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Via Electronic Submission: rule-comments@sec.gov

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

Re: Position Reporting of Large Security-Based Swap Positions - Proposed Rule (File Number S7-32-10) (the "Proposing Release")

Dear Ms. Countryman:

We appreciate this opportunity to comment on the rule recently proposed by the Securities and Exchange Commission (the "Commission") under the Securities Exchange Act of 1934, as amended (the "Exchange Act") which would require any person with a security-based swap ("SBS") position that exceeds a certain threshold to file with the Commission a schedule disclosing certain information related to its SBS positions and positions in securities underlying such transactions within one business day of entering into such positions (the "Proposed Rule").[1]

Harvard Management Company ("HMC") manages Harvard University's endowment and related financial assets. Our mission is to help ensure Harvard University has the financial resources to confidently maintain and expand its leadership in education and research for future generations. The endowment's returns enable leading financial aid programs, groundbreaking discoveries in scientific research, and hundreds of professorships across a wide range of academic fields.

HMC participates in the public markets, both directly and through external managers. HMC's investment programs include the use of SBS to further HMC's investment objectives.

Below we offer some comments on the Proposed Rule. We appreciate the Commission's and Staff's attention to our comments.

[1] Proposed 17 C.F.R. § 240.10B-1.

I. The proposed reporting thresholds are too low and should be revised so that only SBS positions that have the potential to materially impact the market are required to be reported.

We believe that the proposed reporting thresholds are too low. Low thresholds will impose an excessive compliance burden on institutional investors only to flood the market with information that is of little value and will not help to achieve the Commission's goals. Additionally, the thresholds will require reporting that in some cases is significantly more onerous than reporting requirements that currently apply to direct holdings of securities under the federal securities laws. We encourage the Commission to reconsider the reporting thresholds as follows:

- The Commission should require reporting of equity SBS positions only where the holdings of equity SBS (together with physical holdings of underlying securities) exceed 5% of a class of an issuer's equity securities – the same threshold that is applied for purposes of Schedule 13D/Schedule 13G reporting.[2] The notional dollar threshold should be removed.
- Before setting final thresholds for debt SBS (including credit default swaps), the Commission should analyze the data it receives under Regulation SBSR[3] to determine what thresholds have the potential to materially impact the market.

With respect to equity SBS, the position reporting requirements should not be more onerous than the requirements that apply to physical holdings of equity securities. Unlike physical holdings of equity securities, entering into a long, cash-settled SBS transaction provides the long investor with no right to vote the underlying securities and no direct ability to control the issuer of the securities underlying the SBS transaction. We see no justification for an SBS to be subject to more stringent reporting requirements than would apply if the investor held underlying shares directly.

Furthermore, there should be no notional dollar threshold for equity SBS. The proposed notional dollar thresholds are not calibrated to the risks or potential impact an SBS position could have on the market, given that the amount of securities outstanding for different issuers can vary significantly. For example, for SBS on the shares of the largest U.S. issuers, the gross notional threshold for equity SBS represents significantly less than 1% of the shares outstanding. The largest issuer in the S&P 500® Index has a market capitalization of approximately $2.7 trillion. Under the Proposed Rule, an investor would be required to report an SBS position in that issuer with a gross notional amount of only $300 million, which represents approximately 0.011% of the issuer's market capitalization. The median market capitalization of the S&P 500® Index is approximately $31 billion; a $300 million notional position also would represent less than 1% of

[2] *See* Exchange Act §13(d) and §13(g) and rules thereunder (requiring persons who acquire beneficial ownership of more than 5% of a class of an issuer's Exchange Act registered voting equity securities to report such beneficial ownership on Schedule 13D or 13G, as applicable).

[3] 17 C.F.R. § 242.900-242.909.

that amount.[4] If the position is purely SBS with no physical holding, the investor would have no right to vote the shares or control the issuer. We can envision no set of facts in which public disclosure of such a position would achieve any of the Commission's stated policies – namely, providing market participants and regulators with information indicating that a person is building up a large SBS position or alerting the market to the existence of concentrated exposures to a limited number of counterparties. Given the range of sizes of issuers, we believe that a notional dollar threshold is inappropriate and will result in over-reporting of information in a manner that does not further the Commission's goals or provide useful information to the public and will impose significant compliance and operational burdens on institutional investors.

With respect to debt SBS position reporting, we urge the Commission to take additional time to analyze the data it receives under Regulation SBSR to determine what thresholds should apply for debt SBS (including credit default swaps), to confirm that only SBS that have the potential to materially impact the market are required to be reported. Regulation SBSR, which became effective in November 2021, requires market participants to report information regarding SBS transactions, including information about the participants in the SBS transaction and the key terms of the transaction. All of this information is made available to the Commission. We encourage the Commission to study the data that it receives pursuant to Regulation SBSR to develop a more tailored approach that meets the Commission's goals, and allow the public time to review and comment on the Commission's analysis in light of the data.

II. Long and short SBS with the same counterparty under a master netting agreement over the same underlying security should be permitted to be netted for purposes of each of the relevant thresholds.

We urge the Commission to amend the Proposed Rule to allow investors to net long and short SBS transactions with the same counterparty under a master netting agreement, such as an ISDA Master Agreement, over the same underlying security for purposes of calculating whether a reporting threshold has been breached.

One approach to terminating a swap transaction with a counterparty is to enter into an offsetting swap with the same counterparty. For example, if an investor has a long SBS position with dealer A and wishes to replace it with a long SBS position over the same security with dealer B, one approach would be to enter into a short SBS position over the same security with dealer A and simultaneously enter into a long SBS position with dealer B. All payments under the long and short SBS positions with dealer A can be netted pursuant to the applicable master netting agreement; as a result, there is no economic exposure or credit risk. In that case, only the long SBS position with dealer B should count toward the threshold.

[4] S&P 500® data as of February 28, 2022, *available at* https://www.spglobal.com/spdji/en/indices/equity/sp-500/#data.

The Commission's reasoning behind adopting a gross notional test is discussed in the Proposing Release. The Commission notes that:

> the gross position would be particularly informative where the offsetting positions are not with the same counterparty, where it may not be possible to net out any payment obligations between any two counterparties. For example, if a reporting person was long a total return swap with one counterparty and short a total return swap with a second counterparty (on the same reference equity security), a large decline in the price of the underlying security could trigger large payment obligations under both transactions, which could require one or more persons to liquidate some or all of the securities held to hedge the applicable total return swap. Under those circumstances, reporting the gross position would alert each of the two counterparties to the reporting person's overall exposure, which may be relevant to the extent that the counterparty to the other transaction is unable to satisfy its payment or delivery obligations.[5]

In contrast to positions with different counterparties, offsetting provisions over the same underlying security and with the same counterparty should not create any risk of large payment obligations, since the long and short obligations will offset each other. And since only one counterparty is involved, the counterparty will be aware of the positions and there is no need to alert the counterparty to the reporting person's exposure. The Commission will be able to achieve the goals noted above even if it allows investors to net long and short positions entered into with the same counterparty.

III. The scope of positions covered by the Proposed Rule should be tailored to be consistent with comparable reporting regimes.

The Proposed Rule requires reporting of, among others, any SBS position that would be required to be reported under Regulation SBSR. This would include SBS positions referencing unregistered equity securities, such as securities of issuers that only trade outside the United States and private companies, as long as one direct or indirect counterparty to the SBS transaction is a "U.S. person", the transaction is cleared in the United States, or either party to the transaction is a registered SBS dealer or major SBS participant (regardless of location).[6] This represents a significant expansion beyond any existing public reporting regime under U.S. federal securities laws. We recommend that the Commission align the reporting requirement for equity securities with existing requirements under Sections 13(d) and (g) – limiting reporting to voting equity securities that are registered under Section 12 of the Exchange Act – and to remove the requirement in Rule 10B-1(d)(1) requiring public reporting of any SBS transactions that are

[5] *See* Proposing Release at 70-71. In drafting this modification to the threshold calculation, the Commission could look to its recently-adopted rule governing use of derivatives by mutual funds, which allows a fund to exclude from its calculation of "derivatives exposure… any closed-out positions, if those positions were closed out with the same counterparty and result in no credit or market exposure to the fund." *See* 17 C.F.R. § 270.18f-4(a).

[6] *See* 17 C.F.R. § 242.908(a) (defining "U.S. person" by reference to 17 C.F.R. § 240.3a71-3(a)(4)).

required to be reported under Regulation SBSR. With respect to other equity securities and debt securities, we again encourage the Commission to study the data that it receives pursuant to Regulation SBSR to develop a more tailored approach that meets the Commission's goals, and allow the public time to review and comment on the Commission's analysis in light of the data.

IV. The timing for submission of reports should be extended to be consistent with other comparable reporting regimes.

We urge the Commission to revise the Proposed Rule to provide a realistic, workable reporting timeframe for investors. Specifically, we recommend adopting a reporting timeframe that is consistent with the equivalent reporting regimes under Section 13. The Section 13 reporting deadlines are familiar to institutional investors and will provide them with sufficient time to compile the necessary information and file accurate reports. It will also mitigate the effect of this disclosure on trading strategies being pursued by investors.

If reporting timeframes are consistent with the timeframes for Section 13 filings, institutional investors will be able to leverage the compliance procedures they already have in place for Section 13 reporting in order to do their SBS reporting. We see no justification for requiring reporting of an SBS position earlier than reporting of a direct holding of the underlying securities.

Reporting SBS within one business day, as the Commission proposed, is not operationally feasible for institutional investors and is significantly more onerous than the reporting timeframe applicable to direct holdings of the underlying shares. The Commission notes in the Proposing Release that this timing is consistent with the timeframe for when an SBS dealer is required to provide a trade acknowledgement to its counterparty after executing an SBS transaction.[7] While SBS dealers have operational systems in place to provide trade confirmations within this timeframe, institutional investors generally do not. Additionally, many steps would need to be taken after an investor receives a trade affirmation and before it is able to complete a report under the Proposed Rule, including: (1) verification of the trade acknowledgment (as required by SEC rules); (2) determination of the aggregate percentage of the underlying security held (looking through narrow-based indices, etc.); (3) determining the percentage of the underlying security held; (4) preparing the filing; (5) formatting the filing for EDGAR; and (6) submitting the filing. Formatting a filing and submitting to EDGAR may require an institutional investor to coordinate with a third-party service provider. Institutional investors who enter into SBS through accounts managed by outside investment managers will need time to receive information from each manager about new SBS, and aggregate that information across managers and with any SBS entered into by the institutional investor directly. We expect that this process will take, at minimum, multiple working days. This assumes that the parties agree on the trade acknowledgement and that there are no disputes over any terms of the SBS transaction, which can take days, or even weeks, to resolve. To ensure investors are reporting accurately, the

[7] *See* Proposing Release at 67; see also 17 C.F.R. 240.15Fi-2(b).

Commission must allow additional time for investors to complete the trade acknowledgement and verification process, and to gather required information, before they are required to submit reports on Schedule 10B.

With respect to equity SBS, we urge the Commission to revise the reporting timeframe for reporting to be no more onerous than the reporting timeframe applicable to direct holdings of the underlying shares by the investor required to report the SBS position. Under Exchange Act Sections 13(d) and 13(g), persons who acquire beneficial ownership of more than 5% of a class of an issuer's Exchange Act registered voting equity securities are required to report such beneficial ownership on Schedule 13D or 13G, as applicable, generally no sooner than 10 days after the occurrence of such acquisition (depending on the type of investor and nature of the investment; investors who qualify for Schedule 13G have significantly more time).[8] The reporting timeframe for directors, officers and 10% holders required to file reports under Section 16(a) is also less onerous than that of the Proposed Rule. Generally, Section 16 reporting persons are required to file a Form 3 within 10 calendar days of becoming an insider and to report transactions on Form 4 within two business days. Transactions eligible for reporting on Form 5 need not be reported until significantly later.

Following this approach for equity SBS would appropriately balance the Commission's policy goal of providing market participants and regulators with access to information that a person is building up a large SBS position with the additional operational burdens that will be imposed on investors. If the Commission is concerned about potential market manipulation, then information about large positions taken by activist investors would appear to be most relevant and useful to the market and the Commission could require such information to be reported in a relatively short period of time. Flooding the market with information about passive SBS positions entered into for hedging or investment purposes without the intention of changing or influencing the control of the issuer would provide little benefit to the market, but at a significant cost to investors (both from an operational and compliance perspective and in terms of protecting confidential and proprietary trading information).

We urge the Commission to adopt an approach for debt SBS that is consistent with the Section 13(f) reporting regime (*i.e.*, reports are due within 45 days after the last day of the calendar year in which the investor crosses a reporting threshold and within 45 days after the last day of each of the first three calendar quarters of the subsequent calendar year, and the reports include positions as of the end of the relevant period). As the Commission notes in the Proposed Rule, debt securities are less widely traded in the secondary markets than equity securities, and so positions in debt SBS are less susceptible to daily or weekly fluctuation. Quarterly reporting of

[8] The Commission recently proposed to shorten the 13D/13G reporting timeframes, but still would allow more than one business day for investors to prepare and file reports regarding direct holdings of underlying shares. Exchange Act Release Nos. 33-11030; 34-94211 (Feb. 10, 2022), available at https://www.sec.gov/rules/proposed/2022/33-11030.pdf.

debt SBS would achieve the goals of the Proposed Rule while reducing the additional burden on institutional investors of more frequent reporting.

It is typical in SBS arrangements for the SBS dealer to require disclosures regarding the investor counterparty's financial circumstances, positions and performance, among other information. We note that counterparties that see a benefit to receiving disclosure of large SBS positions held by their investor counterparties more quickly and/or with more detail than the reporting required under the Proposed Rule can include such a requirement in their contracts. A regulatory requirement like the Proposed Rule is not necessary in order to accomplish that objective.

Thank you for your consideration of our comments.

Sincerely,

Kathryn I. Murtagh
Chief Compliance Officer

cc:

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