U.S. Chamber of Commerce

1615 H Street, NW
Washington, DC 20062-2000
uschamber.com

March 21, 2022

Ms. Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
Washington, DC 20549

Re: Prohibition Against Fraud, Manipulation, or Deception in Connection with Security-Based Swaps; Prohibition against Undue Influence over Chief Compliance Officers; Position Reporting of Large Security-Based Swap Positions [Release No. 34-93784; File No. S7-32-10]

Dear Ms. Countryman:

The U.S. Chamber of Commerce's Center for Capital Markets Competitiveness (the "Chamber") appreciates the opportunity to comment on the rules proposed by the Securities and Exchange Commission (the "Commission"), published in the Federal Register on February 4, 2022, that would seek to prevent fraud, manipulation, and deception in connection with security-based swaps ("SBSs"), and to increase transparency and oversight in the SBS market. The Commission cites manufactured credit events or other opportunistic strategies in the credit default swap ("CDS") market as the rationale for making these proposals impacting the SBS market.

The Chamber is primarily concerned with the potential costs and unintended consequences that could result from proposed Rule 10B-1. We believe the Commission should delay consideration of this Proposal until it has properly evaluated data generated by Regulation SBSR and assessed the costs that Rule 10B-1 would impose on market participants.

The proposal includes 3 rules using its authority under the Securities Exchange Act of 1934 ("Exchange Act").[1]

- New Rule 10B-1 to require prompt reporting to the Commission of a SBS position that exceeds a certain threshold, disclosing certain information related to the SBS position.

[1] Securities and Exchange Commission, Release No. 34-93784; File No. S7-32-10 (December 15, 2021). https://www.sec.gov/rules/proposed/2021/34-93784.pdf

- Re-proposing Rule 9j-1 to provide stronger rules to prevent fraud and manipulation related to SBS transactions.

- New Rule 15Fh-4(c) to make it unlawful to take actions that would coerce or put undue influence on a SBS swap participant's chief compliance officer.

The Chamber will focus its comments on the various provisions surrounding new Rule 10B-1 (the "Proposal"), which would create a new and expansive disclosure regime related to large SBS positions. The Proposal would require market participants with a SBS position exceeding certain thresholds to publicly report the following information[2]:

1. large positions in SBSs, following certain reporting thresholds;
2. positions in a security or loan underlying the SBS position; and
3. positions in other instruments relating to the underlying security or loan.

The Chamber supports transparency so that market participants can make informed decisions. We understand that the Proposal was made by the Commission with the intention of providing greater transparency into large, concentrated SBS positions. However, we are concerned about how extensive and aggressive the proposed new reporting regime is and the resulting unintended consequences for the market and market participants who rely on swaps for risk management.

There are multiple areas of the Proposal that could be improved just by gathering and assessing additional data on SBS transactions and conducting a more thorough cost-benefit analysis. The Chamber offers our views and recommendations regarding the new SBS data repository and the Proposal's specific provisions on public disclosure, thresholds for reporting, entities required to make SBS position reports, the reporting period, and implementation and compliance.

We are interested in working with the Commission to ensure that any future reporting of SBS positions provides transparency to the market while also minimizing unintended consequences to the market and market participants. Without substantial changes, we believe the current provisions of the Proposal will discourage use of SBSs as a critical risk management tool.

Additional data from the security-based swap data repository will improve the Commission's Proposal.

The Chamber is concerned that the Commission has not gathered and assessed the necessary data that would support many key provisions of the Proposal. Although the Proposal refers to the newly implemented Regulation SBSR, the Commission seems to have disregarded that Regulation SBSR will, with time, provide data that could better inform a proposal on SBS positions. We agree with Commissioner Peirce's statement that "the

[2] Release No. 34-93784; File No. S7-32-10, Page 23.

regulatory concerns driving this rule are not so urgent that we could not have waited until we had a year or two of security-based swap transaction data to consider a recommendation for additional transparency measures[3]."

Regulation SBSR, finalized on February 11, 2015, requires reporting of SBS information to registered security-based swap data repositories ("SDRs") or the Commission. In addition, Regulation SBSR requires the public dissemination of SBS transaction, volume, and pricing information by registered SDRs.[4] The transaction reporting required under Regulation SBSR has only been required since November 8, 2021. Further, public dissemination of SBS transaction information only recently began on February 14, 2022.

Recognizing that SBS transaction reporting is relatively new, the Commission should take the time to fully evaluate the impact of Regulation SBSR before proposing new rules[5]. The Proposal explains that there are key differences between the information required to be reported under Regulation SBSR and under new Rule 10B-1 – chiefly requiring public reporting of position data on SBSs, including information about the reporting person and their positions in other financial instruments. Requiring such information to be made public is a major step that no other regulatory entity in the U.S. requires or is considering requiring.

Instead, we encourage the Commission to delay consideration of this Proposal while it gathers additional information from Regulation SBSR reporting on SBS transactions that will help the Commission determine whether additional regulation is necessary. As discussed in further detail below, the overly expansive and complex disclosures required under new Rule 10B-1 have raised legitimate concerns from our member firms over the type of information to be reported, the process by which such information would be reported, and the timing by which the SBS information would be reported. We believe that additional data will also ensure that a revised proposal is informed by a strong cost-benefit analysis. The Commission itself makes clear in the Proposal that it does not yet have the data necessary to make various estimates.[6]

The SEC has not provided a strong rationale for making the disclosure of large SBS transactions public.

The Proposal would require SBS position data to be made public. This requirement is an unprecedented step that no other regulatory entity in the U.S. has required. The

---

[3] Commissioner Hester M. Peirce, "Statement of Hester M. Peirce on Proposed Security-Based Swap Rules," December 15, 2021 https://www.sec.gov/news/statement/peirce-statement-proposed-security-based-swap-rules-121521?utm_medium=email&utm_source=govdelivery

[4] Securities and Exchange Commission, Release, Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, Page 1. https://www.sec.gov/rules/final/2015/34-74244.pdf

[5] Commissioner Peirce: "…it seems premature to issue a proposal to require additional disclosures until the Commission has had some experience with the data reported and publicly disseminated under these existing rules."

[6] Release No. 34-93784; File No. S7-32-10, Pages 105 and 109.

Commission has failed to provide a rationale in the Proposal for why position data for SBS transactions must be made available to the public. Moreover, the cost-benefit analysis has not fully evaluated the negative consequences related to public disclosure to the firms that utilize SBSs. There are serious implications for firms who would be required to report such information, including publicizing the identities of individual market participants and exposing their proprietary investment strategies.

We are very concerned that forcing firms to disclose information they may have a legitimate interest in keeping confidential would have an adverse impact on legitimate market activity. This would ultimately disincentivize the use of SBS, which have been a legitimate investment tool to help firms manage risk. Until it can fully evaluate all the data collected through Regulation SBSR, we encourage the Commission to keep SBS position data anonymized. The goal of the Commission – to enable regulators and the market to identify elevated activity in large SBSs that could be indicative of potentially fraudulent or manipulative purposes – can be achieved without publicizing market participant identities and proprietary information.

Market participants will be made worse off if SBS position information is made public. For example, if other market participants decide to copycat investment strategies, the result would increase transaction costs for both a SBS and the underlying stock and reduce liquidity in the market. Such behavior would also reduce research accompanying investment strategies and altogether reduce market participant use of swaps.

We encourage the Commission to evaluate whether they can get to the same goal without disclosing SBS trading activity and positions publicly. We understand that the Commission has been empowered to develop rules to require the reporting of large SBS positions through Section 763(h) of the Dodd-Frank Act,[7] which added Section 10B to the Exchange Act. However, the Dodd-Frank Act did not mandate that the rules developed by the Commission must require public reporting of the SBS positions. The Commission should align its approach with the CFTC and FINRA who do not require public dissemination of position information.

The proposed thresholds are too low, they should not be calculated on a gross basis, and are complex and burdensome.

The Proposal lays out a complex framework for determining if a SBS transaction exceeds the threshold and requires reporting to the Commission. The calculations required of market participants will differ depending on whether the SBS is based on equity or debt.

- ***CDS:*** The threshold is the lesser of (i) a long notional amount of $150 million, calculated by subtracting the notional amount of any long positions in a deliverable debt security underlying a SBS included in the SBS position from the long notional

[7] Release No. 34-93784; File No. S7-32-10, Page 11.

amount of the SBS position; (ii) a short notional amount of $150 million; or (iii) a gross notional amount of $300 million.[8]

- ***Equity SBS:*** The threshold is the lesser of (i) the notional amount of $300 million (calculated on a gross basis), provided that once a SBS position exceeds a gross notional amount of $150 million, the calculation of the SBS position shall also include the value of all of the underlying equity securities owned by the holder of the SBS position[9] and (ii) the position representing more than 5% of a class of equity securities, provided that once a SBS equivalent position represents more than 2.5% of a class of equity securities, the calculation of the SBS equivalent position shall also include in the numerator all of the underlying equity securities owned by the holder of the SBS position, as well as the number of shares attributable to any options, security futures, or any other derivative instruments based on the same class of equity securities.[10]

We offer the following comments and recommendations specific to the Proposal's provisions regarding the thresholds to determine reporting for SBS market participants:

Allow the thresholds and calculation methodology to be informed by strong data. The thresholds proposed by the Commission are too low. We question whether the Commission has the "necessary information to determine with any confidence whether the thresholds for reporting…are appropriate."[11] We again strongly encourage the Commission to wait for more extensive data on SBS transactions from Regulation SBSR reporting so that it can better determine appropriate SBS position reporting thresholds.

Reporting thresholds should be calculated on a net basis. We are also concerned by the use of a gross position in a SBS in calculating whether the reporting threshold has been met. The notional values laid out in the Proposal are especially low when considering they apply to gross positions. In many cases, trading activity during a day may inadvertently pull a market participant under the scope of the rulemaking, even though their net position remains below the thresholds. The Commission believes that thresholds based on a gross position will "identify circumstances when a market participant has a large, concentrated position in a security-based swap on a single issuer,"[12] and "identify situations where a counterparty has a higher likelihood of having incentives to undertake opportunistic trading strategies."[13] In actuality, gross positions will sweep unnecessary information into the reporting, muddying the pool of data on a market participant's SBS positions such that it inhibits proper interpretation by both the Commission and the public. An important

---

[8] Release No. 34-93784; File No. S7-32-10, page 73.
[9] Id. Pages 77-78.
[10] Id. Pages 79-80.
[11] Commissioner Peirce https://www.sec.gov/news/statement/peirce-statement-proposed-security-based-swap-rules-121521?utm_medium=email&utm_source=govdelivery
[12] Release No. 34-93784; File No. S7-32-10, Page 70.
[13] Id. Pages 149-150.

improvement to the Proposal would be for the reporting thresholds to be based on net basis instead of a gross basis.

The thresholds and required calculations should be simplified. The hybrid CDS and equity SBS calculations the Commission has proposed are complex and will require extensive systems and compliance updates by firms, the costs of which are not adequately considered in the Proposal's economic analysis. The complex analyses, particularly for equity SBS, include tracking positions in underlying equity securities and derivative instruments based on the same class of equity securities.

Moreover, since the Proposal applies to "any person (and any entity controlling, controlled by or under common control with such person), or group of persons, who through any contract, arrangement, understanding or relationship, after acquiring or selling directly or indirectly, any security-based swap, is directly or indirectly the owner or seller"[14] of a SBS position that exceeds the threshold, the proposed rule would seem to require aggregation of SBS position information. However, the Proposal is not clear about the level at which commonly controlled entities must be aggregated (i.e., individual funds, at the adviser level, or at the firm level). The processes and systems that must be put in place to gather and calculate such information are made more challenging and costlier by the requirement to assess these factors on a daily basis.

The aggregation of data is particularly unworkable and burdensome, so we recommend that the Commission clarify that aggregation is not required. Reporting may cover multiple advisors, who likely manage multiple funds. A high level of operational diligence is required to support the aggregation of data in the same or related instruments (i.e., equity swap, stock underlying the equity swap, bond related to the equity, swap on that bond) across managers and business lines. In addition, the proposal appears to ignore long-standing Commission guidance that acknowledges and respects corporate separateness and information barriers within corporate groups. Our members often engage in investment activities quite separately from their affiliates, with robust information barriers in place based on decades-old Commission guidance that applies in other securities law contexts, such as for purposes of Section 13 filings. If the proposed thresholds disregard information barriers and treat all affiliates in a group as a single holder, this will create additional compliance costs even as it diminishes the value of the information reported—since separate affiliates in fact trade separately.

More information does not necessarily mean better information. In the case of this Proposal, aggregating the SBS positions across related instruments and across a firm's multiple advisors will result in the reporting of too much information that is confusing to the public and even the Commission. As an example, a market participant would be required to report on its SBS position if they have a large equity position in cash, but just a small swap position.

---

[14] Release No. 34-93784; File No. S7-32-10, Page 65.

The operational burden on market participants will also have a chilling effect on market use of swaps. The need to identify related equity positions would be a huge cost and human capital burden on firms to implement and maintain on an ongoing basis. Such rules will result in the needless disincentivizing of the use of swaps, thereby depriving entities of the cost savings and efficiencies that come from managing risk through swaps.

The Proposal includes an overly expansive definition of who must report SBS position information.

The Proposal applies to any person or group of persons directly or indirectly the owner or seller of a SBS position that exceeds the reporting threshold.[15] As explained in the Proposal, the Commission made a deliberate decision to propose a more expansive definition of reporting entity instead of limiting the reporting requirement to a SBS dealer or participant.

Reporting SBS data under these overly inclusive provisions will result in a confusing and burdensome reporting regime for firms.

- First, under this Proposal, even a person who is not registered with the SEC would have to comply with the rulemaking. Those entities that are unregistered with the Commission may find it challenging and costly to comply. They likely do not have systems in place to readily handle reporting to the SEC. Building out compliance systems that can collect and evaluate the information required by this Proposal will likely require more hours and expense than accounted for in the cost-benefit analysis.

- Second, the Proposal does not recognize that firewalls may exist between business units at a firm. As the Commission is aware, there are many legitimate instances under which different departments at a firm are not able to share sensitive information with one another. This situation is one that the Commission already recognizes in the application of its rules under Section 13 beneficial ownership reporting (footnote from ISDA letter). The Commission should extend this same understanding and approach to this Proposal.

- Third, the Proposal could lead to inaccurate and over-counted data. Because of the broad definition around the entity or entities responsible for reporting the SBS position information, and since the current rules do not affirmatively recognize the need for independence among certain business units within a firm, the Commission is likely to receive inaccurate data that may in fact overcount a firm's SBS position. A firm's business units, for example its asset management and broker-dealer units, likely maintain independent investment and trading strategies. Aggregating the positions of independent units would be a mistaken approach if the Commission's goal is to accurately identify elevated activity in large SBSs that could be indicative

[15] Release No. 34-93784; File No. S7-32-10, Page 65.

of potentially fraudulent or manipulative purposes. The current Proposal would lead to an overabundance of information that can be misinterpreted.

- Finally, the broad definition of who must comply with the Proposal extends to certain non-U.S. market participants. The Commission has designed Rule 10B-1 with a clear intention to apply this rule to the global market. According to the Proposal, so long as a single transaction in a larger position has a nexus to the U.S., then the entire SBS position is in scope of the rule. Moreover, as written, the Proposal loops in non-U.S. market participants who do not expect to be subject to a U.S. reporting regime and who may already be subject to another jurisdiction's reporting regime. For example, two non-U.S. persons entering into a SBS on unlisted securities of a U.S. domiciled issuer will need to perform the threshold calculations."[16] We recommend that the Commission determine certain exemptions for non-U.S. market participants not registered with the Commission. For example, if the SBS position is a result of having a counterparty that is a U.S. SBS dealer.

The T+1 reporting period is onerous and unworkable for market participants.

According to the Proposal, if a SBS position exceeds the established thresholds, then the market participant will be required to file a report with the Commission no later than the end of the first business day following the day of execution of the transaction ("T+1").[17] Reporting on a T+1 basis is burdensome and unworkable for market participants.

The Commission explains in the Proposal that it chose a T+1 reporting period to align with Rule 15Fi-2(b), "which governs the timeframe for when a SBS Entity is required to provide a trade acknowledgement to its counterparty after executing a security-based swap transaction."[18] We question the applicability of aligning the reporting period for new Rule 10B-1 with that of Rule 15Fi2(b). There is complex tracking, calculating, and reporting that would be unique to Rule 10B-1. For instance, market participants will need new compliance systems and processes to calculate equity SBS and CDS thresholds, accounting for changing market positions and prices, tracking underlying securities and derivatives, and aggregating data across commonly controlled entities.

The Commission's reporting period should also reflect that new rule 10B-1 will be more burdensome for market participants. We encourage the Commission to recognize the complexity involved in calculating the reporting thresholds and that compliance with a T+1 reporting period will be costly to adopt – more so, according to our members, than reflected in the Proposal's cost-benefit analysis. The Commission should consider a more reasonable reporting timeframe. For example, it would make sense for the Commission to

[16] Sullivan & Cromwell, LLP, "SEC Proposes Rules Relating to Security-Based Swaps," December 29, 2021. https://www.sullcrom.com/files/upload/sc-publication-SEC-proposes-rules-security-based-swaps.pdf
[17] Release No. 34-93784; File No. S7-32-10, Page 67.
[18] Id. Page 67.

align Rule 10B-1 reporting with the parameters for Section 13 reporting, particularly the Form 13F reporting that allows for reporting within 45 days of the end of each quarter.

The Commission should consider an implementation period of no less than 24 months if Rule 10B-1 is finalized.

There are significant challenges in this Proposal that the Commission should fully address before releasing a final rulemaking. With that in mind, the Commission should consider a stepped approach to implementing a new reporting regime for SBS positions.

First, we encourage the Commission to delay consideration of this Proposal while it gathers additional information from Regulation SBSR reporting on SBS transactions that will more accurately inform a rulemaking on large SBS positions.

Second, if Rule 10B-1 is ultimately finalized, we recommend a lengthy implementation period of no less than 24 months. This period of time is a recognition of the unprecedented scope of the new rulemaking, the extensive and complex compliance and systems development that must take place, and the substantial costs associated with these processes.

As we have explained, we believe the Commission can achieve its goal – to enable regulators and the market to identify elevated activity in large SBSs that could be indicative of potentially fraudulent or manipulative purposes – without publicly reporting market participant information and proprietary information. Should the Commission persist in requiring SBS position data to be shared publicly, we recommend that such requirement not go into effect until 12 months after full implementation of the rule. This period of time will enable the Commission to further study the SBS transaction data and anonymized position reporting and demonstrate through a thorough cost-benefit analysis whether such public dissemination is necessary.

The SEC is increasingly allowing insufficient time for the public to comment on substantive changes in regulation. In addition, we encourage the Commission to consider how to stage compliance across the many new regulations to minimize inefficiencies for market participants.

Through several comment letters, CCMC has expressed its deep concern with the Commission's shortened and concurrent timeframes to respond to the wide array of new and complex proposals, most of which are recommending substantial technical changes to the reporting environment. We reiterate our concern with the Commission's inadequate comment periods, especially if it is genuinely seeking meaningful feedback from stakeholders. We hope that the Commission will slow down its agenda in favor of getting the regulations right, keeping in mind they are not only protecting investors, but regulations should maintain fair, orderly, and efficient markets and facilitate capital formation.

In addition, given the Commission's very lengthy and fastmoving agenda, we are concerned about the extensive compliance changes that our member firms will have to make to implement the universe of new rules that are part of the Commission's agenda. The various rules under consideration will require layers of new systems, processes, and operations updates. Has the Commission considered these updates collectively, specifically by conducting a thorough cost-benefit analysis of the cumulative impact of the Commission's various proposals? Moreover, has the Commission considered whether they could phase in new regulations and compliance requirements in a way that, considering the universe of proposals under consideration, is efficient for market participants to adopt? We hope the Commission will work in good faith to consider and develop implementation timetables that minimize the extensive burdens that will be placed on businesses as they comply with these many new regulations.

Conclusion

The Chamber welcomes this opportunity to comment on the Proposal. We believe there is much the Commission must consider, data to gather and evaluate, and changes to be made to the Proposal before it can be finalized. We stand ready to assist and be a resource for the Commission and staff.

Sincerely,

Kristen Malinconico
Director
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce