

SEC Re-Proposes Rules on Arranging, Negotiating or Executing Security-Based Swaps in the United States

June 1, 2015

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Introduction

On May 13, 2015, the SEC published proposed amendments and re-proposed rules on the application of certain Title VII requirements to cross-border security-based swap activities of non-U.S. persons based on U.S. conduct. The [proposed rules](#) would modify numerous prior SEC proposals and final rules, including the [May 2013 proposed rules](#) on the cross-border application of security-based swap regulations, the [August 2014 final cross-border definitions and *de minimis* rules](#) and the [March 2015 reporting final rules](#).¹

Notably, the proposed rules would:

- replace the SEC's prior proposed cross-border conduct standard – “transactions conducted within the United States” – with a standard based on dealing activity of non-U.S. persons that is arranged, negotiated or executed by personnel (or personnel of an agent) located in a U.S. branch or office (“**U.S.-Located Personnel**”);
- amend the SEC's final rules on calculating the *de minimis* threshold to incorporate the revised cross-border conduct standard to determine whether a non-U.S. person engaged in dealing activity must register as a security-based swap dealer;
- generally apply the proposed external business conduct rules (other than those relating to diligent supervision) to non-U.S. persons based on location of conduct, while applying risk-based rules, such as mandatory clearing and trade execution, based on the identity of the counterparties holding the risk; and
- amend the scope of the security-based swap reporting rules to include certain transactions involving non-U.S. persons that are: (i) entered into by non-U.S. persons in connection with dealing activity and that are arranged, negotiated or executed by a party's personnel located in the United States, (ii) executed on U.S.-located trading platforms, and (iii) effected by or through registered broker-dealers, including registered security-based swap execution facilities (“**SBSEFs**”).

The SEC emphasized that it consulted with CFTC staff when drafting the proposed rules and reviewed comment letters submitted in response to the CFTC's request for comment on [CFTC Staff Advisory 13-69](#), which generally

¹ See also Davis Polk's prior memoranda on the cross-border regulation of swaps and security-based swaps: [SEC Proposed Cross-Border Security-Based Swap Rules](#) (May 16, 2013); [SEC Adopts Security-Based Swap Cross-Border Definitional Rule](#) (July 3, 2014); [CFTC Finalizes Cross-Border Swaps Guidance and Establishes Compliance Schedule](#) (July 30, 2013); and [CFTC Issues Cross-Border Substituted Compliance Determinations, Provides Limited Phase In for Some Swap Requirements](#) (Jan. 7, 2014).

requires compliance with CFTC “transaction-level requirements” for swaps between a non-U.S. swap dealer and non-U.S. persons where the dealer has personnel located in the United States regularly involved in arranging, negotiating or executing swaps, and is the first place that the phrase “arrange, negotiate or execute” appeared in this context.² Given the other contexts in which this new phrase is used, including the Volcker Rule, interested parties will be watching the CFTC and the other Volcker regulators closely to see whether their interpretations of this phrase will be similar to the SEC’s interpretation in this proposal.

Comments on the proposed rules are due by July 13, 2015.

Arrange, Negotiate or Execute

In short, the proposed rules would apply some – but not all – SEC Title VII rules to the security-based swap transactions of non-U.S. persons that are “arranged, negotiated, or executed” by U.S.-Located Personnel, particularly when that U.S. conduct is in a dealing capacity. Unlike CFTC Staff Advisory 13-69, the SEC’s August 2014 final cross-border rule and the Volcker Rule, the SEC provides interpretive guidance in the adopting release to the proposed rules regarding when the activities of the personnel of a non-U.S. person that is a potential or registered security-based swap dealer or its agent would and would not be considered “arranging, negotiating or executing” security-based swap transactions. The table below describes examples the SEC provided of these activities.

Activities that would be considered arranging, negotiating or executing security-based swap transactions by U.S.-Located Personnel:

- engaging in market-facing activity by sales or trading personnel in connection with a particular transaction, including interactions with counterparties or their agents;
- engaging in a market-facing act that causes the potential or registered security-based swap dealer to become irrevocably bound under the security-based swap under applicable law;
- responding to counterparty solicitations to enter into a dealing transaction or actively seeking out such counterparties;
- arranging or negotiating the economic terms of a specific security-based swap transaction;
- arranging, negotiating or executing security-based swap transactions in a dealing capacity using U.S.-Located Personnel to respond to inquiries from a non-U.S.-person counterparty outside business hours in the counterparty’s jurisdiction; and
- directing other personnel to arrange, negotiate or execute a particular security-based swap.

² Compliance with CFTC Staff Advisory 13-69 is currently delayed by no-action relief until September 30, 2015; see [CFTC Letter No. 14-140](#) (Nov. 14, 2014).

Activities that would not be considered arranging, negotiating or executing security-based swap transactions by U.S.-Located Personnel:

- submitting a security-based swap for clearing or reporting the security-based swap to a swap data repository in the United States;
- engaging in activities related to collateral management, such as the exchange of margin, either in the United States or involving U.S. banks or custodians;
- engaging in transactions that incidentally occur in the United States, such as activity of a non-U.S. employee of a potential or registered security-based swap dealer assigned to a non-U.S. office who happens to be traveling in the United States;
- engaging in activity that involves U.S. personnel performing internal functions, such as the processing of trades or other back-office activities;
- designing a security-based swap from within the United States, provided that (i) there is no communication with the counterparty regarding the contract in connection with a specific transaction, and (ii) the person designing the specific security-based swap does not execute any trades in the contract;
- preparing underlying documentation for a security-based swap, including negotiating a master agreement and related documentation or performing ministerial or clerical tasks in connection with the security-based swap transaction, provided that the person is not negotiating the specific economic terms of a particular security-based swap; and
- involving a U.S.-based attorney in negotiations regarding the terms of the transaction.

In contrast to the approach taken in the proposed rules, the SEC's May 2013 proposal looked to whether a transaction was "conducted within the United States," which would have required a non-U.S. person that is a potential or registered security-based swap dealer to look at its U.S. conduct as well as that of its counterparty in determining the application of security-based swap rules to a particular transaction. Under the proposed rules, a non-U.S. person that is a potential or registered security-based swap dealer would not need to look to the location of conduct of its counterparty in determining whether security-based swap rules would apply to a transaction; however, it would need to monitor the activities of its own agents, regardless of whether the agent is an affiliate. In this regard, the SEC does not explicitly provide that a party may rely on the representations of its agent with respect to the location of its conduct.

The SEC emphasized that the proposal's approach in focusing on the activities of potential or registered security-based swap dealers – and not on all market participants, generally – is based on its analysis of empirical data on the nature and liquidity of the North American single-name CDS market, which showed dealer involvement in approximately 99% of price forming transactions in 2014.

Proposed Definition of U.S. Business

For a U.S. security-based swap dealer, any transaction by or on behalf of the U.S. security-based swap dealer, wherever entered into or offered to be entered into, other than a transaction conducted through a foreign branch with a non-U.S. person or another foreign branch.

For a Non-U.S. security-based swap dealer:

- any security-based swap transaction entered into, or offered to be entered into, by or on behalf of the non-U.S. security-based swap dealer with a U.S. person (other than a transaction through a foreign branch); or
- any security-based swap transaction arranged, negotiated or executed by U.S.-Located Personnel.

Foreign Business is any security-based swap transaction entered into, or offered to be entered into, by or on behalf of a U.S. security-based swap dealer or non-U.S. security-based swap dealer, other than U.S. business.

The SEC previously defined when a transaction would be considered conducted through a foreign branch; see [17 C.F.R. 240.3a71-3\(a\)\(3\)\(i\)](#).

Security-Based Swap Dealer *De Minimis* Counting for Non-U.S. Persons

The proposal adds some cross-border security-based swaps to those which a potential non-U.S. person must count toward its *de minimis* threshold. These are in addition to the types of transactions required to be counted under the SEC’s August 2014 final cross-border rules, which are described more fully in the Appendix to this memorandum. Under the proposal, a non-U.S. person would need to count toward its *de minimis* threshold any security-based swap dealing transaction that is arranged, negotiated or executed by U.S.-Located Personnel, regardless of whether the transaction was entered into anonymously on a registered SBSEF or national securities exchange and cleared. This change would remove an exception from counting security-based swap dealing transactions of a non-U.S. person that is not a conduit affiliate that are entered into anonymously on a registered SBSEF or national securities exchange and cleared. The SEC states that this exception is now unnecessary as the non-U.S. potential security-based swap dealer need not look to its counterparty in determining whether a security-based swap must be included in its own *de minimis* calculation.

The SEC estimates that approximately 50 entities will ultimately have to register as security-based swap dealers, of which 22 are expected to be non-U.S. persons.

External Business Conduct Requirements

Consistent with its previous proposal, the SEC proposes to apply the external business conduct requirements (other than those relating to diligent supervision) only to the “U.S. business” of a registered security-based swap dealer, not to its “foreign business,” each as defined in the accompanying sidebar. The proposed rules would revise the proposed definition of “U.S. business” in relation to non-U.S. security-based swap dealers, to account for the change in application from “transactions conducted within the United States” to transactions that are arranged, negotiated or executed by U.S.-Located Personnel. In addition, the SEC states that substituted compliance may be available for these transactions, pending further rulemaking and a comparability determination by the SEC.

The Appendix to this memorandum compares the application of the SEC’s external business conduct rules with the CFTC’s current regime.

Security-Based Swap Reporting and Public Dissemination Requirements

The proposed rules would amend Regulation SBSR’s reporting requirements to add to the types of security-based swap transactions subject to reporting and public dissemination under final Regulation SBSR. Under the proposal, a security-based swap meeting any one of the following conditions would need to be reported to a security-based swap data repository and publicly disseminated, even if both counterparties to the transaction are non-U.S. persons:

- executed on a platform having its principal place of business in the United States;
- effected by or through a registered broker-dealer (including a registered SBSEF); or

Reporting Side Responsible for Reporting Security-Based Swaps Covered by the Proposed Rules

No security-based swap dealer or major security-based swap participant on either side and:

- one side includes a non-U.S. person using U.S.-Located Personnel to arrange, negotiate or execute the security-based swap and the other side includes a U.S. person: **by agreement**
- both sides include a non-U.S. person using U.S.-Located Personnel to arrange, negotiate or execute the security-based swap: **by agreement**
- one side includes only non-U.S. persons not using U.S.-Located Personnel to arrange, negotiate or execute the security-based swap and the other side includes either (i) a U.S. person or (ii) a non-U.S. person using U.S.-Located Personnel to arrange, negotiate or execute the security-based swap: **the side that includes the U.S. person or non-U.S. person using U.S.-Located Personnel to arrange, negotiate or execute the security-based swap**
- neither side includes a U.S. person or a non-U.S. person using U.S.-Located Personnel to arrange, negotiate or execute the security-based swap, where the transaction is effected by or through a registered broker-dealer (including a registered SBSEF): **the registered broker-dealer or SBSEF**

- connected with a non-U.S. person's security-based swap dealing activity that is arranged, negotiated or executed by U.S.-Located Personnel.

The "reporting side" for these security-based swap transactions would be determined as described in the accompanying sidebar. The SEC notes that the transaction types listed here would be eligible for substituted compliance, should the SEC grant a comparability determination covering the relevant jurisdiction.

New Impact on Registered Broker-Dealers

Registered broker-dealers (including registered SBSEFs) would be required to report and publicly disseminate any security-based swap that is effected by or through the registered broker-dealer, if both counterparties to the transaction are non-U.S. persons that are not registered security-based swap dealers or major security-based swap participants that did not arrange, negotiate or execute the transaction using U.S.-Located Personnel. As a result, these broker-dealers would be required to become participants of a security-based swap data repository. In addition, they would need to establish, maintain and enforce written policies and procedures reasonably designed to ensure compliance with their reporting obligations, which must be reviewed and updated at least annually.

Mandatory Clearing and Trade Execution Requirements

Unlike the CFTC's approach in CFTC Staff Advisory 13-69 – which looked to apply mandatory clearing and trade execution requirements to a swap between a non-U.S. swap dealer and a non-U.S. person if personnel of the swap dealer located in the United States were regularly involved in arranging, negotiating or executing swaps – the SEC recognized that mandatory clearing is a counterparty credit risk management measure, and that conduct in the United States alone does not implicate the underlying policy rationale for applying the clearing requirement to security-based swap transactions between non-U.S. person counterparties. As a result, the SEC states that mandatory clearing would not apply to a security-based swap transaction between two non-U.S. persons where neither counterparty's obligations are guaranteed by a U.S. person, solely because one or both counterparties arrange, negotiate, or execute the security-based swap using U.S.-Located Personnel. As mandatory trade execution follows mandatory clearing, under the proposal, the requirements would be applied consistently.

The SEC noted, however, that it would continue to monitor developments in the security-based swap market and may reconsider this proposed approach in the future.

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APPENDIX

Comparison of SEC Security-Based Swap Dealer and CFTC Swap Dealer *De Minimis* Methodologies, and the Cross-Border Application of Clearing, Trade Execution and External Business Conduct Standards to Security-Based Swap Dealers and Swap Dealers¹

This chart combines the SEC’s **May 2013 proposed cross-border rules**, **August 2014 final cross-border rules** and **May 2015 proposed and re-proposed cross-border rules** in the SEC column and the CFTC’s **July 2013 final cross-border guidance** and **Staff Advisory 13-69** in the CFTC column, in both cases with content color coded to the release, as listed in this paragraph. As a result, some portions of this chart remain proposed or subject to no-action relief, as applicable.²

	SEC Approach	CFTC Approach
Swap Dealer / Security-Based Swap Dealer <i>De Minimis</i> Threshold	<p>U.S. persons (including foreign branches) and SEC conduit affiliates:</p> <ul style="list-style-type: none"> • must count all security-based swaps entered into in a dealing capacity, regardless of counterparty. <p>Non-U.S. persons that are not SEC conduit affiliates:</p> <ul style="list-style-type: none"> • must count security-based swaps entered into in a dealing capacity: <ul style="list-style-type: none"> ○ with U.S. persons (other than foreign branches of security-based swap dealers, unless the counting entity is guaranteed by a U.S. affiliate); ○ with non-U.S. persons, to the extent the counterparty has a right of recourse against a U.S. affiliate of the counting entity; and ○ that are arranged, negotiated or executed by personnel of the non-U.S. person or its agent located in a U.S. branch or office (collectively “U.S.-Located Personnel”); • are not required to count security-based swaps entered into anonymously on an execution facility or national securities exchange and cleared, unless (i) the counting entity is guaranteed by a U.S. affiliate or (ii) the security-based swap is arranged, negotiated or executed by U.S.-Located Personnel. <p>U.S. and non-U.S. persons must aggregate their security-based swap dealing transactions with those of persons controlling, controlled by or under common control with the counting entity, unless the affiliated person is a registered security-based swap dealer.</p>	<p>U.S. persons (including foreign branches), guaranteed affiliates and CFTC conduit affiliates:</p> <ul style="list-style-type: none"> • must count all swaps entered into in a dealing capacity, regardless of counterparty. <p>Non-U.S. persons that are not guaranteed affiliates or CFTC conduit affiliates:</p> <ul style="list-style-type: none"> • must count swaps entered into in a dealing capacity with: <ul style="list-style-type: none"> ○ U.S. persons (other than foreign branches of U.S. swap dealers); and ○ guaranteed affiliates, except where <u>CFTC No-Action Letter 13-64</u> applies or the guaranteed affiliate: <ul style="list-style-type: none"> ▪ is a swap dealer; ▪ is not a swap dealer, but engages in <i>de minimis</i> swap dealing activity and is affiliated with a swap dealer; or ▪ is guaranteed by a non-financial entity; • are not required to count swaps entered into anonymously on a registered DCM, SEF or FBOT and cleared. <p>U.S. and non-U.S. persons must aggregate their swap dealing transactions with those of persons controlling, controlled by or under common control with the counting entity, unless the affiliated person is a registered swap dealer.</p>

¹ We have not included in this chart a comparison of the SEC’s and CFTC’s transaction reporting rules.

² CFTC No-Action Letter 14-140 extends prior no-action relief from the requirements of CFTC Staff Advisory 13-69 until September 30, 2015.

	SEC Approach	CFTC Approach
<p>Mandatory Clearing and Trade Execution³</p>	<p>The SEC’s May 2013 proposed cross-border rules included rules on the applicability of the mandatory clearing and trade execution requirements to security-based swaps generally, including treatment of cross-border transactions. The SEC did not re-propose revised rule text as part of its May 2015 proposed cross-border rules but instead includes a discussion stating that: “[the SEC] should not impose the clearing requirement on a security-based swap transaction between two non-U.S. persons where neither counterparty’s obligations under the security-based swap are guaranteed by a U.S. person, even if the transaction involves one or more registered foreign security-based swap dealers.”</p> <p>We note [in bracketed, blue text] those portions of the May 2013 proposed rule text that appear to be implicated by the re-proposed approach to the clearing and trade execution requirement. We do not attempt to revise the rule text, but rather simply denote those parts of the rule that are likely to be modified under the re-proposed approach.</p> <p>U.S. persons (other than foreign branches of U.S. banks):</p> <ul style="list-style-type: none"> • apply to all security-based swaps, regardless of counterparty; substituted compliance may be available for mandatory clearing but not trade execution. <p>Foreign branches of U.S. banks:</p> <ul style="list-style-type: none"> • apply to all security-based swaps, unless [not conducted within the United States] with a non-U.S. person that is not guaranteed by a U.S. person [and is not a security-based swap dealer]; substituted compliance may be available for mandatory clearing and trade execution. <p>Non-U.S. person whose performance is guaranteed by a U.S. person:</p> <ul style="list-style-type: none"> • apply to all security-based swaps, unless [not conducted within the United States] with a non-U.S. person that is not guaranteed by a U.S. person [and is not a security-based swap dealer]; substituted compliance may be available for (i) mandatory clearing and (ii) trade execution, unless the security-based swap is with a U.S. persons (other than foreign branches of U.S. banks). 	<p><u>Swap where at least one counterparty is a swap dealer:</u></p> <ul style="list-style-type: none"> • U.S. persons (other than foreign branches of U.S. swap dealers): <ul style="list-style-type: none"> ○ apply to all swaps, regardless of counterparty; no substituted compliance available. • Foreign branches of U.S. swap dealers: <ul style="list-style-type: none"> ○ apply to all swaps, regardless of counterparty; substituted compliance may be available for swaps with non-U.S. persons⁴ or other foreign branches. • Non-U.S. swap dealers (other than U.S. branches): <ul style="list-style-type: none"> ○ apply to swaps with: <ul style="list-style-type: none"> ▪ U.S. persons (other than foreign branches) and U.S. branches of non-U.S. swap dealers; no substituted compliance available; ▪ foreign branches, guaranteed affiliates and conduit affiliates; substituted compliance may be available; and ▪ non-U.S. persons where the non-U.S. swap dealer regularly uses personnel or agents located in the United States to arrange, negotiate or execute swaps; no substituted compliance available. ○ do not apply to swaps with non-U.S. persons that are not guaranteed affiliates or conduit affiliates, unless the non-U.S. swap dealer regularly uses personnel or agents located in the United States to arrange, negotiate or execute swaps. • U.S. branches of non-U.S. swap dealers: <ul style="list-style-type: none"> ○ apply to all swaps, regardless of counterparty; no substituted compliance available. <p><u>Swaps where neither counterparty is a swap dealer:</u></p> <ul style="list-style-type: none"> • Guaranteed affiliates: <ul style="list-style-type: none"> ○ apply to swaps with <ul style="list-style-type: none"> ▪ U.S. persons; no substituted compliance available; and ▪ guaranteed affiliates; substituted compliance may be available; ○ for swaps with conduit affiliates, only the requirements of the inter-affiliate clearing exemption apply, if elected; ○ do not apply to swaps with non-U.S. persons that are not guaranteed affiliates or conduit affiliates.

³ The SEC has not yet finalized rules on the mandatory clearing and trade execution of security-based swaps.

⁴ Swaps between a foreign branch of a U.S. swap dealer and a non-U.S. person that is not a guaranteed affiliate or a conduit affiliate may also rely on the 5% exemption, subject to the conditions of that exemption.

	SEC Approach	CFTC Approach
<p>Mandatory Clearing and Trade Execution (cont.)</p>	<p>Non-U.S. person whose performance is not guaranteed by a U.S. person:</p> <ul style="list-style-type: none"> • apply to security-based swaps: <ul style="list-style-type: none"> ○ with a U.S. person (other than a foreign branch of a U.S. bank); substituted compliance may be available for mandatory clearing but not trade execution; ○ [conducted within the United States, unless with a non-U.S. person that is not guaranteed by a U.S. person and is not a security-based swap dealer; substituted compliance may be available for mandatory clearing and trade execution; and] ○ [not conducted within the United States if the non-U.S. person is a security-based swap dealer and] with a counterparty that is guaranteed by a U.S. person; substituted compliance may be available for mandatory clearing and trade execution. 	<ul style="list-style-type: none"> • Conduit affiliates: <ul style="list-style-type: none"> ○ apply to swaps with U.S. persons; no substituted compliance available; ○ for all other swaps, only the requirements of the inter-affiliate clearing exemption apply, if elected.
<p>External Business Conduct Standards</p>	<p>U.S. security-based swap dealers:</p> <ul style="list-style-type: none"> • apply to all security-based swaps, regardless of counterparty, other than transactions conducted through a foreign branch with (i) a non-U.S. person or (ii) another foreign branch (the “U.S. business” of a U.S. security-based swap dealer); no substituted compliance available; • do not apply to security-based swaps that are conducted as part of its “foreign business” (i.e., security-based swaps not included in its U.S. business). <p>Non-U.S. security-based swap dealers:</p> <ul style="list-style-type: none"> • apply to all security-based swaps: <ul style="list-style-type: none"> ○ with U.S. persons (other than foreign branches); no substituted compliance available; and ○ that are arranged, negotiated or executed by U.S.-Located Personnel of the non-U.S. security-based swap dealer (collectively, the “U.S. business” of a non-U.S. security-based swap dealer); substituted compliance may be available; • do not apply to security-based swaps that are conducted as part of its “foreign business” (i.e., security-based swaps not included in its U.S. business). 	<p>U.S. swap dealers (other than foreign branches):</p> <ul style="list-style-type: none"> • apply to all swaps, regardless of counterparty; no substituted compliance available. <p>Foreign branches of U.S. swap dealers:</p> <ul style="list-style-type: none"> • apply to swaps with U.S. persons (other than with another foreign branch); no substituted compliance available; • do not apply to swaps with non-U.S. persons and foreign branches. <p>Non-U.S. swap dealers (other than U.S. branches):</p> <ul style="list-style-type: none"> • apply to swaps with: <ul style="list-style-type: none"> ○ U.S. persons (other than foreign branches) and U.S. branches of non-U.S. swap dealers; no substituted compliance available; and ○ non-U.S. persons (other than U.S. branches) where the non-U.S. swap dealer regularly uses personnel or agents located in the United States to arrange, negotiate or execute swaps; no substituted compliance available; • do not apply to swaps with non-U.S. persons, unless the non-U.S. swap dealer regularly uses personnel or agents located in the United States to arrange, negotiate or execute swaps. <p>U.S. branches of non-U.S. swap dealers:</p> <ul style="list-style-type: none"> • apply to all swaps, regardless of counterparty; no substituted compliance available.