COUNCIL FOR INVESTOR RIGHTS AND CORPORATE ACCOUNTABILITY

Via electronic mail (rule-comment@sec.gov)

September 8, 2022

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

Re: Updated Comment Letter - Position Reporting of Large Security-Based Swap Position and Modernization of Beneficial Ownership Reporting
File Nos. S7-32-10 and S7-06-22

Dear Ms. Countryman,

In our comment letters regarding the above-referenced proposals,[1] we explained that adoption by the Securities and Exchange Commission (the "**SEC**") of proposed rule 10B-1 and the proposed amendments to rules under Sections 13(d) and 13(g) (the "**Proposed Rules**"),[2] would seriously harm retail and institutional investors by eliminating important incentives and tools for activists to police corporate directors and managers and ensure they act in the best interests of shareholders.[3] We noted that the SEC failed to provide a sufficient cost-benefit analysis for the Proposed Rules. We also explained that the SEC's adoption of the Proposed Rules would be inconsistent with the words and intent of the underlying statutes and, thus, contrary to the requirements of the Administrative Procedure Act.

We are writing again, in light of the standard for court review of federal regulations recently articulated by the U.S. Supreme Court in *West Virginia v. Environmental Protection Agency.*[4] The Supreme Court's holding makes clear that the Proposed Rules, if adopted in their current form, could be subject to invalidation by a court as *ultra vires*. Rather than adopt rules that are susceptible to invalidation because the agency lacks clear statutory authority to adopt them, we

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1 *See* Council for Investor Rights and Corporate Accountability, Letter to Vanessa Countryman, File No. S7-32-10 (March 21, 2022) [here]; Council for Investor Rights and Corporate Accountability, Letter to Vanessa Countryman, File No. S7-06-22 (April 11, 2022) [here] (the "**CIRCA Comment Letters**").

2 The Proposed Rules were proposed under the Securities Exchange Act of 1934, as amended (the "**Exchange Act**"). We refer to proposed rule 10B-1 as (the "**Proposed Rule 10B-1**") and to the proposed amendments to Regulation 13D-G and, by extension Section 16 as (the "**Proposed 13D/G Rule Amendments**").

3 Council for Investor Rights and Corporate Accountability ("**CIRCA**") is a consortium of investors who believe that a well-functioning system of checks and balances among management teams and boards of directors, on the one hand, and shareholders, on the other hand, is fundamental to the long-term competitiveness, economic growth and prosperity of the U.S. capital markets and the U.S. economy generally.

4 *See West Virginia et al., v. Environmental Protection Agency et al.,* 597 U.S. ___ (June 30, 2022) *available* [here] ("***West Virginia v. EPA***").

urge the SEC to withdraw the Proposed Rules or revise them to be consistent with SEC's clear and explicit legislative remit.

In *West Virginia v. EPA*, the U.S. Supreme Court applied the "major question doctrine" to invalidate emission caps set by the EPA on carbon dioxide emissions under the Clean Power Act. The Court explained that, under the major question doctrine, if a federal regulation: (i) involves matters of great political significance; (ii) regulates a significant portion of the national economy; or (iii) intrudes into an area that is the particular domain of state law, in order to be valid, the regulation must be based on "clear congressional authorization."[5] Justice Gorsuch, in his concurring opinion, emphasized that "…the Constitution does not authorize agencies to use pen-and-phone regulations as substitutes for laws passed by the people's representatives."

As an initial matter, the Proposed Rules would implicate the "major question doctrine" based on at least two of the triggers cited by the Supreme Court.

First, because the Proposed Rules would materially adversely impact investor activism, for all of the reasons described in the CIRCA Comment Letters, adoption of the Proposed Rules is likely to have a substantial impact on the capital markets and the national economy. Adoption of the Proposed Rules would impede and possibly end corporate activism, which could fundamentally change the nature of corporate governance and the investment risk for investors across our capital markets. As a result, the Proposed Rules present a major question, consistent with the Supreme Court's holding and the second trigger cited by Justice Gorsuch.

Secondly, as detailed in the CIRCA Comment Letters, the Proposed Rules would have a significant chilling effect on the ability of shareholders to freely communicate with each other regarding matters that are critical to their ownership interests. The exercise of the shareholder franchise is perhaps the most significant right granted to shareholders under state law, and the adoption of the Proposed Rules would significantly impede the free exchange of information among shareholders, which in turn will negatively impact their voting and ownership rights under state law, thereby clearly implicating Gorsuch's third trigger.

In light of the fact that the "major question doctrine" would be implicated by adoption of the Proposed Rules, the SEC's authority to adopt the Proposed Rules would depend upon the SEC's having "clear authority" from Congress to establish and adopt such regulations. As we explain below, the SEC does not, in fact, have "clear authority" from Congress to establish and adopt the Proposed Rules.

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[5] *West Virginia v. EPA, supra* note 4 at 28 ("Given these circumstances, our precedent counsels skepticism toward EPA's claim that Section 111 empowers it to devise carbon emissions caps based on a generation shifting approach. To overcome that skepticism, the Government must – under the major questions doctrine – point to 'clear congressional authorization' to regulate in that manner" (*citing Utility Air Regulatory Group vs. EPA,* 573 U.S. 302,324); *see also* Gorsuch, J., concurring, at 1, 9-11.

In the case of Proposed Rule 10B-1, the SEC has no authority from Congress to adopt a rule in the form that was proposed. Instead, Section 10B of the Exchange Act, as adopted by the Dodd-Frank Act,[6] authorizes the SEC to establish position limits and position accountability and require non-public, large trader reports to be delivered to the SEC on a non-public basis.[7] Accordingly, the public reporting regime in Proposed Rule 10B-1 goes well beyond the Congressional mandate set out in Section 10B. In addition, in accordance with the Congressional directive, any large trader reporting rule adopted by the SEC under Title VII of the Dodd-Frank Act must be consistent with the CFTC's large trader rule, to the extent possible.[8] Because Proposed Rule 10B-1 provides for public reporting rather than confidential reporting (as the CFTC reporting requirement does) and is substantially different from the CFTC's large trader reporting rule in other material ways,[9] we respectfully submit that its adoption would not be within the Congressional grant of authority to the SEC. As a result, Proposed Rule 10B-1 is not based on clear Congressional authority delegated to the SEC. As noted by the Supreme Court, when examining agency authority under the major question doctrine: "…something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims."[10]

Contrary to this requirement, the SEC also does not have authority under the statute to propose expansive definitions of "group" as part of the Proposed 13D/G Rule Amendments. Although Section 13(d)(3) establishes the concept of a "group" and provides parameters around the meaning of the term, it does not grant specific authority to the SEC to define the term and to expand its meaning as the SEC has proposed.

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6 Proposed Rule 10B-1 was based on Section 10B (d) of the Exchange Act, which was adopted by Congress under The Dodd Frank Wall Street Reform and Consumer Protection Act (the "**Dodd-Frank Act**"). The statutory provision was similar to one directed to the Commodity Futures Trading Commission (the "CFTC"), which acted on the Congressional direct to pass CFTC Regulation § 20.4. Unlike Proposed Rule 10B-1, the CFTC rule provides for confidential filing of positions by market intermediaries only with the CFTC.

7 Although subsection (d) does not state whether the filing must be non-public, it is clear from the context and as a matter of statutory construction that a "non-public" filing only is required since the following two sub-sections expressly require "public reporting" as opposed to the language used in (d). This reading is consistent with the CFTC's reading of the analogous provision directed at swaps and is consistent with the stated purpose of the large trader reporting, which is to establish position limits and provide transparency to regulators to oversee the swap market and the security-based swap market.

8 *See* the Dodd-Frank Act § 712(a)(2), 15 U.S.C. § 8302. Although the Dodd-Frank Act required the SEC to develop to be consistent with the rules both of the CFTC and of the prudential regulators, because the prudential regulators have not adopted large trader reporting rules, the directive would only apply to the CFTC's rule.

9 For example, unlike the CFTC rule, Proposed Rule 10B-1 would: (i) apply to all types of counterparties to security-based swaps and not exclusively to clearing members and security-based swap dealers; (ii) require reporting persons, in determining whether the threshold is met, to aggregate cash holdings and other derivatives referencing the security that underlies the security-based swap; and (iii) require disclosure of cash positions.

10 *West Virginia v. EPA, supra* note 4 at 19 (*Citing Utility Air Regulatory Group v. EPA,* 573 U.S. 302 (2014)).

With respect to the SEC's proposal to treat counterparties to certain derivative instruments (other than security-based swaps) as the beneficial owners of the referenced instruments, the SEC does not have the requisite authority to adopt these changes. The words in the statute limit the SEC's authority to define beneficial ownership to security-based swaps. The proposed changes are also inconsistent with the underlying purpose of the Williams Act. The SEC's stated reason for expanding the beneficial ownership provisions, *i.e.*, mitigating information asymmetries so as to allow retail holders to share in the profits made by activists, is wholly unrelated to the underlying goal of the Williams Act to regulate cash tender offers, on which the Section 13(d) provisions are based.[11]

As Justice Gorsuch noted in his concurring opinion to *West Virginia v. EPA*:

> …sometimes old statutes may be written in ways that apply to new and previously unanticipated situations … But an agency's attempt to deploy an old statute focused on one problem to solve a new and different problem may also be a warning sign that it is acting without clear congressional authority.

The SEC is currently subject to a number of actions challenging its rule making authority and related powers.[12] As a result, the SEC is now forced to spend considerable time and resources defending itself and its authority to promulgate regulations instead of pro-actively seeking to follow Congress' mandate to oversee the securities markets and protect investors. We do not believe that is in the best interest of the SEC – or a good use of taxpayer dollars – for the SEC to continue to seek to adopt rules that are contrary to the powers granted to it by Congress. Moreover, by focusing time and effort on proposals that are clearly outside of the SEC's remit, the SEC undermines its credibility and, as a result, its ability to pass regulations that will be upheld. In light of the Supreme Court's clear guidance on the limits on authority of administrative agencies to pass regulations, the SEC should stand down or revise the Proposed Rules consistent with its legislative remit.

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We appreciate the opportunity to provide additional comments to the SEC on the Proposed Rules and would be very happy to meet with the SEC or its staff to discuss our views. Should you have any questions, please feel free to reach out to me, at [redacted], or to our Counsel, Willkie Farr & Gallaher LLP, Georgia Bullitt, at [redacted], Russell Leaf, at [redacted], or Tariq Mundiya, at [redacted].

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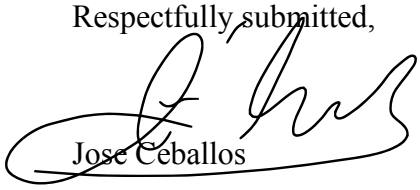
[11] The purpose of the Williams Act was to regulate hostile cash tender offers that forced shareholders to tender their shares on a compressed timetable and without adequate disclosure. Andrew E. Nagel et al., *The Williams Act: A Truly "Modern" Assessment,* HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Oct. 22, 2011), *available at* https://corpgov.law.harvard.edu/wp-content/uploads/2022/10/The-Williams-Act-A-Truly-Modern-Assessment.pdf.

[12] *See, e.g., Grayscale v. SEC, Chamber of Commerce et al. v. SEC, National Association of Manufacturers v. SEC and Nasdaq v. SEC.*

Respectfully submitted,



Jose Ceballos

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