

March 21, 2022

Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0609

Re: File No. S7-32-10; Proposed 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

Dear Ms. Countryman,

We are law and finance professors who study and teach topics related to Release No. 34-93784 (the “Proposed Swaps Rules” or the “Release”), the proposed rules on the prohibition against fraud, manipulation, or deception in connection with security-based swaps; prohibition against undue influence over chief compliance officers; and position reporting of large security-based swap positions.¹ We appreciate the opportunity to comment on the Proposed Swaps Rules.

Our comments also relate to the intertwined Release No 34-94211 (the “Proposed Section 13-D/G Rules”) (together with the Proposed Swaps Rules, the “Proposed Rules”), the proposed rules on the modernization of beneficial ownership. Several of us intend to comment on the Proposed 13-D/G Rules as well. We believe the Securities and Exchange Commission (“Commission”) should consider and analyze the comment letters for the Proposed Rules together.

Our comments focus on the effect of the Proposed Swaps Rules on shareholder activism. We believe these rules could reduce the benefits of activism. Below we describe (1) the Proposed Swaps Rules, (2) the benefits of shareholder activism, and (3) the potential effects of the Proposed Swaps Rules on shareholder activism. Our comments are straightforward: we urge the Commission to consider the literature on shareholder activism as part of its economic analysis of the Proposed Swaps Rules.

The Proposed Swaps Rules

The Proposed Swaps Rules address several categories of swaps, including “credit default swaps” (“CDS”) and “security-based swaps,” two categories of swaps that have posed recent policy questions. First, with respect to CDS, as the introduction to the Release emphasizes, the Proposed Swaps Rules address manufactured credit events and other opportunistic strategies in

¹ This comment letter was drafted by staff of the International Institute of Law and Finance, a non-profit, non-partisan corporation, with assistance from many of the professors who have signed this letter. No signatories to this letter received compensation for the letter.

the CDS market, and concerns among industry participants about how these practices could harm the efficiency, reliability, and fairness of the debt markets.²

Second, with respect to “security-based swaps,” although the Proposed Swaps Rules do not specifically reference the collapse of Archegos Capital Management, L.P. (“Archegos”), the Release states that the “the intent of proposed Rule 10B-1 is to alert regulators and the market, including counterparties to security-based swap trades and the companies whose securities underlie security-based swaps, that one or more market participants are amassing a large position in security-based swaps.”³ The Release apparently was written at least in part with Archegos in mind.⁴

We write, not about these two issues involving CDS or Archegos, but about the potential impact of the Proposed Swaps Rules on shareholder activism. Unfortunately, as we describe below, the relatively low, and complex, threshold for triggering Proposed Swaps Rule 10B-1(b)(1)(iii) would impose a disclosure requirement that could significantly deter shareholder activism, particularly at the largest companies, where shareholder activists have generated the greatest gains for investors.⁵ Shareholder activists would be required to disclose their swaps positions after just one business day after they exceeded the threshold set forth in the Proposed Swaps Rules.⁶

Specifically, Proposed Swaps Rule 10B-1(b)(1)(iii) would require that any investor make such a disclosure “once a Security-Based Swaps Position based on equity meets or exceeds \$300 million, calculated on a gross basis.”⁷ Proposed Swaps Rule 10B-1(b)(1)(iii)(A) would further provide that “once a Security-Based Swap Position exceeds a gross notional amount of \$150 million, the calculation of the Security-Based Swap Position shall also include the value of all of the underlying equity securities owned by the holder of the Security-Based Swap Position (based on the most recent closing price of shares), as well as the delta-adjusted notional amount of any

² See Gina-Gail S. Fletcher, *Engineered Credit Default Swaps: Innovative or Manipulative?*, 94 N.Y.U. L. REV. 1073 (2019).

³ Proposed Swaps Rules, at 77.

⁴ See, e.g., Akayla Gardner, *Gensler Says SEC Plans More Swaps Disclosures Post-Archegos*, BLOOMBERG (Sept. 15, 2021) (quoting Chairman Gensler explaining, “I’ve asked staff for recommendations on how we can put out—with the thought of Archegos in mind—how we can put out aggregate information about the aggregate positions in securities underlying the total return swaps.”).

⁵ We describe various aspects of the relevant literature below. For recent information on shareholder activism, see THE DIRECTORS GUIDE TO SHAREHOLDER ACTIVISM (2021), <https://corpgov.law.harvard.edu/2021/06/11/the-directors-guide-to-shareholder-activism>.

⁶ Proposed Swaps Rules, at 86.

⁷ *Id.* at 77. The Release focuses on “gross” notional amount calculations, and references “net” disclosures in certain contexts related to CDS, but not equities. See *id.* at 149-50, 174-76. The Release does not address the literature on “encumbered shares” or “empty voting,” or analyze the costs and benefits of equity security-based-swap disclosure requirements even for low or zero net positions. See Shaun Martin & Frank Partnoy, *Encumbered Shares*, 2005 UNIVERSITY OF ILLINOIS LAW REVIEW 775 (2005) (“encumbered shares”); Henry T. C. Hu & Bernard Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership*, 79 S. CAL. L. REV. 811 (2006) (“empty voting”). These issues are relevant to both of the Proposed Rules.

options, security futures, or any other derivative instruments based on the same class of equity securities.”⁸ Proposed Rule 10B-1(a)(2) would require that a Schedule 10B be filed promptly, no later than the end of the first business day after execution of a trade.⁹

The one-day disclosure requirement is significantly shorter than the Proposed Section 13-D/G Rules, which would require that a shareholder activist disclose positions within “five days after the date on which a person acquires more than 5% of a covered class of equity.”¹⁰ The existing disclosure regime requires a Schedule 13-D filing “within ten days after [an] acquisition [of more than 5% of a covered class of equity.]”¹¹ Yet the Proposed Swaps Rules do not discuss either the existing ten-day requirement or the proposed five-day requirement.

The Proposed Swaps Rules, perhaps inadvertently, would mandate disclosure of a position in the equity securities of an issuer after one business day so long as that position included a security-based swap position of more than \$150 million in gross notional amount (potentially a small percentage stake for a large firm). This requirement would render the ten- or five-day provisions and their corresponding ownership thresholds in the Section 13-D/G Rules irrelevant in many instances. The Commission provides the public with no discussion of the implications of this new requirement for equity securities disclosure, no economic analysis of the requirement, and no statutory authority for it.¹²

Benefits of Shareholder Activism

The academic literature details many benefits of activism.¹³ Peer-reviewed research shows that shareholders benefit from statistically significant and meaningful average stock price appreciation following announcements of shareholder activism.¹⁴ An examination of stock price performance during the five years after a shareholder activist intervention finds no evidence that

⁸ *Id.* at 78. As noted above, the Release also would increase the disclosure requirements for equities as well as swaps under these circumstances.

⁹ *Id.* at 67.

¹⁰ Proposed Section 13-D/G Rules, at 6.

¹¹ 15 U.S.C. 78m(d)(1).

¹² For example, the Commission could provide empirical evidence of the costs and benefits associated with shortening the time period from ten days to either five days or one day.

¹³ For a review of the literature on shareholder activism, see Alon Brav, Wei Jiang & Rongchen Li, *Governance by Persuasion: Hedge Fund Activism and Market-Based Shareholder Influence*, European Corporate Governance Institute Finance Working Paper No. 797/2021, forthcoming *Oxford Research Encyclopedia of Economics and Finance* (2022); Matthew R. Denes, Jonathan M. Karpoff & Victoria B. McWilliams, *Thirty Years of Shareholder Activism: A Survey of Empirical Research*, 44 J. CORP. FIN. 405 (2017); Alon Brav, Wei Jiang & Hyunseob Kim, *Hedge Fund Activism: A Review*, 4 FOUND. TREND FIN. 185 (2010).

¹⁴ See Alon Brav, Wei Jiang, Frank Partnoy & Randall Thomas, *Hedge Fund Activism, Corporate Governance, and Firm Performance*, 63 J. FIN. 1729 (2008). See also April Klein & Emanuel Zur, *Entrepreneurial Shareholder Activism: Hedge Funds and Other Private Investors*, 64 J. FIN. 187 (2009); Marcel Kahan & Edward Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. PA. L. REV. 1021 (2007); William Bratton, *Hedge Funds and Governance Targets*, 95 GEO. L.J. 1375 (2007).

those gains dissipate; to the contrary, several studies document long-term financial benefits that arise after activists intervene.¹⁵ These findings have been widely replicated and are supported by reliable science.¹⁶ A few studies point to potential problems associated with shareholder

¹⁵ See Edward P. Swanson, Glen M. Young & Christopher G. Yust, *Are All Activists Created Equal? The Effect of Interventions by Hedge Funds and Other Private Activists on Long-Term Shareholder Value*, 72 J. CORP. FIN. 1 (2022) (showing that benefits are not limited to sale of targeted firms, and that long-term shareholders increase ownership after activist interventions); Lucian A. Bebchuk, Alon Brav, & Wei Jiang, *The Long-Term Effects of Hedge Fund Activism*, 115 COLUM. L. REV. 1085, (2015) (documenting significant long-term effects). Other academic work verifies the short- and long-term stock price gains associated with hedge fund activism. See, e.g., Alon Brav, Wei Jiang, & Hyunseob Kim, *Recent Advances in Research on Hedge Fund Activism: Value Creation and Identification*, 7 ANN. REV. FIN. ECON. 579 (2015) (studying the short- and long-term performance gains in activist-targeted companies); Alon Brav, Wei Jiang, Frank Partnoy, & Randall Thomas, *Returns to Hedge Fund Activism*, 64 FIN. ANALYSTS J. 45 (2008) (studying the return profile of hedge fund activism as an investing strategy).

¹⁶ For an exploration of why some activists succeed while others fail, see C.N.V. Krishnan, Frank Partnoy & Randall Thomas, *The Second Wave of Hedge Fund Activism: The Importance of Reputation, Clout and Expertise*, 40 J. CORP. FIN. 296 (2016). See also Nicole M. Boyson, Linlin Ma, & Robert M. Mooradian, *How Does Past Experience Impact Hedge Fund Activism?*, J. FIN. QUANTITATIVE ANAL. (forthcoming 2021); Yaron Nili, *Missing the Forest for the Trees: A New Approach to Shareholder Activism*, 4 HARV. BUS. L. REV. 157 (2014). See also David H. Webber, *THE RISE OF THE WORKING-CLASS SHAREHOLDER: LABOR'S LAST BEST WEAPON* (2018) (discussing successful partnership between labor and shareholder activists).

activism,¹⁷ though even critics of early shareholder activism research recognize that shareholder activism is associated with increased returns¹⁸ for investors, including retail investors.¹⁹

¹⁷ Some have argued that activists encourage a short-term approach to market performance. See Martin Lipton, Wachtell, Lipton, Rosen & Katz, *Important Questions About Activist Hedge Funds*, HARV. L. SCH. F. CORP. GOV. (2013); John C. Coffee, Jr. & Darius Palia, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance*, 41 J. CORP. L. 545 (2016); Leo E. Strine, Jr., *Who Bleeds When the Wolves Bite?: A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System*, 126 YALE L.J. 1870 (2017). But other papers contest this argument. Mark J. Roe, *Stock Market Short-Termism's Impact*, 167 U. PA. L. REV. 71 (2019); Jesse M. Fried & Charles C.Y. Wang, *Short-Termism and Capital Flows*, 8 REV. CORP. FIN. STUDS. 207 (2019); Hadiye Aslan & Hilda Maraachlian, *Wealth Effects of Hedge Fund Activism*, Working Paper (2018). In addition, Coffee & Palia (2016) have suggested that hedge funds “may prefer to share the gains among themselves by using an organizational structure that unites a number of funds into a loosely knit organization (i.e., the ‘wolf pack’) that may acquire 25% or more of the target.” *Id.* at 595. However, the authors further note that “[t]his is an unexplored area, and we express no firm conclusion.” *Id.* at 596. There is no evidence cited in the Release of shareholder activists, or anyone, using swaps to engage in the kind of “reciprocity” suggested in Coffee & Palia (2016).

¹⁸ Taken as a whole, the academic literature finds the phenomenon of shareholder activism to be overall positive for investors, though there is granularity regarding whether individual funds or campaigns subtract, rather than add, value, and also regarding the extent to which the benefits from activism are primarily due to stock picking as opposed to long-term value creation. For example, Martijn Cremers, Erasmo Giambona, Simone M. Sepe & Ye Wang, *Hedge Fund Activists: Value Creators or Good Stock Pickers?* Working paper (2021) employ various methodologies and novel data to conclude that the positive abnormal returns to shareholder activism are due more to stock picking than value creation; they nevertheless document, consistent with prior literature, that shareholder activism “is associated with positive abnormal stock returns in both the short term and the long term.” *Id.* at 24. In addition, Hadiye Aslan & Praveen Kumar, *The Product Market Effects of Hedge Fund Activism*, 119 J. FIN. ECON. 226 (2016) focus on the impact of activism on rival firms, finding that the welfare consequences of shareholder activism are complex in that activism generally increases the efficiency of target firms, with negative consequences on relatively inefficient rival firms, suggesting overall improvements in welfare from the viewpoint of economic efficiency.

¹⁹ Activists provide other benefits to investors as well. See, e.g., Alon Brav, Michael Bradley, Itay Goldstein & Wei Jiang, *Activist Arbitrage: A Study of Open-Ending Attempts of Closed-End Funds*, 95 J. FIN. ECON. 1 (2010) (documenting activists’ effect on reducing discounts in closed-end funds); Agnes Cheng, Henry He Huang & Yinghua Li, *Hedge Fund Intervention and Accounting Conservatism*, 32 CONTEMP. ACCT. RES. 392 (2015) (showing that firms have superior accounting/financial reporting following activist intervention); Sehoon Kim, *Disappearing Discounts: Hedge Fund Activism in Conglomerates*, Working paper (2022) (showing that activists reduce the diversification discount in conglomerates); Virginia Harper Ho, *Risk Related Activism: The Business Case For Monitoring Nonfinancial Risk*, 41 J. CORP. L. 647, 678 (2016) (arguing that activists can improve firm disclosure of risk); Kobi Kastiel, *Against All Odds; Hedge Fund Activism in Controlled Companies*, 2016 COLUM. BUS. L. REV. 60 (2016) (showing that activists can discipline management even at controlled companies); Nickolay Gantchev, Oleg R. Gredil & Chotibhak Jotikasthira, *Governance Under the Gun: Spillover Effects of Hedge Fund Activism*, 23 REV. FIN. 1 (2019) (demonstrating improved performance at nontargeted peers of activist-targeted firms).

In addition to financial gains to investors from increases in the stock prices of targeted firms, the academic literature demonstrates numerous real and operational effects of activism, including:

- Reduced management entrenchment, as measured by CEO turnover²⁰
- Reduced emissions, as measured using plant-chemical level data²¹
- Reduced value-destroying mergers and acquisitions activity²²
- Improved firm performance, as measured by return on assets²³
- Improved firm productivity, as measured by plant-level performance²⁴
- Increased board diversity²⁵
- Improved environmental and social performance²⁶
- Improved corporate innovation, as measured by patent counts and citations²⁷

Finally, the academic literature has demonstrated numerous mechanisms that activists use to achieve benefits. Shareholder activists often gain board representation,²⁸ reduce management

²⁰ See Brav, Jiang, Partnoy & Thomas (2008).

²¹ See Pat Akey & Ian Appel, *Environmental Externalities of Activism*, Working paper (2020); S. Lakshmi Naaraayanan, Kunal Sachdeva & Varun Sharma, *The Real Effects of Environmental Activist Investing*, Working paper (2020); Yongqiang Chu & Daxuan Zhao, *Green Hedge Fund Activists*, Working Paper (2019).

²² See Wei Jiang, Tao Li & Danqing Mei, *Activist Arbitrage in M&A Acquirers*, 29 FIN. RES. LETTERS 156 (2019); Nikolay Gantchev, Merih Sevilir & Anil Shivdasani, *Activism and Empire Building*, 138 J. FIN. ECON. 526 (2020); Nicole M. Boyson, Nikolay Gantchev & Anil Shivdasani, *Activism Mergers*, 126 J. FIN. ECON. 54 (2017).

²³ See Brav, Jiang, Partnoy & Thomas (2008); Nicole M. Boyson & Robert Mooradian, *Corporate Governance and Hedge Fund Activism*, 14 REV. DERIVATIVES RES. (2011); Christopher P. Clifford, *Value Creation or Destruction? Hedge Funds as Shareholder Activists*, 14 J. CORP. FIN. 323 (2008).

²⁴ See Alon Brav, Wei Jiang, & Hyunseob Kim, *The Real Effects of Hedge Fund Activism: Productivity, Asset Allocation, and Labor Outcomes*, 28 REV. FIN. S. 2723 (2015).

²⁵ See Wei Jiang, *Diversity Through Turnover: How to Overcome the Glacial Pace Toward Board Diversity?*, COLUMBIA BUSINESS SCHOOL RESEARCH PAPER (Feb. 26, 2021).

²⁶ See Alexander Dyck, Karl V. Lins, Lukas Roth & Hannes F. Wagner, *Do Institutional Investors Drive Corporate Social Responsibility? International Evidence*, 131 J. FIN. ECON. 693 (2019); Youngqiang Chu, Bo Huang & Chengsi Zhang, *The Color of Hedge Fund Activism*, Working paper (2019). See also Cathy Hwang & Yaron Nili, *Shareholder-Driven Stakeholderism*, U. CHI. L. REV. ONLINE (2020) (“arguing that shareholders have long been advocates of the kind of progressive values that the public desires”).

²⁷ See Alon Brav, Wei Jiang, Song Ma & Xuan Tian, *How Does Hedge Fund Activism Reshape Corporate Innovation?* 130 J. FIN. ECON. 237 (2018).

²⁸ See Lucian A. Bebchuk, Alon Brav, Wei Jiang & Thomas Keusch, *Dancing with Activists*, 137 J. FIN. ECON. 1 (2020). See also Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 Yale L.J. 262 (2016) (discussing negotiations between activists and issuers that conclude with a withdrawn shareholder proposal and some sort of corporate reform).

entrenchment,²⁹ and improve both stock price and operating performance.³⁰ Shareholder activist stock ownership is directly correlated with the probability of success in obtaining one or more board seats through settlement with targeted companies.³¹

Potential Effects of the Proposed Rules on Shareholder Activism

The disclosure obligations in the Proposed Swaps Rules could reduce the incidence and effectiveness of activism by reducing the incentives to engage in activism. These incentives arise from the expected gains in positions that shareholder activists can accumulate before engaging in actions to mitigate agency costs, reduce corporate malfeasance, and hold managers and directors accountable to shareholders. To the extent those expected gains are reduced, shareholder activism will become less attractive.³² Reduced monitoring would adversely affect shareholders

²⁹ See Lucian A. Bebchuk, *The Myth That Insulating Boards Serves Long-Term Value*, 113 COLUM. L. REV. 1637 (2013); Paul Rose & Bernard S. Sharfman, *Shareholder Activism as a Corrective Mechanism in Corporate Governance*, 2014 BYU L. REV. 1014 (2014).

³⁰ The academic literature also examines the tactics activists may use to improve their odds of success. See, e.g., Alon Brav, Wei Jiang, Tao Li & James Pinnington, *Picking Friends Before Picking (Proxy) Fights: How Mutual Fund Voting Shapes Proxy Contests*, Working paper (2021) (examining mutual fund voting behavior in proxy contests); Alon Brav, Amil Dasgupta & Richmond Mathews, *Wolf Pack Activism*, forthcoming MGMT. SCI. (2021) (studying how multiple blockholders might engage management in parallel); Adam L. Aiken & Choonsik Lee, *Let's Talk Sooner Rather Than Later: The Strategic Communication Decisions of Activist Blockholders*, 62 J. CORP. FIN. 1 (2020) (“document(ing) how the choice to start communication early with management, before the 13D disclosure, fits within the” activist strategy); Matthew D. Cain, Jill E. Fisch, Sean J. Griffith & Steven Davidoff Solomon, *How Corporate Governance is Made: The Case of the Golden Leash*, 164 U. PA. L. REV. 649 (2016) (examining the use of so-called “golden leashes” to incentive activist-nominated director candidates).

³¹ It is important to note that activists only hold minority stakes in firms, so they must rely on convincing other shareholders to support their views. See Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 899 (2013); Ronald J. Gilson & Jeffrey N. Gordon, *Agency Capitalism: Further Implications of Equity Intermediation*, in RESEARCH HANDBOOK ON SHAREHOLDER POWER (Jennifer G. Hill & Randall S. Thomas, eds.) (2015); Assaf Hamdani & Sharon Hanes, *The Future of Shareholder Activism*, 99 B.U. L. REV. 971 (2019); John D. Morley, *Too Big to Be Activist*, 92 S. CAL. L. REV. 1407 (2019). Those other shareholders often—and increasingly—include index funds and other large institutional investors. Ian Appel, Todd Gormley & Donald Keim, *Standing on the Shoulders of Giants: The Effects of Passive Investors on Activism*, 32 REV. FIN. STUD. 2720 (2019); Lucian Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. REV. 721, 724 (2019); Clifford G. Holderness, *The Myth of Diffuse Ownership in the United States*, 22 REV. FIN. STUD. 1377 (2009). The literature has long established the important role played by such large investors. Andrei Shleifer & Robert W. Vishny, *Large Shareholders and Corporate Control*, 94 J. POL. ECON. 461 (1986); Alex Edmans, *Blockholder Trading, Market Efficiency, and Managerial Myopia*, 64 J. FIN. 2481 (2009).

³² The literature establishes that the size of the stake acquired by an activist motivates effort, and that shareholder activism is expensive; to the extent disclosure requirements increase the costs of activism and limit the benefits, they could deter the activity. See Rui Albuquerque, Vyacheslav Fos & Enrique Schroth, *Value Creation in Shareholder Activism*, J. FIN. ECON (forthcoming 2021); Nikolay Gantchev, *The Costs of Shareholder Activism: Evidence from a Sequential Decision Model*, 107 J. FIN. ECON. 610 (2013). For a discussion on how activists trade, see Pierre Collin-Dufresne & Vyacheslav Fos, *Do Prices Reveal the Presence of Informed Trading?* 70 J. FIN. 1555 (2015); see also Kerry Back, Pierre Collin-Dufresne

of all types, including those with the longest time horizons and greatest degree of concentration.³³

Despite the availability of relevant data,³⁴ the Release does not include any estimate of the effects of the Proposed Swaps Rules on shareholder activism. There are no data or cost-benefit analyses cited related to shareholder activism. Nor is there a counterfactual analysis to assess lost societal benefits from decreased levels of shareholder activism. There is no indication in the Release that shareholder activists have used swaps in similar ways to the use of swaps in the CDS market or by Archegos. Indeed, the economic analysis in the Release does not reference shareholder activism at all.

The Release states that the Commission constructed the thresholds used in the Proposed Swaps Rules based on an analysis of data in the debt market.³⁵ The Release further notes that the Commission intends to consider some “newly available data in determining thresholds to use in connection with Security-Based Swap Positions based on equity securities when adopting a final rule.”³⁶ Accordingly, it appears that the \$300 million rule is not based on data from the equity swaps market or data related to shareholder activism. The economic analysis also did not address how the disclosure thresholds relate to the risks posed by Archegos. Unfortunately, the Release also does not describe any additional data the Commission might use in the future to support position thresholds that might appear in any final rules, and such data were not made available or even referenced during the comment period.

The Release also notes that “transparency about security-based swap positions could play an important role in protecting market integrity, including by providing the Commission and other regulators with access to information that may indicate that a person (or a group of

Vyacheslav Fos, Tao Li & Alexander Ljungquist, *Activism, Strategic Trading, and Liquidity*, 86 *ECONOMETRICA* 1431 (2018) (studying theoretical implications of liquidity on activist engagements); Nickolay Gantchev & Chotibhak Jotikasthira, *Institutional Trading and Hedge Fund Activism*, 64 *MGMT. SCI.* 2930 (2018).

³³ Although much academic research focuses on “hedge fund” activism, other research examines a range of shareholders’ time horizon and concentration. *See, e.g.*, Brian Bushee, *Identifying and Attracting the “Right” Investors: Evidence on the Behavior of Institutional Investors*, 16 *J. APPLIED CORP. FIN.* 28 (2004); Martijin Cremers & Ankur Pareek, *Patient Capital Outperformance: The Investment Skill of High Active Share Managers Who Trade Infrequently*, 122 *J. FIN. ECON.* 288 (2016); Lawrence A. Cunningham, *Lessons from Quality Shareholders on Corporate Governance Practice, Research and Scholarship*, 5 *GEO. WASH. BUS. FIN. L. REV.* 1 (2021). Research led by the Quality Shareholders Initiative of George Washington University concludes that engaged shareholders with longer time horizons and higher concentration tend to be particularly valuable, whether they are hedge funds, pension funds, or another type of investor. *See* LAWRENCE A. CUNNINGHAM, *QUALITY SHAREHOLDERS: HOW THE BEST MANAGERS ATTRACT AND KEEP THEM* (2020); *see also* Lawrence A. Cunningham, *The Case for Empowering Quality Shareholders*, 46 *BYU L. REV.* 1 (2021).

³⁴ *See, e.g.*, Lucian Bebchuk, Alon Brav, Robert J. Jackson, Jr. & Wei Jiang, *Pre-Disclosure Accumulations by Activist Investors: Evidence and Policy*, 39 *J. CORP. L.* 1 (2013). *See also* Lucian A. Bebchuk & Robert J. Jackson, Jr., *The Law and Economics of Blockholder Disclosure*, 2 *HARV. BUS. L. REV.* 40 (2012).

³⁵ Proposed Swaps Rules, at 152, 161.

³⁶ *Id.* at 76.

persons) is building up a large security-based swap position, which may be relevant for a number of reasons, as discussed in greater detail in section III.”³⁷ We believe this objective could be accomplished by requiring disclosures only to the Commission, not publicly. To the extent there are additional concerns about the public’s understanding, those concerns could be addressed through different mechanisms, including alternatives related to the Proposed Section 13-D/G Rules.

Some of the statements in the economic analysis section of the Release regarding the equity security-based swaps thresholds appear to have been focused on Archegos.³⁸ Specifically, the Release notes the possibility of an economic externality where a market participant who decides to take on a large leveraged position in the underlying entity through a security-based swap will not internalize the total societal cost of a negative outcome.³⁹ In that event, the Release states that disclosure “could alleviate the externality by making information public that could be incorporated into TRS prices, thus requiring the party with the equity exposure to fully pay for the additional risks that it is incurring. Counterparties that have amassed large economic exposures in a specific security or TRS [total return swap] on that security (or both) and are therefore at greater risk of default could then be more easily identified.”⁴⁰ The Release does not address the extent to which swaps clearing rules failed to reduce counterparty risks posed by the Archegos swap transactions.⁴¹

There is no analysis in the Proposed Swaps Rules of the above concerns in the context of shareholder activism. There is no evidence of any such externality related to shareholder activism, or any large leveraged undisclosed equity positions by a shareholder activist that have led to such a negative outcome. Importantly, the Archegos situation did not involve shareholder activism or any possible intention to influence or control the company whose securities were the subject of the derivatives. A number of financial institutions suffered losses as a result of the Archegos situation, but those losses were absorbed by the financial system without the need for government intervention or the liquidation of any of the affected institutions.

More broadly, the Release is titled “Proposed Prohibition Against Fraud, Manipulation, or Deception in Connection with Security-Based Swaps.” Yet the Release presents no evidence that equity-based swaps held by shareholder activists have been associated with, or even have the potential for, fraud, market abuse, or market manipulation.⁴² The Release does not include any

³⁷ *Id.* at 22.

³⁸ *See id.* at 118-19.

³⁹ *See id.*

⁴⁰ *Id.* at 119.

⁴¹ *See* 15 U.S.C. 78c-3(a)(1) (as added by Section 763(a) of the Dodd-Frank Act of 2010); *see also* Process for Submissions for Review of Security-Based Swaps for Mandatory Clearing and Notice Filing Requirements for Clearing Agencies; Technical Amendments to Rule 19b-4 and Form 19b-4 Applicable to All Self-Regulatory Organizations, Release No. 34-69286, Jun. 28, 2012 (describing security-based swaps submissions and clearing requirements).

⁴² The Commission does not address whether the fraud risk associated with equity security-based swaps is sufficient to warrant an exception to the general statutory requirement of identity protection with respect to rulemaking related to public availability of security-based swap information and the Commission’s statutory duty “to ensure such information does not identify the participants.” 15 U.S.C. 78m-1(1)(E)(i).

empirical analysis of fraud, market abuse, or market manipulation based on a meaningful sample size, or describe such problems in the context of shareholder activism, where disclosure of positions is widespread, public, and closely studied, as in the academic literature cited here. The Release does not analyze or compare the potential benefits of the Proposed Swaps Rules based on one unmentioned (non-activist) market participant that the Commission is investigating⁴³ to the potential costs borne by a categorically different (activist) group of market participants. There is no analysis of potential costs and benefits of requiring disclosure of certain positions acquired through equity purchases within five days under the Proposed Section 13-D/G Rules, but requiring disclose of certain positions acquired through swaps within one day under the Proposed Swaps Rules.

Even those of us who are critics of various aspects of shareholder activism recognize that there is evidence in the literature that activism can be a means to address corporate underperformance and malfeasance, and hold management and boards of directors accountable to the ultimate owners of targeted companies. The research cited above demonstrates real benefits from shareholder activism, including benefits to retail investors from the financial gains associated with activism. Yet the Proposed Swaps Rules do not address shareholder activism, the extent to which shareholder activism might be impacted by the new one-day disclosure requirement, or the potential costs of imposing disclosure thresholds significantly below those in the Proposed Section 13-D/G Rules. A piecemeal approach to the Proposed Rules could have a chilling effect on shareholder activism, limiting a key protective tool for shareholders, large and small, and further insulating management and boards from accountability, to the detriment of investors. We urge the Commission to consider the research cited here, and the potential impact on shareholder activism, before adopting the Proposed Swaps Rules.

We appreciate the Commission's consideration of our comments.

Respectfully,

- Emilie Aguirre, *Associate Professor of Law, Duke Law School*
- Olufunmilayo Arewa, *Shusterman Professor of Business & Transactional Law Temple University, Beasley School of Law*
- Hadiye Aslan, *Associate Professor of Finance, Georgia State, J. Mack Robinson College of Business*
- Jordan Barry, *Professor of Law, USC Gould School of Law*
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⁴³ See Heather Perlberg, Matt Robinson & Sridhar Natarajan, BLOOMBERG, *SEC Investigating Archegos for Potential Market Manipulation*, Oct. 8, 2021; Matthew Goldstein, *The S.E.C. Has Issued a Subpoena to Archegos, the \$10 Billion Firm that Collapsed Spectacularly*, N.Y. TIMES, Oct. 8, 2021; Dave Michaels, *SEC Probes Trading by Archegos That Rattled Market*, WALL ST. J., Mar. 31, 2021.

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