

SEC Issues Reporting Rules for Security-Based Swaps

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Introduction

On February 11, 2015, the Securities and Exchange Commission issued a **final rule** (the “**Final Rule**”) and **proposed amendments** (the “**Proposed Rule**”) on the reporting and public dissemination of security-based swap (“**SBS**”) information, as mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Notably, the SEC:

- delayed establishing a final compliance schedule for SBS reporting;
- left many details of SBS reporting, including many of the required data elements, the format of reports and the assignment of product identifiers for standardized SBS, to registered security-based swap data repositories (“**SBSDRs**”);
- created an interim phase for the reporting of SBS information, generally requiring all SBS to be reported within 24 hours of execution, and thus, did not provide for a delay in public dissemination of large notional trades (“**block trades**”);
- did not exempt inter-affiliate transactions from being reported or publicly disseminated; and
- will require all SBS outstanding as of July 21, 2010 or executed thereafter but prior to the compliance date of the reporting obligation under the Final Rule (“**historical SBS**”) to be reported to the extent information is available, though these will not be publicly disseminated. Historical SBS that are still in effect upon reporting are also subject to life cycle event reporting.

The SEC expects to implement additional rules in one or more subsequent phases to further define reporting obligations and to revisit the timeframes for reporting and publicly disseminating SBS, including block trades.

Comments on the Proposed Rule will be due to the SEC within 45 days after publication in the Federal Register.

CFTC Comparison: Reporting of Cleared Transactions

Under an “agency” clearing model, which predominates in the U.S. swap market, a cleared transaction is generally made up of three discrete transactions:

- the “**initial transaction**” between the parties; and
- two “**clearing transactions**” between the clearing agency and the two original parties.

The CFTC’s and SEC’s reporting regimes generally require all three of these transactions to be reported, but differ as follows:

- Under CFTC rules, if the initial transaction is accepted for clearing prior to being reported (which is generally required within minutes of execution), the derivatives clearing organization (rather than one of the parties to that swap) is required to report the initial transaction. Under the SEC rules, one of the parties to the initial transaction (rather than the clearing agency) is required to report the initial SBS.
- The SEC does not require the reporting of valuation data, while the CFTC requires daily valuation data to be reported by the derivatives clearing organization and, if the reporting counterparty for the initial transaction is a swap dealer or major swap participant, also by that reporting counterparty.

CFTC Comparison: Reporting Side

Although the CFTC and SEC reporting hierarchies are largely similar, the reporting obligation for a particular pair of counterparties may differ as between swaps and SBS due to differences in swap dealer and SBS registration requirements, among other things.

Proposed Compliance Schedule

The Proposed Rule includes a proposed compliance schedule for the majority of the provisions of the SBS reporting regime. If adopted as proposed, the compliance dates for the reporting and public dissemination requirements would be set, for a particular asset class, relative to the commencement of operations of an SBSDR in that asset class. SBS information would be required to be reported beginning six months after the related SBSDR’s commencement and publicly disseminated beginning nine months after commencement.

Reporting Obligation and Hierarchy

Subject to the cross-border provisions discussed below, all SBS are required to be reported (“**Reportable SBS**”). Taken together, the Final Rule and Proposed Rule establish the “side” (the “**reporting side**”) of the transaction that is responsible to report the transaction to an SBSDR or, if no SBSDR is available that will accept the reportable information, to the SEC. The SEC defines a “**side**” to include the direct counterparty to the SBS and any guarantor of the direct counterparty’s obligations.

In general,

- under the Final Rule:
 - if only one side includes a registered security-based swap dealer or registered major security-based swap participant (respectively, “**SBSD**” and “**MSBSP**” and collectively, “**Registered Persons**”), that side must report; and
 - the sides must select the reporting side if:
 - both sides include an SBSD;
 - neither side includes a Registered Person and both sides include a U.S. person; and
- under the Proposed Rule, in addition to the above:
 - the clearing agency would be required to report “clearing transactions” (see sidebar); and
 - the execution platform would be required to report on-platform cleared transactions.

The reporting hierarchy outlined above does not assign the reporting obligation for two categories of Reportable SBS: (i) SBS between a U.S. side and a non-U.S. side where neither side includes a Registered Person and (ii) SBS that are accepted for clearing by a U.S. clearing agency where both sides include only non-U.S. persons that are not Registered Persons. The SEC states that it anticipates requesting comment on the appropriate placement of the reporting obligation for these transactions.

CFTC Comparison: Timeframe for Reporting and Public Dissemination

Under the CFTC's swap reporting rules, the reporting party for a swap is generally required to report swap data to a swap data repository ("SDR") as soon as technologically practicable, but no later than 15 minutes after execution if the reporting party is a swap dealer or major swap participant. SDRs are obligated to publicly disseminate swap transaction and pricing information as soon as technologically practicable after receipt, subject to time delays for block trades and large notional off-facility swaps that range from 15 minutes to two hours for swaps where the reporting party is a swap dealer or major swap participant.

CFTC Comparison: Reportable Trade Information

- While the CFTC's reporting rules include detailed tables of required data elements for various types of swaps, the SEC has set only the basic elements of reportable information in the Final Rule, leaving to the SBSDRs the task of sorting out details for each product type.
- The SBS regulatory regime provides for the use of condition flags which will describe additional features of the SBS or note instances where publicly-available information is not sufficient to determine an accurate picture of the SBS.

Timeframe for Reporting and Public Dissemination

The Interim Phase of SBS Reporting

The Final Rule establishes an interim reporting phase under which Reportable SBS must be reported within 24 hours, unless reporting would fall on a day other than a business day, in which case, the SBS must be reported by the same time on the next business day after execution. This 24-hour period is generally measured from the time of execution, though special circumstances exist for SBS between non-U.S. persons that are accepted for clearing by a U.S. clearing agency.

Public Dissemination

In general, all Reportable SBS other than historical SBS, clearing transactions, allocation transactions and certain cross-border transactions are required to be publicly disseminated. For such SBS, SBSDRs must make all primary trade information and any condition flags (each as described below) available to the public, but must not publicly disseminate the identity of any counterparty or certain other information. SBSDRs must publicly disseminate this information immediately upon receipt from the reporting side. Therefore, reporting of transaction information prior to the 24-hour deadline, while permitted, would lead to immediate public dissemination. The Final Rule includes a prohibition on the sharing of reportable information prior to the reporting of primary trade information to an SBSDR. The Proposed Rule would prohibit SBSDRs from charging fees or imposing usage restrictions on publicly-disseminated information.

Treatment of Block Trades

As noted above, neither the Final Rule nor the Proposed Rule provides a special reporting or dissemination regime for block trades, such as subjecting their dissemination to notional caps or delayed public dissemination. Accordingly, during the interim reporting phase, block trades will be subject to the same 24-hour reporting timeframe and public dissemination rules as non-block trades.

The SEC has directed its staff to prepare reports regarding the establishment of block thresholds and reporting delays for SBS transaction data, which the SEC intends to use to inform future rulemakings defining and setting block thresholds and reporting timeframes.

Trade Information To Be Reported

The Final Rule requires that certain primary and secondary trade information be reported. Primary trade information for an SBS generally includes, among other items, the contractual terms, notional amount, price and the date and time (to the second) of execution. Contractual terms are generally reported either as a standardized product identifier, if available, or by reporting specific terms such as the asset class of the SBS, its

CFTC Comparison: Use of Codes

Both the CFTC and SEC reporting regimes make use of coded identifiers (“IDs”) to identify a person, product or transaction. However, the SEC requires more granular information on the persons executing the transaction, including, as applicable, IDs related to the branch, agent, broker, trader and trading desk involved in the SBS.

- The SEC’s reporting rules include the following IDs: counterparty ID, execution agent ID, branch ID, broker ID, trader ID, trading desk ID, product ID and transaction ID. The Final Rule establishes criteria for recognizing standard-setting systems and requires SBSDRs to employ unique identification codes (“UICs”).
- The CFTC reporting rules require the reporting of only the legal entity identifiers of the parties to a swap, and the unique product and unique swap identifiers of the swap.

CFTC Comparison: Life Cycle Event Reporting

In addition to the life cycle event method adopted by the SEC, the CFTC reporting rules permit an alternative method of reporting continuation data about reportable swaps. Under the CFTC’s “state data” method, the reporting party is permitted to report the current state of all reportable information each day, rather than updating the initial state only for and upon life cycle events.

underlying reference assets, the effective and scheduled termination dates, and the terms of any fixed or floating leg.

Secondary trade information generally includes basic identifying information about each counterparty and additional trade information, including the title and date of any ISDA or equivalent agreements between the parties, the names of the relevant clearing agency and platform, if applicable, and the terms of any nonstandard payment streams. Some of this information will be reported using coded identifiers (see sidebar).

The Final Rule does not specify particular data elements to be reported for each product type. Instead, SBSDRs are required to establish and publish policies and procedures setting the reportable data elements for different asset classes of SBS and the reporting formats for submission of SBS information.

Condition Flags

The Final Rule requires the reporting and public dissemination of several “condition flags” describing features of the SBS. Condition flags will include, as applicable, an inter-dealer flag, a to-be-cleared flag, a bespoke transaction flag and any other flags required under the policies and procedures of the SBSDR to which the transaction is reported. For bespoke transactions, a reporting side must attach a flag if the SBS is customized to the extent that additional material information is necessary to identify the SBS or to calculate its price. SBSDRs must collect and disseminate any special circumstance that would provide greater clarity for market observers reviewing a transaction report. For example, SBSDRs should identify whether a transaction is an inter-affiliate trade, a “package trade,”¹ or a trade resulting from a netting or compression exercise.

Reporting Life Cycle Events

The original reporting side is generally responsible for reporting life cycle events within 24 hours and must include the transaction identifier of the original SBS when reporting the life cycle event. A life cycle event is any event that would change the reportable information about an SBS.

Back-Loading of Historical SBS

The Final Rule requires the reporting of historical SBS, though reporting sides need not create or re-create data related to historical SBS if such data does not exist. Under the proposed compliance schedule, historical SBS would be required to be reported, for a given asset class, within six months after an SBSDR has commenced operations for that asset class. Once reported, any historical SBS still in existence would be subject to life cycle event reporting. Reported information about historical SBS, including life cycle event information, will not be publicly disseminated.

¹ A “package trade” is a multi-legged transaction of which an SBS constitutes one or more legs.

CFTC Comparison: Cross-Border Issues

The application of the CFTC's reporting rules in the cross-border context is quite complex, generally depending on whether either counterparty to the swap is a swap dealer or major swap participant, a U.S. person, or guaranteed by a U.S. person. Differences in the definitions of "U.S. person" under SEC rules and CFTC cross-border guidance may impact the determination of a reporting party for swaps versus a reporting side for SBS, among other things.

For descriptions of the CFTC's cross-border swap reporting regime and the SEC's final cross-border definitional rule, please refer to our prior public memos:

- [CFTC Finalizes Cross-Border Swaps Guidance and Establishes Compliance Schedule](#)
- [CFTC Issues Cross-Border Substituted Compliance Determinations, Provides Limited Phase In for Some Swap Requirements](#)
- [SEC Adopts Security-Based Swap Cross-Border Definitional Rule](#)

Cross-Border Issues

Reporting and Public Dissemination of Cross-Border Transactions

The Final Rule generally subjects an SBS to reporting and public dissemination if: (i) either or both sides of the transaction include a U.S. person or (ii) the SBS is accepted for clearing by a U.S. clearing agency. For SBS that are not accepted for clearing by a U.S. clearing agency and where neither side includes a U.S. person but either or both sides include a Registered Person, the SBS is subject to reporting, but not public dissemination. SBS that are not accepted for clearing by a U.S. clearing agency and where neither side includes a U.S. person or a Registered Person are not subject to reporting or public dissemination. Non-U.S. persons that are not Registered Persons incur no reporting obligations under the Final Rule.

Acknowledging that the privacy laws in some foreign jurisdictions may prohibit reporting counterparty IDs, the SEC will consider requests from reporting sides for exemptions from the requirement to report counterparty IDs of historical SBS executed up to the last day before the effective date of the Final Rule. Thereafter, the SEC expects counterparty IDs to be reported for all SBS.

Substituted Compliance

The Final Rule establishes a substituted compliance regime for certain cross-border transactions under which the reporting side may satisfy its reporting obligation by complying with comparable rules of a foreign jurisdiction. An SBS is eligible for substituted compliance only if one of the direct counterparties (*i.e.*, excluding guarantors) is either a non-U.S. person or a "foreign branch." Substituted compliance will only be available in jurisdictions for which the SEC, by public order, makes a comparability determination. The SEC permits any party that potentially would comply pursuant to a substituted compliance order to file an application requesting a comparability determination.

Special Circumstances: Asset Management and Prime Brokerage

"Bunched Orders" and Allocation by Asset Managers

Under the Final Rule, bunched orders² are subject to the same reporting and public dissemination requirements as all other SBS (*i.e.*, reporting by

² A "bunched order" is typically an SBS between an asset manager (negotiating and executing on behalf of multiple clients) and a counterparty (typically an SBS). On or after execution of a bunched order, the asset manager "allocates" the bunched order to its underlying clients, (*cont.*)

the reporting side to the SBSDR within 24 hours of execution with immediate public dissemination of primary trade information), except that the SBS resulting from the allocation of these bunched orders by asset managers are not to be publicly disseminated.

Prime Brokerage Arrangements

Under the Proposed Rule, the SEC proposes to clarify that, under the Final Rule, the following three transactions that typically comprise a prime brokerage arrangement would be subject to reporting and public dissemination unless not required for cross-border reasons: (i) the client / executing dealer transaction, (ii) the prime broker / executing dealer transaction and (iii) the prime broker / customer transaction. The SEC notes in the Proposed Rule that it would expect SBSDRs to provide for condition flags linking the prime brokerage transactions and to include those flags in the publicly-disseminated trade information.

A Cautious First Step

The Final Rule represents the next step toward a comprehensive SBS reporting and public dissemination regime, but also leaves many key details open. The SEC must still finalize the reporting hierarchy for clearing transactions and on-platform cleared SBS and the compliance timing for reporting SBS information. In addition, SBSDRs must develop and publish policies and procedures outlining the full set of reportable data elements and condition flags and must become registered entities. The SEC may undertake further rulemaking on block trades and the reporting timeframe for non-block trades in the future.

While additional steps are necessary prior to reporting of SBS information is required, SBS registration may not be one of them. The SEC states that the reporting regime is not dependent on registration of SBSs.

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resulting in SBS between each of those clients and the SBS and the termination of the original bunched order. (cont.)