

SBSD FINANCIAL RECORDKEEPING AND REPORTING RELEASE

The Institute of International Bankers (“IIB”) appreciates the opportunity to provide the following comments to the Securities and Exchange Commission (the “Commission”) in response to its May 2, 2014 notice of proposed rulemaking¹ (the “Release”) concerning, among other topics, financial recordkeeping and reporting requirements for security-based swap (“SBS”) dealers (“SBSDs”).²

1. Substituted Compliance

- a. We support the Commission’s 2013 proposal to permit non-U.S. SBSDs to satisfy the Commission’s financial recordkeeping and reporting requirements through substituted compliance³
- b. *Automatic Substituted Compliance for Non-U.S. Bank SBSDs*
 - i. A substituted compliance determination should not be a prerequisite for non-U.S. bank SBSDs⁴ to comply with home-country financial recordkeeping and reporting requirements in lieu of the Commission’s requirements
 1. Non-U.S. bank SBSDs are not subject to the Commission’s capital and margin rules, but instead those issued by the Federal Reserve
 2. The Federal Reserve permits non-U.S. banks to satisfy capital requirements using Basel-compliant home-country standards without requiring an independent comparability determination⁵
 3. Requiring non-U.S. bank SBSDs to re-create U.S. domestic banks’ call reports⁶ and conform to the Commission’s recordkeeping rules would require burdensome system builds without a material benefit
 - a. Home-country reports may not have the same format as call reports, but contain very similar data
 - b. Home-country recordkeeping requirements similarly may not require the same itemization prescribed by the Commission, but require maintenance of similar information

¹ 79 Fed. Reg. 25,194.

² Our comments herein are limited to the Release’s proposed financial recordkeeping and reporting requirements for SBSDs and do not address other topics discussed in the Release, including requirements applicable to major security-based swap participants, securities count requirements and recordkeeping requirements related to transaction documentation, communications, associated persons or business conduct standards. In particular, our comments are limited to Proposed Rules 18a-5(a)(1)-(4), (8), (9), (11)-(14), (b)(1)-(3), (9), (10); 18a-6(a), (b)(1)(i), (ii), (iii), (v), (viii), (2)(i), (v); 18a-7; and 18a-8.

³ 78 Fed. Reg. 31,085-91.

⁴ By “bank SBSDs,” we refer to SBSDs for which there is a prudential regulator.

⁵ 12 CFR § 225.2(r)(3).

⁶ Only those non-U.S. bank SBSDs that have U.S. branches are required to prepare call reports at all, and in such cases the reports only cover the U.S. branch, not the bank as a whole, but the bank as a whole will be registered as an SBSD. We note in this regard that many non-U.S. bank SBSDs do not have U.S. branches.

c. One-Step Substituted Compliance for Non-U.S. Standalone SBSDs

- i. The Commission should allow non-U.S. standalone SBSDs⁷ to satisfy financial recordkeeping and reporting requirements through substituted compliance if the SBSD qualifies for substituted compliance for capital and margin requirements
 1. Financial recordkeeping and reporting are so deeply interconnected with capital and margin that a single substituted compliance determination is appropriate
 2. The Commission recognized this in its proposed cross-border rules, as it viewed financial recordkeeping and reporting, capital and margin as part of the same “category”⁸
 3. The Commodity Futures Trading Commission (the “CFTC”) has proposed to allow swap dealers to satisfy financial reporting requirements through substituted compliance if the CFTC has made a substituted compliance determination in respect of capital⁹

2. Position Reports

- a. As a general matter it is unclear why it should be necessary to impose position reporting requirements in addition to the transaction reporting requirements that will already apply under Regulation SBSR¹⁰
 - i. The CFTC and the National Futures Association have not seen it necessary to adopt position reporting requirements for purposes of market surveillance, except in the context of physical commodity swaps, which relate to the CFTC’s position limits¹¹
 - ii. The CFTC has instead used data reported pursuant to its Part 45 rules for market surveillance purposes and has implemented approaches (such as “entity-netted notionals”) designed to measure net positions in swaps through use of data reported pursuant to those rules

⁷ By “standalone SBSDs,” we refer to SBSDs for which there is no prudential regulator and which are not U.S. broker-dealers.

⁸ 78 Fed. Reg. 31,088-89

⁹ 81 Fed. Reg. 91,332-33. In the event the implementation of Regulation SBSR is materially delayed, the Commission should not impose the position reporting requirements as a temporary substitute for Regulation SBSR’s transaction reporting requirements. Developing systems to provide the position reports would be time-consuming and burdensome, including because it would require extensive engagement with Commission staff to identify the appropriate format, content, and organization of reports. As a point of reference, the CFTC’s Division of Market Oversight has developed a guidebook of nearly 100 pages to facilitate compliance with the CFTC’s Part 20 physical commodity swap reporting requirements. See Large Trader Reporting for Physical Commodity Swaps: Division of Market Oversight Guidebook for Part 20 Reports, <https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/ltrguidebook062215.pdf>. It is therefore very unlikely that SBSDs could implement position reporting requirements materially more quickly than Regulation SBSR.

¹⁰ 17 CFR §§ 242.900-909

¹¹ See 17 CFR Pt. 20.

- iii. Given the relatively straightforward nature of most types of SBS, we would expect the data reported pursuant to Regulation SBSR to be at least as useful as the Part 45 data
- b. If the Commission nonetheless adopts position reporting requirements and these requirements are not covered by substituted compliance determinations covering financial reporting more generally, then the Commission should limit the scope of position reporting requirements for non-U.S. SBSDs to transactions that are either (i) cleared on a U.S.-registered clearing agency or derivatives clearing organization or (ii) opposite a U.S. person counterparty
 - i. Reporting non-U.S.-facing positions would create potential conflicts with non-U.S. data protection, blocking, secrecy, and privacy requirements and impose significant costs, with limited regulatory benefits

3. Public Disclosure Only Where No Public Disclosure Regime Already Applies

- a. The Commission should allow non-U.S. SBSDs to satisfy any public disclosure requirements through substituted compliance
- b. If substituted compliance is not available for requirements for non-U.S. SBSDs to disclose financial reporting information to customers, the Commission should limit the application of such public disclosure requirements to SBSDs that are not otherwise subject to a public disclosure regime
- c. Many SBSDs are already required to make public financial disclosures under U.S. or local securities laws or by a prudential or local regulator
- d. Requiring such SBSDs to disclose financial information to U.S. customers could create difficult interpretive and cross-border issues
 - i. For instance, proposed Rule 18a-7(b)(2) could require a standalone SBSD that is a public reporting company to publish material, non-public information every six months, rather than on an annual basis on Form 20-F
- e. Relying on already applicable disclosure requirements would be consistent with Commission's approach to foreign private issuers

4. Segregation

- a. If the Commission adopts IIB's suggestion not to apply omnibus segregation requirements to non-U.S. standalone and bank SBSDs that do not clear SBS,¹² it should eliminate recordkeeping and reporting requirements in respect of omnibus segregation

¹² See IIB comment letter to the Commission, dated November 19, 2018, available at <https://www.sec.gov/comments/s7-08-12/s70812-4663158-176518.pdf>.

- i. For example, it should not require such SBSDs to include the schedules to Form SBS containing the Rule 18a-4 reserve account computation and information on possession or control