SEC OPEN MEETING

OVERVIEW

For questions on the note below, please contact Kevin Batteh at (202) 547-3035.

Today, the SEC held an open meeting to consider whether to adopt rules under the Securities Exchange Act of 1934 providing for the application of the Title VII security-based swap dealer *de minimis* counting requirements to security-based swap transactions connected with a non-U.S. person's dealing activity that are arranged, negotiated, or executed by personnel located in a U.S. branch or office or by personnel of an agent of such non-U.S. person located in a U.S. branch or office.

Please see below for additional information:

Agenda

Fact Sheet

Key Takeaways

- The Commissioners voted unanimously (3 – 0) to approve the rule which requires non-U.S. companies that use personnel located in a U.S. branch or office to arrange, negotiate, or execute a security-based swap transaction in connection with its dealing activity to include that transaction in determining whether it is required to register as a security-based swap dealer.
- The SEC's final rules are largely unchanged from its 2015 U.S. activity proposing release. They focus solely on the location of personnel arranging, negotiating, or executing a security-based swap transaction on behalf of the dealer, whether the personnel are employed by the dealer or by the dealer's agent.

SUMMARY

Title VII Dealer *De Minimis* Requirements to Security-Based Swap Dealing Activity in the U.S.

Chair Mary Jo White

- The Staff recommends adoption of the final rule for Securities-Based Swap Dealers ("SBSDs") which will give the market clarity in how to determine if a market participant will be required to register if they carry out activity in the U.S. via U.S. person or non-U.S. persons.
- Today's rules will further the goals of reducing risk, enhancing transparency, and promoting market integrity within the financial system by helping to ensure that all transactions of dealers that involve market-facing activity by personnel located in the United States are treated equally.
- In today's global security-based swap market, much of the transaction volume occurs in the United States, especially for security-based swap transactions involving U.S.-based reference entities. The rules being considered today would subject this significant activity to Title VII's dealer requirements, thereby promoting the goals of OTC derivatives reform and avoiding a world in which market participants are able to exit our regulatory framework without also exiting the U.S. security-based swap market. By doing so, the rules should also mitigate the likelihood and extent of market

fragmentation, which could limit U.S. market participants to a liquidity pool that is only a fraction of the current size of the current market, with potentially worse pricing and less efficiency.

Commissioner Kara Stein

- This is an important rule that clarifies who should register as a SBSD under U.S. law. The rules address the global nature of swap transactions and the attendant risk they pose.
- A foreign SBSD who imposes risk on the U.S. cannot evade regulation under the rule. The rules focus on location of personnel who arranges swaps in the U.S.
- AIG is an example of the global nature of swaps and how risk can spread quickly around the world. Bailout and crisis spilled across international waters. Half of trading activity in North American single name CDS occurs between U.S. and non-U.S. counterparties. Forty percent of this trading occurs between non-US counterparties but many of these are foreign affiliates that have U.S. parent companies.
- Even if a transaction is conducted by a foreign affiliate, the foreign affiliate's U.S. financial group parent company still has to face exposure of the foreign affiliate even if there is no explicit guarantee. Today's final rule considers the potential spillover of risk.

Commissioner Michael Piwowar

- The final rule is well thought out and well supported by analysis, with the benefit of three comment periods.
- The SEC's final rule is largely unchanged from its 2015 U.S. activity proposing release. The rule narrowly focuses on and provides market participants with clear guidance regarding which security-based swap transactions to count when determining whether they must register as a security-based swap dealer.
- Providing clear guidance regarding which security-based swaps must count in the *de minimis* calculation is beneficial because it will allow global derivatives dealers to determine how to structure their business.
- Commissioner Piwowar also expressed his desire for more rules to be finalized on a consensus basis.