SUBMITTED BY E-MAIL

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

Brussels, 1 April 2022

SUBJECT: EBF's comments on the Notice of Proposed Rulemaking on the 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 (File No. S7-32-10)

Dear Ms Countryman,

The European Banking Federation (EBF) appreciates the opportunity to submit comments on the U.S. Securities and Exchange Commission's (SEC) Notice of Proposed Rulemaking referenced above, with our comments in this letter limited to discussion of position reporting of large security-based swap (SBS) positions (Proposed Rule 10B-1).[1]

EBF supports appropriately calibrated efforts to enhance SBS market transparency, and the benefits such transparency brings to investors, other market participants and regulators. As drafted, however, Proposed Rule 10B-1 presents substantial risk of negatively impacting the SBS market and the vital role it plays in allowing market participants around the globe to hedge risks. In its current form, Proposed Rule 10B-1 would impose significant new reporting requirements on a large number of market participants that will likely result in reporting that is generally not reflective of the risks held by entities holding these positions – and without clear rationale that such reporting would provide additional benefit to the market. Furthermore, proposed requirements for public disclosure raise significant concerns for the confidentiality of hedging and trading activities, which may invite front running and deter key market activity, and thus negatively affecting liquidity. Moreover, the expansive extraterritorial approach proposed by the Commission further exacerbates these concerns. Lastly, the rule as proposed is extraordinarily complex to implement based on the multi-layered thresholds, e.g., for equity SBS, its globe spanning scope, and its reporting across multiple specified and unspecified "related" instruments, whereby such complexity is not necessary to meet the presumed policy rationale of the rule.

[1] EBF further supports the arguments made by separate letter dated March 21, 2022 by ISDA, SIFMA and IIB concerning proposed Rule 9j-1.

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EBF is supportive of comments submitted jointly by the Securities Industry and Financial Markets Association (SIFMA), the International Swaps and Derivatives Association (ISDA) and Institute of International Bankers (IIB) on March 21, 2022 (the SIFMA/ISDA/IIB Letter), which provide detailed policy recommendations on key aspects of Proposed Rule 10B-1, including on the recalibration and clarification of proposed reporting threshold amounts, the recognition of independent business units, and modifications to the proposed reporting deadlines - among other significant items.

EBF would like to add the following specific comments and recommendations:

1. **The SEC Should Conduct Further Analysis before Adopting Proposed Rule 10B-1**: As detailed above, proposed Rule 10B-1 presents significant challenges, both as to market impact and operational complexity. As such, the SEC should conduct further analysis of potential market impacts and implementation costs of Proposed Rule 10B-1 (as well as its interplay with other recent proposals released by the SEC)[2] before adoption. In addition, a proposal of such significance would benefit from further public notice and comment, to allow the SEC to garner a broader array of information about how best to make necessary modifications to mitigate potential negative impacts, clarify the open questions regarding Rule 10B-1's application, and consider the interplay with other SEC rules and proposals.

   Should the SEC decide to move forward with the current Proposed Rule 10B-1, however, we believe it is imperative that the recommendations provided herein, and in the SIFMA/ISDA/IIB Letter, are reflected in any final rule.

2. **Reconsider Rule 10B-1's Territorial Scope**: Rule 10B-1 as proposed is overly expansive, and does not consider deference to home regulators' choices in respect of regulating this subject matter. While the preamble of Proposed Rule 10B-1 may suggest that the SEC considered appropriate extraterritorial limitations, the requirements themselves stand to have a far broader extraterritorial impact in practice.[3] EBF therefore supports recommendations made in the SIFMA/ISDA/IIB Letter to more appropriately tailor Rule 10B-1 to:

   - Narrow the prong for positions comprised of SBSs required to be reported pursuant to Rule 908(a) of Regulation SBSR to reference solely Rule 908(a)(1)(i) (for transactions for which there is a direct or indirect counterparty that is a U.S. person on either or both sides of the transaction)

[2] Particularly the SEC's recent proposal, "*Modernization of Beneficial Ownership Reporting*" (SEC Release No. 33-11030 (February 10, 2022), 87 Fed. Reg. 13846 (March 10, 2022)).

[3] The preamble explains that Rule 908(a) provides that an SBS is subject to regulatory reporting and dissemination if: (i) there is a direct or indirect counterparty that is a U.S. person on either or both sides of the transaction; or (ii) the SBS is accepted for clearing by a clearing agency having its principal place of business in the United States, and that an SBS that is not included in the above provisions is subject to regulatory reporting but not public dissemination if there is a direct or indirect counterparty on either or both sides of the transaction that is a registered SBS or a registered major SBS participant. See Proposed Rule at p. 6674. However, Rule 908(a) also includes several other prongs, resulting in large position reporting where there are far more tenuous U.S. touchpoints.

or (ii) (for transactions accepted for clearing by a clearing agency having its principal place of business in the United States);

- Narrow the prong for SBSs referencing U.S. securities to cover reference securities issued by a company that has securities listed on a U.S. national stock exchange;

- Not subject a non-U.S. person not registered with the Commission to reporting under Proposed Rule 10B-1, if its only SBSs giving rise to a reportable position are those covered by Proposed Rule 10B-1 solely because the non-U.S. person's counterparty is a U.S. SBS dealer or a non-U.S. SBS dealer (including those whose obligations under the SBSs are guaranteed by a U.S. person)[4]; and

- The exclusion of sovereign credit default swaps from Proposed Rule 10B-1.

Additionally, under Proposed Rule 10B-1(d)(1), SBS position reporting requirements apply to an entire SBS position so long as any of the transactions that comprise the SBS position would be required to be reported pursuant to Section 908(a) of Regulation SBSR. As noted above, we believe the scope of Rule 10B-1(d)(1) should be limited to positions comprised of SBS transactions required to be reported pursuant to Rule 908(a)(1)(i) or (ii). As proposed (or as modified as described above), a reporting person that entered into a single SBS transaction with a U.S. person would need to count toward the reporting threshold all SBS transactions based on the same reference asset or issuer. This result is unlike Rule 908(a) of Regulation SBSR, which provides for public dissemination of an SBS transaction solely based on characteristics of that SBS transaction.

To achieve a more appropriate result, EBF recommends that for the purpose of determining whether a reporting person's SBS position exceeds the reporting threshold amount, the reporting person should be permitted to count only those SBS transactions that are within the territorial scope, as narrowed per the above recommendations. For example, assume that (i) a non-U.S. reporting person entered into several uncleared credit default swap transactions referencing a non-U.S. issuer with no class of securities registered under Section 12 or 15(d) of the Exchange Act; and (ii) of these transactions, only one transaction, which had a $10 million notional amount, had a direct or indirect counterparty that was a U.S. person. In such a case, the reporting person should not be required to report this SBS position under Proposed Rule 10B-1 because the $10 million notional amount would not exceed the reporting threshold. If, instead, the notional amount of the credit default swap transactions with U.S. persons had exceeded the reporting threshold amount, then the non-U.S. reporting person would report its entire SBS position (and subsequent amendments), including transactions that were not required to be counted toward the reporting threshold. Similar treatment would apply to any other derivative instruments required to be included under Rule 10B-1(b)(iii), which relates to SBS positions based on equity securities.

[4] As noted in the SIFMA/ISDA/IIB Letter, if the SEC does not adopt recommendations to narrow the prong for positions comprised of SBSs required to be reported pursuant to Rule 908(a) of Regulation SBSR to solely reference Rule 908(a)(1)(i) or (ii), then this exception should also cover positions reportable because they include SBSs covered by Rule 908(a)(1)(v) or (a)(2) of Regulation SBSR.

The above recommendation (coupled with comments in the SIFMA/ISDA/IIB letter) would allow the SEC to more appropriately define the extraterritorial scope of Proposed Rule 10B-1. By not requiring non-U.S. entities to conduct onerous global calculations for what may be a *de minimis* U.S. position, this approach would avoid scoping in positions that lack a significant U.S. nexus (e.g., a position that (A) references a security issued by a non-U.S. issuer and (B) is overwhelmingly comprised of transactions involving no U.S. persons).

3. **Appropriate Transition Periods**: EBF members understand that implementation of this wholly new reporting regime, coming at the same time as other key transparency initiatives, as well as the SEC's proposal to shorten the securities settlement cycle to T+1, among a plethora of other recent SEC rulemaking initiatives, will present significant challenges - even if the recommendations on territorial limits made herein are reflected in a final rule. Thus, we believe a compliance period of at least 24 months is necessary. Further, any compliance period should not begin until the SEC staff has released technical specifications and other necessary guidance related to any final rule.

   Additionally, we support the SIFMA/ISDA/IIB Letter recommendation that the SEC conduct a study prior to the implementation of public reporting. This study would allow the SEC to analyse collected data, consider whether public dissemination is necessary and appropriate, and modify requirements as appropriate. If the SEC determines public dissemination is appropriate, EBF supports additional opportunity for public notice and comment.

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Thank you for considering these comments. Should you have any questions, please do not hesitate to contact Blazej Blasikiewicz, Director of Legal, International & Public Affairs at +[redacted] or [redacted].

Respectfully submitted,

Yours sincerely,

Wim Mijs
Chief Executive Officer
European Banking Federation