

SEC Releases Final and Proposed Rules Regarding SB Swap Reporting

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The Securities and Exchange Commission (SEC) recently issued three releases with final and proposed regulations addressing the reporting of security-based swaps (SB swaps) called for by the Dodd-Frank Act. The regulations provide specifics on how the SEC will regulate SB swap data repositories, when SB swaps must be reported, who must report SB swaps and what kinds of information must be reported. The regulations resemble in many respects the reporting requirements for swaps that the Commodity Futures Trading Commission (CFTC) has implemented.

SB Swap Data Repositories

The first SEC release finalizes the registration requirements, duties and core principles for SB swap data repositories, which are entities (analogous to the CFTC's swap data repositories) that will collect, maintain and publicly report SB swap data, including SB swap transaction, volume and pricing information.¹ However, SB swap data repositories will not need to be registered until one year after Federal Register publication of these final requirements.

Reporting SB Swaps

The SEC laid out its reporting regime for SB swaps in two releases, one with final reporting rules and another with proposals, which taken together will constitute "Regulation SBSR."² Regulation SBSR sets forth when an SB swap is subject to the SEC's reporting requirements, which party is obligated to report the SB swap and what kinds of information must be reported.

Regardless of where it is executed, an SB swap is reportable (*i.e.*, it must be reported to a registered SB swap data repository or, if there is no registered SB swap data repository that will accept the information, the SEC) if it involves a U.S. person,³ registered SB swap dealer or registered major SB swap participant,⁴ or if it is an SB swap that is accepted for clearing by a registered clearing agency having its principal place of business in the United States.⁵

The SEC has proposed that a reportable SB swap that is executed on a platform and will be submitted to clearing must be reported by the platform;⁶ for a reportable SB swap that is not executed on a platform but is a clearing transaction⁷, the clearing agency would be obligated to report the swap.⁸ Regulation SBSR sets forth the hierarchy for determining which counterparty is obligated to report a reportable SB swap that is neither executed on a platform and submitted for clearing nor a clearing transaction.⁹

¹ See SEC Release No. 34-74246, available at <http://www.sec.gov/rules/final/2015/34-74246.pdf>.

² See SEC Release No. 34-74244, available at <http://www.sec.gov/rules/final/2015/34-74244.pdf>, for the final reporting rules; SEC Release No. 34-74245, available at <http://www.sec.gov/rules/proposed/2015/34-74245.pdf>, for the proposed reporting rules.

³ See Rule 242.908(a)(1)(i).

⁴ See Rule 242.908(a)(2).

⁵ See Rule 242.908(a)(1)(iii).

⁶ See Proposed Rule 242.901(a)(1).

⁷ A clearing transaction is an SB swap that has a registered clearing agency as a direct counterparty. See Rule 242.900(g). The original swap that was intended to be cleared must be reported pursuant to Proposed Rule 242.901(a)(1) or Rule 242.901(a)(2)(ii).

⁸ See Proposed Rule 242.901(a)(2)(i).

⁹ See Rule 242.901(a)(2)(iii).

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The information that must be reported by a reporting SB swap counterparty includes the product ID, the date and time of execution, the price, the notional amount, whether the counterparties intend that the SB swap will be submitted to clearing, certain additional IDs and information pertaining to life cycle events.¹⁰ This information must be reported within 24 hours after the time of execution or, in some cases, 24 hours after acceptance for clearing.¹¹ If the reporting deadline falls on a day that is not a business day, the SB swap must be reported by the same time on the next day that is a business day.¹² The registered SB swap data repository is required to publicly disseminate — in a manner that does not identify the counterparties — some of the reported information immediately upon receipt, such as the type of SB swap, the price of the SB swap, and the date and time, to the second, of execution.¹³

Regulation SBSR additionally will require SB swap dealers, major SB swap participants, registered clearing agencies and platforms to establish, maintain and enforce written policies and procedures that are reasonably designed to ensure compliance with the obligation to report information to a registered SB swap data repository and to review and update those policies and procedures at least annually.¹⁴ The SEC also explained in the preamble to the proposed amendments to Regulation SBSR how the regulation will apply to prime brokerage transactions.¹⁵

The SEC left outstanding an important issue — treatment of block trades — until the SEC staff has analyzed additional data and prepared reports that must be published in the Federal Register for public comment. The SEC directed SEC staff to issue reports on its data analyses no later than two years after the first registered SB swap data repository in a given asset class begins publicly disseminating

SB swap transaction data.¹⁶ The SEC intends to use these SEC staff analyses to determine the notional size thresholds that must be met for a delay in reporting block SB swap trades and how long of a delay is permitted.¹⁷

Comparison of SEC and CFTC Reporting Regimes

In this area, as in others, the SEC published the SB swaps reporting requirements after corresponding CFTC rules for swaps reporting were published and implemented, resulting in a similar reporting framework. However, there are some notable differences between the two agencies' reporting regimes, such as:

- the SEC provides in Regulation SBSR a procedure specific to SB swap reporting for the SEC to determine that a foreign jurisdiction's SB swap reporting requirements are comparable to the SEC's requirements and allows substituted compliance, in contrast to the CFTC's more generic substituted compliance approach;
- the CFTC makes the "financial entity" category of entity relevant for determining the reporting counterparty while the SEC does not; and
- the SEC imposes different requirements than the CFTC for reporting SB swaps that are intended to be cleared and the resulting cleared SB swaps.

Compliance Dates

The SEC has staggered the compliance dates for Regulation SBSR. Some rules take effect on the effective date of the release. For others, the SEC sets forth a proposed compliance schedule that keys off of when the first registered SB swap data repository accepting reports in an asset class begins its operations. Comments on the proposal must be received within 45 days of Federal Register publication of the proposal.

¹⁰ See Rule 242.901(c)-(e).

¹¹ See Rule 242.901(j).

¹² See *id.*

¹³ See Rule 242.902.

¹⁴ See Rule 242.907.

¹⁵ See pages 59-70 of SEC Release No. 34-74245, available at <http://www.sec.gov/rules/proposed/2015/34-74245.pdf>.

¹⁶ See Rule 242.901A.

¹⁷ See *id.*