

Is Cross-Border Swaps Regulation at a Standstill?

by KENNETH C. OH on JUNE 21, 2013

The Securities and Exchange Commission (SEC) and Commodity Futures Trading Commission (CFTC) have both proposed rules to govern cross-border security-based swap activities, as mandated under Title VII of the Dodd-Frank Act. However, implementation is unlikely any time soon.

Security-based swaps, a popular derivative, pose problems for regulators because the market involves counterparties located in different countries across the globe. The proposed rules are intended to bring greater certainty to the market by clarifying which securities regulatory requirements apply when a transaction occurs in part within and in part outside the United States.

The difficulty with finalizing the proposed rules is that each agency is authorized to oversee parts of the swaps industry. Moreover, the SEC and CFTC rules proposals take vastly different approaches to a number of key issues. For instance, the SEC's proposal provides for a broader "substituted compliance" -- in certain circumstances, market participants may comply with foreign regulatory requirements in substitution for Title VII requirements -- than the CFTC proposal.

Further muddying the waters, the U.S. House of Representatives recently passed legislation that would require the two agencies to issue one set of uniform rules for cross-border swaps. The Swap Jurisdiction Certainty Act (H.R. 1256) passed by a vote of 301 to 124. The Act also mandates that non-U.S. persons that are in compliance with the swap requirements of a country or administration region that has one of the nine largest swaps markets would be exempt from the new requirements under certain conditions.

Supporters of the Swap Jurisdiction Certainty Act argue that domestic and global swaps regulations need to be coherent and complementary. Meanwhile, critics contend that the legislation is intended to derail the mandates of the Dodd-Frank Act. While the U.S. Senate is not expected to consider a similar bill, the House legislation sends a strong message that the agencies may have to engage in a more collaborative approach. Businesses that may be impacted by the proposed regulations are advised to monitor the legal developments and check back here for updates.

If you have any questions about the cross-border swap proposals or would like to discuss the legal issues involved, please contact me, Kenneth Oh, or the Scarinci Hollenbeck attorney with whom you work.