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Dodd-Frank Implementation Update

Key Differences Between the CFTC and SEC Final Business Conduct Standards and Related Cross-Border Requirements

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The Securities and Exchange Commission (SEC) recently adopted final business conduct rules for security-based swap dealers (SBSDs) and major security-based swap participants (MSBSPs) under Section 15F(h) of the Securities Exchange Act (Exchange Act). The Commodity Futures Trading Commission (CFTC) adopted parallel rules for swap dealers (SDs) and major swap participants (MSPs) under Section 4s(h) of the Commodity Exchange Act (CEA) in 2012. Although the SEC and CFTC rules are similar in many important respects, they have several notable differences. This may complicate a firm's decision-making on whether to integrate its SBSD into its already registered SD. We have highlighted below some of the major differences between the SEC and CFTC rules.[1]

I. Structure of the Rules

The CFTC has divided the Section 4s(h) business conduct standards and requirements into internal business conduct standards (diligent supervision, position limits)[2] and external business conduct standards (antifraud, counterparty eligibility verification, disclosure of material information and daily mark, clearing disclosures, communications—fair dealing, suitability, advisor to Special Entities, counterparty to Special Entities, and political contributions). The SEC's rulemaking, by contrast, covers the external business conduct standards, diligent supervision and chief compliance officer (CCO). In addition, the SEC rules address their cross-border application. The exact compliance date for these rules has not yet been determined.[3]

II. Chief Compliance Officer (CFTC Rule 3.3 and SEC Rule 15Fk-1):

Duties. The SEC's CCO rules differ from those of the CFTC in several key respects. Most significantly, the SEC rules are "designed to be generally consistent with the current compliance obligations applicable to CCOs of other [SEC]-regulated entities," for example under FINRA Rule 3130. They thus frame the role of a CCO as that of an advisor whose job is to take "reasonable steps to ensure" that the SBSD

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[1] Because there are so few MSPs and likely also to be few MSBSPs, we have focused on the rules as they relate to SDs and SBSDs.

[2] The CFTC's internal business conduct standards also address requirements under Section 4s(j) of the CEA.

[3] With one exception, the compliance date for the final SEC rules is the same as the compliance date for the final rules requiring SBSD and MSBSP registration. The compliance date for SBSD/MSBSP registration is the later of six months after the Federal Register publication of final margin and capital rules for uncleared security-based swaps (SBS), SBSD recordkeeping and reporting rules, or final rules establishing a process to apply to the SEC to allow associated persons subject to statutory disqualification to effect or be involved in effecting SBS. The exception to this general compliance date is that the compliance date for the new customer protection requirement in SEC Rule 3a71-3(c) for transactions classified as "US business" under the final rules will go into effect the later of 12 months after publication of these rules or the registration compliance date.

implements an appropriate compliance program. The adopting release confirms the SEC's view that "it is the responsibility of the [SBSD], not the CCO in his or her personal capacity, to establish and enforce required policies and procedures," and explicitly recognizes that "the title of CCO does not, in and of itself, carry supervisory responsibilities, and a CCO does not become a 'supervisor' solely because he or she has provided advice or counsel concerning compliance or legal issues to business line personnel, or assisted in the remediation of an issue. Consistent with current industry practice, the [SEC] generally would not expect a CCO appointed in accordance with Rule 15Fk-1 to have supervisory responsibilities outside of the compliance department." Therefore, "absent facts and circumstances that establish otherwise, the [SEC] generally would not expect that a CCO would be subject to a sanction by the Commission for failure to supervise other SBS Entity personnel."

Conversely, the CFTC rules appear to place more direct responsibility on the CCO for implementation. The SEC rules, for example, require the CCO to take "reasonable steps" to ensure the SBSD establishes, maintains and reviews written policies and procedures reasonably designed to achieve compliance with applicable requirements, while the CFTC rules require the CCO to "tak[e] reasonable steps to ensure compliance," and to "establish" certain procedures in consultation with the SD's board of directors or senior officer. The SEC rule makes clear that in taking reasonable steps to ensure that the SBSD has an appropriate compliance program, the CCO must satisfy three specific obligations: he or she must (i) review the SBSD's compliance, i.e., prepare the SBSD's annual assessment of its policies and procedures; (ii) take reasonable steps to ensure that the SBSD has a system reasonably designed to remediate non-compliance issues identified by the CCO; and (iii) take reasonable steps to ensure that the SBSD establishes and follows procedures reasonably designed to address non-compliance issues. While the CFTC rules also require the SD to address non-compliance issues, the CCO must be directly involved in establishing the procedures.

Another example of the narrower scope of the SEC rules is that they require the CCO to take reasonable steps (in consultation with the board or senior officer) to resolve conflicts, while the CFTC requires the CCO to resolve conflicts (in consultation with the board or senior officer). In addition, the SEC rules require the CCO's steps to be taken in connection with any "material" conflicts, while the CFTC rules require resolution of "any conflicts."

While both the CFTC and SEC rules require the CCO to "administer" the SD's or SBSD's policies and procedures, the CFTC rules frame this responsibility more broadly, requiring the CCO to administer the SD's policies and procedures "reasonably designed to ensure compliance with *the [Commodity Exchange Act (CEA)] and [CFTC] regulations"* (emphasis added). By contrast, the SEC rules limit the CCO's administration of policies and procedures to those "required to be established *pursuant to section 15F of the [Exchange] Act and the rules and regulations thereunder"* (emphasis added). Section 15F deals with registration and regulation of SBSDs, the securities-based swaps analog of Section 4s of the CEA.

The scope of the CCO's responsibilities and the potential for personal liability for the CCO thus appear to be significantly greater under the CFTC rules. Indeed, the CFTC observed in the release adopting the internal business conduct standards the role of the CCO "required under the CEA, as amended by the Dodd-Frank Act, goes beyond what has been represented by commenters as the customary and traditional role of a compliance officer."[4]

Compensation and Removal. The SEC rules appear to be stricter than the CFTC rules with respect to compensation and removal of the CCO. Under the SEC rules, only a majority of the board can set compensation for or remove the CCO, whereas the CFTC rules permit either the board or the senior officer to remove the CCO. However, in contrast to the CFTC rules, the SEC rules do not explicitly state who may appoint a CCO.

[4] Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants, 77 Fed. Reg. 20128, 20162 (Apr. 3, 2012).

Annual Report. Although both sets of rules require the CCO to prepare and sign an annual report, and both share a common 90-day deadline, [5] the CFTC's annual report requirements are significantly more detailed. The CFTC requires the CCO to review each applicable requirement and identify the policy and procedure that is reasonably designed to ensure compliance. The SEC rules do not contain either of these requirements; rather, they require only a "description" of the policies and procedures in the annual report.

III. Supervision (CFTC Rule 23.602 and SEC Rule 15Fh-3)

Both the SEC and the CFTC require SDs and SBSDs to diligently supervise their personnel. In its adopting release, the SEC has stated that the supervision requirements set forth in Rule 15Fh-3 are largely the same as the similar provision adopted by the CFTC. The SEC has, however, provided both greater detail with respect to the minimum requirements for adequate supervision as well as a safe harbor if certain conditions are met (e.g., the maintaining of written policies and procedures reasonably designed to prevent and detect violations of the federal securities laws). [6]

IV. External Business Conduct Standards

A. Antifraud (CFTC Rule 23.410 and SEC Rule 15Fh-4)

Although similar in many ways, the new SEC rules regarding antifraud differ from their CFTC counterparts in one significant respect. While the CFTC rules include an express affirmative defense for SDs that did not act intentionally or recklessly in connection with any antifraud violations and complied in good faith with written policies and procedures reasonably designed to meet the particular requirement that is the basis for any alleged violation, the SEC rules do not contain a similar affirmative defense. In comparing its approach to that of the CFTC, the SEC noted:

> The Commission is not adopting the commenter's recommendation that the final rules incorporate an affirmative "policies and procedures defense." We recognize that the CFTC adopted an express, affirmative defense in its parallel antifraud rules, in part in response to concerns that the statute may impose non-scienter liability for fraud in private rights of action.[ ] The Exchange Act, however, does not contain a parallel provision.[ ] Moreover, the Commission has considered the concerns raised by commenters and determined not to provide a similar safe harbor from liability for fraud on behalf of [SBS] … Entities. As discussed throughout the release in the context of specific rules, the rules being adopted today are intended to provide certain protections for counterparties, including certain heightened protections for special entities. We think it is appropriate to apply the rules so that counterparties receive the benefits of those protections, and therefore we do not think it would be appropriate to provide the safe harbor requested by the commenter from liability for fraud. While we are not adopting a safe harbor from liability for fraud, as discussed below in connection with the relevant rules, the Commission has adopted rules that permit reasonable reliance on representations (e.g., Rule 15Fh-1(b)) and, where appropriate, allow SBS Entities to take into account the sophistication of the counterparty (e.g., Rule 15Fh-3(f) (regarding recommendations of security-based swaps or trading strategies)). (Footnotes omitted)

B. Confidential Treatment of Counterparty Information (CFTC Rule 23.410(c))

The CFTC rules make it unlawful for SDs to disclose or use for their own purposes in a way that would tend to be materially adverse to the interests of a counterparty any material confidential information provided to the SD by or on behalf of the counterparty. The SEC rules do not contain a similar prohibition. However, SBSDs are subject to Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which

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[5] Through no-action relief, the CFTC has extended the 60-day deadline in its rules to 90 days. No-Action Relief for Futures Commission Merchants, Swap Dealers, and Major Swap Participants from Compliance with the Timing Requirements of Commission Regulation 3.3(f)(2) Relating to Annual Reports by Chief Compliance Officers, CFTC Letter No. 15-15 (Mar. 27, 2015).

[6] CFTC caselaw interpreting CFTC Regulation 166.3 (diligent supervision by registrants) sets forth a similar framework. *See,* e.g., *CFTC v. Carnegie Trading Group, Ltd.,* 450 F.Supp.2d 788, 805 (N.D. Ohio, 2006) (finding that CFTC met its burden on its failure to supervise claim where defendant had failed to develop and install procedures for the detection and deterrence of wrongdoing by its agents).

would make it unlawful, in connection with the purchase or sale of any security, to disclose or use material nonpublic information in violation of any duty owed by the SBSD, including to the counterparty that provided the information.

The SEC and CFTC appear to apply differing standards as to what constitutes material confidential information. The focus in the SEC context is on information that is material to the instrument (or issuer) involved in the transaction, whereas the focus in the CFTC context appears to be on the adverse impact on the counterparty. Thus, in the CFTC context, there could be situations where confidential information provided to the SD by a counterparty that would not generally be viewed as material by a reasonable investor would be considered material under CFTC Rule 23.410(c) if it were used by an SD in a way that tended to be materially adverse to the interests of the counterparty.

C. Safe-Harbor and Counterparty Eligibility (CFTC Rule 23.430 and SEC Rule 15Fh-1)

The SEC and CFTC rules both require SDs and SBSD, as applicable, to verify that the counterparty meets the necessary eligibility requirements before offering to enter into or entering into a swap or SBS. Both permit SDs and SBSDs to rely on written counterparty representations to satisfy the counterparty eligibility verification requirements.[7] Under both sets of rules, this requirement does not apply where the SD or SBSD does not know the counterparty's identity, but the scope of the carve-out differs somewhat.

Both the SEC and CFTC rules do not require eligibility verification where a swap or SBS is initiated on a designated contract market or registered securities exchange (since non-eligible contract participants are permitted to transact on DCMs and securities exchanges) or where a swap or SBS is initiated on a swap execution facility (SEF) or security-based SEF *and* the SD or SBSD does not know the counterparty's identity prior to execution. In addition, the SEC rules do not require eligibility verification whenever the identity of the counterparty is not known to the SBSD at a reasonably sufficient time prior to execution to permit the SBSD to comply with its obligations under the rules. For its part, the CFTC has provided more conditional no-action relief for the verification requirement in connection with certain "intended to be cleared" (ITBC) swaps.[8] Generally, the relief will apply when the SD does not know the counterparty's identity prior to execution but the transaction is cleared. It will also apply when the SD knows the identity of the counterparty prior to execution, as long as the ITBC swap is executed on or subject to the rules of a SEF or DCM and is either promptly cleared, not required to be cleared by the CFTC, or not accepted for clearing by a DCO. The SEC expressly rejected this approach, arguing that where the identity of the counterparty is known, the counterparty should receive the benefits of the protections provided by the rules.

D. Disclosures (CFTC Rule 23.431 and SEC Rule 15Fh-3)

The SEC rules relating to required disclosures to counterparties generally mirror those of the CFTC with two important differences. First, the CFTC rules require that the counterparties agree in writing to the manner of disclosure, including as to whether pre-execution oral disclosure may be made, while the SEC rules do not require counterparty agreement to the method of disclosure. Second, the CFTC rules require that the SD provide a scenario analysis upon a counterparty's request and prior to entering into a transaction with a counterparty, while the SEC rules do not contain a similar requirement. According to the SEC, while a scenario analysis may "prove a valuable analytical tool," it is only "one means by which information may be conveyed"[9] and may not be appropriate or necessary in every situation to ensure the proper disclosures are made.

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[7] The SEC rules do not explicitly require that eligibility verification occur before offering or entering into a transaction. However, the adopting release makes clear the SEC's intent in this regard.

[8] CFTC No-action letter 13-70 defines an ITBC swap as a swap that is (i) of a type accepted for clearing by a DCO, and (ii) intended to be submitted for clearing contemporaneously with execution. The letter provides relief from the following CFTC Regulations: 17 C.F.R. §23.402(b)-(f) (KYC); § 23.430 (verification of counterparty eligibility); § 23.431(a) (disclosure, material risks, characteristics, incentives, mid-market mark); § 23.431(b) (scenario analysis); § 23.431(d)(1) (daily mark—cleared swaps); § 23.432 (right to clear and select DCO); § 23.434 (recommendations); § 23.440 (SD as Special Entity advisor); § 23.450 (SD as Special Entity counterparty); and § 23.451 (political contributions).

[9] *Id.*

E. Daily Mark (CFTC Rule 23.431 and SEC Rule 15Fh-3)

The SEC rules relating to provision of the daily mark also differ from the CFTC rules in certain important respects. First, the SEC requires SBSDs to disclose their data sources and a description of the methodology and assumptions used to prepare the daily mark for uncleared swaps. By contrast, the CFTC rules do not require an SD to disclose information deemed confidential and proprietary that is utilized in preparation of the daily mark. The SEC noted that it does not foresee that these disclosures would involve confidential proprietary information. It thus remains to be seen whether this difference between the SEC's and CFTC's approaches will be material. In addition, the SEC rules require that the daily mark be provided free of charge and without any restrictions on internal use by the counterparty (although external use by the counterparty may be restricted). The CFTC rules do not appear to contain similar provisions.

F. Clearing Rights (CFTC Rule 23.432 and SEC Rule 15Fh-3)

Under the CFTC rules, where a swap is required to be cleared, the counterparty to the transaction has the sole right to elect where it will be cleared. The SEC rules, however, limit the counterparty to selecting from those clearing agencies with which the SBSD has a clearing relationship. Similarly, where the transaction is not required to be cleared and both sets of rules allow the counterparty to elect to clear and to choose the clearing agency, the SEC rules again limit the selection of clearing agencies to those with which the SBSD has a clearing relationship.

G. Advisor to Special Entities (CFTC Rule 23.440 and SEC Rule 240.15Fh-2)

Acts as an Advisor to a Special Entity. The SEC's definition of what it means to "act as an advisor" to a Special Entity is broader than the CFTC's definition. Under the CFTC rules, a swap dealer "acts as an advisor" to a Special Entity when it tailors its recommendation to the "particular needs or characteristics" of the Special Entity. The SEC declined to adopt the CFTC's more limited definition to "avoid unnecessarily narrowing the definition of recommendation." Thus, an SBSD acts as an advisor when it "recommends" an SBS or trading strategy. The SEC also declined to exclude from the definition of "recommendation" communications to groups of customers or investment managers with multiple clients.

Safe Harbor. Both the CFTC and SEC rules provide a safe harbor to SDs and SBSDs from being considered an advisor to an ERISA Special Entity. They also both provide a safe harbor with respect to all Special Entities. Though largely similar, to qualify for the safe harbor from acting as an advisor to *any* Special Entity, the SEC rules differ from the CFTC rules in four respects.

1. To qualify for the CFTC's safe harbor, an SD may not provide an opinion as to whether the Special Entity should enter into a recommended swap or trading strategy involving a swap. By contrast, the SEC declined to adopt this standard, arguing that it would lead to confusion.

2. Both sets of rules require the SD or SBSD to disclose to the Special Entity that the SD or SBSD is not undertaking to act in the Special Entity's best interests and also require the Special Entity to represent in writing that it will rely on advice from a qualified independent representative. The SEC rules also require the Special Entity to acknowledge in writing that the SBSD is not acting as an advisor, whereas the CFTC rules require the Special Entity to represent that the Special Entity will not rely on the SD's recommendations.

3. The SEC rules apply to any recommendation the Special Entity receives from the SBSD "involving" a SBS transaction, while the CFTC rules apply to recommendations "materially affecting" a swap transaction.

4. The SEC rules require an SBS transaction to be evaluated by a fiduciary before the transaction "is entered into," whereas the CFTC safe harbor requires a swap transaction to be evaluated by fiduciary before the transaction "occurs." With respect to this last point, the SEC noted that it expects the practical effect of these two terms to be the same.

Due Diligence. When acting as an advisor to a Special Entity, the SEC and CFTC rules have substantially similar requirements with respect to the type of information that an SBS or SD must make reasonable

efforts to obtain to enable it to make a reasonable assessment that an SBS or trading strategy is in the Special Entity's best interest. The one exception to this is that the SEC also requires SBS to obtain from the Special Entity "the authority of the Special Entity to enter into a security-based swap." The CFTC rules do not include this requirement.

H. Acting as Counterparties to Special Entities (CFTC Rule 23.450 and SEC Rule 240.15Fh-5)

The CFTC and SEC rules are substantially the same with respect to the requirement that before acting as a counterparty to a Special Entity, the SD or SBSD have a "reasonable basis" to believe that the Special Entity has a qualified representative. Both SDs and SBSDs must also have a reasonable basis to believe that the independent representative makes appropriate and timely disclosures to the Special Entity. The SEC's disclosure requirement is narrower than the CFTC's in that the SEC rules only require disclosures of "material information concerning the security-based swap," while the CFTC rules do not contain the materiality qualifier.

The CFTC and SEC rules both have tests for determining whether a representative of a Special Entity is "independent" of the SD or SBSD. Both tests have elements focusing on the relationship of the representative to the SD or SBSD. The CFTC rules more narrowly focus on whether there is a "principal relationship" between the SD and the representative and whether the representative may be directly or indirectly controlled by the SD. The SEC rules, on the other hand, more broadly state that to be independent a representative may not have a relationship, "whether compensatory or otherwise, that reasonably could affect the independent judgment or decision-making of the representative."

The SEC and CFTC rules both require SDs and SBSDs to disclose to the Special Entity in writing the capacity in which they are acting and, if acting in more than one capacity with the Special Entity, the material differences between such capacities. The SEC rules, however, require SBSDs also to disclose "any other financial transaction or service involving the counterparty."

Finally, the CFTC rules require an SD's CCO to review any determination that there is not a reasonable basis to believe the representative of a Special Entity meets the criteria of the rule. The SEC does not have such a requirement.

I. Political Contributions (CFTC Rule 23.451 and SEC Rule 40.15Fh-6)

The rules addressing political contributions by SDs and SBSDs, although substantially the same, nevertheless contain slightly different terms. The CFTC rules address contributions to "governmental" Special Entities, while the SEC rules apply to "municipal entities." Nevertheless, the definitions of these terms are substantially identical.

Both rules also include an exception to the prohibition against entering into a transaction with a Special Entity to which the SD has made a contribution. The exception applies where the contribution is discovered by the SD or SBSD within 120 days and meets certain other requirements. The CFTC rules limit use of this exception to no more than two times per year, while the SEC somewhat more liberally allows a larger SBSD (i.e., one with over 50 covered associates) to rely on the exclusion up to three times a year.

J. Prime Brokerage Transactions, Allocation of Standards

Although the SEC acknowledged commenter concerns relating to the practical difficulty of complying with certain of the external business conduct standards in the context of prime brokerage relationships, it declined to allocate responsibilities between an executing dealer and the prime broker. The SEC recognized that the executing dealer may be in a better position to meet certain of the external business conduct requirements in some circumstances while the prime broker may be better positioned in other circumstances. The SEC also recognized that the CFTC, through no-action relief, has permitted swap dealers in prime brokerage arrangements to allocate these responsibilities between them,[10] but the SEC

[10] *See*, e.g., CFTC No-Action Letter 13-11 (Apr. 30, 2013).

at the same time declined to adopt rules in this regard, stating that the request was beyond the scope of the rulemaking.

V. Cross-Border Activity (SEC Rule 3a71-3) and Substituted Compliance (SEC Rule 3a71-6)

The SEC has adopted several rules on cross-border SBS activities for market participants. These rules require non-US SBSDs that use personnel or agents located in the United States to "arrange, negotiate, or execute" an SBS transaction to count that transaction for purposes of determining whether it is required to register as an SBSD.[11] As part of the April 2016 business conduct standards rulemaking discussed in this alert, the SEC rules also extend the business conduct requirements to any SBS arranged, negotiated, or executed by a non-US SBSD through US personnel. Instead of adopting rules, the CFTC has issued interpretative guidance on how it will apply its SD rules in a cross-border context,[12] and has also requested comment on and provided time-limited no-action relief in connection with the applicability of SD requirements relating to swaps entered into by non-US SDs with non-US counterparties that are negotiated, arranged, or executed by personnel in the United States.[13]

Although the process used by the two agencies has differed, both appear to apply their rules to cross-border transactions in a similar manner. In addition, although the CFTC has divided all SD requirements into either "Entity Level" or "Transaction Level" requirements and the SEC has focused on whether SBS transactions are "US business" or "foreign business," the impact of their approaches likely will largely be the same.

Under both approaches, the external business conduct requirements apply (without the availability of substituted compliance) when one or both counterparties to the transaction are US persons, except that they do not apply when the transaction is between a foreign branch of a US bank SD or SBSD and another foreign branch or a non-US person. The CCO and diligent supervision rules apply to both US and non-US SDs and SBSDs, but substituted compliance is available, upon a finding of comparability, for non-US SDs and SBSDs for all related requirements.[14] Under the SEC rules, substituted compliance will not be available for the antifraud provisions or requirements relating to disclosures and provision of information to regulators. Similarly, the CFTC has expressly retained its examination and enforcement authority in each of its comparability determinations.

VI. Conclusion

The SEC stated in the adopting release its intent to harmonize its rules with the parallel CFTC requirements to create efficiencies for entities that have already established infrastructure to comply with the CFTC's SD regime. While the two sets of rules are largely similar, as we point out above, there are both significant and less substantial differences that dual registrants and those assessing how to structure their registered entities should consider.

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[11] 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; Security-Based Swap Dealer De Minimis Exception, 81 Fed. Reg. 8598 (Feb. 19, 2016).

[12] Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 78 Fed. Reg. 45291 (Jul. 26, 2013).

[13] Request for Comment on Application of Commission Regulations to Swaps Between Non-US Swap Dealers and Non-US Counterparties Involving Personnel or Agents of the Non-US Swap Dealers Located in the United States, 79 Fed. Reg. 1347 (Jan. 8, 2014); CFTC No-Action Letter No. 15-48 (Aug. 13, 2015) .

[14] Under the CFTC's comparability determinations issued to date, substituted compliance has not been granted for the requirement that the CCO (or chief executive officer) of the SD certify and file with the CFTC the SD's annual compliance report, except that for Australia, substituted compliance also has not been granted for the requirement that the annual report be produced.

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