed Amendments Release) (proposing amendment of 17 C.F.R. § 242.901); see Rule 908(a)(ii) (codified at 17 C.F.R. § 242.908).
- ⁴⁷ Proposed Rule 901(a)(1) (Regulation SBSR Proposed Amendments Release) (proposing amendment of 17 C.F.R. § 242.901); see *also* Rule 908(a)(ii) (codified at 17 C.F.R. § 242.908). Note that Regulation SBSR defines “platform” as a national securities exchange or security-based swap execution facility that is registered or exempt from registration. Rule 900(v) (codified at 17 C.F.R. § 242.900(v)).
- ⁴⁸ Proposed Rule 908(a)(1)(iii) (proposing amendment of 17 C.F.R. § 242.908).
- ⁴⁹ Proposed Rule 908(a)(1)(iv) (proposing amendment of 17 C.F.R. § 242.908).
- ⁵⁰ Proposed Rule 908(a)(1)(v) (proposing amendment of 17 C.F.R. § 242.908).
- ⁵¹ Proposed Rule 908(a)(2)(ii)(E)(3) (proposing amendment of 17 C.F.R. § 242.908).
- ⁵² Proposed Rule 901(a)(2)(ii)(E)(2) (proposing amendment of 17 C.F.R. § 242.908).
- ⁵³ Proposed Rule 901(a)(2)(ii)(E)(2) (proposing amendment of 17 C.F.R. § 242.908).
- ⁵⁴ Proposed Rule 901(a)(2)(ii)(E)(3) (proposing amendment of 17 C.F.R. § 242.908).
- ⁵⁵ Proposed Rule 901(a)(2)(ii)(E)(4) (proposing amendment of 17 C.F.R. § 242.908).
- ⁵⁶ Rules 901(c)-(d), 902(a) (codified at 17 C.F.R. §§ 242.901(c)-(d), 242.902(a)).
- ⁵⁷ Proposed Rule 901(d)(9) (proposing amendment of 17 C.F.R. § 242.901).
- ⁵⁸ Rule 906(b) (codified at 17 C.F.R. § 242.906(b)).
- ⁵⁹ Proposed Rule 906(b) (proposing amendment of 17 C.F.R. § 242.906).
- ⁶⁰ Rule 906(c) (codified at 17 C.F.R. § 242.906(c)).
- ⁶¹ Proposed Rule 906(c) (proposing amendment of 17 C.F.R. § 242.906).
- ⁶² Rule 908(a)(2) (codified at 17 C.F.R. § 242.908(a)(2)). Note that such security-based swap transactions are still subject to regulatory reporting under Regulation SBSR. Rule 902(c)(5) (codified at 17 C.F.R. § 242.902(c)(5)).
- ⁶³ See SEC Cross-Border Proposed Amendments Release, 80 Fed. Reg. at 27478 n. 259, 27485.
- ⁶⁴ 7 U.S.C. § 2(a)(13)(G).
- ⁶⁵ See CFTC Cross-Border Guidance, 78 Fed. Reg. at 45332. SDR reporting is a “Second Category” entity-level requirement under CFTC regulations.
- ⁶⁶ See Real-Time Public Reporting of Swap Transaction Data, 77 Fed. Reg. 1182 (Jan. 9, 2012), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2012-01-09/pdf/2011-33173.pdf> (CFTC Final Real-Time Reporting Rule). The real-time public reporting requirement is a “Category A” transaction-level requirement under CFTC regulations. See CFTC Cross-Border Guidance, 78 Fed. Reg. at 45335.
- ⁶⁷ 17 C.F.R. § 45.3(a).
- ⁶⁸ See CFTC Cross-Border Guidance, 78 Fed. Reg. at 45345.
- ⁶⁹ See SEC Cross-Border Proposing Release, 78 Fed. Reg. at 31083.
- ⁷⁰ See SEC Cross-Border Proposed Amendments Release, 80 Fed. Reg. at 27481-82; see *also* SEC Cross-Border Proposing Release, 78 Fed. Reg. at 31080.
- ⁷¹ Rule 240.0-13 (codified at 17 C.F.R. § 240.0-13).
- ⁷² See SEC Cross-Border Adopting Release, 79 Fed. Reg. at 47358-59.
- ⁷³ See SEC Cross-Border Proposed Amendments Release, 80 Fed. Reg. at 27478 n. 260; see *also* SEC Cross-Border Proposing Release, 78 Fed. Reg. at 31098, 31099-31100.