March 17, 2022

Via Electronic Mail (rule-comments@sec.gov)

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

Re: File Number S7-32-10: 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

Dear Ms. Countryman:

The Loan Syndications and Trading Association ("LSTA")[1/] appreciates the opportunity provided by the U.S. Securities and Exchange Commission ("SEC" or "Commission") to comment on proposed Rule 9j-1 ("Proposed Rule"), promulgated under the Securities Exchange Act of 1934 ("Exchange Act").[2/] The Proposed Rule, which is designed to prevent fraud, manipulation, and deception in connection with effecting transactions in, or inducing or attempting to induce the purchase or sale of, any security-based swap, is based in part on a 2010 proposed rule of the same title.[3/] As with our comment letter on the 2010 proposed rule, we hope our views assist the Commission as it considers public comments and completes the rulemaking process.

I. Overview

Like its 2010 predecessor, the Proposed Rule was promulgated under Section 9(j) of the Exchange Act, which was enacted by Section 763(g) of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").[4/] The LSTA again expresses its strong support of the

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[1/] The LSTA is a not-for-profit trade association that is made up of a broad and diverse membership involved in the origination, syndication, and trade of commercial loans. The 575 members of the LSTA include commercial banks, investment banks, broker-dealers, hedge funds, mutual funds, insurance companies, fund managers, and other institutional lenders, as well as service providers and vendors. The LSTA undertakes a wide variety of activities to foster the development of policies and market practices designed to promote just and equitable marketplace principles and to encourage cooperation and coordination with firms facilitating transactions in loans. Since 1995, the LSTA has developed standardized practices, procedures, and documentation to enhance market efficiency, transparency, and certainty. For more infomation, visit www.lsta.org.

[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, Release No. 34-93784, 87 Fed. Reg. 6,652 (Feb. 4, 2022) ("Proposing Release").

[3/] *See* Prohibition Against Fraud, Manipulation, and Deception in Connection with Security-Based Swaps, Exchange Act Release No. 63,236, 75 Fed. Reg. 68,560 (Nov. 3, 2010) ("2010 proposed rule").

[4/] Section 9(j) makes it unlawful for any person "to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security-based swap in connection with which such person engages in any fraudulent, deceptive, or manipulative act or practice, makes any fictitious quotation, or engages in any transaction, practice or

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principles underlying Section 9(j) and reiterates that fraud, manipulation, and deception have no place in our capital markets. The LSTA appreciates the consideration the Commission has given to the comment letters submitted with respect to the 2010 proposed rule and supports the Commission's goal of combatting fraud, manipulation, and deception in the security-based swap market. While the LSTA views the changes made to Rule 9j-1 vis-à-vis the Proposed Rule as meaningful progress in developing an antifraud framework to address the unique features of security-based swaps, the Proposed Rule implicates many of the same concerns highlighted in the LSTA's 2010 comment letter[5/] and presents additional issues that would have a detrimental impact on the security-based swap market and on commercial and syndicated lending.

The Proposed Rule introduces several new features not included in the 2010 proposed rule. Rule 9j-1(a) was amended to include attempted misconduct and describe in greater specificity certain types of activity covered by the Proposed Rule. Rule 9j-1(b) introduces an explicit prohibition on price manipulation in connection with a security-based swap, modeled after CFTC Rule 180.2.[6/] Rule 9j-1(c), modeled after Section 20(d) of the Exchange Act, clarifies the application of the Proposed Rule in connection with a security-based swap while in possession of material non-public information ("MNPI").[7/] Conversely, Rule 9j-1(d) clarifies the application of the Proposed Rule in connection with a reference instrument underlying a security-based swap. Rule 9j-1(e) clarifies that "purchase" and "sale" under the Proposed Rule are intended to encompass the Exchange Act definitions of such terms.[8/] Rule 9j-1(f) includes two safe harbors that preclude liability under Rule 9j-1(a) solely for reason of being aware of MNPI and (i) exercising certain contractual rights or obligations under a security-based swap or (ii) conducting certain portfolio compression activities. The Proposing Release also suggests "reasonable alternatives" to various aspects of the Proposed Rule, including by (i) implementing a more prescriptive approach for the Proposed Rule and (ii) implementing a safe harbor for hedging exposure arising out of lending activities.

As we observed in our 2010 comment letter, security-based swaps play an important role in risk management and hedging in the loan markets. LSTA members, whose business involves the origination, syndication, and trading of commercial loans, use security-based swaps to purchase and sell protection against the default risk of borrowers through loan credit default swaps ("LCDS") and to replicate cash flows and exposure to market price risks involved in holding a loan through loan total return swaps ("LTRS").[9/] LCDS and LTRS, as well as single security-based credit default swaps ("CDS"), facilitate lending activity by transferring some or all of the risks associated with lending, which permits LSTA members to sustain their lending activities and operate in a safe and sound manner by de-risking their balance sheets. At the same time, the rights

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course of business which operates as a fraud or deceit upon any person." 15 U.S.C. § 78i(j).

[5/] *See* Letter from R. Bram Smith, LSTA (Dec. 23, 2010), *available at* https://www.sec.gov/comments/s7-32-10/s73210-9.pdf ("2010 comment letter").

[6/] *See* 17 C.F.R. 180.2.

[7/] *See* 15 U.S.C. § 78t(d).

[8/] Which for security-based swaps includes: "the execution, termination (prior to its scheduled maturity date), assignment, exchange, or similar transfer or conveyance of, or extinguishing of rights or obligations under, a security-based swap, as the context may require." 15 U.S.C. § 78c(a)(13)-(14).

[9/] Because Section 761(a)(5) of the Dodd-Frank Wall Street Reform and Consumer Protection Act defines "security-based swap" to include a swap based on "a single security or loan, including any interest therein or on the value thereof," the Proposed Rule would apply to LCDS and LTRS.

and remedies available to lenders under a credit, loan or other similar agreement, such as the ability to modify, forebear, and waive provisions of such agreement, including, for example, a default or acceleration provision, may have an impact on the terms, payments, or delivery under a CDS, LCDS or LTRS that references a borrower or issuer or its loans or securities. The exercise of these creditor rights and remedies is critical to lenders' ability to manage risk in a prudent manner.

We are concerned that the breadth and ambiguity of the Proposed Rule will interfere with legitimate activities of lenders, both in the security-based swap market and in conducting prudent lending and banking practices regarding syndicated loans, which might ultimately discourage bank and non-bank lenders from participating in these activities or reduce the extent of their participation and increase the cost of obtaining credit. The decreased participation that could result from the Proposed Rule would have a severely negative impact on commercial lending activity that is a significant source of capital formation in the U.S. markets.[10/] Therefore, we urge the Commission to consider and address the concerns highlighted in this letter prior to taking any final action with respect to the Proposed Rule.

II. Comments

A. There is no need for the Proposed Rule in light of existing antifraud rules.

The Commission has access to a host of mechanisms to pursue fraud, manipulation, and deception in the security-based swap market. Like other securities, security-based swaps are subject to the general antifraud and anti-manipulation provisions of the federal securities laws, including Sections 9(a) and 10(b) of the Exchange Act and Rule 10b-5 thereunder and Section 17(a) of the Securities Act of 1933 ("Securities Act").[11/] These provisions, which generally prohibit fraud and manipulation in connection with effecting a transaction in or the offer, purchase, or sale of a security or securities-based swap, provide the Commission with the ability to rein in a wide variety of fraudulent or manipulative conduct. Given the broad scope of the Commission's current antifraud and anti-manipulation toolkit, it is unclear why the Proposed Rule is necessary to effectively pursue fraud and manipulation in connection with security-based swaps.

As the Proposing Release observes, when Dodd-Frank was enacted, the definitions of "purchase" and "sale" in Section 2(a)(18) of the Securities Act, "buy" and "purchase" in Section 3(a)(13) of the Exchange Act, and "sale" and "sell" in Section 3(a)(14) of the Exchange Act were amended to include the execution, termination, assignment, exchange, transfer, or extinguishment of rights or obligations in connection with a security-based swap.[12/] As a result of those changes, misconduct in connection with these actions is clearly prohibited under Sections 9 and 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Section 17(a) of the Securities Act, just as misconduct in connection with a transaction in or the offer, purchase, and sale of a security-based

[10/] Syndicated loans provide a significant source of corporate financing and are integral to the healthy function of the U.S. economy. *See* Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, and Office of the Comptroller of the Currency, *Shared National Credit Program, 1st and 3rd Quarter 2019 Reviews* (Jan. 2020), https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20200131a1.pdf (The 2019 Shared National Credit portfolio included 5,474 borrowers, totaling $4.8 trillion).

[11/] 15 U.S.C. § 78i(a); 15 U.S.C.§ 78j(b); 15 U.S.C. § 77q; 17 C.F.R. § 240.10b-5.

[12/] 15 U.S.C. § 77b(a)(18); 15 U.S.C. § 78c(a)(13)-(14).

swap or a reference security underlying a security-based swap. Is it possible that the Proposed Rule is a solution in search of a problem that does not in fact exist?

As background to, and apparent justification for, the Proposed Rule, the Commission references the risk to market integrity posed by certain "manufactured credit events or other opportunistic strategies" to avoid, trigger, delay, accelerate, decrease, and/or increase payouts on security-based swaps.[13/] Of the five examples provided in the Proposing Release, two examples specifically refer to the intentional creation of artificial price changes or artificial events to trigger payments, and a third refers to the manipulated timing of a credit event to affect a payment. All of these scenarios (which are isolated cases among the extremely high volume of security-based swap transactions that are executed every year) are addressed by existing antifraud and anti-manipulation laws, especially as the Commission asserts that the definitions of "purchase" and "sale," as amended by Dodd-Frank, encompass "partial executions, terminations, assignments, exchanges, transfers, or extinguishments of rights or obligations." The other two examples relate to restructuring and refinancing activity that simply highlight the risk that the exercise of legitimate creditor rights could be construed as misconduct under the Proposed Rule. As acknowledged by the author of one of the papers that reported one of these examples, "On the one hand, a favorable view of the loan is that it granted RadioShack another opportunity to turn its fortunes around. On the other hand, a cynical view is that it was a short-term loan that . . . was a ploy to delay the company's inevitable bankruptcy for the benefit of CDS protection sellers."[14/] As we discuss below, this uncertainty would constrain lenders from engaging in routine business decisions out of concern that such decisions could be recharacterized as manipulative.

At best, the Proposed Rule would muddy the waters with a new framework that both fails to provide the Commission with new authority to implement its antifraud and anti-manipulation regime and fails to capture important nuances of the security-based swap market and related securities and loan markets.

Additionally, participants in the syndicated bank loan market have already taken steps to address potential conflicts of interest that could lead to manipulative conduct by lenders who hold a net short position. Anti-net short provisions have been a recent market development to protect borrowers from undesirable conduct by net short debt "activists" who may seek to act upon historical or technical defaults to cause distress and drive down the value of a borrower's loans or bonds. Increasingly, net short lenders face limited access to information regarding the borrower, voting restrictions, and forced divestment, among other limitations in credit agreements. Thus, the private market is already resolving the concerns regarding market practices highlighted by the Commission in a way that is narrowly and properly tailored to the concerns of individual borrowers and lenders.[15/] In comparison, the Proposed Rule is a blunt instrument that could produce unanticipated and undesired results.

[13/] *See* Proposing Release at 6655.

[14/] Gina-Gail S. Fletcher, *Engineered Credit Default Swaps: Innovative or Manipulative?*, 94 N.Y.U. L. Rev. 1073, 1100 (2019).

[15/] Similarly, in the CDS market, the Commission observed that "in March 2019, ISDA introduced amendments to its Credit Derivatives Definitions designed to address certain issues related to manufactured credit events, which ISDA termed ''narrowly tailored credit events.'' Proposing Release at 6655.

B. The Proposed Rule would create considerable uncertainty with respect to the legitimate business decisions of lenders and impair the proper functioning of the security-based swap market and loan market.

The Proposed Rule would create substantial uncertainty regarding the legitimate exercise by lenders of rights and remedies in the ordinary course of business. Lenders will be reluctant to enter into security-based swaps because the routine exercise of such rights and remedies could affect the value of a security-based swap tied to the reference instrument and be construed as misconduct. Without this effective means of managing risk, lenders will be less willing to engage in the same level of commercial and syndicated loan activities. The Commission itself acknowledges that "CDS transactions are an important means by which debt holders hedge their underlying debt instruments, and that the absence of such hedging opportunities could impact prospective investors' willingness and ability to invest in that underlying market."[16]

As described above, lenders use LCDS, LTRS, and CDS to hedge and manage risks related to their lending activity. Lenders typically have certain rights and remedies in connection with entering into a credit, loan or other similar agreement that could impact the payouts or deliveries with respect to a related security-based swap. Because of the Proposed Rule, a lender's decision to exercise or refrain from exercising these rights and remedies would be open to second-guessing and subject the lender to the threat of liability if the lender has hedged its loan with security-based swaps.[17]

This concern is particularly acute with respect to the negligence-based prohibitions in proposed Rule 9j-1(a)(3)-(4). Proposed Rule 9j-1(a)(3) prohibits persons from "[o]btain[ing] or attempt[ing] to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading." Because payments and deliveries are made or received throughout the life of a security-based swap, lenders would have to consider continuously whether they have MNPI (including proprietary information about their activities and intentions as lenders) that they would be required to disclose to security-based swap counterparties, and counterparties, in turn, would have to be prepared to receive such information even if the information could restrict their own activities.[18] As discussed in more detail in our 2010 comment letter, the syndicated loan market operates on the assumption that borrowers provide updated nonpublic information about the borrower's business to its lenders, and that the

[16] *Id.* at 6656.
[17] In this regard, we further urge the Commission to make clear that the rule, when finally promulgated, does not create a private right of action. The existence of a private right of action is a matter of congressional intent and, here, the plain language of Section 763(g) of Dodd-Frank shows no intent to create such a right for a violation of Section 9(j) or any rules promulgated thereunder. Moreover, Section 9(e) of the Exchange Act expressly permits a private right of action for violations of certain subsections of Section 9, but Dodd-Frank does not amend Section 9(e) to include a private right of action for violations of subsection (j). In the absence of clear congressional intent, courts will not infer a private right of action from a statute. *See Thompson v. Thompson*, 484 U.S. 174, 179 (1988) ("[U]nless congressional intent to allow a private right of action 'can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist.'" (*quoting Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 94 (1981))).
[18] As we discuss below, the proposed safe harbor is inadequate to provide relief from these concerns.

private-side recipients of such information will not transmit such information to the public side.[19] With a negligence standard, even a good faith failure to track and disclose such information to a counterparty could be deemed to be actionable misconduct.

Equally problematic is Proposed Rule 9j-1(a)(4) which prohibits persons from "[e]ngag[ing] or attempt[ing] to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." As we observed in our 2010 comment letter, lending facilities are deliberately structured to provide lenders with protection and flexibility to exercise remedies in advance of a bankruptcy of the borrower, to waive events of defaults, or to require or permit a borrower to restructure a loan. These terms also benefit borrowers who look to their lender relationships for the ability and flexibility to renegotiate the terms of their loans, restructure their debt, and work through troubled situations. Under the Proposed Rule, however, a decision to allow a borrower to avoid a bankruptcy filing or payment default could be construed as manipulation in connection with the subsequent exercise of a right or performance of an obligation (whether such action is volitional or nonvolitional) even if the lender could prove no intent.

The Proposed Rule does not provide any clarification or safe harbor to address such concerns. At a minimum, we reiterate our request that the Commission implement a scienter requirement across the board for the Proposed Rule in order to address the concern that a lender could be subject to negligence claims as a result of the often-fluid nature of security-based swap or loan transactions that may be subject to private negotiation, restructuring, or amendment at any given time.

Proposed Rule 9j-1(b), which was not part of the 2010 proposed rule, introduces additional uncertainty for lenders who participate in the security-based swap market. While the Proposing Release states: "Rule 9j-1(b) is designed to capture situations when a payment under the security-based swap is *intentionally distorted*" and is not intended to account for actions taken "the ordinary course of a typical lender-borrower relationship (or a prospective lender-borrower relationship),"[20] the Commission proposes a "facts and circumstances" test for determining whether an act is in the ordinary course or whether it constitutes intentional distortion in violation of Rule 9j-1(b). The use of a facts and circumstances determination as to what is ordinary course conduct introduces additional uncertainty into routine business decisions of loan market participants. Under such a test, any conduct with a perceived impact on the price or valuation of a security-based swap or any related payment or delivery could subject a party to the threat of liability. For example, a lender that has purchased protection under an LCDS would not be able to give notice of an event of default or decline to amend a credit agreement or renew a line of credit without assuming the risk that its decision could be deemed – or alleged to be – manipulative. Similarly, if a lender has sold protection under an LCDS, the lender would not be able to grant any

[19] Lenders who receive this nonpublic "bank syndicate" information maintain information barriers to prevent such information from being accessible to employees who trade securities and security-based swaps. Public-side counterparties to security-based swaps enter into such swaps fully aware that they will not receive such nonpublic information. Becoming aware of nonpublic information will prevent public-side counterparties from trading securities.

[20] Proposing Release at 6663.

request from a borrower to waive an event of default and/or amend the credit agreement without taking the risk that consenting to such a request could be deemed – or alleged to be – manipulative.

Finally, the extension of the Proposed Rule to attempted conduct dramatically exacerbates the risk that legitimate business activities could be deemed to fall within the prohibitions of the Proposed Rule. If it is unclear as to what conduct may be considered fraudulent or manipulative, it is even less clear what an attempt might be. An attempt may capture conduct that is not itself fraudulent or manipulative; instead, the determination of what is an attempt at a prohibited activity involves an inherently subjective judgment regarding the intent of the actor. Under this standard, a legitimate business decision by a lender may, even where it has no market impact on a security-based swap or underlying reference instrument, be subjected to hindsight bias and run the risk of being inaccurately deemed an "attempt" at fraudulent or manipulative conduct in violation of the Proposed Rule. Furthermore, it makes no sense to apply the negligence-based prohibitions of proposed Rule 9j-1(a)(3)-(4) to "attempted" conduct. In that regard, we note that Sections 17(a)(2) and (3) of the Securities Act on which those provisions are based do not apply to attempted conduct.

If market participants run the risk that their legitimate dealings could be characterized as an attempt at fraudulent or manipulative conduct, this could result in a chilling effect on the market for security-based swaps, including LCDS, LTRS and CDS, that would reverberate through the syndicated loan market to similar effect, inhibiting an important source of capital formation.

In considering how to resolve the ambiguity in connection with the Proposed Rule, we urge the Commission to consider its "reasonable alternative" and implement a more prescriptive approach. As noted in the Proposing Release, this alternative could alleviate concerns regarding the application of the Proposed Rule by providing "even more certainty and precision with respect to the particular types of activities that are prohibited in the security-based swap market."[21] We believe that greater certainty of outcome with respect to the Proposed Rule would benefit lenders when they need to exercise rights or remedies under a loan or credit agreement. Without a greater level of certainty regarding such activities, we are concerned that the Proposed Rule will have a detrimental effect on the loan market and could deter lenders and security-based swap participants from acting in a rational manner with respect to their rights and remedies under a swap or any reference instrument. We acknowledge the Commission's consideration of costs with respect to this approach, but we believe the costs would be greater if there is no clear path for lenders or security-based swap participants to exercise legitimate rights and remedies. In the event that the Commission decides to explore a more prescriptive approach, we ask that the Commission submit related revisions to the Proposed Rule for further public comment to ensure that the approach is suitable for borrowers, dealers and investors alike.

C. The Proposed Rule's safe harbors are insufficient to capture common legitimate business activities of lenders who engage in security-based swap transactions.

We appreciate the Commission's concerns with respect to information asymmetries and MNPI impacting the integrity of the market for security-based swaps and their underlying

[21] *Id*. at 6699.

reference instruments. We agree that it would be detrimental if market participants lost faith in the healthy function of those markets as a result of information asymmetries. However, we believe that there are alternative ways to address the Commission's concerns that more effectively account for legitimate activities of market participants. As proposed, the safe harbors are too narrow to address the concerns of loan market participants.

The safe harbor in proposed Rule 9j-1(f)(1) relieves a person from liability "solely for reason of being aware of [MNPI] while taking the following actions: (1) [a]ctions taken by a person in accordance with binding contractual rights and obligations under a security-based swap (as reflected in the written security-based swap documentation governing such transaction or any amendment thereto) so long as: (i) [t]he security-based swap was entered into, or the amendment was made, before the person came into possession of such [MNPI]; and (ii) [t]he entry into, and the terms of, the security-based swap are themselves not a violation of any provision of this section." As discussed above, lenders are concerned that actions they take pursuant to legitimate rights and remedies available to them under loan and credit facilities would be construed as prohibited misconduct, but this safe harbor only applies to actions that constitute the exercise of rights and obligations under the security-based swap. Thus, as proposed, the safe harbor provides no comfort to lenders seeking to enter into a security-based swap to hedge credit exposure to borrowers, and it is unclear even whether the safe harbor would apply to LTRS margin payments that have been the subject of dispute and negotiation between the parties to a transaction. The safe harbor set out in proposed Rule 9j-1(f)(2) for compression exercises also fails to address lenders' concerns about liability for exercising legitimate rights and remedies under loan and credit facilities.

In line with the Commission's request for comment, we urge the Commission to consider creating a safe harbor for entering into security-based swap transactions for purposes of hedging some or all of their exposure arising out of lending activities with a reference entity or the syndication of such lending activities.[22/] Hedging credit risk is a systemically important aspect of the loan market that enables lenders to lend more capital in a sound manner than they otherwise would be able. Lenders' ability to de-risk their portfolios through security-based swaps facilitates capital formation in the U.S. economy and protects them from potential borrower default. The narrow scope of the safe harbors puts this important de-risking mechanism at risk by potentially inhibiting lenders from exercising (or not exercising) legitimate rights and remedies under a security-based swap or underlying reference instrument. Disincentivizing this important de-risking mechanism could have a detrimental impact on the availability and cost of obtaining credit and may encourage unsafe and unsound lending practices. The Commission should therefore consider including a specific safe harbor related to hedging credit risk associated with lending activities.[23/] Such hedging should not be time-limited because effective risk management often involves macro-hedging (tied to a portfolio of loans rather than a specific loan) and dynamic hedging.

Moreover, the current safe harbor in the Proposed Rule only addresses situations where a lender, while aware of MNPI, exercises rights or takes actions with respect to a security-based swap; it does not appear to provide any protection if the lender, while aware of MNPI and party to

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[22/] *Id.* at 6666.
[23/] We note that hedging practices developed to comply with the Volcker Rule may provide a useful starting point for developing a Rule 9j-1 safe harbor for hedging activity. *See* 17 C.F.R. § 255.5.

a security-based swap, exercises rights or remedies under a credit, loan or other similar agreement. Borrowers routinely provide lenders with MNPI during the life of a loan and expect lenders to use such information in making informed decisions regarding their rights and remedies under the credit agreement. If the Proposed Rule is adopted, before taking any action under a credit agreement, a lender would have to consider whether it needs to disclose MNPI to its security-based swap counterparty. As we discussed in our 2010 comment letter, a lender's ability to disclose such information may be restricted by fiduciary duties, contractual duties, Regulation FD or other law or obligation, and the lender may have to insist that the counterparty sign a confidentiality agreement to receive the MNPI. However, the receipt of MNPI subject to a confidentiality agreement would likely require the counterparty to restrict its own trading and investment activities, and the counterparty may therefore refuse. A refusal by the counterparty will put the lender in an untenable position. Under such circumstances, we urge the Commission to consider allowing the lender to avoid liability under the Proposed Rule by disclosing to the counterparty that they are a lender to the borrower and may have MNPI from the borrower.

Any safe harbor should also recognize the effective use of information barriers by lenders, a recommendation we made in our 2010 comment letter. Controls that facilitate independent decision-making, such as information barriers, can resolve the Commission's underlying concerns regarding information asymmetry and access to MNPI and permit firms to engage in legitimate business activities. Indeed, information barriers have been recognized as standard practice to address concerns regarding information asymmetries and MNPI leakage in a variety of contexts, including extensions of credit and derivatives transactions.[24/] As long as a financial institution or other entity maintains an effective information barrier that restricts access to MNPI by employees who engage in security-based swap transaction for hedging or other purposes, there should be no concern that MNPI is being misused and no need to disclose such information to the counterparty.[25/] Recognition of information barriers would address the Commission's concerns and enable market participants to continue their legitimate activities without major disruptions.

D. The Proposed Rule has significant compliance costs.

The Proposed Rule would levy significant costs upon lenders and other security-based swap market participants. The Proposed Rule would require the design and implementation of extensive compliance programs to adhere to the Proposed Rule's broad prohibitions; such costs are only marginally alleviated by the narrow safe harbors, which present resource challenges of their own in ensuring that each activity falls within a designated safe harbor. The costs of compliance with the Proposed Rule would be unreasonably burdensome to lenders, and we believe it would have a significant, negative impact on the loan markets.

Each micro-decision in connection with a decision to exercise (or not to exercise) a right or remedy under a security-based swap or the reference underlying would implicate an additional evaluation of permissibility under the Proposed Rule because these micro-decisions could

[24/] *See, e.g.*, SEC, Office of Compliance Inspections and Examinations, *Staff Summary Report on Examinations of Information Barriers: Broker-Dealer Practices Under Section 15(g) of the Securities Exchange Act of 1934* (Sept. 27, 2012), https://www.sec.gov/about/offices/ocie/informationbarriers.pdf.
[25/] See Rule 10b5-1 under the Exchange Act, which provides a specific affirmative defense against insider trading for entities that maintain effective information barriers. 17 C.F.R. § 240.10b5-1.

potentially subject a lender to liability or claims under an unclear regulatory framework, particularly where such a regime is based on a party's negligence and/or attempted conduct. The Proposed Rule calls into question nearly every action taken with respect to these instruments. Each party will have to implement controls and mechanisms to track decisions it may take that could affect each payment, delivery, obligation, or right as well as to track changes in its positions in the security-based swap and reference underlying. Moreover, unless reliance upon information barriers is permitted, large investors and lenders that engage in trading or investment activity in various parts of their organization will have to consider the cost and effort required to identify all security-based swaps and related reference underlyings held by the organization and to track and coordinate all activity that could affect the purchase, sale, payments, deliveries, and other ongoing obligations or rights with respect to security-based swaps and the related reference underlyings.

III. Conclusion

We appreciate the opportunity to share our views on the Proposed Rule. While we support the Commission's ongoing effort to combat fraud, manipulation and deception in connection with security-based swaps and the securities markets more broadly, we strongly believe that the approach taken by the Proposed Rule would result in significant adverse impact on the markets for security-based swaps and their underlying instruments. In particular, we believe the Proposed Rule would disrupt the syndicated lending that is critical to the U.S. economy. The Commission should only adopt a rule that accounts for the complex motivations and legitimate business activities of security-based swap market participants and avoids undermining prudent and sound lending and banking practices. In any event, we believe that the Proposed Rule, while indicative of progress, does not adequately address the concerns highlighted in this letter and, therefore, should be revised and subject to the opportunity for further public comment.

We thank you for your consideration of our comments and concerns and stand ready to provide any additional information you believe might be useful. Please feel free to direct any questions you have in this regard to the undersigned.

Best regards,

Elliot Ganz
General Counsel, Co-Head Public Policy