sifma

asset management group

April 11, 2022

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

Re: ***File No. S7-06-22; Modernization of Beneficial Ownership Reporting (the "Proposal")***[1]

Dear Ms. Countryman:

The Asset Management Group of the Securities Industry and Financial Markets Association ("**SIFMA AMG**")[2] appreciates the opportunity to provide comments to the Securities and Exchange Commission (the "**Commission**" or "**SEC**") on the above-referenced Proposal to:

- accelerate the filing deadline for Schedule 13D beneficial ownership reports from 10 days to five days and require that amendments be filed within one business day after a material change, and also generally accelerate the filing deadlines for Schedule 13G beneficial ownership reports;

- expand the application of Regulation 13D-G to cash-settled derivative securities (other than security-based swaps, which are subject to a parallel proposal) if held with a control intent by deemed holders of such derivative securities as beneficial owners of the underlying reference equity securities;

- add specification as to the circumstances under which two or more persons have formed a "group" that would be subject to beneficial ownership reporting obligations and provide new exemptions to permit such persons to communicate and consult with each other, jointly engage issuers, and execute certain cash-settled derivative transactions without being subject to regulation as a group; and

- directly impact the 10% calculation of beneficial ownership for purposes of Section 16 of the Securities Exchange Act of 1934 (the "**Exchange Act**").

The Proposal makes a number of changes to a regulation that has functioned very well to implement the relevant statutory provisions of Section 13 of the Exchange Act. In our view, what has been billed as a "modernization" of existing rules is actually a dramatic expansion of scope and obligations – many of which seem unrelated to a data-driven identification of problems requiring attention. While the changes may be characterized as intended to address abuse, the anti-evasion rules already present in Regulation 13D-G have

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[1] Modernization of Beneficial Ownership, 87 Fed. Reg. 13846.

[2] SIFMA AMG brings the asset management community together to provide views on U.S. and global policy and to create industry best practices. SIFMA AMG's members represent U.S. and global asset management firms whose combined assets under management exceed $45 trillion. The clients of SIFMA AMG member firms include, among others, tens of millions of individual investors, registered investment companies, endowments, public and private pension funds, UCITS and private funds such as hedge funds and private equity funds.

proven to be highly effective in addressing potential abuse and we have not seen data suggesting additional regulations are needed.

SIFMA AMG appreciates the Commission's intent to support the well-functioning of our markets, but absent the clear identification of a problem not already well-addressed by existing regulations, we have serious questions and concerns about the expansiveness of these changes. Our members, each representing retail investors, are not convinced there is a significant problem to be addressed, and yet we are firmly convinced that the proposed regulatory changes will present confusion for both dealers and investors, and will require considerable investment for compliance (if that is even possible).

This letter will explain our concerns with respect to several aspects of the Proposal together with our recommendations for change. In our view, the three most urgent problems with the Proposal are:

- the expansion of the "group" concept, with the potential that by merely transacting with respect to a security derivative, whether or not cash-settled, or potentially even other instruments, a "group" may have been formed between the dealer and the customer, with each unwittingly and unintentionally becoming subject to Section 16 of the Exchange Act as a member of a greater-than-10% beneficial owner group;

- the expansion of the definition of beneficial ownership to include certain cash-settled derivatives,[3] potentially requiring, among other consequences, parties to cash-settled derivatives to daily re-calculate their beneficial ownership, defined in a variable way that would change based on factors outside of their control; and

- the acceleration of the filing deadlines for Schedules 13D and 13G, which fail to adequately distinguish between control and non-control purposes, will add unnecessary costs, and do not appear to address demonstrated issues.

The Proposal of 193 pages has been published at a time when the Commission has proposed a number of other reporting and disclosure reforms, including new rules related to the reporting of security-based swaps, significant revisions to the Commission's Regulation ATS, new proposals to enhance short sale disclosures and new requirements with respect to reporting of securities lending transactions. The operational burden and the commercial impact of all these new and additional requirements on market participants will, taken together, be quite significant, thereby demanding adequate time for thoughtful analysis and comment and, ultimately, implementation.

In addition, the Commission has presented 91 questions for response concerning the operation of the Proposal, and SIFMA AMG feels strongly that a 60/30-day comment period is simply an insufficient amount of time to allow for meaningful consideration of, and comment on, the Proposal, which would impose significant changes to current market practices.[4] In this regard, SIFMA AMG reconfirms our request

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3 In this letter, unless the context requires otherwise, we use "cash-settled derivative" to indicate a derivative with respect to a referenced Section 12–registered voting equity security that is required to be settled exclusively in cash and that is not a security-based swap.

4 *See* Letter to Honorable Gary Gensler, Chair, Securities and Exchange Commission, from Alternative Credit Council (ACC); Alternative Investment Management Association (AIMA); American Bankers Association (ABA);

that the comment period should have been extended to 90 days. In particular, we note that the range of activities and operational ramifications implicated by the Proposal would usually warrant a 90-day comment period. We are concerned that a 60/30-day comment period means that commenters are unable to deliberate on the issues carefully and provide the quality of responses and alternatives that would be valuable for the Commission's consideration as part of thoughtful rulemaking.

I. The "Group" Concept Must Be Objectively Clear.

As noted above, the Commission has neither presented data-driven evidence of a problem in this area, nor suggested even anecdotal evidence of a problem which would merit the significant expansion of the concept of "group" as embodied in the Proposal. Rather than identify a problem against which tailored regulations could be crafted, the Commission proposes to make significant changes to a rule that has existed in its current form for more than 40 years based on concerns that certain unspecified activity could theoretically occur, that such activity would not be covered by current regulations, and that therefore the rule requires immediate and substantial changes. And as the proposed fix for the theoretical problem is both so expansive and vague it is difficult to perceive its ameliorating effect while it is all too obvious to perceive its negative effect on investors, dealers, and the overall market.

The Exchange Act never intended the concept of "group" to include two parties whose coincidental behavior includes no conscious agreement as to a subjective purpose of their actions. Section 13(d)(3) of the Exchange Act states:

> "When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purposes of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a 'person' for purposes of this subsection."

The canon of statutory construction *ejusdem generis* provides that, when there is a list in a statute such as [specific noun], [specific noun] or [more generic noun] that the generic item must be of the same type as the more specific items.[5] Here, each of a partnership, a limited partnership and a syndicate involves an

American Council of Life Insurers (ACLI); American Investment Council (AIC); Bank Policy Institute (BPI); Bond Dealers of America (BDA); FIA Principal Traders Group (FIA PTG); Financial Services Forum (FSF); Institute of International Bankers (IIB); Institute for Portfolio Alternatives (IPA); Investment Adviser Association (IAA); Investment Company Institute (ICI); Loan Syndications and Trading Association (LSTA); Managed Funds Association (MFA); National Association of Corporate Treasurers (NACT); National Association of Investment Companies (NAIC); National Venture Capital Association (NVCA); Real Estate Roundtable (RER); Risk Management Association (RMA); Securities Industry and Financial Markets Association (SIFMA); Securities Industry and Financial Markets Association Asset Management Group (SIFMA AMG); Security Traders Association (STA); Small Business Investor Alliance (SBIA); and U.S. Chamber of Commerce (the Chamber) Center for Capital Markets (CCMC) (collectively, the Associations) regarding the need for sufficient comment periods, cost benefit analysis and meaningful public input in the regulatory rulemaking process, dated April 5, 2022. https://www.sifma.org/wp-content/uploads/2022/02/SEC_Joint-Trades_Comment-Period-Letter_4-5-2022.pdf

5 *See* Black's Law Dictionary (11th ed. 2019) (*ejusdem generis* is a "canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed."). Indeed, even without this canon of construction, the use of the adjective "other" to

agreement of some kind among the parties to act together for a common purpose. Thus, the reference to "other group" must similarly involve an agreement. If Congress had intended otherwise, it would have drafted Section 13(d)(3) differently (for example, "When two or more persons act as a group (including without limitation as a partnership, limited partnership, or syndicate, ….")). The problem is not that, 40 years ago, the Commission sought to define group in a way that was inconsistent with the statutory language in Section 13; the problem is that the Commission is proposing to do so now when the existing definition, fully consistent with the Exchange Act, has raised no issues in its application over the past 40 years.

The plain meaning of the phrase "two or more persons act as a . . . group ***for the purposes of acquiring, holding, or disposing of securities of an issuer***" is unambiguous in terms of two components: (a) multiple persons, and (b) acting in concert for certain specific common purposes. The assignment of regulatory obligations to multiple persons – each of which acting individually without conscious agreement as to any purpose of their behavior – is simply not supported by the plain reading of the Exchange Act, and would inevitably lead to compliance confusion as neither the persons, nor the Commission, could reasonably connect the otherwise random, coincidental objective behavior of other persons to divine the subjective common intent necessary for compliance.

We are likewise concerned by the Commission's observation in the Proposal that it would be "burden[ed]" if the existence of a group under Regulation 13D-G is "dependent upon evidence proving the existence of an agreement." While finding evidence of an agreement may be burdensome in some situations, the Commission cites to more than half a dozen cases holding that group activity may be established by circumstantial evidence (and detailing some of those types of evidence). On the other hand, the Commission cites to no specific instances where it believed the courts answered the question of group activity incorrectly.[6] And we have serious concerns that dispensing with more than 40 years of practice and court decisions, and replacing it with a vague, circular rule is impossibly burdensome to market participants. The practical effect of the Commission's proposal would be to assign group status based purely on an after-the-fact assessment of effects or outcomes and thereby create undue risk that one could unintentionally and unknowingly be part of a "group" for both Section 13 and Section 16 purposes. The Commission must make it clear that such an approach is not intended.

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modify "group" indicates that Congress did not intend "group" as a broad, independent catch-all but as a limited one for other similar agreement-based common enterprises.

6 In note 125 of the Proposal, the Commission observes that the appellate court in the *CSX Corporation case* concluded that the district court did not make sufficient findings for appellate review. However, Second Circuit's decision in that case was about the existence of group "for the purpose of 'acquiring, holding, voting, or disposing' … of CSX shares" and when that group was first formed; it did not specifically address the question of an agreement. The Commission also cites to *Morales v. Quintel Ent. Inc.*, 249 F.3d 115 (2nd Cir. 2001). In that case, as in *CSX Corporation* the main issue on appeal was not whether there was an agreement. As the Second Circuit stated in *Morales*, there were a number of instances of coordinated action by the defendants and such "evidence of coordinated action may indicate the existence of a group, even in the absence of a formal agreement." The appellate court then reversed and remanded the district court's decision which was unduly focused on the absence of any "control" purpose. Likewise in the third case cited by the Commission in footnote 125 – *Roth v. Jennings*, 489 F.3d 499 (2nd Cir. 2007) – the Second Circuit reversed a district court decision that ascribed undue weight to self-serving disclaimers of group status. Rather than demonstrating that courts are misconstruing the concept of group and thus that a rule change is necessary, each of these cases demonstrate the courts' appreciation of the statutory scope of Section 13(d)(3) and the need to interpret it properly.

Likewise, we are concerned with the implications of the proposed tipper / tippee provisions – especially in light of the proposed expansive interpretation of the "group" concept coupled with the lowered evidentiary bar for group status. Proposed Rule 13d-5(b)(1)(ii) would provide that:

> "[a] person that is or will be required to report beneficial ownership on Schedule 13D who, in advance of making such filing, directly or indirectly discloses to any other market participant the non-public information that such filing will be made, acts as a group with such other person or persons within the meaning of section 13(d)(3) of the Act to the extent such information was shared with the purpose of causing such other person or persons to acquire equity securities of the same class for which the Schedule 13D will be filed . . . [and] such other person or persons acquired beneficial ownership based on such information."

The rule, in linking "indirectly discloses" to "with the purpose of causing," appears intended to establish a presumption, for all practical purposes, that an acquisition by "such other person" was "based on such information." And again, as burdensome it may be to require evidence of the "indirect disclosure" coupled with the "purpose of causing" another person's acquisition of securities, to omit such evidence of "purpose" would be to render all such communications as the foundation for another's beneficial ownership status.

That would be not only an unfair and inappropriate presumption; it would also be poorly tailored to target the presumed scenario of "sharing . . . material information with other investors positioned to act on the information." Especially when one considers a client acquiring shares from a dealer while at the same time the dealer coincidently also acquires shares, how can knowledge, let alone purpose, be imputed to either party?

The Proposal must be amended to make it clear that such a result would never be captured as the present draft raises significant concerns – both to the investor, that it could be imputed with knowledge of the dealer's trading, and to the dealer, as to the possibility of its market-making transactions being deemed to be subject to Section 16.

In connection with the Commission's proposals on group status and the tipper–tippee provision, the Proposal would provide two new exceptions, designed in the Commission's view to mitigate any unintended consequences for market participants who might question whether their activities implicate Sections 13(d)(3) and 13(g)(3). In our view, the exceptions themselves are problematic in their ambiguity, and ideally would be abandoned as unnecessary if the Commission avoided the ambiguous aspects of the redefinition of "group" which have created the issue addressed by the proposed exceptions.

Under the first exception, pursuant to proposed Rule 13d-6(c):

> "Two or more persons shall not be deemed to have acquired beneficial ownership . . . . or otherwise beneficially own . . . . an issuer's equity securities as a group . . . . solely because of their concerted actions with respect to such issuer's equity securities, including engagement with another or the issuer . . . . provided, that: (1) [c]ommunications among or between such persons are not undertaken with the purpose or effect of changing or influencing control of the issuer, and are not made in connection with or as a participant in any transaction having such purpose or effect . . . . and (2)

> [s]uch persons, when taking such concerted actions, are not directly or indirectly obligated to take such actions."

Again, the phrase "purpose or effect of changing or influencing the control of the issuer," is itself problematic as how can the persons, let alone the Commission, determine the "purpose or effect" has occurred at the time of the act?

Similarly, under the second exception pursuant to Proposed Rule 13d-6(d);

> "[t]wo or more persons who, in the ordinary course of their business, enter into a bona fide purchase and sale agreement setting forth the terms of a derivative security . . . . shall not be deemed to have acquired beneficial ownership of . . . . any such equity securities of the issuer referenced in the agreement as a group . . . . provided, that such persons did not enter into the agreement with the purpose or effect of changing or influencing control of the issuer, or in connection with or as a participant in any transaction having such purpose or effect."

This language presents a similar difficulty. Although the language does not expressly state that parties to a derivative agreement under other circumstances *do* act as a group, again, given the Commission's nearly unbounded concept of group status, our members are naturally concerned that that may be the implication.

In our view, any final rule amending Regulation 13D-G must provide that a Qualified Institutional Investor ("**QII**") or Passive Investor[7] does not act as part of a group with any counterparty if, ***as determined at the time of entry into the transaction***, the QII or Passive Investor has entered into a transaction or a derivative agreement with respect to securities of an issuer including, in each case, any settlement or hedging activities, in the ordinary course of the QII's or the Passive Investor's business ***without the purpose on the part of the QII or Passive Investor of changing or influencing control of that issuer***.

A powerful practical consideration also commends this approach. ***Where the customer has a control intention***, current Rule 13d-3(d) does, and Proposed Rule 13d-3(e) would, ***already impute beneficial ownership to the customer of securities underlying derivatives and other rights***. As we discuss below, we believe that, from the customer's perspective, a link between a cash-settled derivative and control or influence of the issuer is generally too attenuated to support the imputation of beneficial ownership appropriate for Section 13 purposes, let alone for purposes of making a person subject to Section 16 as a greater than 10% beneficial owner. And even assuming that such imputation is appropriate on the grounds that it provides the public with necessary information (and is within the bounds of the statute), ***the customer's Schedule 13D disclosure will otherwise provide the public with that information.***

II. Cash-Settled Derivatives Do Not Constitute "Beneficial Ownership."

The Proposed Rule would dramatically expand the existing, well-understood, and widely relied-upon definition of beneficial ownership under Section 13 by including certain cash-settled derivatives. SIFMA AMG firmly believes that this change, like many of those relating to the concept of "group" discussed above, rests on faulty premises. We do not perceive, and the Commission has not demonstrated,

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[7] We use the terms "QII," "Passive Investor" and "Exempt Investor" with the same meanings given in the Proposal.

a compelling need to adopt this expansive definition of beneficial ownership. If it is to be adopted in some form, however, it is critical that key changes be made to the Proposal to avoid a number of inappropriate results and unintended consequences.

SIFMA AMG believes the Proposal's treatment of cash-settled derivatives is fundamentally misguided as the arguments why such derivatives could confer "beneficial ownership" are highly speculative theories of market effects that might conceivably occur and in which cash-settled derivatives might be said to have played a role.[8] We are very concerned that on the basis of these data-less hypotheticals, the Commission has proposed a complex, costly, and possibly impossible compliance need for investors in cash-settled derivatives to: daily re-calculate their beneficial ownership, which would change based on factors outside of their control; and navigate a much more complicated test for becoming subject to Section 16, all the while in a state of ignorance as to whether or when beneficial ownership would be imputed or aggregated.

The Proposal states:

> "We recognize that cash-settled derivative securities differ from the rights covered under Rule 13d-3(d)(1) in that they ordinarily do not entitle their holders to acquire the reference securities. To the extent such derivative security is held with the purpose or effect of changing or influencing the control of the issuer, however, we believe that the ***potential*** for a holder of a cash-settled derivative security to exert influence on a counterparty that ***may*** directly hold the reference securities implicates the same concerns that the Commission articulated in adopting Rule 13d-3(d)(1). Thus, we believe that deeming such holders to be beneficial owners of the reference securities would be consistent with the Commission's longstanding view of the right to acquire beneficial ownership as described in Rule 13d-3(d)(1)."[9]

We view the stated justification for this significant change to be highly speculative, inconsistent with market practice, and completely lacking any evidence of abuse.

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8 Proposal at 54-57 ("An investor in a cash-settled derivative ***may*** be positioned . . . to acquire any reference securities that the counterparty ***may*** acquire to hedge the economic risk of that transaction, including any obligations that ***may*** arise in connection with settlement. Entry into the agreement governing the derivative ***may***, therefore, result in a rapid accumulation of a covered class . . . . [I]f an arrangement or understanding exists outside of the term of a derivative instrument that enables the investor to acquire the reference securities from a counterparty, the reference securities ***could*** be viewed as having been impermissibly 'parked' . . . . The use of cash-settled derivative securities in the change of control context also ***may*** serve as a catalyst for related acquisitions of beneficial ownership by institutional counterparties that ultimately ***could*** contribute to a shift in corporate control . . . . Holders of cash-settled derivatives also ***may*** have incentives to influence or control outcomes at the issuer of the reference security . . . . such holders ***may*** possess economic power that ***can*** be used to produce desired outcomes through engagement with a counterparty or issuer of the reference security and ***potentially could*** impact the stock price. An unwinding of agreements governing cash-settled derivatives also ***could*** adversely impact the stock price of an issuer . . . . Consequently, counterparty dispositions of reference securities at [settlement] . . . . ***may*** impair the orderly operation and efficiency of our capital markets.") (emphases added).

9 Proposing Release at 57 (emphases added).

What little evidence is presented by the Commission of past abuse neither involves cash-settled derivatives, nor were beyond the reach of Regulation 13 D-G's existing anti-evasion provisions. In our view, the changes in the Proposal are completely unnecessary for the Commission to be able to proscribe the cited conduct. In addition, the association of cash-settled derivatives with "exert[ing] influence on a counterparty" is inconsistent with standard representations, warranties and agreements contained in ISDA agreements governing derivative securities, which make clear that a party to a cash-settled derivative agreement has no control over the future disposition or use of the counterparty's hedge position once it is established.[10]

SIFMA AMG agrees with the arguments in the letter dated April 11, 2022, submitted by SIFMA (the "**SIFMA Comment**") emphasizing the following points:

- dealers manage their hedge positions not based on counterparty preference but in accordance with their own risk management practices, and concerns related to any unwritten agreement relating to "parking" or similar conduct would raise not only evasion issues, but also books and records issues for dealers;[11]

- the hedging activity of a dealer is for its own account, and in the event that a dealer's establishment or unwind of a hedge position independently raises market conduct concerns, other legal authorities exist to address those concerns;[12] and

- most dealers have policies, procedures and practices in place designed to directly address the kind of abusive practices hypothesized in the Proposal,[13] including: policies on how dealers vote shares, the dealer's disclosure of the contents of its voting policies to its derivatives counterparties and on the coordination of voting with those counterparties, as well as policies ensuring that dealers dispose of hedges in an appropriate and consistent fashion.

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10 *See, e.g.*, International Swaps and Derivatives Association Master Agreement, §3(g) ("No Agency: [Each party represents] [i]t is entering into this agreement, including each Transaction, as a principal and not as an agent of any person or entity") and 2002 ISDA Equity Derivatives Definitions, §13.2 (Agreements and Acknowledgements Regarding Hedging Activities) ("each party to a Transaction agrees and acknowledges that . . . any Hedge Positions established by either party or any of its Affiliates is a proprietary trading position and activity of such party or such affiliate[;] each party or such Affiliate is not holding the Hedge Positions or engaging in the Hedging Activities on behalf or for the account of or as agent or fiduciary for the other party, and the other party will not have any direct economic or other interest in, or beneficial ownership of, the Hedge Positions or Hedging Activities[;] and the decision to engage in Hedging Activities is in the sole discretion of each party, and each party and its Affiliates may commence or, once commenced, suspend or cease the Hedging Activities at any time as it may solely determine").

11 The Exchange Act requires registered dealers to keep and maintain accurate books and records. Exchange Act §§ 17a-3 (Records to be made by certain exchange members, brokers, and dealers).

12 For example, Exchange Act §§ 9(a) (prohibiting manipulative transactions and market conduct by brokers).

13 Proposing Release at 56-57.

Given dealer trading and hedging practices are independent from customer strategies, that dealer policies and procedures protect against abuse, and existing rules apply to address abuse by both dealers and customers, SIFMA AMG believes the Commission should refrain from treating cash-settled derivatives as conferring beneficial ownership for purposes of Regulation 13D-G.

In addition, SIFMA AMG believes the different purposes of Section 16 and Section 13 merit the existing different approach to the definition of "beneficial ownership". Whereas Section 16 protects against the pecuniary interest of an "insider" in exploiting material non-public information, Section 13 is focused on an investor's influence or control of an issuer. It is therefore reasonable for the Section 16 definition to be more expansive given the higher percentage ownership test, while the lower percentage test of Section 13 merits a less expansive definition. We therefore believe the use of the Rule 16a-1 definition of "derivative security" is untenable in the context of Schedules 13D-G.

Moreover, the Section 16 definition of included derivative securities targets "any option, warrant, convertible security, stock appreciation right, or similar right with an exercise or conversion privilege at a price related to an equity security, or similar securities with a value derived from the value of an equity security," while excluding "[i]nterests in broad-based index options, broad-based index futures, and broad-based publicly traded market baskets of stocks approved for trading by the appropriate federal governmental authority."[14] This long-standing and clear definition is completely appropriate for addressing Section 16's policy purposes, but would be rendered far less clear, and potentially impossible to reliably calculate, if the Proposal's approach to cash-settled derivatives was included.

Our concern is also that proposed Rule 13d-3(e)(1)'s test for beneficial ownership based on holding a derivative security, which potentially includes an "intermediate" index or basket under the Commission's traditional interpretive guidance on Rule 16a-1,[15] could be deemed to confer on the holder beneficial ownership of one or more underlying reference securities in the intermediate basket. We find this result to be completely unworkable as:

- it is implausible to assign an investor's control or influence over issuers of the multiple securities in an "intermediate" basket;

- the Commission's discussion of the need to track the delta-adjusting of the multiple securities in an "intermediate" basket is highly confusing to follow, appears to be based on the delta-adjusting of a single security, and would likely to be impossible for parties to monitor for compliance purposes if applied to multiple securities in an "intermediate" basket; and

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14 Rule 16a-1(c)(4).

15 *Goldman, Sachs & Co.*, SEC No-Action Letters (June 7, 1996) and (October 15, 1997). We refer to such derivative securities as "intermediate-based interests" on an "intermediate basket." An example of an intermediate basket might be a basket of 15 equity names, each of which is equally weighted. An intermediate-based interest on that basket may be neither a security-based swap nor, because each name constitutes more than 5% of the basket, considered "broad-based."

- while the "intermediate" basket may be a swap, it likely would fall within the regulatory authority of the CFTC, and therefore appears outside of the SEC's authority, including under Section 13 – and especially in terms of such swaps conveying beneficial ownership under Regulation 13D-G.[16]

For these reasons, SIFMA AMG firmly believes the SEC should clarify that the coverage of Regulation 13D-G excludes derivative securities that are not a "narrow-based security index."

II. Accelerated Filing Deadlines for Qualified Institutional Investors and Passive Investors are Unreasonable and Unwarranted.

SIFMA AMG finds uncompelling the Commission's justification for the acceleration of the filing deadlines, and, given the proposed expansive definition of "group" and inclusion of cash-settled derivatives, extremely complex – if even possible – from a compliance perspective with questionable beneficial effect. While the Commission assumes that the current filing deadlines include a gap that presents the "potential to change control," such concerns are already addressed by existing certifications that QIIs and Passive Investors are required to make. If a QII or Passive Investor who has filed on Schedule 13G can no longer make the required passivity certification, Regulation 13D-G already provides a means by which the QII or Passive Investor must switch its reporting to Schedule 13D.

Again, the Proposal is thin on supporting data demonstrating the cited example, and it is difficult to discern a data-demonstrated problem narrowly targeted by the Proposal. The current filing timeline is reasonable and relatively well-functioning, consistent with the Commission's expressed view that QIIs "are permitted greater flexibility" in making Schedule 13G and Schedule 13G/A filings "in recognition of the fact that [QIIs] routinely buy and sell securities in the ordinary course of business and are less likely to abuse the process."[17] And the creation, implementation, and testing of a daily reporting system incorporating delta-adjustment will be significant for QIIs and Passive Investors, imposing meaningful costs on QIIs and Passive Investors not adequately addressed by the Commission's cost benefit analysis.

While we acknowledge the SEC's reasoning for proposing accelerated filing includes better transparency into QII holdings, registered investment companies ("**RICs**") who often qualify as QIIs already submit various holdings reports whether to the SEC, to the public, or to investors. Examples include: RICs file complete holdings with the SEC quarterly; annual and semi-annual filings of holdings are made on Form N-CSR, with quarterly filings on Form N-Q; and most RICs voluntarily publish their top 10 holdings on their websites more frequently (monthly); and transparent ETFs are required to publish complete holdings on their websites daily.

Apart from the specific challenges presented by the inclusion of cash-settled derivatives, we are struck that the Proposal appears not to acknowledge the different purposes behind Schedules 13D and 13G in proposing accelerated filing deadlines. As the Schedule 13G filer has acquired more than five percent of securities without a purpose or effect of changing or influencing control of the issuer, there is far less

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16 The Authority granted to the Commission in Section 13(o) of the Exchange Act extends only to security-based swaps, not to swaps subject to the exclusive authority of the CFTC.

17 Amendments to Beneficial Ownership Reporting Requirements, 63 Fed. Reg. 2854 (Jan. 12, 1998) at 2855.

urgency in completing the filing, compared to the Schedule 13D filer who intends to influence the control of the issuer.

While we generally do not believe there is a compelling need for accelerated filing, we are prepared to make a recommendation should the Commission feel compelled to move ahead with this aspect of the Proposal. For Schedule 13G, where there is less urgency for the filing given the absence of a purpose to change or influence control of an issuer, we recommend that rather than require filing within five days of month-end for both initial and amended filings, a Schedule 13G could be required within forty-five days of the end of the calendar quarter in which the five percent ownership was acquired or a there was a material change in such ownership. In addition, the Commission should confirm that a change of less than five percent should not require the need for an amended filing. For QII's we see no reason to move beyond the current requirement of a 13G filing within ten days of the month end in which the ten percent ownership is acquired or in which there is a subsequent five percent change to such ownership.

With respect to Schedule 13D filings, we can support a degree of acceleration given the purpose or effect of changing or influencing control of the issuer. For initial filings, we recommend the requirement to file within five business days of the acquisition, rather than five calendar days. For amendments, we do not believe it will be practicable to file within one business day and instead recommend the Commission qualify the existing "promptly" requirement so that the form must be in within three business days following the material change.

Again, we do not believe the Commission has adequately explained why the accelerated filing deadlines are needed, nor has it appropriately differentiated the Schedule 13D and 13G deadlines to reflect the purpose of the filings. The unsubstantiated fear that potential filers will sell down to avoid filing does not square with fundamental investment strategies deployed by our members. And as noted elsewhere, given the proposed dramatic expansion of the group definition and the addition of cash-settled derivatives to the calculations, tight filing deadlines may prove impossible to meet. Nevertheless, should the Commission elect to move forward, we commend our proposed deadlines as a workable compromise.

IV. Extended Implementation Period Necessary.

SIFMA AMG is of the firm view that while significant changes are required in the Proposal as outlined above, even when such changes are made, an extended period will be required to implement the expanded scope and accelerated filing schedule, including material rebuilds of existing monitoring and reporting systems. We disagree with the Commission's view that that "compliance costs to QIIs" in connection with shortened Schedule 13G deadlines—including newly required daily monitoring systems—"should be minor." Similarly, we disagree with the Commission's observation that "compliance costs" arising from the change in the definition of beneficial ownership are assumed to be "small."

Apart from predicting a modest increase in the number of Schedule 13D/G and Form 3/4/5 filings, the Proposal notes the Commission is "unable to quantify" the costs of expanding the definition of beneficial ownership or expanding the group concept. While certain costs are identified - such as "loss in revenue" for derivatives dealers - there is little mention of market changes, such as potentially decreased liquidity, that could result from the Proposal. As noted above, given the expansive and confusing proposed definitions, there will be a chilling effect on aspects of the market as market participants will be subject to greater risk of, but have less certainty about, potentially becoming subject to Section 16.

We also note the Section 13(d) definition of beneficial ownership currently used in Regulation 13D-G appears in many different instruments and contexts, some of which do not relate to direct participation in equities markets. The Proposal's changes to the definition of beneficial ownership could cause unintended changes in the meaning and operation of these agreements. Analyzing and evaluating those changes, negotiating revisions to contracts, and other related activities will be costly and potentially disruptive.

We also note the Commission's proposal on position reporting of security-based swaps has recently been outstanding for notice and comment.[18] As set forth in the 10B Proposal, new SEC Schedule 10B would have different filing triggers and thresholds and report a different set of information than reported in Schedules 13D/G,[19] while also including some of the same information. To the extent that the mix of publicly available information is relevant to commenting on the Proposal, that mix depends on the outcome of the 10B Proposal, and vice versa.

SIMA AMG believes a sensible path forward is to consider comments on the Proposal and on the 10B Proposal, then re-propose both rules together for further notice and comment. And as noted above, any final amendments to Regulations 13D-G and 10B must also be accompanied by a reasonable phase-in period.

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On behalf of SIFMA AMG, we appreciate the opportunity to respond to the Proposal and for your consideration of our comments and recommendations. If you have any questions or require additional information, please do not hesitate to contact us by calling Lindsey Keljo at (202) 962-7312 or William Thum at (202) 962-7381.

Sincerely,

LWKeljo

Lindsey Weber Keljo
Asset Management Group - Acting Head

William C. Thum
Managing Director and Assistant General Counsel

cc: The Honorable Gary Gensler, Chair
The Honorable Hester M. Pierce, Commissioner
The Honorable Allison Herren Lee, Commissioner
The Honorable Caroline A. Crenshaw, Commissioner

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18 10B Proposal, *supra*.

19 We note that we support the framework reflected in the 10B Proposal and the Proposed Rule whereby security-based swaps would be subject to reporting on Schedule 10B, but would not be considered in beneficial ownership calculations for purposes of Regulation 13D-G. Nonetheless, the adoption and implementation of these related regulations will clearly require care and coordination.