

SEC Cross-Border Proposal Balances Burdens and Benefits of New SBS Regime

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On Friday, the SEC proposed a package of rule amendments and regulatory guidance regarding the cross-border application of its security-based swap (“SBS”) rules. The [proposal](#) represents an attempt by the SEC to reconsider certain aspects of the cross-border application of SBS regulatory requirements that market participants have identified as unnecessarily burdensome or incongruous with parallel CFTC swaps requirements.

The proposal addresses five key topics, two of which relate to the application of the SBS rules to SBS transactions that are “arranged, negotiated, or executed” by personnel who are located in the United States (“**ANE Transactions**”):

- **Market color.** The proposed supplemental guidance would clarify that the provision of non-transaction specific market color by a U.S. person, such as information on instrument pricing or general market conditions, would not cause an SBS transaction to be an ANE Transaction. The guidance would be conditioned on the U.S. person having no client responsibility in relation to the transaction and not receiving transaction-linked compensation.
- **De minimis counting.** The SEC proposes to excuse a non-U.S. entity from counting SBS towards its security-based swap dealer (“**SBSD**”) *de minimis* registration threshold solely because it is an ANE Transaction, under two alternative approaches. Under the first approach, a non-U.S. entity would not be required to count such ANE Transactions towards the *de minimis* threshold if all arranging, negotiating or execution activity within the United States is performed by personnel associated with an affiliated entity that itself is registered as an SBSD. Under the second approach, that activity within the United States could be performed by personnel associated with either an affiliated broker or an affiliated registered SBSD. Both approaches would be subject to a number of conditions, including compliance by the affiliated broker or SBSD “as if” it were the counterparty to the transaction and subject directly to SBSD rules.

The proposal also addresses the requirement that an SBSD provide a certification and opinion of counsel regarding the SEC’s access to books and records of the SBSD, the cross-border application of the associated person statutory disqualification provisions, and certain recordkeeping requirements:

- **Certification and opinion of counsel on access to SBSD books and records.** The SEC proposes guidance that would provide that the required certification and opinion of counsel need only address the law of the jurisdiction(s) in which a nonresident SBSD maintains its books and records and need only address books and records related to the U.S. business of the SBSD. The proposed guidance would also provide that the certification and opinion may be predicated on the nonresident SBSD obtaining consents from the persons to whom the information relates and, in some circumstances, may account for the existence of memoranda of understanding between non-U.S. authorities and the SEC.

The SEC is also proposing rule amendments that would allow a nonresident SBSD that is unable to provide the required certification and opinion of counsel to be conditionally registered for up to 24 months before being to submit the certification and opinion of counsel.

- **Statutory disqualification checks for non-U.S. associated persons.** The SEC proposes to excuse SBSDs from the requirement to perform a statutory disqualification check on a non-U.S. resident associated person if that person does not effect and is not involved in effecting SBS transactions with U.S. persons, subject to certain restrictions. This change is intended to align the SEC’s requirement with the cross-border application of the parallel statutory disqualification requirements under the CFTC’s swap regime.

- **Recordkeeping.** The SEC is proposing two new exceptions from the requirement that an SBSB make and keep current a questionnaire or application for employment for each associated person who is a natural person.

First, an SBSB would not need to make or keep current such questionnaires or employment applications if the entity qualifies for the proposed exclusion from the statutory disqualification prohibition described above. Second, a questionnaire or application for employment provided by an associated person that is not a U.S. person would not need to include information if its receipt, or the creation or maintenance of records reflecting that information, would violate local law.

The proposal demonstrates the SEC's recognition that some modifications to its SBS rules may be appropriate to address overly burdensome or inefficient aspects of the SBS regulatory regime as it currently stands, including through steps towards harmonization with CFTC swaps requirements. This should be viewed as a positive development and an important step as the SEC works to finalize and implement its SBS regulatory regime.

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