

Setting the scene

Final SEC guidance on cross-border SBSs is likely to ease concerns surrounding reporting duties and compliance with the SEC's Regulation SBSR

On July 13 2016, the US Securities and Exchange Commission (SEC) adopted amendments and guidance (Final Rules and Guidance) related to its rules on the regulatory reporting and public dissemination of security-based swaps (SBSs), known as Regulation SBSR. Two key issues addressed by the Final Rules and Guidance that may interest market participants involved in the cross-border SBS market are the compliance date for when SBS reporting begins and the applicability of Regulation SBSR to certain cross-border situations.

With regard to the compliance date, the Final Rules and Guidance make a significant modification to the compliance schedule as proposed that links the

At the same time that Regulation SBSR was adopted, the SEC proposed additional provisions of Regulation SBSR to address issues not covered in the Regulation SBSR adopting release. The companion proposing release (Companion Proposal) included a proposed compliance schedule establishing when SBS must be reported under Regulation SBSR, as well as provisions for reporting platform-executed SBS that will be submitted for clearing and for SBS resulting from the clearing process. Separately, in April 2015, the SEC proposed rules addressing the application of Regulation SBSR to SBS activity of non-US persons within the US (US Activity Release). The Final Rules and Guidance adopted by the SEC in its July release

There is no date certain for when security-based entity registration will be required, and thus no date certain when SBS reporting will commence

reporting compliance date to the compliance date for registration of SBS dealers and major SBS participants. This should alleviate certain compliance challenges in the cross-border context. Concerning the cross-border applicability of Regulation SBSR, the Final Rules and Guidance continue the SEC's policy of applying Dodd-Frank Act requirements to certain SBS transactions between non-US persons, where such transactions are "arranged, negotiated, or executed" within the US.

Regulation SBSR, which was adopted in February 2015, sets forth the information that must be reported and publicly disseminated for each SBS, assigns reporting duties for many SBSs, and requires registered SBS data repositories (SDRs) to establish and maintain policies and procedures for carrying out their responsibilities under Regulation SBSR. It also addresses the application of Regulation SBSR to certain cross-border SBS transactions.

address the open issues from the Companion Proposal and the US Activity Release.

Compliance date challenges

Perhaps most important for market participants is that the Final Rules and Guidance establish the much anticipated compliance schedule for reporting under Regulation SBSR. Market participants have been waiting for the commencement of SBS reporting, as reporting for swaps has been in place for some time in the US under rules of the Commodity Futures Trading Commission (CFTC), which has had jurisdiction over swaps based on interest rates, foreign exchange, commodities and broad-based security indexes. Under the Companion Proposal, the compliance date for newly executed SBS reporting would have been six months after the first registered SDR that could accept reports of SBS in a particular asset class commences operations as a registered SDR.

Commentators voiced a number of

concerns about requiring compliance before SBS dealer registration is required, noting that, during any interim period after the commencement of reporting of SBS but before SBS dealer or major SBS participant registration is required, there would be no registered SBS dealers or major SBS participants to occupy the highest rungs of the reporting hierarchy in Regulation SBSR.

As under the CFTC's reporting rules for swaps, Regulation SBSR establishes a reporting hierarchy under which only one counterparty reports a SBS to an SDR based on a counterparty's regulatory status, with registered SBS dealers and major SBS participants (except in SBSs with each other) as the reporting counterparty with respect to uncleared SBSs with all other counterparties. Without any registered SBS dealers or major SBS participants, a number of challenges in negotiating and carrying out reporting duties would result, including particular challenges with ascertaining reporting duties under the rules for cross-border transactions, especially for buy-side US persons. Any interim solutions to assign reporting obligations negotiated between counterparties would not be useful for the period after SBS entities registration is required, when, by rule, SBS dealers or major SBS participants would be the reporting party.

Recognising these challenges, the SEC changed the compliance date for reporting newly-executed SBSs in a particular asset class under the Final Rules and Guidance. The compliance date, described as Compliance Date 1 in the Final Rules and Guidance release, is now the first Monday that is the later of: (1) six months after the date on which the first SDR that can accept transaction reports in that asset class registers with the SEC or (2) one month after the SBS entities registration compliance date. The one-month period after the SBS entities registration compliance date according to the SEC is designed to allow market participants to become familiar with which firms have registered as SBS dealers, and for registered SBS dealers to ensure that they have systems, policies, and procedures in place to commence their reporting duties under Regulation SBSR. Two additional compliance dates are provided for in the Final Rules and Guidance, one for when SDRs must commence public dissemination of SBS data – or Compliance Date 2 – which is the first Monday that is three months after Compliance Date 1, and the other for the reporting of historical SBS – or Compliance Date 3 – which is two

Reporting responsibilities under regulation SBSR as modified by the Final Rules and Guidance

Party B	SBSD	Non-SBSD, U.S. person	Non-SBSD, non-US person, SBS dealing ANE	Non-SBSD, non-US person, not ANE
Party A				
SBSD	Parties select	Party A	Party A	Party A
Non-SBSD, US Person	Party B	Parties select	Parties select	Party A
Non-SBSD, non-US person, SBS dealing, ANE	Party B	Parties select	Parties select	Party A
Non-SBSD, non-US person, not ANE	Party B	Party B	Party B	N/A, except if effected by or through a registered broker-dealer, in which case the broker-dealer reports

Key: SBSD = SBS dealer
 ANE = Arranged, negotiated, or executed by personnel of such non-US person located in a US branch or office, or by personnel of its agent located in a US branch or office

months after Compliance Date 2.

With regard to Compliance Date 1, the SBS entities registration compliance date, to which SBS reporting is now linked under the Final Rules and Guidance, is separately provided for in the SEC's final SBS dealer and major SBS participant registration rules and, admittedly, is not definite (see *James Schwartz's swap registration article on page XX*). The registration rules provide that the compliance date will occur only after the occurrence of several events that, taken together, have not yet occurred, cannot occur for a minimum of six months, and seem relatively unlikely to occur until after significantly more than six months have passed. In any event, in light of these contingencies, there is no date certain under the SBS entities registration rules for when security-based entity registration will be required, and thus no date certain for when SBS reporting will commence.

A number of commentators also requested that the SEC defer compliance with Regulation SBSR until the SEC has made substituted compliance determinations with respect to regulatory reporting and public dissemination of SBS transactions for certain foreign jurisdictions, which would allow market participants to comply with the foreign jurisdictions' rules in place of SEC rules. This approach was taken by the CFTC through staff no-action letters, which have delayed regulatory reporting of swaps for

certain registered non-US swap dealers based in Australia, Canada, the EU, Japan or Switzerland with non-US counterparties that are not guaranteed by a US person, until the earlier of 30 days after a comparability determination issued by the CFTC (which has not yet been issued for these jurisdictions) or December 1 2016. However, the SEC declined to provide for such a delay, noting that it had not received any substituted compliance applications and that other jurisdictions were still in the process of promulgating reporting rules, which could lead to a significant delay in Regulation SBSR implementation.

Nonetheless, despite the lack of a date certain for when SBS reporting is to commence and no provision for a delay for substituted compliance determinations to be made, market participants will likely welcome the new compliance date in the Final Rules and Guidance for reporting under Regulation SBSR and its linkage to the compliance date for the SBS entities registration rules because of the challenges and inefficiencies that it avoids.

Cross-border SBSR applicability

Another important issue for international market participants is the cross-border applicability of Regulation SBSR as provided for in the Final Rules and Guidance. In particular, the Final Rules and Guidance address the applicability of SBSR to certain SBS transactions that are

"arranged, negotiated, or executed" by non-US persons within the US, and the assignment of reporting responsibilities in certain cross-border situations not provided for in Regulation SBSR as adopted in 2015.

When it was adopted in 2015, Regulation SBSR provided for regulatory reporting and public dissemination of any SBS transaction that (1) has a direct or indirect counterparty that is a US person on either or both sides of the transaction or (2) is accepted by a clearing agency having its principal place of business in the US. Regulation SBSR also required regulatory reporting (but not public dissemination) of uncleared SBSs of registered non-US SBS dealers and major SBS participants when there is no US person on either side. It did not address reporting and public dissemination of transactions that are "arranged, negotiated, or executed" in the US. It also did not assign the reporting responsibility for SBSs between two unregistered non-US persons and between an unregistered US person and an unregistered non-US person. These issues were taken up in the US Activity Proposal, and in turn have been finalised under the Final Rules and Guidance.

Under the Final Rules and Guidance, SBSs in connection with a non-US person's SBS dealing activity that are "arranged, negotiated, or executed" by personnel of such non-US person located in a US branch or office, or by personnel of its agent located in a US branch or office, are required to be reported and publicly disseminated. The Final Rules and Guidance do not subject additional transactions involving registered SBS dealers to Regulation SBSR's regulatory reporting requirements because registered SBS dealers, whether US or non-US, are already subject to regulatory reporting requirements with respect to *all* of their counterparties, whether US or non-US, under Regulation SBSR as previously adopted. However, this provision of the Final Rules and Guidance would require that transactions of non-US SBS dealers that are "arranged, negotiated, or executed" in the US be publicly disseminated.

In addition, the Final Rules and Guidance assign reporting responsibility for SBSs in situations involving non-registrants. Specifically, they provide that, for SBSs between two non-US persons engaged in SBS dealing activity that is "arranged, negotiated, or executed" in the US, or between one such non-US person and a US person, the parties shall select the reporting side. For SBSs between a non-US person who is not engaged in SBS dealing activity "arranged, negotiated, or executed" in the

Another important issue for international market participants is the cross-border applicability of Regulation SBSR as provided for in the Final Rules and Guidance

United States, and a non-US person who is engaged in such activity in the United States or a US person, the Final Rules and Guidance provide that the latter is the reporting side. If the SBS is between two non-US persons who are not engaged in SBS dealing activity “arranged, negotiated, or executed” in the US, Regulation SBSR does not apply, unless the SBS is effected by or through a registered broker dealer, including a registered SBS execution facility, in which case the registered broker-dealer reports. As modified by the Final Rules and Guidance, the reporting responsibility as between two counterparties – Party A and Party B – to a SBS under Regulation SBSR is summarised in the table on the preceding page.

The Final Rules and Guidance thus extend reporting requirements to dealing SBSs between non-US persons that are

“arranged, negotiated, or executed” in the United States. This follows rules the SEC adopted in February 2016 that require a foreign dealing entity to count against its *de minimis* threshold (above which registration as a SBS dealer is required) to transactions with non-US persons where the foreign dealing entity is engaged in activity that is “arranged, negotiated, or executed” in the US. The February 2016 release contains detailed guidance about when a SBS is deemed to be “arranged, negotiated, or executed” in the US that may facilitate guidance with the reporting rules. The concept originated with the CFTC in Staff Advisory 13-69 issued in 2013, in which CFTC staff stated that the CFTC’s Transaction-Level requirements would apply to a swap transaction between a non-US registered swap dealer and a non-US

person, if the transaction is “arranged, negotiated, or executed” in the US.

The Advisory has not been implemented, however, because after its issuance the CFTC requested comment on whether the Advisory should be adopted as CFTC policy and issued no-action relief from the effects of the Advisory. That relief, which has been extended several times and was set to expire on September 30 2016, was extended again by CFTC staff on August 4 2016 until September 30 2017. In conjunction with that relief, CFTC Chairman Timothy Massad said in a statement that he intends to ask the CFTC in the fall of 2016 to consider a proposed rule to address the “arranged, negotiated or executed” issue.

While well behind the CFTC in terms of its implementation of rules for SBSs, the SEC through the February 2016 release and the Final Rules and Guidance has taken the lead with respect to when Dodd-Frank Act requirements apply to a non-US person’s dealing activity involving SBSs “arranged, negotiated, or executed” in the US. It remains to be seen whether the CFTC will adopt a similar approach to regulatory requirements under the Dodd-Frank Act with respect to swaps – stay tuned.

By Julian Hammar, of counsel with Morrison & Foerster (Washington, DC)

TP WEEK
TRANSFER PRICING
WEEKLY NEWS FROM
**INTERNATIONAL
TAX REVIEW™**



The market leading source of up to the minute information on transfer pricing issues

Take a seven day free trial at www.tpweek.com/FreeTrial

- All the latest global transfer pricing news and analysis
- Country by country guides
- Exclusive interviews
- Latest TP appointments
- Sector guides
- Ruling updates
- Case studies

For more information contact Nick Burroughs on:
Tel: +44 (0) 20 7779 8379 Email: nburroughs@euromoneyplc.com