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

Submitted electronically via rule-comments@sec.gov

March 21, 2022

Dear Ms. Countryman:

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 (File Number S7-32-10)

The Alternative Investment Management Association (AIMA)[1] appreciates the opportunity to comment on the U.S. Securities and Exchange Commission's (Commission) proposed rule that: (i) is designed to prohibit fraud, manipulation or deception in connection with security-based swaps ("SBSs"); (ii) prohibits undue influence over chief compliance officers; and (iii) establishes a new reporting regime for large SBS positions (the "Proposal").[2]

AIMA's members include institutional investment managers and other market participants, many of whom are active members in the SBS market and would therefore be impacted by the Proposal. The

[1] AIMA, the Alternative Investment Management Association, is the global representative of the alternative investment industry, with more than 2,000 corporate members in over 60 countries. AIMA's fund manager members collectively manage more than $2 trillion in assets. AIMA draws upon the expertise and diversity of its membership to provide leadership in industry initiatives such as advocacy, policy and regulatory engagement, educational programs and sound practice guides. AIMA works to raise media and public awareness of the value of the industry. AIMA set up the Alternative Credit Council (ACC) to help firms focused in the private credit and direct lending space. The ACC currently represents over 200 members that manage $400 billion of private credit assets globally. AIMA is committed to developing skills and education standards and is a co-founder of the Chartered Alternative Investment Analyst designation (CAIA) – the first and only specialised educational standard for alternative investment specialists. AIMA is governed by its Council (Board of Directors). For further information, please visit AIMA's website, www.aima.org.

[2] SEC, Proposing Release, 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, 87 Fed. Reg. 6652 (Feb. 4, 2022) (the "Proposing Release").

new reporting regime for large SBS positions, pursuant to proposed Rule 10B-1, would be highly detrimental both to the broader financial ecosystem and our members' trading and risk management strategies. Accordingly, we have limited our response to this aspect of the Proposal.

We strongly encourage the Commission to abandon its preliminary determination to disclose Schedule 10B reports to the public and to consider instead other, more appropriately tailored alternatives and make several other important changes prior to considering a final rule. In particular, we suggest that the Commission:

- should not disclose reporting persons' Schedule 10B reports;
- should, instead of proposing Rule 10B-1, revise its rules to require enhanced risk mitigation practices for SBS dealers;
- should have considered other narrowly tailored approaches instead of proposed Rule 10B-1 to address its stated concerns; and
- should, if it determines disclosure is necessary, not disclose Schedule 10B reports any earlier than 60 days after a report is filed, especially with the proposed level of granularity.

Furthermore, we believe the Commission:

- prematurely issued the Proposal without sufficient data and therefore has proposed arbitrary reporting thresholds, which has led it to underestimate the potential number of respondents; and
- issued a Proposal with such broad scope that it will disadvantage reporting market participants and could lead to fewer SBS market participants and reduced market liquidity.

These points are discussed in further detail below in the attached annex with relevant data points provided. We would be happy to elaborate further on any of the points raised in this letter. For further information, please contact Daniel Austin, AIMA's Director of U.S. Policy and Regulation, by email at [redacted] or phone at [redacted].

Yours sincerely,

Jiří Król
Deputy CEO, Global Head of Government Affairs
AIMA

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

ANNEX

1. The Commission should not disclose reporting persons' Schedule 10Bs because doing so would lead to negative market impacts as well as curtail many of the benefits the Commission believes such disclosure would provide.

The Commission is proposing to establish a new large trader reporting regime for SBSs that would require public reporting of, among other things: (i) certain large SBS positions; (ii) positions in any security or loan underlying the SBS position; and (iii) positions in another instrument relating to the underlying security or loan or group or index of securities or loans.[3] Persons that trigger this reporting requirement must file with the Commission a Schedule 10B and include information on nine specific items, including the name of the reporting person, the type of the reporting person and the reporting person's Legal Entity Identifier (LEI), if applicable.[4] This report must be filed no later than the end of the first business day following the day of execution of the SBS position that triggered the reporting requirement, i.e., T+1 reporting, and it would be made publicly available immediately upon filing.[5]

To justify its preliminary determination to disclose these reports, the Commission cites several benefits it believes could accrue to both it and market participants from this additional transparency.[6] It explains that because the reporting requirements would inform market participants of large concentrated SBS positions, they would be better able to assess counterparty risk and, as a result, adjust prices for such risk and limit the scope of moral hazard.[7] This increase in market integrity, according to the Commission, could lead to increased liquidity, greater supply and demand for SBSs and other benefits.[8] What the Commission fails to sufficiently recognize, however, is that increasing transparency, i.e., immediately disclosing Schedule 10B reports with the proposed level of granularity, will ultimately undermine the benefits it believes the Proposal will achieve.

First, the Commission believes that this additional market integrity may lead to increased supply and demand for SBSs because more market participants would enter the SBS market.[9] On the contrary, many market participants are sensitive to the timely publication of what essentially amounts to their proprietary trading strategies, and, as a result, they may exit the SBS market or significantly limit their activity so as to not trigger the reporting requirement and subsequent T+1 disclosure. Such an outcome would likely offset any anticipated increase in liquidity from Schedule 10B disclosures.[10] Furthermore, we respectfully challenge the logic behind the Commission's belief that market liquidity

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3 *Id.* at 6657.
4 *Id.* at 6673.
5 *Id.* at 6668.
6 *Id.* at 6656-57, 67.
7 *Id.* at 6687.
8 *Id.*
9 *Id.*
10 *Id.* at 6688.

will increase "as a result of the counterparties being able to identify the market participant who exceeded the reporting threshold and limit their counterparty risk exposure to them."[11] We believe the opposite would occur – a decline in SBS market liquidity.

Second, investment managers that will be required to file Schedule 10B reports are sophisticated market participants, many of whom are also AIMA members. These managers' portfolios are typically the result of information developed, created or discovered via their proprietary research process. Additional disclosure of a manager's portfolio via Schedule 10B would further erode the importance of developing critical proprietary investment information and risk harming the fund and its underlying investors. Disincentivizing such in-depth, costly and time-intensive research will ultimately undermine both equity and debt market liquidity and price discovery more generally.

Many researchers and policymakers have highlighted the ever-increasing role of passive or indexed investing.[12] These investors rely on the price formation and liquidity generated by active investors, like AIMA members.[13] Active investors' independent research can, for example, challenge or question corporate mismanagement and potentially lead to improved corporate performance thus providing a set of views independent of broker-generated research. SBSs are an important tool by which active investors seek to derive the economic benefits of their own investment research. The Proposal would force active managers to prematurely disclose the results of this valuable research, undermine the value of their independent research and discourage active investing strategies thereby adversely impacting market-wide liquidity and price discovery.

Third, the Commission acknowledges that the information provided on Schedule 10B could lead to copycat trading, but it seeks to alleviate these concerns because, "the information provided would be limited to only [SBSs] and related securities, and would not include information about the reporting parties' entire portfolios."[14] On the surface, this claim is correct – the scope of Schedule 10B reports is limited to those SBSs and related securities that triggered the reporting requirement; however, the practical outcome is entirely different.

Prior Commissions have acknowledged the potential negative impacts that can result from disclosing market participants' trading data. For example, in 2008, the Commission required institutional

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[11] *Id.*

[12] *See e.g.*, Vladyslav Sushko & Grant Turner, *The implications of passive investing for securities markets*, BIS Quarterly Review (March 2018), *available at* https://www.bis.org/publ/qtrpdf/r_qt1803j.pdf (finding that passive funds managed about $8 trillion or 20% of aggregate investment fund assets as of June 2017, up from 8% a decade earlier); *see also* James Seyffart, *Passive likely overtakes active by 2026, earlier if bear market*, Bloomberg Intelligence (Mar. 11, 2021), *available at* https://www.bloomberg.com/professional/blog/passive-likely-overtakes-active-by-2026-earlier-if-bear-market/ (finding that passive investing vehicles overtook active investing around August 2018 and its market share stands at about 54%).

[13] *See* Russ Wermers, *Active Investing and the Efficiency of Security Markets*, 19 JOURNAL OF INVESTMENT MGMT. No. 1 (May 3, 2021), *available at* https://ssrn.com/abstract=3353956 (citing several academic publications, which indicate that active managers help to eliminate market anomalies and provide significant positive externalities to public securities markets, benefitting both active and passive investors).

[14] *Id.* at 6689.

investment managers to file nonpublic Form SH. In doing so, they stressed the importance of the form's nonpublic nature and citied concerns about additional imitative short selling should Form SH be public.[15] In 2020, the Commission explained that, despite the 45-day filing window, filers of Form 13F still face indirect costs from copycat trading and front-running.[16]

Several academic publications have also found a connection between more frequent portfolio disclosure and copycat trading. In their 2010 paper, Vebeek and Wang found that, on average, copycat funds marginally outperform actively managed mutual funds with disclosed asset holdings.[17] Their results indicate that copycat trading (or free riding) is an attractive investment strategy and that mutual fund performance can suffer from regular disclosure.[18] Parida and Teo conclude that mutual funds with more frequent disclosure obligations suffer more from activities like front-running.[19] Research also finds that there is a drop in fund performance after a hedge fund begins filing Form 13F, with a concentrated decline in performance among funds with larger expected proprietary costs for disclosure.[20] Furthermore, this decline in performance cannot be explained by alternative explanations, e.g., decreasing returns to scale or mean reversion.[21]

Here, the Commission attempts to assuage concerns of copycat trading, yet such a result will only be more likely to occur if the Proposal is finalized as is. Only a few paragraphs prior to its acknowledgement of the potential for copycat trading, the Commission clearly states that "the use of standard identifiers . . . on Schedule 10B would augment transparency by providing ***consistent identification*** [emphasis added] of entities and securities across datasets and jurisdictions, allowing market participants to ***cross-reference*** [emphasis added] the data reported on Schedule 10B with data reported from any other sources that use those standard identifiers."[22] The ability to cross-reference Schedule 10B reports with other forms filed with the Commission (and in other jurisdictions) will only further certain market participants' ability to engage in copycat, or perhaps targeted, trading.

In its recent proposed rule that would establish a reporting framework for short sales, this Commission goes to great lengths to highlight the negative impacts, including copycat trading and short squeezes, that can result from the disclosure of individual market participant's identities and

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15 SEC, Interim final temporary rule; Request for comment, Disclosure of Short Sales and Short Positions by Institutional Investment Managers, 73 Fed. Reg. 61678 61680 61683 (Oct. 17, 2008).

16 SEC, Proposed rule, Reporting Threshold for Institutional Investment Managers, 85 Fed. Reg. 46016, 46022 (July 31, 2020).

17 Marno Vebeek & Yu Wang, *Better than the Original? The Relative Success of Copycat Funds*, 37 JOURNAL OF BANKING & FINANCE 3454-71 (2010), *available at* https //ssrn com/abstract=1566794.

18 *Id.*

19 Sitikantah Parida & Terence Teo, *The Impact of More Frequent Portfolio Disclosure on Mutual Fund Performance* 87 JOURNAL OF BANKING & FINANCE 427-45 (2018), *available at* https://ssrn.com/abstract=2097883.

20 Zhen Shi, *The Impact of Portfolio Disclosure on Hedge Fund Performance*, WFA 2012 Las Vegas Meetings Paper (2012), *available at* https://ssrn.com/abstract=1573151.

21 *Id.*

22 Proposing Release, *supra* note 2, at 6688.

strategies.[23] The Commission explains that disclosing proposed Form SHO data would "likely spur copy-cat trading strategies," an outcome that it notes has been documented to occur in the EU where individual short sellers' names are made public.[24] The increase in copycat short selling strategies would likely lead to herding and increased volatility.[25] The Commission ultimately concludes to aggregate reported Form SHO data prior to publication so as "to protect the identity of reporting Managers"[26] and help "safeguard against the concerns . . . related to retaliation against short sellers, including, short squeezes, and the potential effect that such public disclosure may have on short selling."[27]

The same rationale and negative outcomes, particularly copycat trading, the Commission explicitly examines in its short selling proposal apply here, yet the Proposing Release pays only cursory acknowledgment of this likelihood and casually dismisses these concerns. We respectfully request that the Commission heed its own words and findings in the short sale proposal as it contemplates considering a final rule here and not disclose Schedule 10B reports.

Fourth, the Commission acknowledges that CDS transactions are "an important means by which debt holders hedge their underlying instruments, and that the absence of such hedging opportunities could impact prospective investors' willingness and ability to invest in that underlying market."[28] It further claims, however, that the Proposal is "sufficiently tailored" to balance these concerns.[29] We respectfully disagree with this assertion.

As previously discussed, many market participants are sensitive to the timely publication of their proprietary trading strategies, and, as a result, they may change their behavior to avoid triggering the reporting threshold. In this instance, many of our members use the CDS market, and other SBSs, to hedge and engage in other risk management practices. If these market participants curtail their activity in the CDS market, it follows that they may also be limiting their hedging and risk management practices. The practical effect of the Commission's disclosure regime will discourage sound risk management.

In summary, although the Commission believes several benefits will accrue to it and the market from the disclosure of Schedule 10B reports, we strongly believe the contrary outcome is more likely. The preliminary determination to make the reports public, especially with their proposed level of

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[23] SEC, Proposed rule, Short Position and Short Activity Reporting by Institutional Investment Managers, 87 Fed Reg 14950 14952 (Mar. 16, 2022).

[24] *Id.* at 15005.

[25] *Id.* at 15007.

[26] *Id*. at 14980.

[27] *Id.* at 14955.

[28] Proposing release, *supra* note 2, at 6656.

[29] *Id.*

granularity, will undermine the Commission's stated goals and lead to a decline in liquidity, harm market efficiency and integrity, lead to additional copycat trading and discourage risk management.

2. Instead of a new, complex reporting regime under proposed Rule 10B-1, the Commission should instead revise existing rules to require enhanced risk mitigation practices for SBS dealers.

The Proposing Release provides a thorough summary of the existing regulatory frameworks for SBSs and explains that SBS market participants are subject to the general antifraud and anti-manipulation provisions of the federal securities laws.[30] The Commission also discusses how it has now finalized many of its Title VII rules, including those related to risk mitigation; capital, margin and segregation; and recordkeeping and reporting requirements.[31]

Although the Commission examines several alternative approaches to proposed Rule 10B-1, it fails to consider revising any of its existing Title VII rules. These rules already address many of the issues the Commission is seeking to remedy. Accordingly, we believe the Commission should instead revise its rules to require enhanced risk mitigation practices for SBS dealers, especially since, according to data relied upon in the Proposing Release, SBS dealers participated in 82.1% of transactions.[32]

Moreover, many AIMA members report that their dealers already require counterparty disclosure of related cash and derivatives positions above certain thresholds precisely to prevent concentrated exposures from developing. Robust counterparty credit mechanisms will be a more effective, more direct answer to the policy issues the Commission is attempting to address without the harms to markets and market participants we have outlined. It would also relieve both the Commission and market participants from a new, complex reporting regime under proposed Rule 10B-1.

A related alternative the Commission could also consider is addressing its uncleared initial margin models for SBSs. The Commission could review these models to ensure that they are appropriately calibrated to account for large, concentrated SBS positions. If not, it could propose amendments to reflect the necessary adjustments. It is also worth noting that the Commodity Futures Trading Commission's (CFTC) final phase of its initial margin requirements will go into effect on September 1, 2022, for entities with smaller average daily aggregate notional amounts of swaps.[33] According to CFTC estimates, approximately additional 670 entities will be brought into scope.[34] Once effective, this margin regime will further reduce market-wide risk and, in turn, address many of the Commission's concerns expressed in the Proposal.

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30 *Id.* at 6681.
31 *Id.*
32 *Id.* at 6684.
33 CFTC, Final rule, Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants, 85 Fed. Reg. 71246 (Nov. 9, 2020).
34 *Id*. at 71248.

3. The Commission fails to consider other narrowly tailored approaches that would still afford it with many of the same benefits it hopes the Proposal will achieve.

The Commission outlines several potential alternatives to the reporting framework outlined in proposed Rule 10B-1.[35] First, the Commission considers whether reporting obligations should be placed on registered SBS data repositories ("SBSDRs"). It determines that this alternative would not include the identity of the person building up the SBSs position(s) and would thereby limit the effectiveness of proposed Rule 10B-1.[36] Second, the Commission addresses whether position limits would prohibit market participants from building up large, concentrated positions in SBSs.[37] It explains that positions limits would provide market participants with the ability to adjust their counterparty exposure and further acknowledges that "position limits could have risk reduction benefits beyond those associated with reporting;" however, it rejects this alternative.[38]

The Commission next considers several alternatives for calculating potential thresholds for SBSs based on equity and non-CDS debt,[39] as well as four alternative reporting methodologies for single-name CDSs.[40] Finally, the Commission explains that it could have simply required different information be reported on Schedule 10B, e.g., not disclosing the identity of the filer.[41] Some of these alternatives would likely yield a better result than what the Commission has proposed, benefitting both it and market participants.

The Commission neglects to consider other, narrowly tailored avenues that would still afford it with many of the same benefits it hopes to achieve. At the outset, we believe that the Commission could simply choose not to disclose Schedule 10B reports. This alternative would help avoid many of the negative market impacts described above, e.g., reduced liquidity, copycat trading, discouraging risk management and more. Furthermore, simply not disclosing Schedule 10B reports would still provide the Commission with many of the benefits it believes could be achieved by proposed Rule 10B-1.[42]

The Commission fails to adequately consider that reporting under Regulation SBSR began only mere weeks ago.[43] Even with this limited SBSDR data, the Commission focuses almost entirely on the CDS

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35 Proposing Release, *supra* note 2, at 6699-6701.

36 *Id.* at 6699. The Commission explains that section 13(m)(1)(C)(iii) of the Exchange Act provides that any rulemaking pursuant to section 13(m) must be structured in a manner "that does not disclose the business transactions and market positions of any person." *Id.* The Commission further believes that this alternative would place significant burdens on the SBSDR. *Id.*

37 *Id.* at 6700.

38 *Id.* We agree with the Commission's determination to reject the imposition of position limits.

39 *Id.* For equity-based swaps, the Commission considers using the average daily trading volume of the relevant securities and exceeding a certain percentage thereof and notional values that vary based on types of equity underlying the equity-based swap. *Id.* The Commission considers a bifurcated approach for non-CDS debt that would include both a threshold based on the national amount of the position and a threshold based on the percentage component. *Id.*

40 *Id.* at 6700-01.

41 *Id.*

42 *Id.* at 6667.

43 Transaction reporting for SBSs has been required since November 8, 2021, with public dissemination beginning on February 14, 2022. *Id.* at 6653.

market in the Proposal, despite daily trading volume in equity-based SBSs vastly outnumbering single-name CDS volume. The Proposing Release even goes so far as to explain that the Commission "intends to consider this newly available data in determining thresholds . . . when adopting a final rule."[44] Such a decision would require the Commission to re-issue the Proposal to allow market participants the opportunity to opine on these new thresholds, while also indicating that the Proposal's thresholds are not grounded in appropriate data analysis. We believe the Commission was premature in issuing the Proposal until it, SBSDRs and market participants have had some experience with the reported data and public dissemination thereof.

Another alternative, and perhaps the easiest to implement, is counterparty disclosure. The Commission explains that because the proposed reporting requirements, and disclosure thereof, would inform market participants of large concentrated SBS positions, they would be better able to assess counterparty risk and, as a result, adjust prices for such risk and limit the scope of moral hazard.[45] The most straightforward way for this benefit to materialize is simply to require the disclosure of large, concentrated SBS positions to counterparties. This alternative would address many of the issues, and the Commission's concerns, that were apparent from recent market events when SBS dealers were not fully aware of a counterparty's large, concentrated SBS positions in a few reference entities spread across multiple dealers.

4. Because the Commission issued the Proposal without sufficient data, it has proposed arbitrary reporting thresholds, and, as a result, underestimates the number of potential respondents subject to reporting under proposed Rule 10B-1.

The Commission has proposed separate thresholds for SBSs based on equity and debt, with a further delineation for CDSs.[46] For CDSs, the threshold is the lesser of: (i) a long notional of $150 million; (ii) a short notional of $150 million; and (iii) a gross notional of $300 million.[47] The Commission explains that these notional thresholds are set to capture naked CDS positions that carry the potential for a manufactured or opportunistic credit event and capture a large enough position for a CDS seller to avoid or delay a credit event, respectively.[48] The gross notional threshold is set with the intent to capture concentrated risk in a counterparty that may have an impact on the broader market.[49]

For SBSs based on debt securities,[50] the Commission is proposing a gross notional threshold of $300 million without regard for the market participant's CDS positions and without excluding any debt securities underlying a SBS included in its position.[51] Finally, the threshold for SBSs based on equity

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44 *Id.* at 6671.
45 *Id.* at 6687.
46 *Id.* at 6670.
47 *Id.*
48 *Id.*
49 *Id.*
50 Not CDSs.
51 Proposing Release, *supra* note 2, at 6670.

securities would be the lesser of a gross notional amount of $300 million[52] or a position that represents more than 5% of a class of equity securities.[53]

Because, the Commission has not been able to adequately consider SBSDR data,[54] we believe it was premature in issuing the Proposal until it, SBSDRs and market participants have had some experience with the reported data and public dissemination thereof. As a result, the Commission has proposed arbitrary reporting thresholds for Schedule 10B and therefore underestimates the potential number of respondents subject to proposed Rule 10B-1.

Indeed, the Commission notes its intention "to consider this newly available data [from SBSDRs] in determining thresholds to use in connection with [SBS] Positions based on equity securities when adopting a final rule."[55] We strongly disagree with this approach, which to us suggests that the proposed thresholds lack economic justification.[56] Utilizing data gathered during the time between the Proposal's issuance and consideration of a final rule to inform the thresholds would, in our view, run contrary to the essence of the formal rulemaking process and would require the Commission to re-issue the Proposal to allow market participants the opportunity to comment on these thresholds.

The Commission explains that the CDS thresholds are based "at least in part, on individual CDS exposure data from the Depository Trust and Clearing Corporation Trade Information Warehouse."[57] Commission staff also considered "opportunistic CDS strategies described in relevant academic literature" in developing the CDS thresholds.[58] The Proposing Release further explains that the "vast majority of [single-name CDS] transactions, 82.1 percent, measured by number of transaction-sides" were executed by SBS dealers.[59]

In our opinion, this data suggests that many Schedule 10B reports based on CDS will ultimately be filed by SBS dealers, yet it is unclear how their reporting will further the Commission's stated objectives. The Proposing Release fails to provide any evidence that SBS dealers are more likely than other market participants, if they are even likely to do so, to engage in opportunistic strategies, a

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[52] The Commission proposes additional parameters for these thresholds to address attempts to evade the reporting requirements. *Id.* For the notional-based threshold, once an SBS position exceeds a gross notional amount of $150 million, the calculation of the position must also include the value of all underlying equity securities owned by the market participant, as well as the delta-adjusted notional amount of any options, security futures or any other derivative instruments based on the same class of equity securities. *Id.* For the percentage-based threshold, once an SBS position represents more than 2.5% of a class of equity securities, the calculation of the position must also include in the numerator all the underlying equity securities owned by the market participant, as well as the number of shares attributable to any options, security futures or any other derivative instruments based on the same class of equity securities. *Id.* at 6701.

[53] *Id.* at 6670-71.

[54] *Id.* at 6653.

[55] *Id.* at 6671.

[56] For example, the $300 million gross notional threshold for SBSs on equities is drastically low for issuers with large market capitalizations, and the Proposal lacks sufficient justification or analysis as to how Commission staff reached this conclusion.

[57] Proposing Release, *supra* note 2, at 6670, n.128.

[58] *Id.*

[59] *Id*. at 6684.

primary concern the Commission seeks to address. Also, it seems that, based on the incomplete data currently available to the Commission, the Proposal will lead to continuously updated reports from SBS dealers. We respectfully question how this result would benefit SBS market participants, SBS dealers and the market generally. To reiterate our point above, instead of proposing a new, complex reporting regime, the Commission should instead require enhanced risk management requirements for SBS dealers.

The Commission again acknowledges the current lack of adequate data in its estimate of the number of potential respondents that may be subject to Rule 10B-1 requirements.[60] Instead, it extrapolates from single-name CDS data to reach an estimate of potential respondents.[61] It cites to a prior determination that single-name CDS contracts make up a majority of the market;[62] however, the data the Commission previously relied upon was from 2006-17 and did not encompass CDS transactions that both: (i) do not involve U.S. counterparties and (ii) are based on non-U.S. reference entities.[63]

The Commission uses this data to estimate that 800 respondents will be subject to at least one Schedule 10B reporting requirement and that 50 respondents will need to develop the technological infrastructure to monitor their compliance with proposed Rule 10B-1.[64] We do not believe the Commission can reasonably estimate the number of potential respondents using stale, incomplete information and without sufficient SBSDR data. Accordingly, we believe that this estimate understates the number of potential respondents, especially given the proposed, low reporting thresholds and the Proposal's broad scope of applicability.[65]

5. <u>The Proposal's broad scope will disadvantage reporting market participants lead to fewer SBS market participants and reduced SBS market liquidity.</u>

The scope of proposed Rule 10B-1 is extremely broad.[66] The Commission acknowledges that this broad applicability could place reporting persons at a disadvantage compared to non-reporting

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60 *Id.* at 6678. "Because reporting transaction data regarding other types of [SBSs] has only recently become mandatory, the Commission does not yet have a precise estimate as to the number of persons we would expect to file reports with respect to [SBS] Positions consisting of [SBSs] based on equity securities and other debt securities (non-CDS)." *Id.*

61 *Id.*

62 As previously mentioned, the Commission fails to consider that, according to now-available SBSDR data, equity-based SBS volume significantly outpaces that of single-name CDS. *See supra* at page 8-9. Therefore, we believe the Commission's determination that single-name CDS contracts make up a majority of the market is incorrect.

63 *See* SEC, Final rule, Risk Mitigation Techniques for Uncleared Security-Based Swaps, 85 Fed. Reg. 6359, 6391-92 (Feb. 4, 2020).

64 Proposing Release, *supra* note 2, at 6678.

65 *See id*. at 6674. Specifically, proposed Rule 10B-1(d) would provide that the reporting requirements apply so long as: (i) any of the SBS position transactions would be required to be reported pursuant to 17 CFR 242.908 of Regulation SBSR; or (ii) the reporting person holds any amount of reference securities underlying the SBS position and (a) the issuer of the reference security is an entity organized, incorporated or established under the laws of the U.S. or having its principal place of business in the U.S. or (b) the reference security is part of a class of securities registered under section 12 or 15(d) of the Exchange Act. *Id.*

66 *Id*.

ones.[67] We agree with this assessment. Reporting persons would be disadvantaged to the benefit of non-reporting persons who will now have a competitive advantage because of access to Schedule 10B reports and the strategies contained therein.

Also, we agree with the Commission that "a portion of reporting entities for whom these reporting costs are large might be incentivized to change their geographical location of operation to a non-U.S. jurisdiction and limit their participation in the underlying securities' markets."[68] This result could lead to fewer market participants and a decline in SBS market liquidity; however, the Commission again believes that because of its proposed level of transparency, these effects will be mitigated, a determination with which we disagree.

6. If the Commission requires the filing of Schedule 10B reports as proposed disclosure of these reports should occur no earlier than 60 days after a report is filed.

Persons that exceed the prescribed reporting threshold must file a Schedule 10B report and include information on nine specific items, including the name of the reporting person, the type of the reporting person and the reporting person's LEI, if applicable.[69] These reports must be filed T+1, and this report would be made publicly available immediately upon filing.[70]

To reiterate, should the Commission decide to require the reporting of Schedule 10B reports with the proposed level of granularity, we would strongly encourage the Commission to maintain their confidentiality or consider another alternative to gather and analyze SBS market data. Such a decision could still allow for several potential benefits to accrue to the Commission.[71]

If the Commission, however, moves forward with its preliminary determination to disclose Schedule 10B reports, with their proposed level of granularity,[72] it should not do so T+1.[73] We would recommend instead that the Commission disclose Schedule 10B reports no earlier than 60 days after a filing. The 60-day timeframe would not eliminate the multiple negative results that could come from T+1 disclosure; however, it would mitigate, to some extent, these adverse consequences.

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67 *Id*. at 6690.
68 *Id.*
69 *Id.* at 6673.
70 *Id.* at 6668.
71 *Id.* at 6687.
72 Including the name/LEI of the reporting person and reference entity, among other granular data.
73 This next-day disclosure would likely undermine many of the benefits the Commission hopes to achieve because of the public availability of Schedule 10B reports. *See supra* pages 3-8.