



EUROPEAN COMMISSION  
Directorate General Internal Market and Services

FINANCIAL MARKETS  
Financial markets infrastructure

Brussels, 21 August 2013  
MARKT.G.2/HR/kc (2013) 3111462

Sent via email: [rule-comments@sec.gov](mailto:rule-comments@sec.gov)

**Subject: Comments of the European Commission in respect of the SEC's Cross-Border Proposal: File Number S7-02-13, and File Numbers S7-34-10 (Regulation SBSR) and S7-40-11**

The European Commission welcomes the opportunity to provide comment on the SEC's proposed rules and interpretation with regard to Cross-Border Security-Based Swap Activities.

The need for legal certainty around the requirements that will apply to cross-border derivative transactions is essential in a market where the majority of transactions take place between counterparties incorporated in different jurisdictions. The European Commission is therefore fully supportive of the SEC's endeavour to provide comprehensive and detailed rules and interpretive guidance in this area.

In order to ensure that the cross-border activity of firms and market infrastructures is not inhibited by the application of multiple inconsistent, conflicting or duplicative rules, regulators must work together to create mechanisms that provide for the application of only one set of comparable rules, where those rules achieve the same outcomes. We are encouraged that the SEC has sought to introduce such mechanisms via its cross-border proposal, through the use of substituted compliance (in respect of firms) and exemptive relief (in respect of market infrastructure).

In the annex to this letter we list the aspects of the cross-border proposal that we view as critical to achieving the smooth implementation of SEC rules on a cross-border basis, highlighting any areas where we see a need for enhancement.

European Commission staff is at your disposal to discuss this comment submission further with SEC staff.

The matter is being handled by Ms Hannah Rayner, Tel. +32 2 292-1009, e mail address [hannah.rayner@ec.europa.eu](mailto:hannah.rayner@ec.europa.eu).

Patrick Pearson

## ANNEX

### I. The definition of a US Person

The European Commission is supportive of a definition of a US person that is territorial in scope; i.e. one that does not capture entities incorporated in foreign jurisdictions. Within this meaning, we understand that the SEC's proposed definition of a US person<sup>i</sup> is primarily territorial in nature. This is with one notable exception, in the form of the inclusion of "any partnership, corporation, trust, or other legal person ...having its *principal place of business* in the United States."

We understand that the purported capture of entities incorporated outside of the US but operating principally within the US is designed to ensure the non-evasion of obligations by entities that essentially conduct their core business within the US but that are notionally incorporated in non-regulated jurisdictions. The European Commission respectfully submits that the SEC should further clarify the type of businesses that it intends to capture through this notion, either within the operative text of its rules or through detailed accompanying guidance. The SEC may wish to consider adding criteria to establish whether a non-US entity meets the definition of US person in this respect, such as quantitative thresholds (i.e. by reference to a percentage of business conducted in the US) and whether the seat of incorporation of the entity is a non-regulated jurisdiction. It is essential that further clarity is provided on this aspect of the definition, in order to enable firms to establish whether they or their counterparties would be classified as US persons by the SEC.

### II. "Transactions conducted within the US"

The notion of transactions conducted within the US runs throughout the proposal and is a trigger point for the application of US rules transacted with or between non-US firms. The result is that transactions involving non-US firms may be caught by SEC rules by virtue of being deemed to be concluded on US territory, although either one or both of the legal counterparties to the transaction may be non-US persons. In the case of SEC rules on regulatory reporting, public reporting and trade execution, substituted compliance may not be available as a result; a non-US counterparty involved in the transaction would have to comply directly with the SEC's rules.

The understanding of the European Commission is that non-US dealers or other firms would be required to comply with US rules on regulatory reporting, public reporting and trade execution in the following cases:

- A transaction executed by a non-US firm with a US firm where the non-US firm transacts via a US branch, agent or intermediary but where the non- US firm is the legal counterparty to the transaction.
- A transaction executed between two non-US firms, in each case via US branches, agents or intermediaries, but where the non- US firms are the legal counterparties to the transaction.

Further, substituted compliance would generally not be available for the non-US entities in these cases, the counterparties would potentially be subject to the application of multiple rules where those entities are incorporated in regulated jurisdictions. Specifically, in the case of EU firms deemed to have conducted their transactions in the US, they will become subject to trade execution and reporting rules in both the EU and US, which may give rise to inconsistencies, overlaps and duplication.<sup>ii</sup>

The European Commission would therefore respectfully submit that the SEC should not seek to apply its rules in the case where the legal counterparty to a transaction deemed to be conducted in the US is a non-US firm on the basis that no US firms are exposed to counterparty credit risk under such transactions and in particular where those non-US firms are subject to comparable rules in its domestic jurisdiction.

### III. Security-Based Swap Execution Facilities (SBSEFs)

The European Commission welcomes the introduction of a regime that would exempt from the registration requirements a foreign security-based swap market that is subject to comparable, comprehensive supervision and regulation under appropriate governmental authorities in its home country.

However, we understand that the SEC would like to maintain direct access to the books and records of the foreign SBSEF, even in the case where an exemption has been awarded. We would respectfully submit that, where necessary, access to information on a foreign SBSEF should be obtained via the SBSEF's home regulator. The SEC's proposed prerequisite to have a MOU in place could cover exchange of information.

### IV. Foreign Clearing Agencies (FCAs)

The European Commission supports the introduction of a range of options for FCAs to provide services to US firms. The European Commission respectfully suggests that the SEC include further clarity in its final rules and guidance as to the circumstances under which FCAs would be required to comply with special foreign rules and what those rules might entail. Further detail should also be provided on the type of assessment that would be undertaken in respect of domestic comparability in order to provide an exemption.

### V. Substituted Compliance

The European Commission is encouraged by the holistic approach that the SEC proposes to take when assessing a foreign regime with a view to awarding substituted compliance. We support the consideration of regulatory outcomes as the standard for permitting substituted compliance, as well as the consideration of particular market practices and characteristics in individual jurisdictions. This flexible approach recognises the differing approaches that regulators and legislators may take to achieving the same regulatory objectives in the derivatives markets.

The European Commission would, however, respectfully suggest that the review of a foreign regime should be conducted in cooperation solely with the relevant foreign regulators or legislators, as opposed to firms. In particular, we would suggest that the initiation of the review should be left to the relevant foreign regulator or legislator in order to avoid duplication or confusion.

### VI. Direct access to Firm Records

The European Commission notes that the SEC will require non-US persons to register with it as security based swap dealers (SBSDs) on the basis that those firms conduct business with US persons, even though those persons may be subject to comparable oversight and regulation in their domestic jurisdictions. In order to register with the SEC and, further, in order to rely on substituted compliance, a non-US person must provide the SEC with a legal opinion confirming that it is able to provide the SEC with prompt access to its books and records and submit to onsite inspection and examination by the SEC.

The European Commission is of the opinion that any need to access the books or records of an EU firm or to carry-out onsite inspections of EU firms, should be addressed through cooperation with the relevant national regulator, via supervisory cooperation and information sharing which are well established channels for cooperative oversight of firms that are internationally active.

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<sup>i</sup> § 240.3a71-3(a)(7)

<sup>ii</sup> The European Commission understands that trade execution requirements would not apply in the case that either counterparty is an unregistered entity not guaranteed by a US entity.