



Pension Investment  
Association of Canada

Association canadienne des  
gestionnaires de caisses de retraite

March 18, 2022

Securities and Exchange Commission  
100 F Street NE, Washington, DC  
20549-1090  
Attention: Vanessa A. Countryman, Secretary

[rule-comments@sec.gov](mailto:rule-comments@sec.gov)

**VIA EMAIL**

Dear Ms. Countryman,

**Re: Pension Investment Association of Canada (“PIAC”) Comments on Proposed SEC Rule 10B-1: Position Reporting of Large Security-Based Swap Positions (File No. S7-32-10)**

The Pension Investment Association of Canada (PIAC) would like to thank the Securities and Exchange Commission (SEC) for considering our comments on SEC proposed rule 10B-1: Position Reporting of Large Security Based Swap Positions.

PIAC has been the voice for Canadian pension funds since 1977 in matters related to pension investment and governance. PIAC’s members manage over \$2.4 trillion of assets on behalf of millions of Canadians. Our mission is to promote sound investment practices and good governance for the benefit of plan sponsors and beneficiaries.

While PIAC is supportive of the SEC being provided with greater transparency regarding the entry into of certain security based swap positions (SBS) and we are supportive of the SECs goals of using any such data as a tool to prevent fraudulent or manipulative activities and in order to monitor concentration risks, PIAC is concerned with certain aspects of the proposed Rule. PIAC would like to comment on the following four aspects of the Proposed Rule:

- PIAC believes that the SEC should create a waterfall of the parties responsible for the reporting of SBS positions. We are of the view that if a pension plan (or other non-dealer) is facing a securities based swap dealer (SBSD) or a swap dealer (SD), that the SBSD or SD should be responsible for reporting. This approach would follow the approach taken by the CFTC and Canadian derivatives trade reporting

regulations. SBSs and SDs are better positioned to report these trades, as they currently already do so for swaps and already have the trade reporting infrastructure established.

- PIAC believes that while aggregate SBS reporting data should be made public for transparency purposes, that such information should be rendered anonymous so as to not identify either of the parties that has entered into the transactions. This will limit the possibility of dealers or other market participants using the information for deceptive and manipulative trading practices (such as front running) or other purposes that does not constitute fair dealing. For physical equities trades, the identity of parties that hold positions are not made publicly available, except in the case of certain substantial shareholder reporting (above 5%), and much less frequent SEC reporting for pension plans (such SEC form 13G or 13F filings).
- PIAC believes that in the event that trade reports are not possible under the EDGAR system by SBSs or SDs on behalf of non-swap dealers on an anonymous basis, we would strongly encourage that the SEC use the same existing trade reporting infrastructure for swap data repositories that currently exists globally for swaps, for instance, as used by the CFTC, Canadian and other global regulators.
- PIAC believes that in the event that the SEC is intent on moving ahead with Rule 10B-1 (including requiring buy side participants to file, even if facing a SBS or SD), in respect of SBS transactions that involve equities or baskets of equities, that the SEC should apply the same substantial shareholder reporting thresholds for SBS as applies to the trading of the underlying physical equities (if a party acquires beneficial ownership of more than 5% of a class of registered equity voting securities), with a potential aggregation between physical holdings and derivatives exposures. Furthermore, ultimately, if the SEC's primary concern involves the disclosure of the single name CDS market, then any fixed dollar reporting thresholds within this Rule are likely best focused on such SBS that involve single name or narrow basket CDS positions.

#### **PIAC members usage of SBS and high level concerns:**

PIAC members include large and small Canadian pension plans, including some with over CAD 100 billion in assets. Many PIAC member Canadian pension plans invest in SBSs, and considering the size of these plans, these Rules proposed in 10B-1 will directly impact some PIAC members. PIAC members might invest in SBSs involving US or non-US counterparties in various ways. For example, a Canadian pension plan might seek to invest in a single name equity SBS (rather than holding the physical), as it is often more efficient for our banking counterparty to buy and sell the underlying equity security (with the bank typically holding the equity security in order to hedge its position). Furthermore, PIAC members might also seek to enter into SBSs involving narrow baskets of securities (equity or bonds) for thematic investment purposes. For instance, pension plans might work with a dealer counterparty in order to structure a total return swap involving a narrow basket of equities (for example, involving US technology stocks or dividend paying stocks), based on discussions with the dealer in terms of the return characteristics that we are seeking. These

SBS transactions might also be used to incur prudent amounts of economic leverage, which are carefully managed by pension plans.

Unfortunately, Rule 10B-1, as currently proposed, will involve a very high regulatory monitoring burden for PIAC members. Regardless of the frequency where PIAC members transactions exceed the various \$150MM or \$300MM reporting thresholds (for some pension plans it will occur relatively frequently), various PIAC members will have to build additional operational monitoring infrastructure and train compliance personnel in order to ensure T+1 reporting. Moreover, as we don't have to report on a T+1 basis for physical securities transactions today (with more delayed reporting where holdings exceed 5% substantial shareholder reporting levels) this will be creating an entirely new operational and compliance burden that does not exist if we were trading the physical securities directly (or non SBS based swaps for that matter). Moreover, as the SECs proposed rule would allow all of our counterparties or potential counterparties to see our existing aggregated SBS positions (if of a sufficient size) it will increase the risks that our SDs or SBSDs might look to use that information in order to engage in deceptive and manipulative trading practices (such as front running) in respect of our positions, or alternatively, to otherwise use that information in ways that might not be considered fair dealing.

**Detailed discussion of four specific points above:**

**1) Creation of Reporting Waterfall with Securities Based Swap Dealers/ Swap Dealers responsible for reporting**

PIAC believes that the SEC should create a waterfall of the parties responsible for the reporting of SBS positions. PIAC is of the view that if a pension plan (or other non-dealer such as an insurance company or corporate end-user) is facing a securities based swap dealer (SBSD) or a swap dealer (SD), that the SBSBD or SD should be responsible for reporting both sides of the trade to the relevant regulator (or swap data repository). We believe that this approach works well within the CFTCs regulations (that apply if Canadian pension plans are facing a US SD) and Canadian securities regulations (that apply if Canadian pension plans are facing a counterparty that is a dealer or a bank). SBSBDs and SDs are better positioned to report these trades, as they currently already have the trade reporting infrastructure in place for swaps transactions globally (where using existing swap data repositories).

CFTC Approach:

Under the CFTCs Final Rule 17 CFR Part 45 – Swap Data Recordkeeping and Reporting Requirements<sup>i</sup>, as amended, the determination of which counterparty must report is set-out at § 45.8. This section includes a waterfall providing for a determination of which counterparty is the reporting counterparty for a swap. Under subsection (a), it establishes the responsibility for reporting to the swap dealer to report the trade, if only one counterparty is a swap dealer. Section 45.8(a) of this rule states “(a) If only one counterparty is a swap dealer, the swap dealer shall be the reporting counterparty.”

The CFTC waterfall then continues to list various fallbacks in the waterfall, in subsection (b) if neither party is a SD, but one is a major swap participant; (c) if both parties are non-SD/ MSP counterparties, but one is a financial entity, (d) if both parties are swap dealers or major swap participants etc. (assuming that it is an off-SEF trade). In each case, the CFTC waterfall provides for a methodology of who should report based on entity type, provided that for off-SEF trades between two dealers or major swap participants, the parties will agree as to which party will report (it is generally settled that ISDA methodology will determine who will report in this instance).

PIAC is of the view that our swap dealer counterparties are responsible for reporting CFTC swaps that PIAC members enter into when facing banks or swap dealers. Our counterparties already have the infrastructure to report through swap data repositories, including assigning unique product identifiers to each transaction type, using LEIs for each counterparty, and identifying and reporting the material terms of each transaction to swap data repositories, as required by regulation. We are of the view that if our swap counterparties currently have to report transactions on the S&P 500, or any transactions involving a US dealer, then our SBS / SD counterparties should also have to report transactions if involving SBSs (eg. a Total Return Swap on a narrow basket of securities rather than on the S&P 500). SBSs and SDs have already established sophisticated reporting systems and processes in order to report as they are in the business of trading swaps and SBSs, and it makes sense to have such dealers report SBS transactions on behalf of non-dealer counterparties. Moreover, in using swap data repositories for the reporting, the SEC should be able to be able to aggregate data on a counterparty basis, and based on underlying security, and it would presumably be easier for the SEC to perform specific targeted reviews for credit or systemic risk concerns.

#### Canadian Securities Administrators Approach:

If a Canadian pension plan is facing a dealer under a swap, Canadian securities regulations require that the swap dealer report the trade. Within Canada, securities regulations are within the authority of Provincial regulators, however, the Provinces of Canada seek to harmonize derivatives related regulations by way of the Canadian Securities Administrators (composed of the securities commissions of the various Provinces). The Ontario Securities Commission (OSC) sets out the reporting counterparty waterfall under section 25(1) of Rule 91-507 (Trade Repositories and Derivatives Data Reporting).<sup>ii</sup> Section 25(1) of such rule states:

25. (1) The reporting counterparty with respect to a transaction involving a local counterparty is
- (a) if the transaction is cleared through a recognized or exempt clearing agency, the recognized or exempt clearing agency,
  - (b) if the transaction is not cleared through a recognized or exempt clearing agency and is between two derivatives dealers, the derivatives dealer determined to be the reporting counterparty under the ISDA methodology,
  - (c) if paragraphs (a) and (b) do not apply to the transaction and the transaction is between two derivatives dealers, each derivatives dealer,

(d) if the transaction is not cleared through a recognized or exempt clearing agency and is between a derivatives dealer and a counterparty that is not a derivatives dealer, the derivatives dealer,

(e) if paragraphs (a) to (d) do not apply to the transaction, the counterparty determined to be the reporting counterparty under the ISDA methodology, and

(f) in any other case, each local counterparty to the transaction.

Therefore, under the OSCs OTC derivative trade reporting regulations, the swap dealer would be responsible for reporting the swap if a Canadian pension plan is facing a swap dealer. As Canadian securities regulations would also apply if a Canadian pension plan is facing a swap dealer under an OTC derivatives transaction (regardless of it involves a US underlier) and regardless of if the counterparty is Canadian, US or other, we would hope that the SEC would seek to harmonize SBS reporting with the approach taken by the Canadian regulators (and the CFTC for that matter), requiring the SBS (or SD) to report the SBS if they enter into a trade with a non-SBS or a non-SD, such as a pension plan.

**2) Any reporting to SEC should be made publicly available on an aggregate anonymous basis, eg. identifying the global aggregate SBS positions on an underlying security name, but not identifying the holders of those positions**

PIAC believes that while aggregate SBS reporting data should be made public for transparency purposes, that such information should be rendered anonymous so as to not identify either of the parties that have entered into the transactions (including the reporting party). This will limit the possibility of dealers or other market participants entering into deceptive and manipulative trading practices or front running positions (PIAC members entering into SBSs might seek to spread-out the entry of sizeable positions across several dealers over a period of time). Even if our banking counterparties might not make use of such information for deceptive and manipulative trading purposes, their use of such information might not amount to fair dealing. Unfortunately, we have seen many instances of market manipulation, disclosure of client information and price fixing within the FX markets and interest rate swap markets. We would submit that one of the reasons that this is potentially less prevalent in the equities swap markets is because of a combination of two factors (i) buy side participants don't have to publicly disclose their equities or SBS holdings on as frequent of a basis (provided that holdings are below substantial shareholder reporting levels and they are not for the purposes of acquiring control) and (ii) there is transparent pricing (closing prices, bid/offer spreads) within equity trading on exchanges. Therefore, we are of the view that while anonymous transparency is helpful (we support greater aggregate transparency for the market – volumes, notionals for a specific underlyer, etc.), complete transparency, including listing the amount of securities or SBSs that a specific pension plan might hold, is problematic on a T+1 basis to parties other than the SEC.

For physical securities trades, the identity of parties that holds positions are not made publicly available on a T+1 basis. Instead, an initial schedule 13D report is generally filed within 10 calendar days if a party acquires beneficial ownership of more than 5% of a class of registered equity voting securities, moreover, pension plans might qualify to file a short form Schedule 13G report (if acquiring greater than 5% of a class of shares) if the party

does not have the purpose of influencing control of the issuer. There is an even greater delay for 13G filings (within 45 days after the end of a calendar year if a Qualified Institutional Investor holds between 5% and 10%). Furthermore, PIAC members also might make much less frequent quarterly Form 13F institutional investor filings to the SEC. Pension plans would file Form 13F for a mandated SEC list of securities where holdings are greater than US \$100 million or more in 13(f) securities. However, the fact that these 13F and 13G filings are made less frequently than on a T+1 basis, greatly reduces the potential that our counterparties (or other market participants) might have the opportunity to front run our positions or might seek to otherwise take advantage of their knowledge of our existing holdings.

To be clear, PIAC is fully supportive of the SEC being provided with greater transparency regarding the entry into of certain security based swap positions (SBS) including specific positions, counterparties, aggregate positions, and we are supportive of the SECs goals of using any such data as a tool to prevent fraudulent or manipulative activities and in order to monitor concentration risks. However, that greater transparency involving the names of the parties to the contracts should be provided only to the SEC on a T+1 basis. Providing that information to our potential counterparties or the general public, which would not be done if we were trading physical securities, actually increases, instead of decreases the potential for deceptive and manipulative trading practices on the part of our counterparties.

Finally, PIAC does not agree with the SECs rationale for reporting a person's aggregate SBS positions, with the apparent aim of seeking to identify positions that might have a significant impact on a persons counterparties, where the SEC on page 71 states:

For example, if a person has a large Security-Based Swap Position that is broken up between a number of different counterparties, reporting of the aggregated position could alert each individual counterparty to the fact that the reporting person has a significant exposure to the other individual counterparties with respect to the same security-based swap.

Firstly, our SBS dealer counterparties will typically hold the physical security as a hedge under any total return swap with a pension plan, therefore, the risks to the counterparty are greatly reduced. Moreover, under various global uncleared margin regulations (Canadian, US, EU, UK) PIAC members would be required to post daily variation margin collateral having zero thresholds to our bank dealer counterparties, and depending upon volumes, might be required to post initial margin as well. The posting and receiving of uncleared margin (and trade reporting to swap data repositories and to regulators) are steps that already reduce and limit risks within the system. However, we would submit that providing counterparties (or the general public) with the specific identity of a party entering into SBS positions, on an aggregate basis, does not make the system safer, especially as it relates to equity SBSs. Rather, it opens it up to potential abuse. If the SEC does not require such public reporting for equities (unless above existing substantial shareholder reporting levels), why should it be required for SBSs?

**3) If anonymous trade reporting is not possible through EDGAR (not listing either of the parties that have entered into the trade) by SBSDs / SDs, the SEC should use**

**the same swap data repository infrastructure for trade reporting as is used by other global regulators, including the CFTC**

The CFTC, together with Canadian, EU, UK regulators already require the reporting of swap data to swap data repositories. For instance, refer to endnote(s) (i) and (ii), with references to CFTCs and OSCs rules and regulations regarding swap data recordkeeping and reporting requirements. In the event that EDGAR does not permit dealers to report on behalf of buy side participants to the SEC on an anonymous basis (not providing details to the public of the parties that have entered into the swaps), then PIAC is of the view that the SEC should leverage existing swap data repositories for SBS trade reporting. PIAC believes that as the general infrastructure is already in place for swap dealers to report swaps to swap data repositories (including securities based swaps with non-US dealers) that all that is needed would be for the SEC to require additional asset information fields for SBS transactions (fields specific to SBS transactions required by the SEC). For instance, the general counterparty trade data (eg. transaction identifier, ISDA type, clearing questions, inter-affiliate questions, collateralization, counterparties, jurisdictions, etc.) and common transaction data (eg. unique product identifier, contract or instrument type, underlyers, asset class (eg. equity), payment frequency, resets, etc. will remain the same as currently exists for the CFTC and OSC Rules. For instance, see Appendix A to OSC Rule 91-507, and Exhibit A “Minimum Primary Economic Terms Data CREDIT SWAPS and EQUITY SWAPS” of CFTC Final Rule 17 CFR Part 45 – Swap Data Recordkeeping and Reporting Requirements)<sup>iii</sup>. PIAC believes that most of the same reporting details for CFTC governed equity swaps, would also apply to SEC governed SBSs. The SEC could therefore focus on specifying the additional information related to SBS derivatives that it requires or would find helpful for its regulatory oversight and systemic risk monitoring purposes. Furthermore, SDs (and presumably SBSDs) are already familiar and comfortable with reporting swaps to swap data repositories on behalf of non-dealer counterparties such as pension plans.

Finally, if using swap data repositories for the SBS reporting, the SEC should be able to aggregate data on a counterparty basis, based on underlying security, and it would presumably be easier for the SEC to perform specific targeted reviews for credit or systemic risk concerns, whether on a security basis, by over-the-counter counterparty or by trading infrastructure (exchange/ clearinghouse).

**4) If proceeding with EDGAR filings (to be made by buy side participants), equity SBS should have the same reporting thresholds as underlying physical equities (5%) potentially aggregated, with the possibility for specific \$ limits for single name and narrow basket CDS**

PIAC believes that in the event that the SEC is intent on moving ahead with Rule 10B-1, and the proposal continues to require that buy side participants to file, even if facing a SBS or SD, PIAC proposes that the SEC should apply the same substantial shareholder reporting thresholds for SBS as applies to the trading of the underlying physical equities - generally, if a party acquires beneficial ownership of more than 5% of a class of registered equity voting securities. Furthermore, the same reporting timelines should apply to pension plans as apply under Forms 13F or 13G (assuming that the pension plans are not intent on acquiring such shares for the purpose of influencing control over the issuer).

This consolidation between physical equities and derivatives positions could potentially result in a similar approach to Europe, where certain EU regulations require that in the share position calculation, parties aggregate both physical equities and synthetic derivatives positions in shares held through derivatives<sup>iv</sup>. For instance, in France, there generally exists an initial 5% substantial shareholder reporting obligation, but there is an aggregation of 5% of (a) the total amount of issued shares (voting and non-voting) and (b) financial instruments referenced to in-scope shares (with an aggregation of both (a) and (b)).<sup>v</sup> PIAC could better understand the policy rationale, and would therefore be more supportive, if (i) such reporting obligation required that the holder of the securities (or derivatives instruments) was required to aggregate physical share holdings and derivatives referencing those shares (other than broad based indexes), (ii) if the aggregate limit were the same for derivatives and physical equities at the 5% level and (iii) the SEC maintained current reporting timelines applicable to pension plans, where pension plans are not seeking to exercise control over the issuer.

Finally, if it is a primary concern of the SEC to have disclosure of the single name (or narrow basket) CDS market in order to increase the transparency for the reasons listed by the SEC in this comment paper, then the specific dollar limit thresholds within this Rule might be best used to apply only to single name or narrow basket CDS.

#### **Four PIAC Areas of Focus**

We would like to thank the SEC for considering PIAC's comments on SEC proposed rule 10B-1: Position Reporting of Large Security Based Swap Positions.

In summary, PIAC believes that: (1) the SBS regulations should create a reporting party waterfall, whereby securities based swap dealers or swap dealers should report SBS transactions if facing parties that are non-dealers; (2) any SBS reporting on a T+1 basis available to the general public should not disclose the identity of the parties holding such positions; (3) the SEC might consider using swap data repositories for SBS reporting, as the swap reporting infrastructure already exists in many jurisdictions; and (4) if requiring PIAC members to directly report via EDGAR and without anonymity, the SEC should consider (i) for equities / SBS referencing equities, a substantial shareholder reporting limit of 5% (aggregated across derivatives and physical securities) having similar reporting timelines as currently apply to pension plans that are not seeking to exercise control (13G timelines) and (ii) the proposed dollar limits within this proposed Rule should be narrowly focused on CDS (or narrow basket CDS), where substantial shareholder reporting thresholds do not currently apply.

We trust our response has been helpful. Thank you for your attention and please do not hesitate to contact us if you have any questions or concerns.



Yours sincerely,



Sean Hewitt  
Chair

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<sup>i</sup> <https://www.cftc.gov/sites/default/files/idc/groups/public/@lfederalregister/documents/file/2011-33199a.pdf> (Final Rule).  
[https://www.cftc.gov/LawRegulation/DoddFrankAct/Rulemakings/DF\\_17\\_Recordkeeping/index.htm](https://www.cftc.gov/LawRegulation/DoddFrankAct/Rulemakings/DF_17_Recordkeeping/index.htm) (Showing various amendments)

<sup>ii</sup> [https://www.osc.ca/sites/default/files/pdfs/irps/rule\\_20160512\\_91-507\\_derivatives-data-reporting.pdf](https://www.osc.ca/sites/default/files/pdfs/irps/rule_20160512_91-507_derivatives-data-reporting.pdf) (Final Rule)  
<https://www.osc.ca/en/securities-law/instruments-rules-policies/9/91-507> (OSC Rule 91-507 Trade Repositories and Data Reporting with amendments)

<sup>iii</sup> <https://www.cftc.gov/sites/default/files/idc/groups/public/@lfederalregister/documents/file/2011-33199a.pdf> (Final Rule).  
[https://www.cftc.gov/LawRegulation/DoddFrankAct/Rulemakings/DF\\_17\\_Recordkeeping/index.htm](https://www.cftc.gov/LawRegulation/DoddFrankAct/Rulemakings/DF_17_Recordkeeping/index.htm) (Showing various amendments)

<sup>iv</sup> EU Transparency Directive (2004/109/EC) implementing European Commission Directive 2007/14/EC as amended by Directive 2013/50/EU.

<sup>v</sup> French Commercial Code, Article L 233-9 I. 4° and 4 bis, calculated according to the principle of horizontal aggregation set-out in the above EU Transparency Directive in endnote iv.