

SEC Issues Time-Limited Relief From SBS Reporting Requirements

December 31, 2019

On December 18, 2019, the Securities and Exchange Commission (“SEC”), as part of supplemental guidance and rule amendments addressing the cross-border application of certain rules regulating security-based swaps (“SBS”) pursuant to Title VII of the Dodd-Frank Act (the “**Final Rule**”),¹ issued a statement regarding compliance with rules for SBS data repositories (“SDRs”) and Regulation SBSR (the “**Statement**”). Please [click here](#) to read the alert memorandum regarding the rest of the Final Rule.

The Statement provides certain time-limited relief from compliance with certain provisions of Regulation SBSR as well as certain SDR rules. The SEC adopted this relief in light of efforts to increase harmonization of its SBS reporting rules with the swap reporting rules of the Commodity Futures Trading Commission (“CFTC”), the CFTC’s announced reconsideration of its swap reporting rules,² and concerns that dissimilar rules between the CFTC’s and SEC’s regimes would require SDRs and SBS market participants to face the unnecessary burden of implementing changes to existing swap reporting systems, policies, and procedures solely to comply with the SEC’s SBS reporting rules.

The relief will remain effective until the earlier of (i) a four-year period following the applicable compliance date with respect to a particular SBS asset class for Regulation SBSR and (ii) 12 months following notice by the SEC that such relief will expire.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

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¹ See “Rule Amendments and Guidance Addressing Cross-Border Application of Certain [SBS] Requirements,” Release No. 34-87780; File No. S7-07-19.

² See CFTC Letter 17-33 (July 10, 2017), available at <https://www.cftc.gov/sites/default/files/ido/groups/public/@lrlettergeneral/documents/letter/17-33.pdf>.



Background

- Regulation SBSR governs regulatory reporting and public dissemination of SBS transactions.³
- Under Regulation SBSR, the first compliance date (“**Compliance Date 1**”) for affected persons with respect to an SBS asset class is the first Monday that is the later of:
 - six months after the date on which the first SDR that can accept transaction reports in that asset class registers with the SEC; or
 - one month after the date that is 18 months after the later of (i) March 1, 2020 or (ii) 60 days following publication of the Final Rule in the Federal Register.

No SDR is currently registered with the SEC, although the clock on the second condition has started with the adoption of the Final Rule.

Relief With Respect to Regulation SBSR

- The Statement provides that the following actions will not provide a basis for SEC enforcement action with respect to Regulation SBSR until the earlier of (i) four years following Compliance Date 1 in each SBS asset class or (ii) 12 months after the SEC provides notice that the no-action position will expire:
 - **Reporting Duties.** If a person with a duty to report an SBS transaction (or a duty to participate in the selection of the reporting side) under Rule 901(a) (relating to the assignment of reporting duties) does not report the transaction (or does not participate in the selection of the reporting side) because, under the CFTC’s swap reporting rules in force at the time of the transaction, a different person (or no person) would have the duty to report a comparable swap transaction.

This position does not extend to instances where a transaction falls within Rule 901(a)(2)(ii)(E) (relating to the assignment of reporting duties when neither party is a registered security-based swap dealer (“**SBSD**”) or major security-based swap participant) and one or both sides is relying on the *de minimis* counting exception provided for in the Final Rule for SBS transactions between non-U.S. persons that are arranged, negotiated, or executed by personnel located in a U.S. branch or office of a non-U.S. SBSD or its agent (“**ANE Transactions**”). The SEC notes that it would expect such relying entity to report an ANE Transaction using staff of an affiliated U.S. registered SBSD or broker-dealer.

- **Required Data Elements.** If a person with a duty to report a data element of an SBS transaction, as required by any provision of Rules 901(c)(2)-(7) and 901(d) (which collectively govern required data elements aside from product IDs) does not report that data element because the CFTC’s swap reporting rules in force at the time of the transaction do not require that data element to be reported. In addition, the Statement provides relief with respect to Rule 907(a)(1) (requiring SDRs to establish and maintain written policies and procedures that enumerate SBS data elements that must be reported), if a registered SDR does not enumerate in its policies and procedures for reporting transaction information one or more specific data elements that are required by Rule 901(c) or 901(d) because such data element(s) are not required under the CFTC’s swap reporting rules, except that the registered SDR’s policies and procedures must set out how a participant must identify the SBS and any security

³ 17 C.F.R. § 242.900 *et seq.*

underlying the SBS and thereby comply with Rule 901(c)(1).

- **Life Cycle Reporting.** If a person does not report a life cycle event of an SBS transaction in a manner consistent with Rule 901(e) (which governs reporting of life cycle events) and the person acts instead in a manner consistent with the CFTC's swap reporting rules for the reporting of life cycle events that are in force at the time of the life cycle event. In addition, the Statement provides relief with respect to Rule 907(a)(3) (requiring SDRs to establish and maintain written policies and procedures for flagging transaction reports related to life cycle events), if a registered SDR does not enumerate in its policies and procedures for handling life cycle events provisions that are not required under the CFTC's swap reporting rules that pertain to the reporting of life cycle events.
- **Public Dissemination.** If a registered SDR does not disseminate an SBS transaction in a manner consistent with Rule 902 (which generally requires dissemination at the time the SDR receives data for an SBS and does not include notional caps) but instead disseminates (or does not disseminate) the SBS transaction in a manner consistent with Part 43 of the CFTC's swap reporting rules in force at the time of the transaction, provided that for an SBS based on a single credit instrument or a narrow-based index of credit instruments having a notional size of \$5 million or greater, the registered SDR that receives the report of the SBS transaction does not utilize any capping or bucketing convention under Part 43 of the CFTC's swap reporting rules but instead disseminates a capped size of \$5 million in lieu of the true notional size.

The SEC's position with respect to Rule 902(a) does not extend to (i) a covered inter-dealer SBS transaction for which at least one side of the transaction "arranges, negotiates, or executes" in reliance on the *de minimis* counting exception

or (ii) an SBS transaction between an entity relying on the *de minimis* counting exception for ANE Transactions and a registered SBSD.

- **Transaction Reporting Codes.** With respect to Rule 903(b) (regarding transaction reporting codes), a registered SDR permits the reporting or public dissemination of SBS transaction information that includes codes in place of certain data elements even if the information necessary to interpret such codes is not widely available to users of the information on a non-fee basis.
- **Non-Reporting Side Information.** With respect to Rule 906(a) (requiring SDRs to obtain certain information from the non-reporting side, such as branch ID or trader ID), if a registered SDR does not send reports of missing unique identification codes ("UICs") to its participants. In addition, the Statement provides relief with respect to Rule 907(a)(5) (requiring SDRs to establish and maintain written policies and procedures for assigning UICs), if a registered SDR does not have policies and procedures for assigning UICs.
- **Ultimate Parent and Affiliate Information.** With respect to Rule 906(b) (requiring SDRs to obtain ultimate parent and affiliate information), if a registered SDR does not collect ultimate parent and affiliate information from its participants. In addition, the Statement provides relief with respect to Rule 907(a)(6) (requiring SDRs to establish and maintain written policies and procedures for obtaining information that identifies a participant's ultimate parent and affiliates), if a registered SDR does not have policies and procedures for obtaining from its participants information about each participant's ultimate parent and affiliates.

Condition Flags. With respect to Rule 907(a)(4) (requiring SDRs to establish and maintain written policies and procedures for identifying characteristics of an SBS that could cause a person to receive a distorted view of the market and to establish and apply related flags), if a registered SDR does not have policies and procedures for establishing and directing its participants to use condition flags in the reporting of SBS transactions, provided that the registered SDR instead complies with analogous CFTC rules regarding condition flags or other trade indicators.

Relief for SDRs

- In addition, the SEC also takes the position that certain actions with respect to SDR rules will not provide a basis for SEC enforcement action against a registered SDR that can accept transaction reports in a particular SBS asset class until the earlier of (i) four years following Compliance Date 1 in that asset class or (ii) 12 months after the SEC provides notice that such a position will expire, including:
 - With respect to Section 13(n)(5)(B) of the Exchange Act and SEC Rule 13n-4(b)(3) thereunder (which require SDRs to confirm the accuracy of submitted data with both counterparties to an SBS), if a registered SDR does not confirm with both counterparties to the SBS the accuracy of the data that was submitted to the SDR.
 - With respect to Rule 13n-5(b)(1)(iii) under the Exchange Act (which requires SDRs to establish, maintain, and enforce policies and procedures to ensure that submitted transaction data is complete and accurate and identifies the source of each trade side and the pairing method, if any, for each transaction), if a registered SDR does not establish, maintain, and enforce written policies and procedures reasonably designed to satisfy itself that the transaction data that has been submitted to the SDR is complete and accurate, and clearly identifies the source for each trade side and the pairing method (if any) for each transaction in order to identify the level of quality of the transaction data that was submitted to the SDR.
- A registered SDR does not adhere to any provision of Section 11A(b) of the Exchange Act pertaining to securities information processors.
- The SEC clarifies that in an application to register as an SDR, an applicant does not need to include materials explaining how it would comply with the provisions noted above and could instead rely on its discussion regarding how it complies with comparable CFTC requirements. Thus, an applicant must still submit an application on Form SDR but would not need to provide Exhibit S to describe its functions as a securities information processor. The applicant may instead represent in its application that it: (i) is registered with the CFTC as an SDR; (ii) is in compliance with applicable requirements under the CFTC's swap reporting rules; (iii) satisfies the standard for SEC registration of an SDR under SEC Rule 13n-1(c); and (iv) intends to rely on the SEC position set forth in the Statement with respect to any SBS asset class(es) for which it intends to accept transaction reports.
- Finally, an applicant would not need to comply with the requirement in SEC Rule 13n-1(b) and SEC Rule 13n-11(f)(5) to file Form SDR and all amendments "electronically in a tagged data format" and may instead submit such documents electronically as portable document format (PDF) files, consistent with CFTC SDR application procedures.

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