

Client Alert

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The SEC's Registration Rules for Security-Based Swap Dealers

Early this month the U.S. Securities and Exchange Commission ("SEC") released final rules (the "Registration Rules") for the registration of security-based swap dealers ("SBSDs").¹ The Registration Rules, released more than three years after the release by the U.S. Commodity Futures Trading Commission ("CFTC") of its parallel rules for the registration of swap dealers,² set out the formal requirements for SBSB registration and are instructive for financial institutions that may be required to register as SBSBs when such registration comes to be required.

Timing for Registration and for Related Calculations

The Registration Rules have little immediate effect. Their compliance date, when the SBSB registration requirement will go into effect, will occur only after the occurrence of several events that, taken together, have not yet occurred, cannot occur for a minimum of six months, and seem relatively unlikely to occur until after significantly more than six months have passed.³

Moreover, market participants are not required to register as SBSBs until after their security-based swap activity exceeds certain de minimis thresholds.⁴ The Registration Rules Release states that, for purposes of complying with registration requirements, entities engaging in security-based swaps activities are not required to begin calculating whether their activities meet or exceed such thresholds until two months prior to the compliance date of the Registration Rules.⁵

¹ Registration Process for Security-Based Swap Dealers and Major Security-Based Swap Participants, 80 Fed. Reg. 48,963 (August 14, 2015) (the "Registration Rules Release"). The Registration Rules Release is available [here](#). Under the Registration Rules, registration requirements are very similar for SBSBs and for major security-based swap participants ("MSBSPs"). For clarity and ease of reading, and in view of the likely rarity of MSBSPs, this client alert generally refers to SBSBs and not to MSBSPs.

² Registration of Swap Dealers and Major Swap Participants, 77 Fed. Reg. 2613 (January 19, 2012). Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act gives the CFTC jurisdiction over "swaps" and "swap dealers" and the SEC jurisdiction over "security-based swaps" and "security-based swap dealers."

³ Specifically, the compliance date will occur on the later of: (i) six months after the date of publication in the Federal Register of a final rule release adopting rules establishing capital, margin and segregation requirements for SBSBs; (ii) the compliance date of final rules establishing recordkeeping and reporting requirements for SBSBs; (iii) the compliance date of final rules establishing business conduct requirements for SBSBs; or (iv) the compliance date for final rules establishing a process for a registered SBSB to make an application to the SEC to allow an associated person who is subject to a statutory disqualification to effect or be involved in effecting security-based swaps on the SBSB's behalf. Registration Rules Release at 48,964.

⁴ See generally Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant," 77 Fed. Reg. 30,596, 30,756 (May 23, 2012).

⁵ Registration Rules Release at 48,964.

Conditional Registration

An applicant will be conditionally registered if it timely completes and submits (i) the primary application form applicable to it, as described below, and (ii) a certification form, also described below.⁶ The SEC may deny or grant ongoing registration as a SBSB based on the applicant's application. The SEC will grant ongoing registration if it finds that applicable requirements are satisfied, and may institute proceedings to determine whether ongoing registration should be denied.⁷ If information contained in an applicant's registration materials becomes inaccurate, such applicant must correct such materials.⁸

Primary Application Forms

The Registration Rules provide that an applicant must file one of three primary forms as part of its application for registration.⁹ The forms are annexed to the Registration Rules and form part of the rulemaking. The three forms are:

- Form SBSE, for entities that are neither registered or registering with the SEC as a broker-dealer nor registered or registering with the CFTC as a swap dealer or major swap participant;
- Form SBSE-A, for entities that are not registered or registering with the SEC as a broker-dealer but that are registered or registering with the CFTC as a swap dealer or major swap participant; and
- Form SBSE-BD, for entities that are registered or registering with the SEC as a broker or dealer.¹⁰

The SEC's decision to use three different primary application forms is intended to recognize that, if an applicant is registered with the SEC or the CFTC, the SEC can obtain access to certain information regarding such applicant.¹¹ As a result, the three forms request different amounts of information, with the Form SBSE-BD, for entities already registered or registering as a broker or dealer with the SEC, appearing to require significantly less information than the other two forms.

Certifications

In addition to a primary application form, an applicant must file a Form SBSE-C, which, like the primary application forms, is annexed to the Registration Rules and forms part of the SEC's rulemaking. Form SBSE-C contains two separate certifications, one by a senior officer of the applicant and the other by the applicant's chief compliance officer or his or her designee.

A senior officer of the applicant must certify that such officer has:

- after due inquiry, reasonably determined that the applicant has developed and implemented written policies and procedures reasonably designed to prevent violation of federal securities laws and the rules thereunder; and
- documented the process by which he or she reached such determination.¹²

⁶ Registration Rules at § 240.15Fb2-1(d).

⁷ Registration Rules at § 240.15Fb2-1(e).

⁸ Registration Rules at § 240.15Fb2-3.

⁹ Registration Rules at § 240.15Fb2-1(a).

¹⁰ Registration Rules Release at 48,989.

¹¹ Registration Rules Release at 48,967.

¹² See Registration Rules at § 240.15Fb2-1(b); Form SBSE-C.

For these purposes, the term “senior officer” includes only the most senior executives in an organization, such as an applicant’s chief executive officer, chief financial officer, chief legal officer, chief compliance officer, president, or other person at a similar level. In addition, the “senior officer” making the certification must have the legal authority to bind the applicant.¹³ The development of the written policies and procedures referenced in this certification will likely be among the most time-consuming of the tasks required to register as an SBSB.

Further, the applicant must certify, by its chief compliance officer or his or her designee, that the applicant:

- neither knows, nor in the exercise of reasonable care should have known, that any associated person¹⁴ who effects or is involved in effecting security-based swaps on its behalf is subject to a statutory disqualification,¹⁵ unless otherwise specifically provided by SEC rule, regulation or order;¹⁶ and
- has performed background checks on all of its associated persons who are natural persons¹⁷ and who effect or are involved in effecting security-based swaps on its behalf.¹⁸

The Registration Rules expressly require the applicant’s chief compliance officer, or his or her designee, to review and sign the questionnaire or application for employment executed by each associated person who is a natural person and who effects or is involved in effecting security based swaps on behalf of such applicant.¹⁹ The questionnaire or application must serve as a basis for a background check of the associated person to verify that such person is not subject to statutory disqualification.²⁰

Nonresident SBSBs

Additional requirements apply to “nonresident security-based swap dealers,” which are defined to include (i) in the case of a corporation, one incorporated in or having its principal place of business in any place not in the United States and (ii) in the case of a partnership or other unincorporated organization or association, one having its principal place of business in any place not in the United States.²¹

¹³ Registration Rules Release at 48,968, note 29.

¹⁴ For these purposes, an “associated person” of a SBSB means (i) any partner, officer, director or branch manager of the SBSB (or any person occupying a similar status or performing similar functions); (ii) any person directly or indirectly controlling, controlled by or under common control with, the SBSB; or (iii) any employee of the SBSB, provided that the term does not include any person whose functions are solely clerical or ministerial. Registration Rules Release at 48,974 and note 88; Section 3(a)(70) of the Securities Exchange Act of 1934 (the “Exchange Act”), 15 U.S.C. § 78c(a)(70).

¹⁵ Generally for these purposes a person is subject to “statutory disqualification” if such person has been subject to any of the actions, decrees, orders or judgments described in paragraphs (A)-(F) of Section 3(a)(39) of the Exchange Act, 15 U.S.C. § 78c(a)(39). See Registration Rules at § 240.15Fb2-1(e) and § 240.15Fb6-1; Form SBSE-C.

¹⁶ When the SEC issued the final Registration Rules, it also voted to publish in the Federal Register proposed rules that would permit a SBSB to make an application to permit a statutorily disqualified person (including a natural person) to effect or be involved in effecting security-based swaps. See Applications by Security-Based Swap Dealers or Major Security-Based Swap Participants for Statutorily Disqualified Associated Persons to Effect or Be Involved in Effecting Security-Based Swaps; Proposed Rule, 80 Fed. Reg. 51,683 (August 25, 2015), available [here](#). The comment period for these proposed rules closes on October 26, 2015.

¹⁷ With respect to non-natural persons, when an entity files an application to register as an SBSB, such entity may permit a non-natural person that is associated with such entity that is subject to statutory disqualification to effect or be involved in effecting security-based swaps on its behalf, provided that the statutory disqualification(s) occurred prior to the compliance date of the Registration Rules, and provided that the entity identifies each such associated person on the applicable application form. Registration Rules at § 240.15Fb6-1.

¹⁸ Registration Rules at § 240.15Fb6-2; Form SBSE-C.

¹⁹ The Registration Rules Release clarifies that a person is “involved in effecting” security-based swaps if the person generally is engaged in functions necessary to facilitate the SBSB’s security-based swap business, including, but not limited to, the following activities: (1) drafting and negotiating master agreements and confirmations; (2) recommending security-based swap transactions to counterparties; (3) being involved in executing security-based swap transactions on a trading desk; (4) pricing security-based swap positions; (5) managing collateral for the SBSB; and (6) directly supervising persons engaged in the activities described in items (1) through (5) above. See Registration Rules Release at 48,976.

²⁰ Registration Rules at § 240.15Fb6-2(b).

²¹ Registration Rules at § 240.15Fb2-4(a).

Each nonresident SBSB must:

- appoint an agent for service of process in the U.S.;²²
- certify that it can and will provide the SEC with prompt access to its books and records and will submit to onsite inspection and examination by the SEC;²³ and
- provide an opinion of counsel to the effect that it can, as a matter of law, provide the SEC with prompt access to its books and records and can, as a matter of law, submit to onsite inspection and examination by the SEC.²⁴

A nonresident SBSB must provide a re-certification within 90 days after any changes in the legal or regulatory framework that would impact a nonresident SBSB's ability to provide the SEC with prompt access to its books and records. Such re-certification must be accompanied by a revised opinion of counsel describing how, as a matter of law, the nonresident SBSB will continue to meet its obligations to provide the SEC with prompt access to its books and records and to be subject to SEC inspection and examination under the new regulatory regime.²⁵

Author

James E. Schwartz
New York
+1 (212) 336-4327
jschwartz@mofocom

Contacts

Anna T. Pinedo
New York
+1 (212) 468-8179
apinedo@mofocom

Julian E. Hammar
Washington D.C.
+1 (202) 887-1679
jhammar@mofocom

David H. Kaufman
New York
+1 (212) 468-8237
dkaufman@mofocom

Barbara R. Mendelson
New York
+1 (212) 468-8118
bmendelson@mofocom

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²² Registration Rules at § 240.15Fb2-4(b).

²³ Registration Rules at § 240.15Fb2-4(c)(1)(i).

²⁴ Registration Rules at § 240.15Fb2-4(c)(1)(ii).

²⁵ Registration Rules at § 240.15Fb2-4(c)(2).