

SEC Adopts Amendments to Regulation SBSR

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On July 14, 2016, the Securities and Exchange Commission adopted **amendments** to and provided guidance on **Regulation SBSR**, its rules governing the reporting and public dissemination of security-based swap data.¹ Among other things, the amendments and guidance supplement Regulation SBSR by:

- assigning reporting duties for platform-executed security-based swaps that will be submitted to clearing and for security-based swaps that have a registered clearing agency as a direct counterparty ("**clearing transactions**");
- establishing reporting requirements for certain cross-border security-based swaps;
- providing further guidance on the application of Regulation SBSR to bunched orders and prime brokerage arrangements; and
- prohibiting a registered security-based swap data repository ("**SBSDR**") from imposing fees or usage restrictions on data that is required to be publicly disseminated.

As part of the amendments, the SEC adopted a new compliance date schedule for most of the provisions of Regulation SBSR.² This schedule divides Regulation SBSR requirements into three groups and provides compliance dates for each. Regulation SBSR's reporting requirements will not come into effect until at least one month after the registration compliance date for security-based swap dealers ("**SBSDs**") and major security-based swap participants ("**MSBSPs**," and together with SBSDs, "**SBS Entities**"). That timing is itself tied to a number of other unfinished rulemakings, including final rules establishing capital and margin requirements for registered SBS Entities. **Appendix 1** provides detail on the compliance date schedule and the requirements that come into effect on each of the three compliance dates.

¹ Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, 81 Fed. Reg. 53,545, Final Rule (Aug. 12, 2016). The SEC originally adopted Regulation SBSR in February 2015. Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, 80 Fed. Reg. 14,563, Final Rule (Mar. 19, 2015), available [here](#).

² The compliance date for Rules 900 (Definitions), 907 (Policies and procedures of registered security-based swap data repositories) and 909 (Registration of security-based swap data repository as a securities information processor) was the effective date of Regulation SBSR, May 18, 2015.

Reporting Hierarchy Amendments

Regulation SBSR contains a reporting hierarchy that generally allocates responsibility for reporting security-based swap data to one “reporting side” of a reportable security-based swap transaction. The amended rules supplement the existing hierarchy by (i) designating as the reporting side the registered clearing agency that is the counterparty to a clearing transaction, (ii) clarifying the reporting treatment of a security-based swap executed on a platform (as defined below) that will be submitted to clearing, and (iii) describing the applicability of Regulation SBSR to certain cross-border security-based swap transactions. [Appendix 2](#) contains a flowchart that illustrates the full reporting hierarchy, as supplemented by these amendments.

Reporting of Clearing Transactions

Under the “agency” model of clearing predominant in the United States, clearing transactions typically arise when a security-based swap accepted for clearing by a clearing agency is terminated and replaced with two separate security-based swaps between the clearing agency and each counterparty to the original security-based swap. Although the original security-based swap would not be a clearing transaction—and therefore would be separately subject to reporting under the Regulation SBSR reporting hierarchy—the new security-based swap transactions between the clearing agency and each original counterparty would be clearing transactions under the amended rules, and the clearing agency would be responsible for reporting the transactions. Clearing transactions would also include security-based swaps that arise as part of a clearing agency’s internal processes, such as security-based swaps used to establish prices for cleared products.

As with other counterparties responsible for reporting under Regulation SBSR, a clearing agency may select the SBSDR to which it reports a clearing transaction. In addition to other data required to be reported under Regulation SBSR, a clearing agency also must report for a clearing transaction whether or not the clearing agency accepted the original security-based swap for clearing and must report this information to the SBSDR where the original security-based swap was, or will be, reported. To facilitate this, the person responsible for reporting the original security-based swap must promptly provide the clearing agency with the transaction ID of the original security-based swap and the identity of the SBSDR to which the original security-based swap was, or will be, reported.

Reporting of Platform-Executed Security-Based Swaps Submitted to Clearing

Under the amended rules, a security-based swap transaction executed on a national securities exchange or a security-based swap execution facility (“**SBSEF**”) that is registered or exempt from registration (a “**platform**”) and

that will be submitted to clearing must be reported by the platform.³ A platform would have a reporting obligation only where the counterparties inform the platform before or at the point of execution that they intend to submit the security-based swap to clearing. Given that a platform may have limited information about the security-based swap transaction or the counterparties, the platform is required to report only a subset of the information about the security-based swap that otherwise would be required to be reported under Regulation SBSR. For example, a platform would not be obligated to identify the participation of any indirect counterparties.

Cross-Border Matters

Under Regulation SBSR currently, once the reporting requirements are fully phased-in, a security-based swap will be subject to reporting and public dissemination if there is a direct or indirect counterparty that is a U.S. person on either or both sides of the transaction or if the security-based swap is accepted for clearing by a clearing agency having its principal place of business in the United States. Even if a security-based swap does not fall within either of these categories, it will be subject to reporting, but not public dissemination, if a registered SBS Entity is on either or both sides of the transaction.

The amended rules expand the extraterritorial reach of Regulation SBSR. Specifically, the following types of security-based swaps will be subject to reporting and public dissemination requirements even if they are entered into between non-U.S. persons:

- a security-based swap executed on a platform having its principal place of business in the United States;
- a security-based swap effected by or through a registered broker-dealer (including a registered SBSEF); and
- a security-based swap connected with a non-U.S. person's security-based swap dealing activity (including the security-based swap dealing activity of unregistered non-U.S. entities) that is arranged, negotiated, or executed by personnel of such non-U.S. person (or its agent) located in a U.S. branch or office ("**U.S. ANE Activity**").

The amended rules also establish a reporting hierarchy that designates reporting sides for certain cross-border transactions that do not include a registered SBS Entity as a direct or indirect counterparty. The rules further clarify that a non-U.S. person will not be subject to reporting obligations under Regulation SBSR unless it is a registered SBSD or MSBSP, a platform, a registered clearing agency, or engaging in U.S. ANE Activity.

³ The platform would not be responsible for reporting any resulting clearing transactions—these would be reported by the registered clearing agency as described above. Any security-based swap executed on a platform that is not submitted for clearing would generally be reported by one of the sides to the security-based swap.

Special Circumstances: Bunched Orders and Prime Brokerage

“Bunched Orders” and Allocation by Asset Managers

A “**bunched order**” is typically a security-based swap between an asset manager (negotiating and executing on behalf of multiple clients) and a counterparty. On or after execution of a bunched order, the asset manager allocates the bunched order to its underlying clients, resulting in a security-based swap between each of those clients and the counterparty and the termination of the original bunched order.

In the original Regulation SBSR adopting release, the SEC explained that a bunched order (as described in the sidebar) would be subject to the same reporting and public dissemination requirements as all other security-based swaps, except that security-based swaps resulting from the allocation of a bunched order by the asset manager would not be publicly disseminated. Under the amendments, a similar approach would also apply for:

- a platform-executed bunched order that will be submitted to clearing; and
- any clearing transaction resulting from a bunched order execution, whether or not executed on a platform, including clearing transactions that result from the allocation of the bunched order.

Specifically, the SEC states that platform-executed bunched orders submitted to clearing and any clearing transaction resulting from a bunched order execution will be reported as any other platform-executed security-based swap submitted to clearing and any other clearing transaction, respectively. However, as with other clearing transactions, clearing transactions resulting from allocation of bunched orders would not be publicly disseminated.

The SEC also provided guidance regarding the application of Regulation SBSR to situations where a non-U.S. person that is not engaging in U.S. ANE Activity enters into a bunched order with an asset manager or execution agent acting on behalf of funds or accounts that are unknown when the transaction report for the bunched order execution is due. In this context, whether or not the bunched order execution is subject to Regulation SBSR would generally depend on the U.S. person status of the underlying funds or accounts, but if this information is temporarily unknown, the SEC stated that it would be reasonable for the sides to look to the U.S. person status of the asset manager or execution agent as a proxy to determine whether reporting and public dissemination requirements would apply. The SEC intends to reevaluate this issue after required reporting commences.

Prime Brokerage Arrangements

The guidance accompanying the amended rules clarifies that each separate transaction or leg of a prime brokerage arrangement would be subject to reporting and public dissemination. However, the SEC would expect an SBSDR to publicly disseminate conditions flags linking the prime brokerage transactions to ensure that market observers do not receive a distorted view of the market.

Prohibition on Charging Fees for or Imposing Usage Restrictions on Publicly Disseminated Data

Regulation SBSR requires an SBSDR to publicly disseminate some of the security-based swap transaction data reported to it. Under the amended rules and guidance, an SBSDR may not charge fees for, or impose usage

restrictions on, any security-based swap data that it is required to publicly disseminate. Impermissible usage restrictions would include, among others, requiring attribution of the data to the SBSDR, restricting the data to internal use, prohibiting redistribution of the data or requiring a user of the data to agree to any terms limiting the SBSDR's liability for incorrect reports. An SBSDR may, however, impose fees on persons who are required to report transactions to the SBSDR. In addition, an SBSDR may charge fees for value-added data products that incorporate the regulatorily mandated transaction data, provided that the SBSDR first satisfies its duty to publicly disseminate the required data on a non-fee, unrestricted basis.

Policies and Procedures Requirements

Under Regulation SBSR currently, registered SBS Entities will be required to establish, maintain and enforce written policies and procedures reasonably designed to ensure compliance with their Regulation SBSR reporting obligations, and to review and update these at least annually. The amended rules provide that clearing agencies, platforms and broker-dealers that incur reporting duties as a result of the amended rules will also be required to adopt and maintain written policies and procedures.

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Appendix 1: Compliance Date Schedule for Regulation SBSR

	Determination of Compliance Date	Applicable Requirements ⁴
Compliance Date 1	<p>With respect to newly executed security-based swaps in a class of security-based swaps accepted by an SBSDR,⁵ the first Monday that is the later of:</p> <ol style="list-style-type: none"> 1. six months after the date on which the first SBSDR that can accept transaction reports in that asset class registers with the SEC; or 2. one month after the SBS Entities registration compliance date 	<ul style="list-style-type: none"> ▪ Reporting of security-based swaps in the relevant asset class entered into after Compliance Date 1 (<i>Rule 901, other than 901(i), 903, 908(a), 908(b)</i>) ▪ SBSDR operating hours requirements (<i>Rule 904, other than 904(d)</i>) ▪ Correction of erroneous reports (<i>Rule 905, other than 905(b)(2)</i>) ▪ Reporting of missing UICs by SBSDR participants (<i>Rule 906(a)</i>) ▪ Policies and procedures of SBSDR participants (<i>Rule 906(c)</i>)
Compliance Date 2	The first Monday that is three months after Compliance Date 1	<ul style="list-style-type: none"> ▪ Public dissemination requirements for security-based swaps by SBSDRs (<i>Rules 902, 904(d), 905(b)(2)</i>) ▪ Duty of some SBSDR participants to provide an SBSDR with information regarding ultimate parents and affiliates that are also participants of that SBSDR (<i>Rule 906(b)</i>)
Compliance Date 3	By two months after Compliance Date 2	<ul style="list-style-type: none"> ▪ Reporting of transitional and pre-enactment security-based swaps⁶ in the relevant asset class (<i>Rule 901(i)</i>)

⁴ Rule 908(c) permits market participants to submit requests for a substituted compliance determination. Persons may begin submitting substituted compliance requests as of October 11, 2016.

⁵ Because the compliance dates are specific to a particular asset class, there may be different compliance dates for security-based swaps in different asset classes.

⁶ A transitional security-based swap is a security-based swap executed on or after July 21, 2010 (the date of the enactment of the Dodd-Frank Act), and before Compliance Date 1. A pre-enactment security-based swap is a security-based swap executed before July 21, 2010, the terms of which had not expired as of that date.

Appendix 2: Summary of Regulation SBSR Reporting Hierarchy

Step #1 – Determine whether SBS will be subject to Regulation SBSR:

The extraterritorial reach of Regulation SBSR’s reporting requirements is very broad. An SBS will be reportable under Regulation SBSR if it: (i) involves direct or indirect U.S. person counterparties; (ii) is executed on or cleared through a platform or clearing agency having its principal place of business in the United States; (iii) is effected by or through a registered broker-dealer (including an SBSEF); or (iv) is connected with a non-U.S. person’s U.S. ANE Activity*. If the SBS does not fall within any of the foregoing categories, it must still be reported, but not publicly disseminated, if there is a direct or indirect counterparty that is an SBS Entity*.

Step #2 – If subject to Regulation SBSR, determine person responsible for reporting the transaction:

