Proskauer

SEC Proposes Large Security-Based Swaps Position Reporting Rules, Re-Proposes Anti-Fraud Rules

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On December 15, 2021 the Securities and Exchange Commission proposed new rules requiring that large positions in security-based swaps and related securities be reported to the commission and publicly disseminated. At the same time, the Securities and Exchange Commission proposed new rules restricting the personnel of security-based swap dealers from taking action to influence the chief compliance officer of the security-based swap dealer in the performance of their duties. The Securities and Exchange Commission also re-proposed regulations prohibiting fraudulent, deceptive and manipulative conduct in connection with security-based swaps.

The Securities and Exchange Commission (the “SEC”) proposed new rule 10B-1 requiring the reporting of large security-based swaps positions on the SEC’s Electronic Data Gathering, Analysis, and Retrieval system (“EDGAR”). The rule is intended to increase transparency in security-based swaps positions. In the proposing release the SEC expressed concern about manufactured credit events triggering credit default swaps and the risks of concentrated positions that are not known to the market or regulators. The SEC stated that the reporting of such large security-based swaps positions will alert market participants as to possible financial incentives a market participant might have to act contrary to the interests of the issuer and its stakeholders. The SEC believes that such transparency would be beneficial to the market even where there is no fraud, manipulation or deceptive conduct on the part of the owner of the large security-based swaps position. The SEC also believes that such public reporting could help inform pricing and enhance the risk management of dealers where one market participant has built up a large position across a number of dealers by alerting the dealer as to significant exposure with respect to the same security-based swap.

Rule 10B-1 would require any person, affiliate of such person or group of persons who would directly or indirectly be the owner or seller of a security-based swap to report such security-based swap position on EDGAR, subject to certain thresholds. The thresholds vary based on the type of swap and, in certain circumstances, will include the value of any underlying securities owned by the holder of the reportable security-based swap position in determining whether the threshold has been met. The information on security-based swaps positions is required to be filed on EDGAR within one business day of execution of the relevant position and will be publicly disseminated.

The SEC originally proposed anti-fraud, deception and manipulation rules with respect to security-based swaps in 2010. The rule explicitly addressed misconduct in connection with offers, purchases and sales of security-based swaps and also applied to cash flows, payments, deliveries and other ongoing obligations and rights specific to security-based swaps. The new re-proposed rule prohibits fraudulent, deceptive and manipulative conduct in connection with security-based swaps and also includes anti-manipulation rules similar to those promulgated by the Commodity Futures Trading Commission. The rule prohibits persons in possession of material non-public information ("MNPI") from using swaps to gain exposure to securities and avoid the liability that would otherwise arise from directly purchasing the relevant securities while in possession of MNPI. In addition, the rule makes it unlawful for any officer, director, supervised person or employee of a security-based swap dealer or major security-based swap participant to coerce, manipulate, mislead or fraudulently influence the entity's chief compliance officer in the performance of their duties under the securities laws.

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