

SEC Proposes to Exempt Certain Communications Involving Security-Based Swaps from Securities Act Registration

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Introduction

On September 8, 2014, the Securities and Exchange Commission (“SEC”) **proposed a rule** to permanently exempt the publication or distribution of certain security-based swap price quotes on a registered or security-based swap execution facility or a national securities exchange (“**eligible trading platform**”) from constituting “offers” for purposes of the registration requirements of the Securities Act of 1933 (the “**Securities Act**”).

Title VII of the Dodd-Frank Act amended the Securities Act and the Securities Exchange Act of 1934 (the “**Exchange Act**”) to include “security-based swap” in the respective definitions of “security.” As a result, security-based swaps are subject to the provisions of the Securities Act, including the prohibition under Section 5 on making an offer to purchase or sell a security unless a registration statement has been filed with the SEC, absent an available exemption. In addition, under Section 5(e) of the Securities Act, it is unlawful to make offers or sales of security-based swaps to persons who are *not* eligible contract participants (“**ECPs**”),¹ unless the security-based swaps are registered under the Securities Act. An exemption from Section 5 may be available where an offer to ECPs does not involve a public offering. However, price quotes published on an eligible trading platform generally will be made widely available. Absent a rule such as the one proposed, widely distributed price quotes could jeopardize the availability of a registration exemption with respect to security-based swaps with ECPs or could result in unregistered offers to non-ECPs.

Proposed Rule

Proposed Rule 135d under the Securities Act would provide that, for purposes of Section 5, the publication or distribution of quotes relating to security-based swaps that may be purchased only by ECPs and that are traded or processed on or through eligible trading platforms would not be deemed to constitute an offer, an offer to sell, or a solicitation of an offer to buy or purchase such security-based swaps. The proposed rule also would apply to any guarantees of security-based swaps that are securities.

Currently, security-based swap trading platforms have discretion over who may access their platforms and are able to restrict access to price quotes, potentially allowing the transactions to qualify as not involving a public offering. However, national securities exchanges are, and—once provisions applicable to them under Title VII of Dodd-Frank are implemented—registered or exempt security-based swap execution facilities may be required to provide access to or publish their quotes on an unrestricted basis. Publication or distribution of these quotes on an unrestricted basis could be viewed as offers of security-

¹ The term “eligible contract participant” includes, among others, swap dealers; financial institutions (including banks, federal or state credit unions, foreign banks, financial holding companies and trust companies); regulated insurance companies; corporations, partnerships, and other entities with at least \$10 million of total assets; commodity pools with at least \$5 million of total assets and an operator that is subject to CFTC or foreign regulation (with additional requirements for retail foreign exchange transactions); and individuals with at least \$10 million of investments.

based swaps, which would require compliance with the registration requirements of the Securities Act, unless an exemption is available. The proposed rule is designed to address what the SEC called an “unintended consequence” caused by the interaction of Section 5 and the requirement that quotes on eligible trading platforms be publicly disseminated on an unrestricted basis.

The proposed rule would apply to the initial publication or distribution of quotes and any subsequent republication or redistribution of the quotes on or through media other than eligible trading platforms, including online information services. Price quotes contemplated under the proposed rule could take a number of forms depending on the trading platform model, including indicative quotes, executable quotes, bids and offers and other pricing information as well as other types of quote information that may develop. While the proposed rule is limited to eligible trading platforms, the SEC has sought comment on whether the proposed rule should be extended to other security-based swap trading platforms.

The antifraud and other provisions of the U.S. federal securities laws, including Section 17(a) of the Securities Act, which relates to oral and written misstatements and omissions in the offer and sale of security-based swaps and other securities, would continue to apply to communications covered by the proposed rule.

The SEC declined to propose a broad-based exemption from Section 12(g) of the Exchange Act (which may require issuer reporting once security ownership has reached certain levels of dispersion) or from the Trust Indenture Act of 1939 (the “**Trust Indenture Act**”) (which requires certain debt securities to be issued under a qualified indenture). The SEC was not convinced that a permanent exemption from Section 12(g) was appropriate at this point, and suggested waiting until the market for security-based swaps further develops. The SEC also believed that a permanent exemption from the Trust Indenture Act was not appropriate because privately placed debt securities are already exempt. The SEC has issued interim rules, currently scheduled to expire on February 11, 2017, that temporarily exempted certain security-based swaps from the Securities Act (other than the anti-fraud provisions in Section 17(a) thereof), the registration requirements of Sections 12(a) and (g) of the Exchange Act, and the indenture provisions of the Trust Indenture Act.²

Request for Comment

While the proposed rule is limited to the publication or distribution of price quotes by eligible trading platforms, the SEC requested comment on whether the exemption from Section 5 should cover other types of written communications, such as research, as requested by commenters in response to other rulemakings. The SEC asked for detail regarding the sorts of communications that may be considered “research” or should otherwise be exempted, including whether such communications include buy/sell recommendations and are related to industries, entities or particular offerings of security-based swaps. The SEC specifically requested comment on a possible rule that would provide that a security-based swap dealer’s publication or distribution of a written communication would not be considered to constitute an offer of securities *provided* that the communication does not include buy/sell strategies for security-based swaps and is included in an issuer-specific or industry research report that includes information regarding securities other than only security-based swaps. Comments on the proposed rule are due by November 10, 2014.

² See Exemptions for Security-Based Swaps, 76 Fed. Reg. 40,605 (July 11, 2011) (available [here](#)). See also Extension of Exemptions for Security-Based Swaps, 79 Fed. Reg. 7,570 (Feb. 10, 2014) (available [here](#)).

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

Annette L. Nazareth	202 962 7075	annette.nazareth@davispolk.com
James T. Rothwell	212 450 4806	james.rothwell@davispolk.com
Lanny A. Schwartz	212 450 4174	lanny.schwartz@davispolk.com
Alan F. Denenberg	650 752 2004	alan.denenberg@davispolk.com
Zachary J. Zweihorn	202 962 7136	zachary.zweihorn@davispolk.com
Julie V. Kourie	212 450 4951	julie.kourie@davispolk.com

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