Via Electronic Mail Apr. 10, 2022

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

Re: File No. S7-06-22; File No. S7-32-10

Dear Ms. Countryman,

Below please find two proposals regarding Rules 10B-1 and 13d-3(e), addressing common concerns revealed by the current comment file: (1) confidentiality of individual transaction data under Rule 10B-1; and (2) Beneficial Ownership conferral on cash-settled derivatives under Rule 13d-3(e).

Sincerely,
/s/Wm. Robertson Dorsett
Wm. Robertson Dorsett
William.dorsett@law.columbia.edu

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

I. Proposals Regarding Rules 10B-1; 13d-3(e)

Reviewing the comments for proposed rules 10B-1 and 13d-3, two consistent concerns emerge: (1) concern with the public disclosure requirement of Rule 10B-1; and (2) concern with the ramifications of beneficial ownership conferral for cash-settled derivatives.

These concerns could be allayed, without contradicting the mandate of either the Dodd-Frank Act or the Williams Act, by the following Proposals:

(1) Under Rule 10B-1, mandating confidentiality for individual transaction data, while requiring public dissemination of aggregate transaction data; and

(2) Under Rule 13d-3, allowing permissive non-conferral of beneficial ownership for equity-linked, cash-settled derivatives *only to the extent* the SEC is satisfied that derivative counterparties can *effectively and irrevocably* contract out of the right to convert such derivatives to either (a) physical ownership of underlying shares, or (b) any other form of voting rights.

Brief Justification for Proposal (1)

Confidentiality of individual transaction data and public dissemination of aggregate transaction data is not only permitted, but required by Dodd-Frank. That requirement is clear from both the legislative history and the text of § 763(i) as enacted, and explained below.

Brief Justification for Proposal (2)

ISDA-standard, cash-settled, equity linked derivatives provide a contractual option—unilaterally exercisable by the long counterparty—to convert to physical shares at a pre-determined price, with minimal price friction. This is because the final price at which a swap settles is a market-reference price—typically VWAP or market-close—against which the long counterparty can execute a purchase order with minimal tracking error. Said otherwise, ISDA-standard equity-linked instruments create a *de facto* 13d-3(d) call option. See my 12-Feb-2022 comment, available here: https://www.sec.gov/comments/s7-06-22/s70622-20115899-267627.pdf

However, the legislative history and enacted text of the 1968 Williams Act—as explained below—make clear that the legislation's concern was corporate control. Consequently, to the extent that the SEC is satisfied private parties can *irrevocably* contract out of the right to obtain physical share ownership and/or any other form of voting rights, it may not be necessary to confer Beneficial Ownership on cash-settled derivatives to meet the aims of the Williams Act. Whether such irrevocable contracts are actually feasible is beyond the scope of this comment, and a matter for the SEC to determine.

The statutory language and legislative history supporting Proposals (1) and (2) is below:

II. Supporting Statutory Language and Legislative History

Rule 10B-1 Legislative History and Enacted Text

The public disclosure of participant identity contradicts the confidentiality mandate of Dodd-Frank § 763(i).[1] Sec. 763(i) authorizes the SEC to "make security-based swap transaction and pricing data available to the public in such form and at such times as the Commission determines appropriate to enhance price discovery."[2] Sec. 763(i) also circumscribes the authority to identify individual participants, requiring that rulemaking be "in a manner that does not disclose the business transactions and market positions of any persons."[3] The confidentiality mandate is clear from the legislative history.

2009 Treasury Dept. Whitepaper on Financial Regulatory Reform

First, the Treasury's initial recommendation—in its 2009 whitepaper on Financial Regulatory Reform—was to require public disclosure of aggregate transaction data, while keeping individual transaction data confidential:

> *CCPs [Central Counterparty Clearinghouses] and trade repositories should be required to, among other things, make aggregate data on open positions and trading volumes available to the public and make data on any individual counterparty's trades and positions available on a confidential basis to the CFTC, SEC, and the institution's primary regulators.*[4]

H.R. 4173 (as passed by the House of Representatives, Dec. 11, 2009)

The Treasury's August 11, 2009 draft legislation reiterated its focus on public disclosure of aggregate transaction data, and expressly excluded public disclosure of individual transaction data. The proposal would have amended Section 13[5] of the Securities Exchange Act to include the following:

> *The Commission . . . shall make available to the public, in a manner that does not disclose the business transactions and market positions of any person, aggregate data on security-based swap trading volumes and positions from . . . (A) clearing agencies . . . (B) security-based swap repositories . . . and (C) reports received by the Commission.*[6]

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[1] 15 U.S.C. § 78m(m)(1)(C);(E)
[2] Dodd-Frank § 763(i) (codified at 15 U.S.C. § 78m(m)(1)(B)).
[3] Dodd-Frank § 763(i) (codified at 15 U.S.C. § 78m(m)(1)(C)(iii)).
[4] *Financial Regulatory Reform: A New Foundation – Rebuilding Financial Supervision and Regulation*, at 48 (Oct. 8, 2009).
[5] 15 U.S.C. § 78m.
[6] Dep't Treasury, *Title VII – Improvements to Regulation of Over-the-Counter Derivatives Markets*, § 753(h) at 108:4-17 (Aug 11, 2009) (available at https://www.treasury.gov/press-center/press-releases/Pages/tg261.aspx).

H.R. 4173, as passed by the House of Representatives on December 11, 2009, proposed language identical in relevant part to the Treasury's August 11, 2009 draft, and further emphasized the requirement of confidential treatment of individual trade data.[7]

H.R. 4173 (as passed by the Senate, May 10, 2010)

The amendments between H.R. 4173 (as passed by the House, December 11, 2009) and H.R. 4173 (as passed by the Senate, May 20, 2010) with regard to Section 763(i)[8] are instructive with regard to Dodd-Frank's tension between dissemination of aggregate and individual transaction data.

Mitigating in favor of broad data dissemination, H.R. 4173 (as passed by the Senate, May 10, 2010) amended the section previously entitled "Public Reporting of Aggregate Security-Based Swap Data" by removing the modifier "aggregate" and titling the section instead "Public Reporting of Security-Based Swap Data."[9] The Senate bill also included a section defining the "Purpose" of 15 U.S.C. § 78m(m) broadly as "to authorize the Commission to make security-based swap transaction and pricing data available to the public in such form and at such times as the Commission determines appropriate to enhance price discovery."[10]

However, the bill also included explicit circumscription of that rulemaking authority. The Senate bill explicitly required the SEC to ensure that data disclosure of security-based swap transactions cleared at a registered clearing agency "does not identify the participants,"[11] and applied the same confidentiality requirement to non-cleared swaps.[12]

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[7] "A security-based swap repository shall . . . make available, on a confidential basis . . . all data obtained by the swap repository, including individual counterparty trade and position data, to the Commission, the appropriate Federal banking agencies, the Financial Services Oversight Council, the Securities and Exchange Commission, and the Department of Justice or to other persons the Commission deems appropriate, including foreign financial supervisors (including foreign futures authorities), foreign central banks, and foreign ministries." *Wall Street Reform and Consumer Protection Act of* 2009, H.R. 4173 (as passed by the House, Dec. 11, 2009), at 747:1-748:2 (available at https://www.govinfo.gov/content/pkg/BILLS-111hr4173rfs/pdf/BILLS-111hr4173rfs.pdf) ("H.R. 4173 (as passed by House)").

[8] 15 U.S.C. § 78m(m).

[9] *See* H.R. 4173 (as passed by Senate, May 10, 2010) at 834:3-4 (available at https://www.govinfo.gov/content/pkg/BILLS-111hr4173pp/pdf/BILLS-111hr4173pp.pdf) ("H.R. 4173 (as passed by Senate)").

[10] H.R. 4173 (as passed by Senate) at 834:13-18.

[11] "With respect to the rule providing for the public availability of transaction and pricing data for security-based swaps described in clauses (i) [mandatory clearing] and (ii) [voluntary or permissive clearing] . . . the rule promulgated by the Commission shall contain provisions . . . to ensure such information does not identify the participants." H.R. 4173 (as passed by Senate) at 836:10-17.

[12] "With respect to security-based swaps that are not cleared at a registered clearing agency and which are reported to a security-based swap data repository or the Commission . . . the Commission shall make available to the public, in a manner that does not disclose the business transactions and market positions of any person, aggregate data on such security-based swap trading volumes and positions." H.R. 4173 (as passed by Senate) at 835:13-23.

H.R. 4173 (as passed by the Senate, May 10, 2010)

The enacted version of the Dodd-Frank Act did not differ significantly in this regard. See Dodd-Frank § 763(i) as codified at 15 U.S.C. § 78m(m)(1) [Public Availability of Security-Based Swap Transaction Data] – the purpose of which "is to authorize the Commission to make security-based swap transaction and pricing data available to the public in such form and at such times as the Commission determines appropriate to enhance price discovery," while circumscribing that authority "in a manner that does not disclose the business transactions and market positions of any persons."[13]

Rule 13d-3 Legislative History and Enacted Text

The Williams Act of 1968 was undoubtedly concerned with undisclosed ownership—implicating corporate control—of corporate securities issuers.

The Williams Act – ultimately enacted in 1968 as Section 13(d) of the Securities Exchange Act of 1934[14] – was first proposed in 1965 by Senator Harrison A. Williams (NJ) as Senate Bill No. 2731.[15] Senator Williams introduced the legislation to combat what he deemed "[Federal Securities law's] fail[ure] to take proper cognizance of the activities of corporate raiders."[16] Williams was concerned with the "inadequate disclosure system in regard to cash tender offers," in contrast to stringent disclosure requirements preceding either an exchange offer or proxy contest.[17] The legislation proposed transposition[18] of the advance disclosure requirements for proxy solicitations onto (1) cash tender offers;

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[13] 15 U.S.C. § 78m(m)(1); Dodd-Frank § 763(i); H.R. 4173 (as enacted) at 404-05.

[14] Act of July 29, 1968, Pub. L. No. 90-439, 82 Stat. 454, *amending* Securities Exchange Act § 13 (codified at 15 U.S.C. § 78m).

[15] S. 2731, 89th Cong., 1st Sess. (1965).

[16] Williams alleged that "[i]n recent years we have seen proud old companies reduced to corporate shells after white-collar pirates have seized control with funds from sources which are unknown in many cases, then sold or traded away the best assets, later to split up most of the loot among themselves." 111 Cong. Rec. 28257 (1965) (remarks of Senator Williams, "Protection Against Corporate Raiders").

[17] "Where one who seeks control of a corporation makes an exchange offer of stock to obtain the control, the offer must be registered under the Securities Act of 1933 and full disclosure is made under scrutiny of the SEC. Similarly, where control is sought through a proxy contest, schedule 14B information must be filed which tells shareholders the identity of the participants and their associates, their stockholdings and when they acquired them, the extent to which the shares were purchased with borrowed funds and the identity of the lender if obtained otherwise than through a bank loan or margin account, and details as to any arrangements they have with anyone as to employment by, or future transactions with, the issuer. Intelligent decisions cannot be made by stockholders without such information. But no information need be filed where a cash tender offer is made to stockholders. Such an offer can be made on the most minimal disclosure; yet the salient facts are important to the corporation, the stockholder, and to the marketplace." 111 Cong. Rec. 28258 (1965) (remarks of Senator Williams, "Protection Against Corporate Raiders").

[18] "[S. 510, the 1967 successor to S. 2731] is patterned on the present law and the regulations which govern proxy contests." 113 Cong. Rec. 24665 (1967) (remarks of Senator Williams, "Disclosure of Corporate Equity Ownership").

and (2) those open market acquisitions contemplated to result in ownership above a specified percentage threshold[19] of a class of securities.[20] Williams' proposal included a permissive exemption from disclosure requirements for passive investors, underscoring the legislation's central concern with changes in corporate control, as opposed to mere changes in economic exposure.[21]

In a 1966 memo responsive to Williams' proposed legislation, the Securities and Exchange Commission confirmed the Commission was "in accord with the overall objectives of S. 2731 [the 1965 proposal]."[22] However, the SEC proposed several amendments, including (1) amending Williams' proposed twenty-day advance disclosure requirement to a more practical requirement to disclose within the five-days subsequent to acquisition;[23] and (2) expanded beneficial ownership to individuals presently obtaining the future "*right*" – through options or otherwise – to acquire ownership implicating disclosure thresholds.[24]

The 1966 S.E.C proposals provide some basis for the argument that cash settled, equity-linked swaps should not – without more – confer beneficial ownership. The first proposal – that disclosure be required subsequent, and not antecedent, to acquisition – suggests the SEC's interest in ensuring premature disclosure requirements would not unduly influence the cost of open-market acquisition, even when such open-market acquisition precedes or accompanies a transaction to effect change in corporate control. Senator Williams' revised 1967 legislation conceded to this proposal for the same stated reason; namely, to "avoid[ ] upsetting the free and open auction market where buyer and

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[19] S. 2731 (1965) proposed a five (5) percent threshold, with public disclosure required twenty (20) days prior to exceeding that threshold. 111 Cong. Rec. 28259 (1965) (remarks of Senator Williams, "Protection Against Corporate Raiders").

[20] Those requirements would include, *inter alia*, "the identity and the background of the person, or group, making the tender offer," "[t[he size of the holdings," "[t]he source of funds," "[t]he financing arrangements," "[a]ny side agreements that have been made with respect to the stock," "[t]he purpose of the tender offer," and "[t]he plans of the tenderer if he wins control of the company." 111 Cong. Rec. 28258-59 (1965) (remarks of Senator Williams, "Protection Against Corporate Raiders").

[21] "I am also including a provision giving the Commission authority to grant a requested exemption if it appears that the particular transaction will not in any way change or influence the ultimate control of the corporation. This exception will, I believe, further protect the legitimate buyer who may be acquiring 5 percent of a corporation strictly for investment purposes and with absolutely no interest in affecting management policy." 111 Cong. Rec. 28259 (1965) (remarks of Senator Williams, "Protection Against Corporate Raiders").

[22] 111 Cong. Rec. 19003 (1966) (*Memorandum of the Securities and Exchange Commission to the Committee on Banking and Currency, U.S. Senate, on S. 2731, 89th Congress*).

[23] "The Commission foresees difficulty in requiring 20 days advance notice of a proposed acquisition in excess of 5 per cent and believes that a statement filed not more than 5 days after the acquisition would be less burdensome to beneficial owners who become subject to it." *Id.* at 19004

[24] "We would also suggest that one who obtains the *right* to increase his beneficial ownership to more than 5 per cent should be made subject to the reporting requirements, in order to reach options or contracts to purchase, which are also relevant to the purposes of the bill." *Id.*

seller normally do not disclose the extent of their interest and avoid[ ] prematurely disclosing the terms of privately negotiated transactions."[25]

The second 1966 SEC proposal – extending reporting requirements to "options or contracts to purchase" – indicates the SEC's concern with – at a minimum – contractual rights to obtain ownership exceeding reporting thresholds. The proposal does not clarify what constitutes a "right" to obtain shares.

In 1967, Williams introduced a revised version of the 1965 proposal that would ultimately be enacted as Section 13(d) of the Securities Exchange Act, incorporating both the SEC's proposal to require notice subsequent to acquisition[26] and to extend reporting requirements to present rights to future share acquisition. Williams' introductory remarks reiterate both the legislative intent to reduce idiosyncratic, security-specific risk posed by undisclosed ownership,[27] and the exemption of acquisitions implicating economic exposure without implicating corporate control.[28]

This hesitancy to confer beneficial ownership on the basis of economic interest alone was mirrored by SEC rulemaking that followed, as demonstrated by the changes between the 1977 and 1978 Rule 13D codifications. The 1977 Form 13D called for the identification of those holding "economic interest in the securities reported on."[29] In

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[25] Arguably, however, Senator Williams' comments reflect acquiescence more than agreement: "Substantial open market or privately negotiated purchases of shares may precede or accompany a tender offer or may otherwise relate to shifts in control of which investors should be aware. While some people might say that this information should be filed before the securities are acquired, disclosure after the transaction avoids upsetting the free and open auction market where buyer and seller normally do not disclose the extent of their interest and avoids prematurely disclosing the terms of privately negotiated transactions." 113 Cong. Rec. 856 (1967) (remarks of Senator Williams, "Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids").

[26] While the January, 1967 proposal set the threshold reporting requirement at 10 percent – with notice required seven days subsequent to acquisition – the August, 1967 proposal and 1968 legislation set the threshold reporting requirement at 10 percent – with notice required 10 days subsequent to acquisition. *See Id.;* 113 Cong. Rec. 24662 (Aug. 30, 1967) ("Disclosure of Corporate Equity Ownership"). The current threshold is 5 percent – with notice required 10 days subsequent to acquisition – as codified by the SEC in 17 C.F.R. § 240.13d-1.

[27] "The need for such legislation has been caused by the increased use of cash tender offers rather than the regular proxy fight to gain control of publicly owned corporations . . . This legislation will close a significant gap in investor protection under the Federal securities laws by requiring the disclosure of pertinent information to stockholders when persons seek to obtain control of a corporation by a cash tender offer or through open market or privately negotiated purchases of securities." 113 Cong. 854 (Jan. 18, 1967) (remarks of Senator Williams, "Full Disclosure of Corporate Equity Ownership").

[28] Reporting requirements are inapplicable for "[a]ny acquisition . . . which the Commission . . . shall exempt . . . as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purpose of this subsection." 113 Cong. Rec. 857 (1967) (remarks of Senator Williams, "Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids"); Securities Exchange Act, § 13(d)(5)(D) (1968); Securities Exchange Act, § 13(d)(6)(D) (2015) (codified at 15 U.S.C. § 78m(d)(6)(D)).

[29] Item 5(d): "If any other person is known to have an economic interest in the securities reported on, including but not limited to the right to receive or the power to direct the receipt of dividends from, or the proceeds from the sale of, such securities, a statement to that effect should be included in response to this item and, if such interest relates to more than five percent of the class, such person should be identified." *Adoption of Beneficial Ownership Disclosure Requirements*, 42 FR 12342-01 (Mar. 3, 1977).

contrast, the 1978 Form 13D removed the term "economic interest," calling instead for the identification of those "known to have the right to receive or the power to direct the receipt of dividends from, or the proceeds from the sale of, such securities."[30] The amendment was intended to remove uncertainty over the relevant coverage of Item 5 [Interest in Securities of the Issuer], and to reduce "considerable uncertainty . . . with respect to the scope of the interests contemplated."[31]

[30] *Filing & Disclosure Requirements Relating to Beneficial Ownership*, Release No. 5925 (Apr.21, 1978). That language remains unchanged today, as codified in 17 C.F.R. § 240.13d-101.

[31] "New Item 5(d) is limited to the receipt of dividends or the proceeds upon sale whereas old Item 5(d) applied to all economic interests in the securities. The Commission has limited the item to the traditional economic interests in a security in order to facilitate compliance with the Item. Prior to the amendment considerable uncertainty had been expressed with respect to the scope of the interests contemplated by the Item." *Filing & Disclosure Requirements Relating to Beneficial Ownership*, Release No. 5925 (Apr. 21, 1978).