

Congress of the United States
House of Representatives

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November 13, 2015

The Honorable Mary Jo White
Chair, Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Dear Chair White:

I am writing to comment on the Commission's proposed rule entitled *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*.¹ My primary concern is that the proposed rule would allow entities other than the Commission—including private entities—to grant waiver requests. If adopted, the rule would constitute the first time the Commission has granted executive authority to another entity without being required to do so by Congress.

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) implemented a regulatory regime for security-based swaps (SBS) governed by the Commission. Section 764(a) inserted Section 15F into the Securities Exchange Act of 1934 to impose registration and regulation requirements on SBS dealers and major SBS participants.²

Under Section 764(a), registered entities must prevent any of their associated entities that have been subject to a statutory disqualification from effecting or being involved in effecting SBS.³ This enables the Commission to ensure that entities disqualified from participating in the SBS market cannot continue to act on behalf of another SBS dealer or major SBS participant. Disqualifications include having a registration revoked by the Commission or other swaps regulatory authority, having been convicted of any felony within the preceding ten years, and having intentionally violated the securities and commodities laws.⁴

¹ 80 Fed. Reg. 51684 (Aug. 25, 2015).

² 15 U.S.C. § 78o-10.

³ 15 U.S.C. § 78o-10(b)(6). The limitation is subject to the SBS entity knowing or should have known that the associated entity was subject to disqualification.

⁴ 15 U.S.C. § 78c(a)(39).

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The proposed rule would create a process by which waivers could be granted to entities disqualified from effecting or being involved in effecting SBS on behalf of other SBS entities. These waivers would permit associated persons to identify purchasers, settle transactions, confirm transactions, draft and negotiate master agreements and confirmations, recommend security-based swap transactions, execute transactions, and price SBS positions.

Subsection (j)(2) would allow disqualified persons to associate with an SBS entity “without making an application, where the Commission, Commodity Future Trading Commission (CFTC), an SRO or a registered futures association has granted a prior application or otherwise granted relief from a statutory disqualification with respect to the associated person.”⁵

The proposed rule would give the CFTC and self-regulatory organizations the authority to interpret the Exchange Act by allowing them to grant waivers after having “specifically reviewed the underlying basis for each and every statutory disqualification under Exchange Act Section 3(a)(39)(A) through (F), and made an affirmative finding.”⁶

The Commission should not delegate its authority to interpret the Exchange Act to these entities. Through the Exchange Act, Congress granted to the Commission regulatory, executive, and adjudicatory authority over the whole of the nation’s securities laws. None of the entities to which the proposed rule would grant the authority to issue a waiver has been granted that responsibility by statute. Congress granted the CFTC authority over the non-security-based derivatives market, including responsibility for interpreting the Commodity Exchange Act, but Congress has not granted the CFTC the authority to regulate the SBS market.

Congress gave self-regulatory organizations the responsibility of policing and promoting their membership, subject to their bylaws, which must conform to the Securities and Commodity Exchange Acts.⁷ They are authorized to adjudicate their own bylaws, subject to approval by the Commission and CFTC, but they do not have the impartiality necessary to make decisions regarding the best interests of the public. Any amendments to their rules must be approved by the Commission or CFTC to ensure compliance with the law.⁸ Any adjudicative decision made by a self-regulatory organization is appealable to the Commission or CFTC.⁹ Congress made determinations to provide the CFTC and self-regulatory organizations with limited jurisdictions for specific purposes. However, the Commission retains sole authority and responsibility to interpret and adjudicate the entire body of securities law in the public interest.

The Commission can and should take into account the views of other bodies that may have adjudicated similar issues based on the same facts, but it should not grant to those entities

⁵ 80 Fed. Reg. at 51685.

⁶ 80 Fed. Reg. at 51699.

⁷ Exchange Act Section 15A(a); Commodity Exchange Act Section 17(a).

⁸ Exchange Act Section 19A(a)(1); Commodity Exchange Act Section 17(f).

⁹ Exchange Act Section 15A(h)(3); Commodity Exchange Act Section 17(h)(2).

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the authority to interpret and govern the law. **Any waiver decision should be reviewed by the Commission and voted on by the Commissioners.**

Additionally, the Federal Register release explains that, while orders “issued in accordance with Rule of Practice 194 would be made publicly available,” all applications “would be kept confidential subject to applicable law.”¹⁰ As with all statutory and regulatory disqualifications, the Commission should make public the waiver applications it receives absent a good cause determination that they should remain under seal.

The release also explains that under the proposed rule, a temporary waiver would be withdrawn if the Commission does not act within 180 days. However, it also states that the Commission is considering whether a waiver instead should be made permanent if the Commission does not act within that 180-day period.¹¹ I believe no waiver should be granted simply because the Commission is constrained in its resources and cannot make a decision within a limited amount of time.

If you have any questions about this letter, please contact Todd Phillips at (202) 225-4741. Thank you for your cooperation with this matter.

Sincerely,



Elijah E. Cummings
Ranking Member

cc: The Honorable Jason Chaffetz, Chairman

¹⁰ 80 Fed. Reg. at 51694.

¹¹ 80 Fed. Reg. at 51697.