

Dissenting Statement on Proposed Security-Based Swaps Rules



Commissioner Elad L. Roisman

Dec. 15, 2021

I thank the rulemaking team for their work on the proposal we are considering today. I would also like to thank the broader team in the Division of Trading and Markets that worked on our Title VII registration and trade reporting rules that went live last month. Finalizing these rules, and the related implementation guidance, was no easy task. Your efforts, particularly over the last few months, are very much appreciated. As today's proposal makes clear, there is more work on the horizon regarding Title VII. Unfortunately, in their current form, I cannot support the proposed rules we are considering today.

In 2010, we made our first attempt at fulfilling the directive in Section 763(g) of the Dodd-Frank Act to adopt rules addressing fraud, manipulation, and deception in connection with security-based swaps by proposing Rule 9j-1.^[1] In response, we received feedback from market participants about the potential unintended consequences of that initial proposal on the day-to-day operations of both the security-based swaps market and the underlying cash markets.^[2]

Today, we are considering a re-proposal of Rule 9j-1. This second attempt has made some changes to respond to several comments that we received on the 2010 proposal. But, in other respects, I see this re-proposal as doubling down on our prior approach. I believe that the re-proposed rule will lead to confusion for market participants that could have detrimental effects on their ability to use security-based swaps for hedging and risk management.

The extent of potential confusion regarding how this re-proposed rule could operate is broad and could touch many aspects of our capital markets. The re-proposed rule has implications for the ability of security-based swaps to serve as a means through which lenders manage credit risk from their loan portfolios and trading desks hedge cash positions they have entered into. Re-proposed Rule 9j-1 also would affect trading in underlying securities markets in a manner that could raise doubts for firms regarding their secondary market trading activity, even if trading is done by an affiliate of the security-based swap counterparty.

Fostering market integrity is a key means by which the Commission carries out its three-part mission and instills fairness and confidence in securities markets. The antifraud provisions of the federal securities laws are time-tested, and in this instance, perhaps we could have considered an approach that hewed more closely to those safeguards. Such an alternative approach might mitigate areas of potential confusion, allowing the security-based swaps market to continue serving its important risk management function that benefits both issuers and investors.

I also have concerns about proposed Rule 10B-1 regarding public large position reporting. The release explains that the goals of public reporting are: (1) providing information about the build-up of large positions that could be indicative of potentially fraudulent or manipulative purposes; (2) flagging the existence of concentrated positions, which may not be known to all counterparties; and (3) providing advance notice of a potential manufactured credit event or other opportunistic strategy. Unfortunately, it is not clear that the large amount of information to be reported will be effective for achieving these goals.

At this time, we are unable to determine what types of entities will ultimately be obligated to publicly report as large traders. Thus, we cannot be sure that these entities are the ones that may be engaging in activities that the proposed rule seeks to address. Nor is it readily apparent that the information to be reported will necessarily be helpful in shining a light on these activities. I question seeking public comment on a proposal that provides for public reporting of a significant amount of information on positions in both swaps and underlying or related securities, involves complex threshold calculations (particularly for equity security-based swaps), and imposes a one-day reporting timeframe, without having a better sense of whether our proposed approach is fit for this purpose.

Last month, dealers began reporting their security-based swaps trades under Regulation SBSR.^[3] Today's release states that we will evaluate this new data in considering changes to the reporting thresholds upon adopting any final rule. I believe the more prudent approach would be to analyze this new data in the first instance and use that analysis to inform our proposal. Such an approach would put us in a position to craft a rule that we are confident is calibrated to achieve its stated goals and also enable commenters to respond to the data and help further inform us. Unfortunately, our staff has not been able to take that additional time to use the new information and tools at our disposal to inform this policymaking. Hopefully, commenters will nonetheless be able to evaluate the bases for the proposed thresholds and provide relevant information that can assist us in closing some of the many data gaps.

Lastly, as with the other matters we have considered today, I am troubled by the decision to provide a comment period that is only 45 days long. The comment period for this proposal runs not only over several holidays, but is also concurrent with five other rule proposals that have open comment periods,^[4] not including the four additional rules we are considering at today's meeting.^[5] Public feedback on Commission rule proposals is a critical part of the rulemaking process. I am not sure we are providing enough time to adequately review and provide meaningful comment on this proposal or the others under consideration today.

So, I thank the team again for all their work on this recommendation, but I respectfully dissent.

[1] See Securities and Exchange Commission, Prohibition Against Fraud, Manipulation, and Deception in Connection with Security-Based Swaps, Rel. No. 34-63236 (Nov. 3, 2010), <https://www.sec.gov/rules/proposed/2010/34-63236.pdf> (hereinafter, "2010 Rule 9j-1 Proposing Release").

[2] Comments on the 2010 Rule 9j-1 Proposing Release are available at: <https://www.sec.gov/comments/s7-32-10/s73210.shtml>.

[3] See 17 CFR 242.900-909.

[4] See Electronic Submission of Applications for Orders under the Advisers Act and the Investment Company Act, Confidential Treatment Requests for Filings on Form 13F, and Form ADV-NR; Amendments to Form 13F, Rel. No. 34-93518 (Nov. 4, 2021), <https://www.sec.gov/rules/proposed/2021/34-93518.pdf> (comments due December 20, 2021); Updated EDGAR Filing Requirements, Rel. No. 33-11005 (Nov. 4, 2021), <https://www.sec.gov/rules/proposed/2021/33-11005.pdf> (comments due December 22, 2021); Proxy Voting Advice, Rel. No. 34-93595 (Nov. 17, 2021), <https://www.sec.gov/rules/proposed/2021/34-93595.pdf> (comments due December 27, 2021); Electronic Recordkeeping Requirements for Broker-Dealers, Security-Based Swap Dealers, and Major Security-Based Swap Participants, Rel. No. 34-93614 (Nov. 18, 2021),

<https://www.sec.gov/rules/proposed/2021/34-93614.pdf> (comments due January 3, 2022); Reporting of Securities Loans, Rel. No. 34-93613 (Nov. 18, 2021), <https://www.sec.gov/rules/proposed/2021/34-93613.pdf> (comments due January 7, 2022).

[5] See Securities and Exchange Commission, “Open Meeting Agenda - December 15, 2021,” <https://www.sec.gov/os/agenda-open-121521> (noting that the Commission will consider rule proposals on: (1) Rule 10b5-1 and Insider Trading; (2) Share Repurchase Disclosure Modernization; (3) Money Market Fund Reforms; and (4) Security-Based Swap Positions).