

THE REVIEW OF
**SECURITIES & COMMODITIES
REGULATION**

AN ANALYSIS OF CURRENT LAWS AND REGULATIONS
AFFECTING THE SECURITIES AND FUTURES INDUSTRIES

Vol. 56 No. 13 July 19, 2023

THE SEC'S PROPOSED RULE FOR REPORTING LARGE SECURITY-BASED SWAP POSITIONS

In this article, the authors discuss the SEC's proposed Rule 10B-1 in detail, which requires the reporting of large security-based swap positions above certain prescribed thresholds. They begin by comparing the proposed rule to other recently enacted and proposed regulations, observing that the proposal enters a crowded regulatory environment. Next, the article examines the SEC's rulemaking authority and explores events that have directly contributed to enacting this proposed regulation. Finally, the authors provide an in-depth summary of proposed Rule 10B-1 and identify potential conflicts with existing regulations and unintended consequences of the proposed Rule.

By Elanit A. Snow *

On December 15, 2021, the Securities and Exchange Commission (the "SEC") published a set of proposed rules (the "Proposing Release")¹ which included new Rule 10B-1 (the "Proposed Rule"). The Proposed Rule would, among other things, require public reporting of large security-based swap positions above certain prescribed thresholds.

Although not directly mentioned in the Proposing Release, the Proposed Rule is widely perceived as a direct response to the collapse of Archegos Capital Management, L.P. ("Archegos"). Archegos obtained

exposure to the economics of more than 10% of multiple companies' shares by taking highly leveraged positions in total return swaps with several broker-dealers. It was then forced to liquidate its positions, roiling the market.² The SEC believes that reporting and public dissemination of security-based swap positions would prevent or reduce the odds of a similar situation occurring again.³ The Proposed Rule would drastically change the market for security-based swaps by making information about all positions that exceed certain thresholds public and requiring that the identity of the reporting party be publicly disseminated.

¹ *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* Ex. Act Rel. No. 34-93784 (February 4, 2022) 87 FR 6652, available at <https://www.govinfo.gov/content/pkg/FR-2022-02-04/pdf/2021-27531.pdf>.

² Lucian A. Bebchuk, James Barr Ames Professor of Law, Economics and Finance Director, Corporate Governance Program at Harvard University, Letter to the SEC, *Release No. 34-93784; File No. S7-32-10* (March 20, 2022) ("Bebchuk Comment Letter"), at 5, available at <https://www.sec.gov/comments/s7-32-10/s73210-20120578-272763.pdf>.

³ Proposing Release at 6656.

* ELANITA A. SNOW is senior counsel in the New York office of Proskauer Rose LLP. Her e-mail address is esnow@proskauer.com.

I. A FLURRY OF REGULATION

The Proposing Release goes beyond just the Proposed Rule; it also specifically tries to address fraud and manipulation in the security-based swaps market and proposes to make it unlawful for any specified actor, including officers, directors, or employees, to try to unduly coerce or influence a security-based swap dealer's or major security-based swap participant's chief compliance officer (both of which topics are not the focus of this article).⁴ These rules are being proposed on top of an already robust regulatory framework which has seen an exhaustive revamp in recent years.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd Frank Act") amended the Securities Exchange Act of 1934 (the "Exchange Act") to explicitly authorize the SEC to require reporting of large security-based swap positions and requires the SEC to adopt rules to prevent fraud and deceit in the security-based swaps market.⁵ The SEC has enacted a number of rules under Title VII of the Dodd-Frank Act, including rules imposing a variety of obligations on security-based swap dealers and major security-based swap participants (each individually, an "SBS Entity"). These include rules relating to recordkeeping and trade reporting.⁶

The reporting and dissemination of the Security-Based Swap Information regulation ("Regulation SBSR"), adopted by the SEC in 2015, requires market participants to report individual security-based swap

transactions to a security-based swap data repository ("SBSDR") within 24 hours of trade execution and further requires the SBSDR to publicly disseminate the transaction information, including pricing and volume information in real time.⁷ The reporting obligations of Regulation SBSR went into effect on November 8, 2021, three months prior to the Proposed Rule's publication. The public dissemination of security-based swap trade information pursuant to Regulation SBSR went into effect on February 14, 2022, after the publication of the Proposing Release. This gave the SEC little time to thoroughly review the data provided under Regulation SBSR.⁸

The SEC proposed numerous other reporting requirements contemporaneously with the release of the Proposed Rule. In February 2022, the SEC proposed that short sales above a specified reporting threshold be reported on Proposed Form SHO within 14 calendar days after the end of the calendar month in which the short sale is effected.⁹ In March 2022, the SEC published significant revisions to its Section 13(d) rules (the "Beneficial Ownership Release") which, among other changes, proposes that any person acquiring more than 5% of a covered class of equity securities report such position on Schedule 13D within five days.¹⁰ The SEC also proposed an amendment to Rule 13d-3 that would require certain cash-settled derivatives (excluding security-based swaps) to be included in calculating whether one has crossed the 5% beneficial ownership

⁴ Proposing Release at 6652.

⁵ *Dodd-Frank Act*, Pub. L. No. 111-203, § 929-Z, 124 Stat. 1376, 1871 (2010) (codified at 15 U.S.C. § 78o); 15 U.S.C. 78j-2(d).

⁶ Proposing Release at 6681. See also *Capital, Margin, and Segregation Requirements for Security-Based Swap Dealers and Major Security-Based Swap Participants and Capital Segregation Requirements for Broker-Dealers*, Ex. Act Rel. No. 86174 (June 21, 2019) 84 FR 43872 and *Recordkeeping and Reporting Requirements for Security-Based Swap Dealers, Major Security-Based Swap Participants and Broker-Dealers*, Ex. Act Rel. No. 87005 (December 16, 2019) 84 FR 68550.

⁷ *Regulation SBSR-Reporting and Dissemination of Security-Based Swap Information*, Ex. Act Rel. No. 72744 (February 11, 2015), 80 FR 14577.

⁸ Proposing Release at 6682.

⁹ *Short Position and Short Activity Reporting by Institutional Investment Managers*, Ex. Act Rel. No. 34-94313, 87 FR 14950 (March 16, 2022), available at <https://www.govinfo.gov/content/pkg/FR-2022-03-16/pdf/2022-04670.pdf>.

¹⁰ *Modernization of Beneficial Ownership Reporting*, Ex. Act Rel. No. 33-11030; 34-94211, 87 FR 13846 (March 10, 2022), available at <https://www.govinfo.gov/content/pkg/FR-2022-03-10/pdf/2022-03222.pdf>.

threshold for purposes of Section 13D/G filings and Section 16 reporting.¹¹

The Proposed Rule thus enters a crowded regulatory market. As with any new rule, growing pains are expected but those pains will likely be exacerbated by the fact that aspects of the Proposed Rule are inconsistent with existing regulations and may have unintended consequences on the market and on market participants' ability to hedge effectively.

II. SEC'S RULEMAKING AUTHORITY

A. SEC's Authority to Enact Rules Surrounding Large Security-Based Swap Reporting

Section 763(h) of the Dodd-Frank Act added Section 10B to the Exchange Act which, among other things, provided the SEC with the authority to establish position limits for security-based swaps and rulemaking authority to require reporting of large security-based swaps. Specifically, the Dodd-Frank Act authorizes the SEC to compel persons who effect transactions "in any securities-based swap or uncleared security-based swap, and any security or loan or group or narrow-based security index of securities or loans" to report such information as the SEC may prescribe.¹² Until now, the SEC has not utilized authority under Section 10B with respect to either position limits or reporting of large positions in security-based swaps.

B. Potential Benefits of Large Security-Based Swap Reporting

The SEC lists three potential benefits of reporting large positions in security-based swaps: (i) providing market participants (including issuers and issuers' stakeholders) and regulators with access to information that may indicate a person or group is building up a large security-based swap position; (ii) alerting market participants and regulators about the existence of concentrated exposures to a limited number of counterparties; and (iii) providing market participants and regulators with advance notice that a person (or group) is building up a large credit default swap

("CDS") position. The SEC believes that in some cases, a large security-based swap position could be indicative of potentially fraudulent or manipulative actions, and that alerting market participants, in addition to regulators, to such risks would allow parties to better manage these risks, leading to better and more accurate pricing. Additionally, information about large CDS positions could alert regulators, issuers, and other stakeholders as to incentives parties may have to vote against their interests as debt holders, even if such conduct is not inherently fraudulent.¹³

The Proposing Release also argues that such information should be publicly available, and not reported on an anonymous basis, because the entire market would benefit from such public information, in addition to the SEC as the primary regulator of the security-based swap market. The SEC believes such transparency could play an important role in market integrity. The SEC acknowledged the inherent proprietary nature of security-based swap transactions but felt it safeguarded against those concerns by not requiring disclosing parties to report any information about their counterparties, including counterparty identity. Anonymized reporting was considered and rejected by the SEC, saying that transparency directly contributed to one of the key benefits of the rule; providing market participants an opportunity to take certain protective actions when transacting with persons or groups who hold a large, concentrated security-based swap position. While not explicitly stated in the Proposing Release, these rules seem to be intended not only to limit manufactured credit events under CDS but also to prevent another Archegos.¹⁴

III. PROPOSED RULE

A. Who Has to Report Large Security-Based Swaps?

Rule 10B-1(a)(1) requires "any person (and any entity controlling, controlled by or under common control with such person) or any 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 of a Position that exceeds the Reporting Threshold Amount" to report their security-based swap positions to the SEC for public dissemination. Those who own a security-based swap position by virtue of participation in a group can satisfy the reporting

¹¹ Note that the Beneficial Ownership Release would specifically require disclosure of cash-settled derivatives (including cash-settled security-based swaps) if the reporting person is otherwise required to file Schedule 13D, even if the cash-settled derivatives are not included in the calculation of the 5% beneficial ownership threshold under the current rules. See Beneficial Ownership Release at 13889.

¹² Dodd-Frank Act 78j-2(d).

¹³ Proposing Release at 6656, 6667.

¹⁴ Proposing Release at 6667-6668, 6699.

requirement by either a single group joint filing or individual filings by each member of the group. Should the members of the group elect to make individual filings, each filing must identify all members of the group and should include the information concerning such other group members that the filing person knows or has reason to know.¹⁵

The Proposed Rule does not define “group” and may require that entities not only consider their own security-based swap positions when calculating whether they exceed the reporting thresholds but also the security-based swap positions of entities within the same corporate group. The Proposed Rule also does not state whether an entity’s holdings of an underlying security or narrow-based security index would be ascribed to other entities in the same corporate group, potentially causing related entities, which might otherwise be well below the applicable thresholds, to exceed the reporting thresholds. The proposal also raises questions for entities, such as private funds, in determining which entities are deemed to be under common control with other entities managed by the same manager.

The SEC notes that the Dodd-Frank Act grants it authority to require reporting by any person that effects transactions in security-based swaps for such person’s own account or the account of others. The SEC considered whether such reporting obligations should only apply to certain types of persons, such as SBS Entities, but opted against limiting the obligation. An integral purpose of the Proposed Rule is to provide the SEC and the market with information about any large positions in security-based swaps and related securities that, in the event of a default, could impact the markets, counterparties, and other market participants. Ultimately, the SEC chose to have the reporting obligations apply broadly, as it believes such information is needed for counterparties’ risk management strategies and accurate pricing of swaps. Again, while not explicitly referencing Archegos, the SEC seems to be trying to prevent a similar situation.¹⁶

The Proposed Rule also includes provisions intended to prevent evasion of the reporting requirement. Any person who, directly or indirectly, creates or uses a trust, proxy, power of attorney, etc. as part of a plan to evade the reporting requirements, will be deemed to be the owner of the security-based swap position. If a number of entities agree to acquire separate security-based swaps that each individually fall below the relevant threshold to

avoid the reporting requirement of such positions aggregated together, each entity that was party to the arrangement will be deemed to be the owner of the aggregated security-based swap position.¹⁷

B. What Swaps are in Scope for the Reporting Requirement?

The Proposed Rule requires all security-based swap positions that exceed the applicable reporting threshold be reported on Schedule 10-B. Security-based swap positions include all security-based swaps referencing (i) a single security, loan, or a narrow-based security index, (ii) any securities issued by the same issuer (the “Issuing Entity”) as the issuer of the security, loan, or securities comprising the narrow-based security index referenced in any other security-based swap position owned by that person, and (iii) any narrow-based security index that includes any of those Issuing Entities or their securities. Based on this definition, market participants who own a security-based swap referencing a single equity or loan must look through the components of any security-based swap referencing a narrow-based security index and include in their threshold calculation for such equity or loan, the proportion of each narrow-based security index position that is based on the same equity or loan. For purposes of calculating whether a person has exceeded any applicable reporting threshold, security-based swaps referencing the equity of an Issuing Entity are treated as a separate class from security-based swaps referencing a loan of the same Issuing Entity.¹⁸

C. What are the Reporting Thresholds?

Proposed Rule 10B-1(b)(1) defines “Reporting Threshold Amount,” which establishes three primary reporting thresholds depending on the type of security-based swap.

Credit Default Swaps

For credit default swaps, the reporting threshold is the lesser of (i) a long notional amount of \$150 million, calculated by subtracting the notional amount of any long positions in debt securities underlying the CDS (any security that could potentially be deliverable into a CDS auction) from the long notional amount of the security-based swap position, (ii) a short notional amount of \$150 million, and (iii) a gross notional amount of \$300 million. Based on a review of available

¹⁵ Proposing Release at 6668.

¹⁶ Proposing Release at 6654, 6668.

¹⁷ Proposing Release at 6668.

¹⁸ Proposing Release at 6668-6669.

DTCC-TIW data, the SEC believes the \$150 million long notional threshold is high enough to avoid over-reporting, but low enough to identify situations where a party to a CDS could potentially impact the CDS or bond market, or have an effect on the reference entity. The SEC is of the view that a party may be incentivized to act against their own interest as a debt holder because they would gain more from their CDS than they would lose on their bonds, a situation more likely to occur with a naked long CDS exposure. Likewise, the SEC believes the \$150 million notional threshold for short CDS positions is high enough to capture situations where a CDS seller has a large enough position to potentially avoid or delay the occurrence of a credit event. Finally, the SEC believes a gross CDS position that equals or exceeds \$300 million is high enough to create counterparty concentration risk that might impact the market, even in the absence of a manufactured or other opportunistic credit events.¹⁹

Security-Based Swaps Referencing Debt

With respect to all other security-based swap positions based on debt securities (other than CDS), the reporting threshold is a gross notional amount of \$300 million. This does not take into account the direction of the person's CDS positions (if any) and does not allow the reporting person to exclude or net out any underlying debt securities they may hold.²⁰

Security-Based Swaps Referencing Equity

The reporting thresholds for security-based swap positions based on equity securities include both a threshold based on the notional amount of the security-based swaps and a threshold based on the total number of shares attributable to the security-based swaps as a percentage of the outstanding number of shares of that class of equity securities.

A reporting person would be required to file a report if the gross notional amount of its security-based swap positions on a single equity security is equal to or greater than \$300 million. In order to prevent potential reporting persons from evading the reporting requirements by keeping security-based swap positions below the \$300 million gross notional threshold while also building up a position in the underlying equity securities, Schedule 10-B must also be filed if a reporting person holds equity security-based swap positions of at least \$150 million and those positions,

plus the value of underlying securities held by such person as well as the delta-adjusted notional amount of any options, security futures, or any other derivative instruments based on the same class of equity securities, is equal to or greater than \$300 million combined. The SEC believes such an approach will provide greater transparency into the positions of a person with significant exposure to a particular equity security, even if the security-based swap position, in and of itself, would not trigger a Schedule 10-B filing.²¹

Many commenters raised questions and concerns about the notional amount-based thresholds.²² The commenters note that there is disparate treatment between the reporting thresholds for security-based swap positions under the Proposed Rule and the reporting of positions in the underlying equity security under Rule 13d-1. Under Rule 13d-1, positions in the underlying equity security must be reported when a person is the beneficial owner of 5% or more of a covered class of equity securities. The \$150 million or \$300 million gross notional threshold represents a small fraction of the outstanding securities of many Issuing Entities, leading to the over-reporting of immaterial security-based swap positions.²³

A reporting person must also file a Schedule 10-B if a security-based swap position represents more than 5% of a class of equity securities or where the security-based swap position represents at least 2.5% of a class of equity securities if, after combining the security-based swap position with the ownership of underlying equity securities and any shares attributable to options, futures, or other derivatives, that person owns or has security-based swap positions representing more than 5% of that class of equity securities. The Proposed Rule provides guidance as to how to perform this calculation for cash-settled security-based swaps where the delta is not equal to one and for security-based swaps where there is no obvious methodology for determining the percentage. These calculations would apply not only to all security-based swaps referencing a single equity security but also

¹⁹ Proposing Release at 6670.

²⁰ *Id.*

²¹ Proposing Release at 6671.

²² *See, e.g.*, Bebchuk Comment Letter, *supra* note 2; MFA Comment Letter, *infra* note 26 at 20; and IIB, ISDA and SIFMA Comment Letter, *infra* note 27 at 17.

²³ For example, a person could buy \$1.5 billion of equity of a company with a market valuation of \$300 billion before triggering the reporting requirement under Rule 13d-1. The same person would be required to report a position of only \$300 million referencing the equity of that same company if that position is acquired using security-based swaps.

to a narrow-based security index that includes such security. The SEC believes that a test based on the number of shares underlying the security-based swap position is important to capture swap positions referencing securities issued by companies with a smaller market capitalization. The notional amount of such security-based swaps may not trigger the \$150 million or \$300 million gross notional threshold tests but could be large enough to impact the Issuing Entity and the market.²⁴

As with the threshold for security-based swap positions based on CDS, the SEC chose these thresholds in an attempt to capture positions that could have a significant effect on the equities markets, Issuing Entities, and their security holders, yet also avoid over-reporting, which could limit the effectiveness of the rule. As noted above, on November 8, 2021, the SEC began collecting equity security-based swap transaction data from registered SBSDRs pursuant to Regulation SBSR. The SEC stated it will consider this newly available data in determining appropriate thresholds before publishing a final rule.²⁵

D. What Information Must be Reported?

There are nine categories of information required to be reported on Schedule 10-B. These include:

1. the name of the reporting person (or names if it is a joint filing), whether the reporting person is a member of a group and the names of the members of the group if the members are satisfying the group's Rule 10B-1(a)(1) obligation by making individual filings;
2. the residency or place of organization of the reporting person or persons;
3. the type of reporting person (*e.g.*, a broker-dealer, SBS entity, insurance company, investment company or investment adviser, corporation, partnership, etc.);
4. for persons that are legal entities, the Legal Entity Identifier ("LEI") of such person, if such person has an LEI;
5. the notional amount of the applicable security-based swap position of the reporting person, along with

summary information about the composition of the position as it relates to the direction and the tenor or expiration of the underlying swap and the product ID of the swap;

6. for security-based swaps based on debt securities (including CDS), ownership of (i) all debt securities underlying the security-based swap and the LEI of the issuer and (ii) all security-based swaps based on equity securities issued by the same Issuing Entity (including, in each case, the Financial Instrument Global Identifier ("FIGI") of each underlying equity security);
7. for security-based swap positions based on equity securities, ownership of (i) all equity securities underlying the security-based swap and the LEI of the issuer and (ii) all security-based swaps based on debt securities issued by the same Issuing Entity and, in each case, the FIGI of the underlying security;
8. ownership of any other instrument relating to the security-based swap and/or any underlying security or loan or index of securities or loans, and any other material terms not otherwise disclosed; and
9. to the extent that the reporting threshold amount is based on the number of shares in an equity security-based swap, the number of shares attributable to the security-based swap, along with the closing price used in the calculation and the date of such closing price.

Commenters raised a number of concerns about the breadth of information required to be reported on Schedule 10-B. The information required to be disclosed includes proprietary information about market participants' investment positions and trading strategies. Commenters asserted that the public disclosure of this proprietary information would impair their ability to operate their trading business and to effectively hedge, and would allow others to take advantage of this information by aiding front-running and copycat trading, thereby driving up costs for all market participants.²⁶ The SEC acknowledges in the Proposing Release that certain aspects of a security-based swap may be sensitive or proprietary information, but does not address the fact that the mere public disclosure of this information would

²⁴ Proposing Release at 6671-6672.

²⁵ Proposing Release at 6674.

²⁶ See, *e.g.*, MFA Comment Letter at 6, available at <https://www.sec.gov/comments/s7-32-10/s73210-20120700-272867.pdf>.

have significant detrimental effects on market participants.²⁷

E. When and Where do Large Security-Based Swaps Need to be Reported?

Proposed Rule 10B-1(a)(2) would require that Schedule 10-B be filed promptly, but in any event no later than the end of the first business day following the day of execution of the security-based swap transaction that results in the security-based swap position first exceeding the relevant threshold. Proposed Rule 10B-1(c) would require an amendment following any material change to any information previously reported on Schedule 10-B, including any material increase in the security-based swap position or if a security-based swap position falls back below the applicable reporting threshold. Any such amendment must also be filed promptly, but in no event later than the end of the first business day following such change. For the purposes of Rule 10B, an acquisition or sale in an amount equal to 10% or more of the previously disclosed position would be deemed to be “material.”²⁸

This timing is intended to be consistent with SEC Rule 15Fi-2(b), which governs the timeframe for when SBS Entities are required to provide a trade acknowledgment to their counterparties after executing a security-based swap transaction. In the Proposing Release, the SEC states that once a security-based swap agreement reaches the point where an SBS Entity is required to deliver a trade acknowledgment to its counterparty, both sides of the transaction should have the necessary information about the size of the transaction to allow them to make their own determination as to whether a reporting threshold has been exceeded.²⁹

Commenters noted that the complexity of the calculations make reporting within one business day of exceeding an applicable threshold extremely difficult. Market participants will be required to constantly monitor changing positions and market prices across

equities, loans, and indices and security-based swap positions referencing these equities, loans, and indices, as well as aggregate information across controlled entities.³⁰

Interestingly, the SEC does not discuss the discrepancy between the one business day timing in the Proposed Rule and the timing required under Section 13 of the Exchange Act, which currently allows for 10 calendar days to report a physical position in the underlying security in excess of a 5% threshold. Additionally, on February 10, 2022, the SEC published the Beneficial Ownership Release, which proposed a number of amendments to Rule 13d-1 of the Exchange Act. Among other changes, such amendments would shorten the time period from 10 calendar days to five calendar days for “beneficial owners” of a publicly traded security above the prescribed threshold to file Schedule 13D. In the Beneficial Ownership Release, the SEC notes the “chilling effect” that a shortened reporting deadline could have on the market and proposed five days as a balance intended to provide information in light of technological advances but also not impose “undue burdens” on beneficial owners.³¹ Many commenters urged the SEC to align the timing for filing reports under the Proposed Rule with that under Rule 13d-1.³²

All reports on Schedule 10-B will be required to be filed on the SEC’s Electronic Data Gathering, Analysis, and Retrieval system (“EDGAR”). Such reports would be made publicly available immediately upon filing. The SEC is proposing that Schedule 10-B utilize the Financial Information eXchange Markup Language (“FIXML”), a structured data language built on the open Financial Information eXchange standard.³³

²⁷ Proposing Release at 6673. *See also*, The Institute of International Bankers (“IIB”), the International Swaps and Derivatives Association (“ISDA”), and the Securities Industry and Financial Markets Association (“SIFMA”) Letter to the SEC (March 21, 2022) (the “IIB, ISDA and SIFMA Comment Letter”) at 6, *available at* <https://www.sec.gov/comments/s7-32-10/s73210-20120774-272955.pdf>.

²⁸ Proposing Release at 6672, 6668.

²⁹ Proposing Release at 6668. 17 CFR 240.15FI-2(b).

³⁰ *See, e.g.*, ISDA and SIFMA Letter to the SEC, *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)* (March 21, 2022), at 24-25 (“ISDA and SIFMA Joint Comment Letter”) *available at* <https://www.sec.gov/comments/s7-32-10/s73210-20120774-272955.pdf>.

³¹ Beneficial Ownership Release at 13851-13852.

³² *See, e.g.*, ISDA and SIFMA Joint Comment Letter, *supra* note 30, at 25. *See also*, IIB, ISDA and SIFMA Comment letter, *supra* note 27, at 7 and Bebchuk Comment Letter, *supra* note 2, at 2.

³³ Proposing Release at 6668, 6672, 6675.

F. Cross-Border Implications

Proposed Rule 10B-1(d) provides that the reporting requirements apply to all security-based swap positions so long as (i) any of the transactions that constitute the security-based swap position would be required to be reported under the cross-border provisions of Regulation SBSR (Rule 908) or (ii) the reporting person holds any amount of reference securities underlying the security-based swap position, and (x) the issuer of such security is a partnership, corporation, trust, vehicle, or other person organized under U.S. law, or having its principal place of business in the U.S. or (y) such reference security is part of a class of securities registered under Section 12 or 15(d) of the Exchange Act.³⁴

Rule 908(a) requires a security-based swap to be reported to an SBSDR and publicly disseminated if (i) there is a direct or indirect counterparty that is a U.S. person on either side of the transaction or (ii) the security-based swap is accepted for clearing by a clearing agency having its principal place of business in the U.S. The rule also provides a security-based swap 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 side of the transaction that is an SBS Entity. The Proposing Release states that when a U.S. person enters into a security-based swap, the SEC takes the view that the security-based swap necessarily exists at least in part within the U.S. and therefore reporting and public dissemination of such security-based swap is consistent with the SEC's territorial approach. This would mean that a security-based swap position exceeding the relevant threshold but referencing a non-U.S. issuer would be required to be reported under the Proposed Rules if one party to the swap were a U.S. person.³⁵

Section 10B of the Exchange Act generally provides the SEC with the authority to require any person effecting transactions in any security-based swap and underlying security or loan to report such information. The second prong of the cross-border application of the Proposed Rule requires a filing when the securities or loans underlying a security-based swap (i) are issued by an entity subject to U.S. jurisdiction or (ii) are subject to ongoing reporting obligations under the federal securities laws (*i.e.*, Section 12 or 15(d) of the Exchange Act). This would bring security-based swaps between non-U.S. persons into the scope of the Proposed Rule any time such persons' security-based swap positions reference a security by a U.S. issuer or an issuer registered under Section 12 or 15(d) of the Exchange Act. It is unclear how the SEC would enforce compliance where neither party to the security-based swap is a U.S. person or SBS Entity.³⁶

IV. CONCLUSION

Few commenters disagree with the SEC's intentions behind the Proposed Rule, which ultimately is to provide transparency to a complex and shifting market. However, as discussed above, they note some inconsistencies with existing and proposed rules. Some commenters expressed the view that the SEC may not have sufficiently accounted for the potential for the Proposed Rule to seriously displace the security-based swap market, which is based on proprietary and confidential data. These commenters hope that the SEC will review the data now available under Regulation SBSR and consider the operational difficulties and market impact of implementing the Proposed Rule and the other rules proposed contemporaneously with the Proposed Rule before finalizing any reporting requirements. ■

³⁴ Proposing Release at 6674.

³⁵ *Id.*

³⁶ Proposing Release at 6674-6675.