



BETTER MARKETS

Electronically Filed

August 21, 2023

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Reopening of Comment Period for Share Position Reporting of Large Security-Based Swap Positions (File No. S7-32-10); 88 Fed. Reg. 41,338 (June 26, 2023)

Dear Ms. Countryman:

Better Markets¹ appreciates the opportunity to provide additional comment on the proposal to establish enhanced reporting requirements for large security-based swap positions, which was originally published by the Securities and Exchange Commission (“SEC” or “Commission”) in the Federal Register on February 4, 2022 (“2022 Proposal”).² The 2022 Proposal is now being reopened for comment regarding specific questions about the reporting threshold amounts for each asset class and in light of a memorandum issued by the staff of the SEC’s Division of Economic and Risk Analysis (“DERA Staff Memo”), released on June 20, 2023.³

The 2022 Proposal had three main components. The Proposal sought to (1) prohibit fraud or manipulation in connection with security-based swap (“SBS”) transactions; (2) prohibit coercion or deception of the chief compliance officer (“CCO”) of an SBS entity; and (3) require public reporting of large SBS positions (in the form of Rule 10B-1). As we stated in our original

¹ Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans’ jobs, savings, retirements, and more.

² 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, 87 Fed. Reg. 8,443 (Feb. 04, 2022).

³ SEC Division of Economic and Risk Analysis, *Supplemental data and analysis regarding the proposed reporting thresholds in the equity security-based swap market*, File No. S7-32-10 (June 20, 2023) (“DERA Staff Memo”).

comment letter in response to the 2022 Proposal, which we fully incorporate herein by reference,⁴ we believe all three components of the 2022 Proposal are important reforms in the SBS market that will help prevent fraud and abuse, increase transparency in the interest of systemic stability, and deter acts aimed at weakening the role of the CCO.

The Commission adopted two of the three reforms from the 2022 Proposal on June 30, 2023, but decided to continue to consider comments received on the provision requiring public reporting of large SBS positions.⁵ The Commission reopened the proposal (“Reopened Proposal”) on reporting for large SBS positions for commenters to provide additional input, specifically as it relates to the reporting threshold amounts for individual asset classes and in light of the DERA Staff Memo.

COMMENTS

It is certainly a hallmark of good rulemaking and government transparency to disclose new information, and related analysis, which is relevant to a pending rule proposal, and to allow the public to provide comments on how that new information may or may not impact a proposal. In this case, the information and analysis contained in the DERA Staff Memo on (1) the potential use of SBS data reported to the Security-Based-Swap Data Repositories and (2) the effects on activist investors, does not alter the bases or need for the 2022 Proposal. Additionally, while the Reopened Proposal asks questions regarding whether the Reporting Threshold Amounts should be higher or lower for each asset class, there is no justification for diluting the strength of the 2022 Proposal or providing any openings for market participants to evade large SBS position reporting requirements.

1. The DERA Staff Memo Provides Helpful Additional Information but In No Way Justifies Any Substantive Changes to the 2022 Proposal.

The Commission reopened the large position reporting requirements portion of the 2022 Proposal, in part, to include supplemental economic analysis from the SEC’s Division of Economic and Risk Analysis. Specifically, the DERA Staff Memo provides supplemental economic analysis in response to several commenters who urged the Commission (1) to use SBS data that was already being reported to SBSDRs in lieu of proposed Rule 10B-1 and (2) consider the economic effects of proposed Rule 10B-1 specifically on activist investors. While this supplemental economic analysis was hardly necessary to comply with the requirements of notice-and-comment rulemaking under the Administrative Procedures Act, the Commission provides good-faith analysis in this instance that directly responds to comments they received in response to proposed Rule 10B-1 in the 2022 Proposal. However, while this additional economic analysis is helpful supplementary

⁴ Better Markets Comment Letter, 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, 87 Fed. Reg. 8,443 (Feb. 04, 2022).

⁵ Prohibition Against Fraud, Manipulation, or Deception in Connection With Security-Based Swaps; Prohibition Against Undue Influence Over Chief Compliance Officers, 88 Fed. Reg. 42,546 (June 30, 2023).

information, nothing in the DERA Staff Memo justifies any substantive changes to the proposed Rule 10B-1 in the 2022 Proposal.

A. SBS Data Reported to SBSDRs Are Not an Adequate Substitute for Large Position Reporting Requirements in the 2022 Proposal.

The DERA Staff Memo analyzes new data collected and reported to SBSDRs pursuant to Regulation SBSR that was not readily available during the crafting of the 2022 Proposal. According to the DERA Staff Memo, data reported to SBSDRs were not considered during the crafting of the 2022 Proposal because only approximately one month's worth of this data was available at that time.⁶ The DERA Staff Memo supplements the 2022 Proposal with this analysis in response to several commenters suggesting the Commission analyze the SBS market using the now-available SBSDR data prior to finalizing any rule. The DERA Staff Memo also evaluates input from commenters arguing that the Commission should utilize this data in lieu of collecting large position data through proposed Rule 10B-1. While the analysis recognizes some overlap in the data reported to SBSDRs and the data that would be required to be reported to the Commission via proposed Rule 10B-1, there are significant gaps in the SBSDR data that the 10B-1 data would fill, thus providing the Commission with information that is critical to the protection of investors and financial stability.

As to arguments made by several commenters that the Commission should, instead of collecting large position reporting data using proposed Rule 10B-1, utilize SBSDR data or require SBSDRs to publicly disclose positions to accomplish the goals of the proposal, the Commission already considered this alternative in the 2022 Proposal. Even though data had not been reported to SBSDRs during the crafting of the 2022 Proposal, the Commission had already identified limitations with relying on this data, namely that this data was anonymized, is limited to SBS data only, and would still impose "significant burdens" on SBSDRs.⁷ Specifically, Regulation SBSR was promulgated under Section 13(m)(1)(C)(iii) of the Exchange Act, which does not allow disclosure of any business transactions or market positions by any person.⁸ Therefore, if the Commission jettisoned proposed Rule 10B-1 in favor of the data reported to the SBSDR, counterparties would not have the visibility necessary to protect themselves from one entity building up a large position in one security across multiple market participants. If the Commission opted to rely on anonymized data reported to SBSDRs instead of data gathered under proposed Rule 10B-1, financial institutions such as those that lost more than \$10 billion in the Archegos fiasco would still not be able to adequately spot the buildup of risk amongst their counterparties such as Archegos' concentrated SBS bets in the markets. Additionally, data reported to SBSDRs under Regulation SBSR is limited to the SBS transactions themselves and does not include positions related to the SBS such as a securities loan. Abandoning proposed Rule 10B-1 in favor of the existing data reported to SBSDRs would significantly limit the potential benefits of the 2022 Proposal and hamper the Commission's and market participants' ability to identify the concentration of risk in the markets.

⁶ DERA Staff Memo at 2.

⁷ 2022 Proposal at 6,699.

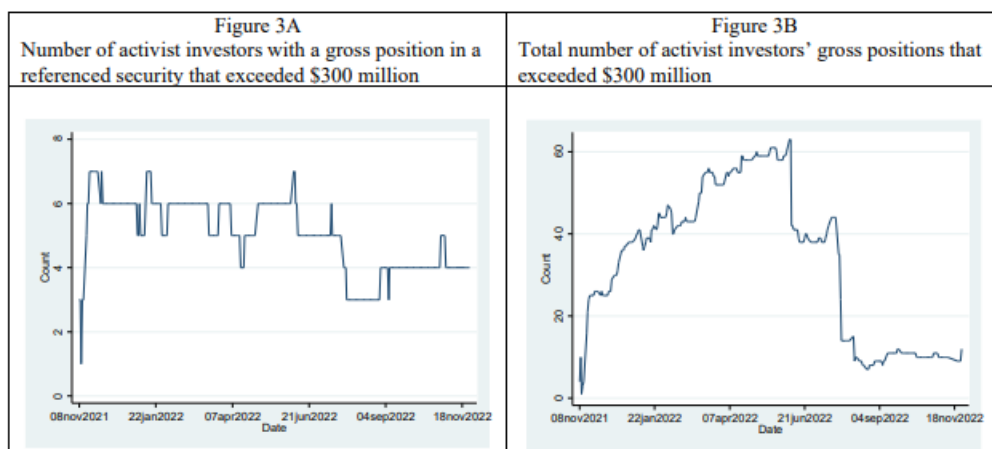
⁸ 15 U.S.C. 78m(m)(1)(C)(iii).

B. The Number of Activist Investors with Positions Large Enough to Warrant Filings Pursuant to Proposed Rule 10B-1 are Negligible.

The DERA Staff Memo provides economic analysis on the effects of Proposed Rule 10B-1 on activist investors in response to several comment letters received by the Commission on the 2022 Proposal. Commenters of the 2022 Proposal raised the suggestion that the large position reporting requirements in the 2022 Proposal would somehow reduce the effectiveness of, and the incentives to engage in, shareholder activism.⁹ In response, the Commission conducted an analysis of the SBS positions of certain market participants they have identified as activist investors that may also be required to be reported under Proposed Rule 10B-1.

The DERA Staff Memo identified 244 potential activist investors who reported equity SBS data to SBSDRs.¹⁰ Of the activist investors identified, Figure 3 in the DERA Staff Memo displays that fewer than seven activist investors on any given day hold a gross position in a referenced security that exceeded the proposed reporting threshold of \$300 million.¹¹

Figure 3: Activist Investors with Gross Positions Exceeding \$300 Million (listed in the U.S.)



Similarly, Figure 4 in the DERA Staff Memo displays that fewer than 15 activist investors on any given day hold a gross position exceeding five percent of the market capitalization in a referenced security.¹²

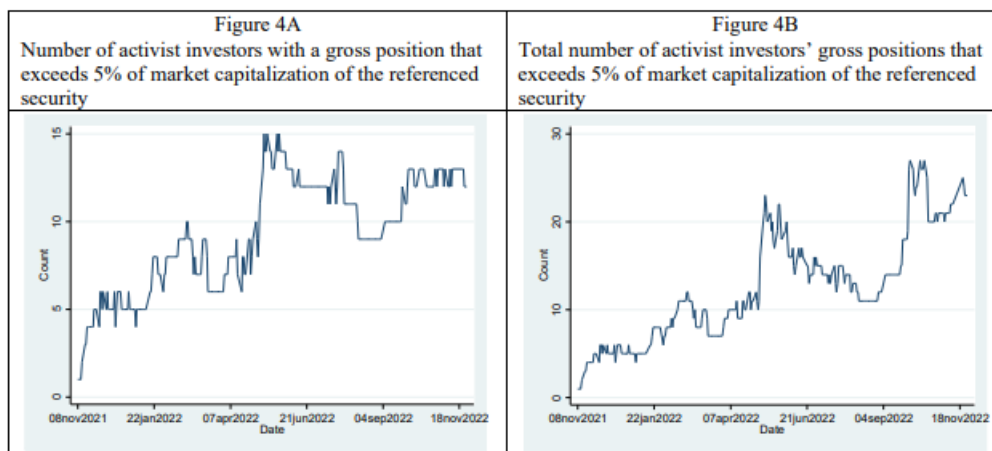
⁹ 85 Law and Finance Professors Comment Letter, Prohibition Against Fraud, Manipulation, or Deception in Connection with Security-Based Swaps; Prohibition Against Undue Influence Over Chief Compliance Officers; Position Reporting of Large Security-Based Swap Positions, 87 Fed. Reg. 8,443 (Feb. 04, 2022).

¹⁰ DERA Staff Memo at 12.

¹¹ DERA Staff Memo at 13.

¹² DERA Staff Memo at 14.

Figure 4: Activist Investors with Gross Positions Exceeding 5% of Market Capitalization in a Referenced Security (listed in the U.S.)



While the 2022 Proposal did not directly address the economic effects of the large positions reporting requirements in Proposed Rule 10B-1 on activist investors, the DERA Staff Memo supplements the proposal with a comprehensive analysis on this specific topic. The DERA Staff Memo makes clear that the potential economic effects of the large position requirements in Proposed Rule 10B-1 on activist investors are negligible at best, affecting only a handful of activist investors that hold gross positions in excess of the proposed reporting thresholds. Accordingly, the Commission should not make any substantive changes to the 2022 Proposal in light of this supplemental economic analysis.

2. The Reporting Threshold Amounts in the 2022 Proposal Should Not be Raised or Diluted to Allow Market Participants to Evade Large Position Reporting Requirements

As we stated in our original comment letter, the proposed large position reporting requirements and proposed Rule 10B-1 is an appropriate response to the threats exemplified by the Archegos fiasco that roiled markets in early 2021. This market event revealed a lack of transparency still prevalent in the SBS markets that poses serious risks to the broader financial system and investors in those markets. Proposed Rule 10B-1 is an important reform that appropriately expands existing SBS reporting obligations to include large SBS positions. As such, the Reporting Threshold Amounts in the 2022 Proposal will appropriately capture SBS positions large enough to pose a risk to the financial system and should not be raised or diluted with exemptions in response to industry pressure.

The Archegos market event provides an illustrative example of the quantifiable impacts one obscure trader can cause to financial institutions and investors if there are no SBS large positions reporting requirements. When Archegos' SBS positions went south, the result was swift and devastating, wreaking havoc in the markets and causing billions of dollars of losses for both financial institutions who were Archegos' counterparties and investors in the underlying stocks of the SBS positions. The collapse of the \$36 billion private investment firm also led to about \$10

billion of losses amongst Wall Street banks and more than \$100 billion in lost shareholder value.¹³ These are the types of real costs to financial institutions and investors that we can expect in the future if the Commission fails to adopt a sufficiently strong large position reporting regime.

While the benefits of the Proposal will be huge, the costs of compliance will be minimal. In the 2022 Proposal, the Commission estimates that the one-time costs for a market participant to comply with the large positions reporting requirements, as proposed, would be about \$101,000 and \$77,000 thereafter on an annual basis for roughly 850 market participants. Compared to the tens of billions of dollars of losses already suffered during the Archegos fiasco to both financial institutions and investors, the costs of Proposed Rule 10B-1 are minuscule. Because the actual costs already incurred due, in part, to the lack of a large position reporting regime have been so high, the Commission must not raise any Reporting Threshold Amount for any asset class in the 2022 Proposal or carve out any exceptions that can be used as a method of evading the letter and spirit of the proposal.

The proposed reporting requirement will not represent an undue burden on the industry but will prove enormously beneficial to the markets and the public, provided the reporting thresholds truly and appropriately capture all positions that are large enough to pose a risk to the financial system and other investors. Undoubtedly, the notional thresholds proposed by the SEC are sufficiently large that they could reasonably pose a risk to the financial system. Accordingly, the SEC must certainly not raise those thresholds in response to industry pressure. Raising the Reporting Threshold Amount or introducing exemptions would prove especially unwise because the rule would give false comfort that the market has a complete understanding of large, risky positions in SBS, while in fact there would still be unknown and significant pockets of hidden risk.

CONCLUSION

We hope these comments are helpful as the Commission finalizes the 2022 Proposal.

Sincerely,



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¹³ Jonathan Stempel, “Archegos tried to lull banks before \$36 billion firm collapsed, prosecutors say,” REUTERS (Aug. 19, 2022), <https://www.reuters.com/legal/archegos-tried-lull-banks-before-36-bln-firm-collapsed-us-prosecutors-2022-08-19/>.

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