SUBMITTED BY E-MAIL

Ms Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street N.E.
Washington, D.C. 20549-1090

Brussels, 23 July 2019
EBF_037843

Dear Secretary Countryman:

SUBJECT: EBF's comments on the Proposed Rule Amendments and Guidance Addressing Cross-Border Application of Certain Security-Based Swap Requirements [Release No. 34-85823; File No. S7-07-19]

The European Banking Federation ("EBF") fully supports the efforts by the U.S. Securities and Exchange Commission ("SEC") to amend its rules and interpretive guidance related to security-based swaps ("SBSs") and security-based swap dealers ("SBSDs") promulgated pursuant to Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act" or "Title VII"). We are grateful for the opportunity to submit our comments on the Proposed Rule Amendments and Guidance Addressing Cross-Border Application of Certain Security-Based Swap Requirements ("Proposal") published by the SEC on May 24, 2019.

While we welcome many of the suggested amendments and the efforts by the SEC to address EBF concerns, we believe that certain additional modifications to the proposed SBSD framework are necessary to ensure that the SBSD registration requirements are workable for non-U.S. registrants and do not conflict with non-U.S. laws, most notably, those regulating data protection. We continue to have serious concerns that absent a satisfactory resolution of these issues, foreign-based market participants headquartered or with material operations in the EU will be severely disadvantaged relative to their U.S.-based peers that conduct the same types of operations in the EU, a clear violation of principles of equality of competitive opportunity that puts at risk non-U.S. markets participants' ability to continue SBS activities in the United States.

Our comments focus primarily on (1) the requirements under Exchange Act Rule 15Fb2–4(c)(1) to submit the certification and opinion of counsel, (2) the related discussion regarding consents as a means to overcome privacy concerns, (3) the additional requirement under Exchange Act Rule 3a71-6(c)(2)(ii) calling for certification and opinion of counsel, or adequate assurances, in connection with substituted compliance determinations, and (4) the broad application of background check requirements. We also respond to certain questions raised in the Proposal regarding the application of rules to

transactions between non-U.S. persons that are in some way "arranged, negotiated or executed" ("ANE") in the United States.

Our main recommendations focus on areas where current SBSD rules, even after accounting for the thoughtful changes contemplated by the Proposal, treat non-U.S. registrants less favourably in significant ways than U.S. registrants. The SEC should eliminate these potential sources of competitive imbalance by harmonizing the SBSD regulatory framework with Title VII swap-dealer requirements, including as follows:

1. **Certification and Opinion of Counsel Requirement under Exchange Act Rule 15Fb2–4(c)(1):**

   A. The SBSD registration requirements regarding the certification and opinion of counsel should be eliminated and, as is the case with U.S. SBSDs, instead rely on the obligation of an SEC registered SBSD (whether U.S. or non-U.S.) to comply with all applicable Title VII requirements. Requiring the opinion and certification of counsel for non-U.S. SBSDs but not U.S. SBSDs raises competitive equality concerns, especially since all SBSDs – both U.S. and non-U.S. – are subject to the same obstacles with respect to privacy and blocking statutes because U.S. SBSDs also operate global dealing businesses in non-U.S. jurisdictions in which these statutes apply. As a result, the imposition of significantly more onerous requirements on non-U.S. registrants is not warranted.

      This recommended approach would more closely harmonize the SEC SBSD framework with the approach taken by the Commodity Futures Trading Commission ("CFTC"), as the CFTC does not require this type of certification and opinion as a condition of registration for U.S. or for non-U.S. swap dealers. We note that the CFTC, through the NFA, has been able to conduct examinations of non-U.S. swap dealers.

      Eliminating the certification and opinion of counsel requirement would also address consequences that were most likely unintended, such as the knock-on effects on the registration timeline. The SEC has recognized and sought to address some of these downstream effects, but several others remain to be resolved, as this comment letter highlights. The SEC's goal of establishing the SBSD regime without undue delay would be well served by removing the certification and opinion of counsel in their several forms.

   B. Should the SEC choose to maintain the certification and opinion of counsel requirements for non-U.S. SBSDs only, it should adopt the proposed revisions with the following additional changes in order to address legal conflicts in non-U.S. jurisdictions:

      i. **If non-U.S. SBSDs are required to provide a certification and opinion as a registration condition, supporting the SEC's ability to obtain indirect access to books and records should suffice where the nature of the data (e.g. personal data protected by GDPR) calls for such an approach.**

         We appreciate the recognition by the SEC that in some respects, e.g. conflicts with foreign blocking statutes, among other things, a solution can only be

achieved in coordination with, and after entering into arrangements with, home country regulators. Indeed, some conflicts with blocking and secrecy laws can be successfully addressed in this manner, resulting in direct access to records.

However, the same is not true for privacy concerns, as the Proposal highlights. Such privacy concerns can be present in some trade records, in particular as regards employee information. We appreciate the SEC's acknowledgment and efforts to accommodate potential conflicts of laws in this area through the use of consents. However, reliance on consent ultimately is not a viable path forward due to the rules and guidance established under EU General Data Protection Regulation ("GDPR") and similar Member State rules governing the ability of an SBSD to obtain legally valid consents, and, because those consents may be legally withdrawn at any time.

Among other things, according to Article 4(11) of GDPR, any consent should be freely given. The European Data Protection Board has clarified[1] that this implies that consent "should be a reversible decision" and that "GDPR prescribes that if the data subject has no real choice, feels compelled to consent or will endure negative consequences if they do not consent, then consent will not be valid (…) Accordingly, consent will not be considered to be free if the data subject is unable to refuse or withdraw his or her consent without detriment."

These conditions make the use of consent an unreliable and inappropriate mechanism for the basis of a long-term, stable compliance program that addresses EU data privacy and protection standards. Accordingly, addressing these conflicts will, we believe, require an alternative method of obtaining access, such as through a memorandum of understanding ("MOU") that allows for prompt access to books and records indirectly via EU Member State regulators. This should be recognized by waiving, for those data elements, the requirement that the certification and opinion speak to direct access.

ii. The SEC should clarify that if an SBSD maintains copies of "U.S. business" books and records and/or relevant financial records in multiple jurisdictions (e.g. because records may also be stored in transit), then the SBSD should be permitted to support the opinion and certification based on the analysis of a single jurisdiction where access to a particular record can be supported.

iii. In addition, if an SBSD's U.S. broker-dealer affiliate maintains copies of some or all of an SBSD's covered books and records, the opinion and certification should be permitted to exclude those books and records for the same reason that U.S. SBSDs are not subject to the opinion or certification requirement.

iv. There should be no requirement for a negative non-interference opinion on the place of incorporation, much less for the places where the SBSD conducts

[1] Article 29 Working Party, Guidelines on consent under Regulation 2016/679, As last Revised and Adopted on 10 April 2018, available at https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=623051.

business. The latter is wholly unworkable, and the cost well out of proportion to any benefits the SEC might yield.

v. The current requirement in the final registration rule that the certification and legal opinion be kept evergreen within 90 days of a change in law or regulation should be adjusted to allow for a more flexible approach, embedded in the annual SBSD certification cycle, and allowing for time to resolve potential new conflicts of law, or develop a strategy to adjust the business in a manner consistent with the new legal landscape and the SEC's record access expectations.

2. **Consents to Provide Direct Access under Proposed Exchange Act Rule 18a-6(g)**:

The Proposal describes the records access requirement under proposed Exchange Act Rule 18a-6(g) as independent of, and in addition to, the certification and opinion of counsel requirement for *non-resident SBSDs*. If a non-resident SBSD seeks to rely on consent as a means to provide the SEC will full and direct access, the Proposal's Preamble suggests that such SBSD should obtain such consents prior to registering.

In the Proposal, the SEC further notes that if a *non-resident* SBS Entity is unable to obtain consent from a customer or counterparty whose information will be documented in books or records subject to these obligations or if a customer or counterparty provides a consent then later withdraws that consent, *the firm may need to cease conducting a security-based swap business with that person* in order to comply with the Exchange Act and the SEC's rules thereunder or to seek an alternative basis exists under the foreign laws that allows the non-resident SBS Entity to satisfy its obligations under the federal securities laws.

While we appreciate that the records access requirement exists independently of the certification and opinion of counsel requirement (indeed we believe it is sufficient and recommend above that the certification and opinion of counsel requirement be removed), we are troubled by certain aspects of the guidance contained in the Proposal. The SEC should clarify its expectations related to consents as follows:

i. It is unclear why the SEC speaks solely of non-resident SBS Entities in this context, given that U.S. SBSD typically conduct global dealing businesses, face many of the same issues to the extent they operate in non-U.S. jurisdictions, and are equally subject to proposed Exchange Act Rule 18a-6(g) (a separate rule applies for broker-dealer SBSDs).

ii. The SEC should *not* require gathering consents as a registration condition. Additional time will be required to do so. In addition, we respectfully submit that gathering consents should not be required for the non-U.S. business of non-U.S. SBSDs, as doing so would be wholly out of proportion to the SEC's regulatory and supervisory interest concerning non-U.S. SBSD registrants. The core regulatory interest regarding non-U.S. SBSDs, which warrants the greatest

burden on applicants, is well defined by the Proposal as connected to the U.S. business, i.e. those transactions that, per the SEC, would appear particularly likely to affect the integrity of the SBS market in the United States or raise concerns about the protection of participants in those markets. If the SEC requires other books and records, as part of a specific investigation or otherwise, any consents required to provide access to the relevant books and records could be obtained at such time.

iii. The SEC should similarly clarify that it does not expect that non-resident SBSDs, among the appropriate steps to ensure the SEC will have books and records access, would cease conducting SBS business with any person solely because such person withdraws consent. If this guidance were retained, it should be limited, for non-U.S. SBSDs, to instances where U.S. business is concerned. For non-U.S. SBS business, given the much lower regulatory interest, it would be incumbent on the SEC to identify instances, e.g. during an examination or enforcement matter, where its regulatory interest warrants such disruption. The SEC similarly should clarify what its expectation is in this regard for U.S. SBSDs.

iv. Consents should not be required where such consents cannot be obtained (for example, as the SEC itself points out, under GDPR, i.e. for personal data protected by GDPR and Member State privacy laws). The access to those books and records located outside the United States that contain privacy-protected data should occur pursuant to relevant agreements between the SEC and third-country supervisors. While access to certain books and records can be direct (e.g. trading records that do not contain data protected by privacy laws) once an MOU is in place (e.g. to overcome French blocking laws), and after obtaining requisite counterparty consents, the same is not true for protected personal data. Instead, indirect access via EU Member State regulators would be the viable path to promptly obtain such access. As a result, the SEC should not require indiscriminate up-front consents to provide it with unfettered access to data, an impossibility under EU law.

v. No up-front consents should be required on legacy books and records, for the same reasons as the Preamble notes in its guidance on the certification and opinion of counsel.

3. **Certification and Opinion of Counsel/Adequate Assurances under Exchange Act Rule 3a71-6(c)(2)(ii):** We respectfully request that the SEC strikes the dual use of the certification and opinion of counsel, as well as the alternative of adequate assurances, as a pre-requisite for a non-U.S. SBSD's or foreign financial regulator's application for substituted compliance. These requirements had been added at a time when the SEC expected that its substituted compliance determinations should not proceed unless there were assurances on records access. This benefit to SEC staff resources is no longer a consideration, now that the substituted compliance determinations will proceed even absent such an up-front opinion and certification, or adequate assurance. Yet the increase in

burden and complexity is material. This requirement does not provide additional certainty on records storage jurisdictions beyond that which the registration-related certification and opinion would already provide, and adequate assurances of the scope required by the SEC, in our view, significantly increase the risk of delaying or derailing the issuance of substituted compliance determinations between the SEC and foreign financial authorities.

The following recommendations, while not derived from the competitive imbalance of the current regime, are nonetheless of great significance to member institutions:

1. **Substituted Compliance and SBSD Registration**: We respectfully request that the SEC allows registered SBSDs to operate under a provisional-substituted compliance regime should the SEC and its international counterparts not agree on substituted compliance findings well ahead of the registration date. Given the emphasis of the SEC and CFTC to more fully align their respective derivatives regimes, at the very least, a temporary presumption of substituted compliance should be available where the CFTC has granted such substituted compliance already. Provisional substituted compliance would allow firms to use the just-finalized 18-month conformance period to address those requirements they know will apply to them. Otherwise, non-resident SBSDs would be required to build and implement separate compliance frameworks to meet the full-scale of the SEC's Title VII rules on a temporary basis. This approach would be extremely inefficient, could incentivize non-U.S. firms to take measures to limit or cease SBS trading with U.S. persons, or force them to waste significant resources building towards redundant requirements for which substituted compliance should eventually become available, but for which the industry must rely on international regulatory dialogue.

2. **Statutory Disqualification Provision and Questionnaire Recordkeeping Requirement**: We strongly support the SEC's proposed exclusion from the statutory disqualification provision in SEC Rule of Practice 194 for non-U.S. associated persons ("AP") that interact only with non-U.S. persons and appreciate the SEC's efforts to align its rules with the CFTC's rules so as to reduce compliance burdens. We remain concerned, however, that despite the Proposal's modifications, the scope of non-U.S. APs subject to the SEC's statutory disqualification prohibition and questionnaire recordkeeping requirement in Exchange Act Rule 15fb2-1 is still over-inclusive. That scope should be limited to include only non-U.S. front office personnel that engage in transactions with U.S. persons, rather than sweeping in, via the definition of "involved in effecting", a number of back-office functions. This would better align the SEC's and CFTC's AP scope. Moreover, when it comes to middle- and back-office functions, a great number of additional persons would need to be covered, because financial institutions tend not to organize those functions to be focused on a single jurisdiction such as the United States (e.g. when negotiating global master agreements), but rather serve the entire swap business holistically, and which tend to be harder to canvas under home country laws, given that they have no trading authority. The same reasons, we believe, make the SEC's sweeping AP coverage unbalanced.

   We also strongly support the SEC's proposed amendments that would allow SBSDs to exclude from the questionnaire requirements certain APs, as well as any

information that would violate applicable laws in the jurisdiction where the AP is located or employed. However, we seek flexibility regarding the due diligence inquiries the SBSD may subsequently perform. Certain jurisdictions' laws or regulations may prevent a non-resident SBSD from taking additional due diligence steps to verify the information contained in the questionnaire. For example, under India's privacy laws, a questionnaire soliciting background information may ask an employee whether they have committed a crime or felony, but the administrator of the questionnaire is prohibited from taking any steps to confirm the employee's answer. Thus, we ask the SEC to clarify that, in performing due diligence, it does not expect the SBSD to take any actions that would violate applicable privacy laws in the jurisdiction where the AP is located or employed.

3. **Review of Employment Applications**: An SBSD's chief compliance officer or their delegate should not be required to review and sign each employment application. This requirement is out of proportion to the regulatory objectives the SEC seeks to achieve. Regular course review by institutions following their established practices suffices and places such review with the correct personnel in charge of such reviews.

4. **Treatment of ANE Transactions**: ANE should not be a trigger for SBSD registration, SBS reporting, dissemination or external business conduct standards. Applying these requirements to SBS transactions between two non-U.S. persons without a further U.S. nexus would provide no or minimal risk-reducing benefits. Moreover, in particular as regards reporting, they will result in significant costs to the non-U.S. counterparties specifically and to the markets generally. Dissemination under SBS rules is likely to give a distorted view of prevailing market prices and ultimately be confusing to the markets.

Conclusion

We respectfully request that the SEC address our concerns as articulated above by adopting our related proposed modifications to the proposed SBSD framework to ensure that the SBSD registration requirements are workable for non-U.S. registrants, particularly with respect to those requirements that conflict with non-U.S. laws. We believe that doing so would resolve the current barriers to the participation of foreign-based market participants headquartered or with material operations in the EU, thereby permitting them to continue to conduct their U.S. SBS activities and be consistent with principles of equality of competitive opportunity.

We appreciate your consideration and we would be grateful for the opportunity to meet with the SEC staff to discuss our comments in more details. Please feel free to reach out to Blazej Blasikiewicz, Senior Policy Adviser in charge of Legal and International Affairs, at [redacted] or [redacted], if you have questions.

Yours sincerely,

Wim Mijs
Chief Executive Officer
European Banking Federation