



Security-Based Swap Dealer Certification and Opinion Requirements

This outline describes proposals for the clarification of certain Securities and Exchange Commission (“SEC” or “Commission”) rules relating to the registration of security-based swap (“SBS”) dealers (“SBSDs”). These proposals are intended to promote competitive parity between U.S. and non-U.S. SBSDs and avoid undue costs, burdens and disruption to the SBS market.

I. Certification and Opinion Requirements for Non-Resident SBSDs

- The Commission has adopted the below certification and legal opinion requirements applicable to an SBSD that is incorporated or has its principal place of business outside the U.S. (a “non-resident SBSD”):
 - SEC Rule 15Fb2-4(c)(1)(i) provides that a non-resident SBSD shall, when applying for registration with the Commission, certify that it can, as a matter of law, and will (i) provide the Commission with prompt access to its books and records and (ii) submit to onsite inspection and examination by the Commission.
 - SEC Rule 15Fb2-4(c)(1)(ii) provides that a non-resident SBSD applicant must also provide the SEC with an opinion of counsel regarding these matters.
 - SEC Rule 3a71-6(c)(2)(ii) requires that an applicant for substituted compliance provide this certification and opinion of counsel.
 - No equivalent requirements apply to U.S.-resident SBSDs (or broker-dealers).
- In order to satisfy these requirements, a non-resident SBSD must ascertain which books, records, locations and laws must be covered by the requisite certification and opinion.
- In addressing this question, we believe it would be appropriate to construe the certification and opinion requirements in a manner that would:
 - ensure Commission access to the types of records most relevant to the Commission’s oversight responsibilities;
 - mitigate the potential for practical hurdles to SBSD registration that would outstrip the assumptions underlying the Commission’s cost-benefit analysis; and
 - be consistent with the Commission’s objective of fostering a level competitive playing field among SBSDs, as well as the national treatment principle that has

generally animated the Commission's approach to non-U.S. registrants and which is codified in a number of U.S. free trade agreements.

- Based on these considerations, we respectfully request that the Commission staff clarify that the certification and opinion are solely meant to cover:
 - Prompt access to the non-resident SBSB's U.S.-Related Records¹ and, for a non-resident SBSB subject to Commission capital and margin regulation,² Financial Records;³
 - Submission to onsite Commission inspection and examination of (i) any books and records located at a U.S. branch or office of the non-resident SBSB and (ii) U.S.-Related Records located at the non-resident SBSB's U.S.-Related Foreign Locations;⁴ and
 - Those foreign laws applicable to the foregoing,⁵ excluding any foreign laws requiring the redaction of identifying information regarding a non-resident SBSB's non-U.S. personnel or non-U.S. person counterparties, if such laws would likewise apply to a U.S.-resident SBSB having personnel, storing books and records, or engaging in the execution of SBS transactions with non-U.S. person counterparties domiciled, in the same jurisdiction(s) as the non-resident SBSB.

¹ "U.S.-Related Records" would be defined to mean books and records relating to SBS transactions entered into by the non-resident SBSB after the effective date of its registration (i) with U.S. persons, (ii) for which the non-resident SBSB's obligations are guaranteed by a U.S. person or (iii) arranged, negotiated or executed on behalf of the non-resident SBSB by personnel located in a U.S. branch or office of the non-resident SBSB or its agent. Where an SBSB maintains such books and records in multiple locations, the SBSB would designate the location that is relevant for purposes of the certification and opinion.

² A non-resident SBSB would be considered to be subject to the Commission's capital and margin regulation if such SBSB does not have a Prudential Regulator (as defined in Title VII of the Dodd-Frank Act) and is not eligible or applying for substituted compliance with Commission capital and margin requirements. As part of the substituted compliance application, a non-resident SBSB would describe any potential impediments to Commission access to Financial Records, so that any resulting Commission comparability determination could include conditions, if any, necessary to ensure effective access to such records.

³ "Financial Records" would be defined to mean books and records necessary for the Commission to assess the non-resident SBSB's compliance with Commission capital and margin requirements.

⁴ "U.S.-Related Foreign Locations" would be defined to mean non-U.S. branches and offices of the non-resident SBSB from which personnel arrange, negotiate or execute SBS transactions on behalf of the non-resident SBSB (i) with a counterparty that is a U.S. person or (ii) for which the non-resident SBSB's obligations are guaranteed by a U.S. person.

⁵ Whether a non-resident SBSB's home country laws (i.e., the laws of the jurisdiction where a non-resident SBSB is incorporated or has its principal place of business) would be covered would depend on the extent to which those home country laws apply to the non-resident SBSB's U.S.-Related Records, Financial Records, if relevant, or U.S.-Related Locations, based on the manner in which the non-resident SBSB has structured its SBS business.

- In addition, we respectfully request that the Commission staff clarify that, under the following limited circumstances, a non-resident SBSB's certification and opinion may be based on the assumption that the non-resident SBSB would provide Commission access to books and records through, and submit to onsite Commission inspection and examination with the approval of, the relevant non-U.S. governmental body(ies):
 - the relevant foreign laws would require a U.S.-resident SBSB having personnel or storing books and records at the same location(s) as the non-resident SBSB to do the same; and
 - the Commission and relevant non-U.S. governmental body(ies) have entered into an information-sharing agreement and memorandum of understanding containing such terms relating to prompt and complete access by the Commission as the Commission determines to be necessary and appropriate for this specific purpose.⁶
- For books, records, locations or information not covered by the certification and opinion, a non-resident SBSB would, like a U.S.-resident SBSB, remain obligated to satisfy all applicable Commission recordkeeping requirements.⁷ Thus, a non-resident SBSB would remain obligated, upon Commission request, promptly to make those books and records available or submit to onsite inspection and examination of those locations, including (where relevant/necessary) seeking the consent of non-U.S. governmental bodies, counterparties and/or personnel.
- Attached is an Appendix summarizing how, with these clarifications, the certification and opinion requirements would apply in certain hypothetical scenarios.

II. Associated Person Certification and Background Checks

- SEC Rule 15Fb6-2(a) provides that a registered SBSB must certify that it neither knows, nor in the exercise of reasonable care should have known, that any person associated with such SBSB who effects or is involved in effecting SBS on its behalf is subject to a statutory disqualification, unless otherwise specifically provided by rule, regulation or order of the Commission.
- SEC Rule 15Fb6-2(b) provides that, to support the above certification, the SBSB's Chief Compliance Officer, or his or her designee, must review and sign the questionnaire or application for employment, which the SBSB is required to obtain pursuant to the relevant recordkeeping rule applicable to such SBSB, executed by each associated person who is a natural person and who effects or is involved in effecting SBS on behalf of the

⁶ This second condition is intended to address the Commission's concerns associated with existing information-sharing agreements and memoranda of understanding, as noted in the adopting release for the SBSB registration rules.

⁷ We would, however, request that the Commission's proposed recordkeeping requirements be modified to limit the scope of required employee background questionnaires, as described below.

SBSD. The questionnaire or application must serve as a basis for a background check of the associated person to verify that the person is not subject to statutory disqualification.

- Although employee background checks are customary in the U.S., local laws in some non-U.S. jurisdictions affirmatively prohibit employee background checks.
- Given the breadth of the associated person definition and related requirements, and the extent to which the SBS business is global in nature, the costs and market disruptions that would result from relocating businesses and employees to satisfy those requirements would be significant.
- In addition, statutory disqualification triggers overlap to a significant extent with events or conditions that raise sales practice concerns, and the Commission has decided to apply Title VII sales practice requirements only to an SBSB's transactions with U.S. counterparties and transactions arranged, negotiated or executed by personnel located in a U.S. branch or office of the SBSB or its agent.
- It would be consistent with international comity for the Commission to defer to home country registration and licensing requirements for associated persons located abroad.
- In light of these considerations, we respectfully request that:
 - For purposes of SEC Rule 15Fb6-2(a), the Commission staff clarify that the phrase "exercise of reasonable care" takes into account (i) whether the Commission's recordkeeping rules (as modified per the below) require the associated person to execute a prescribed questionnaire or application for employment and (ii) the level of diligence regarding associated person qualifications that is permitted and customary under applicable law in the jurisdiction where the associated person is employed or located; and
 - The Commission's pending SBSB recordkeeping proposal (proposed SEC Rules 18a-5(a)(10) and (b)(8)) exclude an associated person employed or located in a non-U.S. branch or office of the SBSB or an affiliate from the requirement for the SBSB to make and keep a questionnaire or application for employment executed by such associated person in circumstances where:⁸
 - Applicable non-U.S. law prohibits an SBSB from conducting background checks on the associated person and consent does not cure the prohibition or may not be a condition of employment;
 - The associated person is not subject to a statutory disqualification that the SBSB actually knows;

⁸ As an alternative to modifying its recordkeeping proposal, the Commission could instead either (a) grant an exemption from Rule 15Fb6-2 for associated persons who satisfy these conditions or (b) provide this relief relating to employment questionnaires as part of the implementation of its substituted compliance framework for recordkeeping requirements.

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- The associated person does not effect and is not involved in effecting SBS with U.S. counterparties on behalf of the SBSB; and
- The associated person complies with applicable registration or licensing requirements in the jurisdiction(s) where he or she effects or is involved in effecting SBS on behalf of the SBSB.

Appendix: Application of Proposed Clarifications Regarding SBSB Certification and Opinion Requirements

	UK SBSB, Trading With U.S. Persons Through and Booking in its UK Head Office	Swiss SBSB, Trading With U.S. Persons Through and Booking in its UK Branch	U.S. SBSB, Trading With U.S. Persons Through and Booking in its UK Branch
Facts	<p>SBSB incorporated and having its principal place of business in the UK trades SBS with U.S. persons.</p> <p>These SBS are booked in the SBSB's head office in the UK.</p> <p>Personnel located in the SBSB's UK head office arrange, negotiate and execute these SBS.</p> <p>The SBSB maintains its records for these SBS in its UK head office.</p> <p>SBSB is a bank or eligible for substituted compliance with capital and margin requirements</p>	<p>SBSB incorporated and having its principal place of business in Switzerland trades SBS with U.S. persons.</p> <p>These SBS are booked in the SBSB's London branch.</p> <p>Personnel located in the SBSB's UK branch arrange, negotiate and execute these SBS.</p> <p>The SBSB maintains its records for these SBS in its UK branch.</p> <p>SBSB is a bank or eligible for substituted compliance with capital and margin requirements</p>	<p>SBSB incorporated and having its principal place of business in the U.S. trades SBS with U.S. persons.</p> <p>These SBS are booked in the SBSB's London branch.</p> <p>Personnel located in the SBSB's UK branch arrange, negotiate and execute these SBS.</p> <p>The SBSB maintains its records for these SBS in its UK branch.</p>

	UK SBSB, Trading With U.S. Persons Through and Booking in its UK Head Office	Swiss SBSB, Trading With U.S. Persons Through and Booking in its UK Branch	U.S. SBSB, Trading With U.S. Persons Through and Booking in its UK Branch
Relevant Non-U.S. Laws	UK duty of client confidentiality ⁹ UK personal data protection law ¹⁰	UK duty of client confidentiality UK personal data protection law	UK duty of client confidentiality UK personal data protection law
Proposed Application of Certification and Opinion Requirements	The certification and opinion would cover the UK duty of client confidentiality as applicable to the SBSB’s U.S. counterparties, which would necessitate that the SBSB obtain such counterparties’ consents to providing their information to the Commission.	The certification and opinion would cover the UK duty of client confidentiality as applicable to the SBSB's U.S. counterparties, which would necessitate that the SBSB obtain such counterparties’ consents to providing their information to the Commission.	Because the SBSB is incorporated and has its principal place of business in the U.S., it would not be subject to the Commission’s non-resident SBSB certification and opinion requirements.

⁹ In the UK, banks are subject to an implied duty of confidence in accordance with common law and equitable principles. See Tournier v National Provincial and Union Bank of England [1924] 1 KB 461. In the absence of consent, disclosure pursuant to foreign law may be seen as a breach of regulatory principles of “treating customers fairly.” See Principle 6 of the Financial Conduct Authority Principles for Business.

¹⁰ The UK currently has a national personal data protection law implementing EU Data Protection Directive 95/46/EC (the “Data Protection Directive”). Subject to the terms of any exit by the UK from the European Union (“EU”), the Data Protection Directive and the current national laws implementing it will be replaced by the General Data Protection Regulation (“GDPR”) on May 25, 2018, after which the GDPR will directly apply in all member States of the EU. Given the uncertain terms and timing of the UK’s exit from the EU, this matrix solely addresses the UK laws that apply or would apply to the UK as an EU member.

	UK SBSB, Trading With U.S. Persons Through and Booking in its UK Head Office	Swiss SBSB, Trading With U.S. Persons Through and Booking in its UK Branch	U.S. SBSB, Trading With U.S. Persons Through and Booking in its UK Branch
	The certification and opinion would not cover UK personal data protection law because such law would likewise apply to personnel located in a UK branch or office of a U.S. SBSB.	The certification and opinion would not cover UK personal data protection law because such law would likewise apply to personnel located in a UK branch or office of a U.S. SBSB.	The SBSB’s UK branch would, however, be subject to the UK duty of client confidentiality and UK personal data protection law.