Managed Funds Association
The Voice of the Global Alternative Investment Industry
Washington, D.C. | New York | Brussels | London

May 16, 2023

Via Electronic Mail: rule-comments@sec.gov

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

Re: Notice of Proposed Rulemaking on Position Reporting of Large Security-Based Swap Positions; File No. S7-32-10

Dear Ms. Countryman,

Managed Funds Association[1] ("**MFA**") appreciates the opportunity to provide additional comments to the Securities and Exchange Commission ("**SEC**" or "**Commission**") on its proposed "Position Reporting of Large Security-Based Swap Positions" rules ("**Proposal**").[2] This letter further addresses the SEC's proposed Rule 10B-1 ("**Rule 10B-1**") under the Securities and Exchange Act of 1934 (the "**Exchange Act**"), which proposes to establish reporting and disclosure requirements for certain security-based swap ("**SBS**") positions.

We remain concerned that requiring the public, attributed disclosure of market participants' proprietary and otherwise confidential investment positions and trading strategies will impair fair, orderly, and efficient market activity across a number of asset classes and impair capital formation. Indeed, as written, Rule 10B-1 would likely result in a significant number of SBS market participants materially curtailing their use of SBS, which will reduce liquidity and make it more costly, or impossible, for market participants to enter essential hedging transactions. In turn, this will limit the availability, and increase the cost, of capital for issuers.

We write now under separate cover, in part, to provide additional clarity on the previously enumerated harms of public, attributed position disclosure and explain that SBS provide none of the indicia of ownership comparable to direct ownership of reference securities which may justify a public, attributed disclosure regime. Moreover, considering that there are now roughly 18 months of SBSDR data available, we write to urge the Commission to use that data to better understand the dynamics of SBS markets and determine what additional data, if any, is needed to

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1 Managed Funds Association ("**MFA**"), based in Washington, D.C., New York, Brussels, and London, represents the global alternative asset management industry. MFA's mission is to advance the ability of alternative asset managers to raise capital, invest, and generate returns for their beneficiaries. MFA advocates on behalf of its membership and convenes stakeholders to address global regulatory, operational, and business issues. MFA has more than 170 member firms, including traditional hedge funds, credit funds, and crossover funds, that collectively manage nearly $2.2 trillion across a diverse group of investment strategies. Member firms help pension plans, university endowments, charitable foundations, and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time.

2 Exchange Act Release No. 34-93784 (Dec. 15, 2021), 87 Fed. Reg. 6,652 (Feb. 4, 2022).

meet its policy goals. In so doing, the Commission should reconsider whether Rule 10B-1 is necessary or appropriate.

We write also to present more fully our proposal that the Commission modify Rule 10B-1 to focus only on regulatory reporting (as opposed to public disclosure), in a manner similar to the Commodity Futures Trading Commission ("**CFTC**") large trader reporting rules, which are the closest existing analogues to the Commission's Proposal, as discussed in our original comment letter.[3] We again strongly encourage the Commission to further consider whether Rule 10B-1, and in particular, a public disclosure regime, is necessary or appropriate in the public interest and would, in fact, promote efficiency, competition, and capital formation.[4]

I. Summary

The issues presented by Rule 10B-1 continue to be of great concern to MFA and its members, and we appreciate this further opportunity to share our views. The following is a summary of our positions, which are explained more fully below.

1. **The Commission elsewhere has recognized the importance of protecting proprietary information, but the Proposal selectively ignores the Commission's own rationale for confidentiality and the lessons of recent history.**

2. **The Proposal undermines clearly expressed congressional intent that a public disclosure regime be justified by a determination that SBS provide incidents of ownership comparable to direct ownership of reference securities.**

3. **The Commission should modify the Proposal to focus only on regulatory reporting, in a manner similar to the CFTC large trader reporting rules, at thresholds more representative of large directional exposures.**

    A. *The Commission should exhaustively consider whether Regulation SBSR reporting requirements would be equally effective at addressing the perceived risks which the Proposal was intended to address before proceeding to a final rule.*

    B. *If the Commission elects to proceed to a final rule, the Commission should modify the rule to provide for anonymized and aggregated reporting similar to the CFTC large trader reporting rules.*

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3 *See* Managed Funds Association, *Comment Letter re Notice of Proposed Rulemaking on Position Reporting of Large Security-Based Swap Positions; File No. 37-32-10* (March 21, 2022), https://www.sec.gov/comments/s7-32-10/s73210-20120732-272888.pdf.

4 15 U.S.C. § 78c(f).

C. If the Commission elects to proceed to a final rule, the Commission should modify the rule to provide for thresholds that are representative of large directional exposures.

II. The Commission elsewhere has recognized the importance of protecting proprietary information, but the Proposal selectively ignores the Commission's own rationale for confidentiality and the lessons of recent history.

We continue to be concerned that the risks of imitative or disruptive trading inhering in public disclosure regimes have not been adequately addressed by the Commission in respect of Rule 10B-1. Ample evidence shows that public disclosure of proprietary investment positions and trading strategies decreases investment returns which, in turn, reduces the incentives for fundamental research.[5] These costs increase as public disclosure becomes more frequent.[6] Recent history is instructive as to how the Proposal may lead to further unintended and undesirable consequences.

Take, for example, the June 2020 collapse of Wirecard, a German payment processor and financial services provider, which filed for insolvency after admitting that almost €2 billion in cash was "missing." The accounting fraud that eventually led to the firm's demise was predicted by many short sellers several years earlier, as early as 2015.[7] However, many short sellers were reluctant to accumulate a larger short position for fear of public, attributed disclosure and the threat of retaliation.

In 2016, two London-based short sellers released the then-anonymous "Zatarra Report" that alleged criminal activity at Wirecard. "[T]he company spent almost four hundred thousand euros on private investigators, to unmask and humiliate the authors of the report…Their correspondences were hacked."[8] By 2019, the company had gone so far as to hire a former Libyan intelligence chief to lead the company's self-funded surveillance operation in London that targeted

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5 *See* Mary Margaret Meyers, James M. Poterba, Douglas A. Shackelford, & John B. Shoven, *Copycat Funds: Information Disclosure Regulation and the Returns to Active Management in the Mutual Fund Industry*, 47 J.L. & ECON. 515 (Oct. 2004), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=293617.

6 *See* Zhen Shi, *The Impact of Portfolio Disclosure on Hedge Fund Performance*, 126 J. FIN. ECON. (Oct. 2017), https://ssrn.com/abstract=1573151; Sitikantha Parida & Terence Teo, *The Impact of More Frequent Portfolio Disclosure on Mutual Fund Performance*, 87 J. BANKING & FIN. 427 (Feb. 2018), https://ssrn.com/abstract=2097883.

7 Wirecard's retaliatory conduct toward short sellers appears to have begun much earlier. *See* Ben Taub, *How the Biggest Fraud in German History Unravelled*, THE NEW YORKER (Feb. 27, 2023) ("It was not the first time Wirecard had pursued its detractors; in 2008, the company threatened Tobias Bosler, the investor in Munich."), https://www.newyorker.com/magazine/2023/03/06/how-the-biggest-fraud-in-german-history-unravelled.

8 *Id.*

short sellers.[9] From there, the attacks on short sellers only escalated—short sellers recall instances of personal violence and blackmail—until the ongoing fraud was fully disclosed to the market.

Anecdotal evidence from interviews with fund managers revealed that many funds that were short Wirecard were reluctant to cross the public disclosure threshold of 0.5 percent.[10] This reluctance is consistent with the thesis that a public, attributed disclosure threshold suppresses price discovery and impedes market efficiency.[11] Over and above the disclosure of market participants' proprietary investment positions and trading strategies, the threat of retaliation in the form of harassment, intimidation, false claims of price manipulation, and violence have "wiped out" fundamental short sellers, according to at least one fund manager who was short Wirecard.[12]

More broadly, public disclosure of market participants' proprietary investment positions and trading strategies tends to invite imitative or disruptive trading that either co-opts reporting persons' investment in independent research or is wholly decoupled from market realities.[13] At worst, such disclosure may lead to issuer retaliation, as was the case in the Wirecard

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9 Paul Murphy, *Wirecard critics targeted in London spy operation*, THE FINANCIAL TIMES (Dec. 11, 2019), https://www.ft.com/content/d94c938e-1a84-11ea-97df-cc63de1d73f4.

10 The E.U. and U.K. regulatory regimes require individual investors to disclose their short interest in a publicly listed company when the investor's net short interest equals or exceeds 0.5 percent of the public company's issued shares.

By comparison, the Commission is proposing to require individual investors to disclose their equity SBS position in respect of a publicly listed company when the investor's position equals or exceeds a potentially even lower threshold—$300 million *gross* notional exposure, or less than 0.5 percent and 1 percent of the average and median market caps, respectively, of S&P listed issuers.

11 Copenhagen Economics, *Market Impact of Short Sale Position Disclosures* (July 15, 2021), https://www.copenhageneconomics.com/dyn/resources/Publication/publicationPDF/3/573/1626345387/market-impact-of-short-sale-position-disclosures.pdf.

12 Jana Kasperkevic, *Fahmi Quadir: "Short Sellers are Always an Eager Boogeyman"*, PROMARKET (Feb. 22, 2021), https://www.promarket.org/2021/02/22/fahmi-quadir-short-sellers-boogeyman-wirecard-gamestop-fraud-germany/.

13 Take, for example, the "Reddit Revolution" of late 2020 and early 2021. Fueled by enthusiasm generated on social media sites such as Twitter and Reddit, millions of retail investors purchased stock in several companies—most notably, the video game retailer GameStop—that certain institutional investors were short. The trading activity had a meteoric impact on these issuers' stock prices—in a matter of weeks between December and January, GameStop's shares rose 1,700%. These retail investors were able to discover the institutional investors' short positions because they were expressed in listed put options.

Put options are reportable "section 13(f) securities." Rule 13f-1(c) defines "section 13(f) securities" as listed equity securities of a class described in Section 13(d)(1) of the Exchange Act. 17 C.F.R. § 240.13f-1(c). In determining what classes of securities are "section 13(f) securities," an institutional investment manager may rely on the most recent list of such securities published by the Commission. *See* U.S. Securities and Exchange Commission, *Official List of Section 13(f) Securities* (last modified Jan. 9, 2018), https://www.sec.gov/divisions/investment/13flists.

The Official List of Section 13(f) Securities includes exchange-traded or registered securities association-quoted equity securities, including: stocks; equity options and warrants; shares of close-end investment companies and exchange traded funds; and certain convertible debt securities. The Official List of Section 13(f) Securities plainly includes put options. Relatedly, the Commission's "Frequently Asked Questions

fraud. For this very reason, the Commission has recognized the importance of protecting proprietary information in its proposed rule regarding short position and short activity reporting by institutional investment managers.[14] In that release, the Commission notes that:

> The Commission's determination to maintain the confidentiality of the information disclosed on Form SH was based in part on the concern that requiring public disclosure may have had the unintended consequence of giving rise to imitative short selling, thereby exacerbating already extreme levels of market volatility observed during the 2008 financial crisis. The Commission also stated that implementing a nonpublic, rather than public, disclosure requirement would help to prevent the potential for sudden and excessive fluctuations of securities prices and disruption in the functioning of the securities markets that could threaten fair and orderly markets.[15]

The Commission does not address in any manner in the current Proposal why it has taken inconsistent positions regarding public disclosure in these proposals or why it believes that public disclosure under Rule 10B-1 would not result in similar unintended consequences, including with respect to price volatility and market disruption. Indeed, we believe that public disclosure of SBS positions would either facilitate imitative transactions similar to imitative short selling or disruptive trading that would exacerbate volatility and lead to reduced liquidity in SBS markets and underlying securities markets, thereby resulting in similar deleterious effects on these markets and their participants.[16]

Nor does the Commission address in any manner in the current Proposal the possibility that public disclosure of SBS positions, and in particular, credit default swap ("**CDS**") positions, may have on distressed issuers. As many commenters have noted, CDS liquidity makes

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About Form 13F" queries, "What about options and warrants?", and responds, "You may report put or call options that you hold and that are included on the Official List of Section 13(f) Securities." *See* U.S. Securities and Exchange Commission, *Frequently Asked Questions About Form 13F* (last modified Dec. 9, 2022), https://www.sec.gov/divisions/investment/13ffaq.

These retail investors were able to discover, and ultimately "squeeze," the institutional investors' short positions, which, in turn, led to the December 2020 and January 2021 market volatility.

14 "Short Position and Short Activity Reporting by Institutional Investment Managers," Exchange Act Release No. 34-94313 (Feb. 25, 2022), 87 Fed. Reg. 14,950 (March 16, 2022).

15 *Id.* at 14,954.

16 Studies show that publicly available information regarding fund flows and positions exposes funds to predatory trading strategies that can reduce liquidity and increase volatility in the securities markets. *See* Teodor Dyakov & Marno Verbeek, *Front-Running of Mutual Fund Fire-Sales*, 37 J. BANKING & FIN. 4931 (Sep. 6, 2012), https://ssrn.com/abstract=2170660.

hedging easier and cheaper,[17] thereby enhancing the capacity and flexibility of lenders. The increased hedging costs flowing from public disclosure, and the risk of imitative, or front-running, behavior, are likely to increase the cost of capital and reduce lending. The increased costs of capital and reduced lending may lead troubled issuers into inefficient, and otherwise avoidable, bankruptcies or liquidations. Further, that such a possibility exists may perversely incentivize the accumulation of large, directional CDS positions in excess of the reporting thresholds to encourage imitative trading and spur a liquidity crisis for the troubled issuer.

III. The Proposal undermines clearly expressed congressional intent that a public disclosure regime be justified by a determination that SBS provide incidents of ownership comparable to direct ownership of reference securities.

We continue to be concerned that the Commission is attempting to use its supposed authority under Section 10B to do what would otherwise be prohibited under Section 13. As an initial matter, equity SBS provide none of the indicia of ownership comparable to direct ownership that Congress intended to include within the concept of beneficial ownership under Section 13(d). The purpose of Section 13(d) is to ensure public disclosure when an investor acquires voting securities that can provide the holder with influence or control. For the purpose of establishing the predicate to include equity SBS in the Section 13 public disclosure regime, Congress set forth a specific procedure in Section 13(o), including a determination that equity SBS provide incidents of ownership comparable to direct ownership of a reference security. Unlike ownership of a reference security, however, equity SBS do not result in any potential for control of the issuer; equity SBS do not convey voting rights.[18]

Section 13(o) of the Exchange Act applies specifically to SBS and reflects Congress's clear understanding and intent that the definition of "beneficial ownership" include only those securities that the holder either directly owns, or that confer comparable rights upon the holder. Although the Commission has (appropriately) excluded SBS from its proposed Rule 13d-3(e),[19] we are concerned that the Commission appears to be using Rule 10B-1 to require disclosure of SBS without satisfying the other requirements of Section 13(o), including that the Commission "consult[] with the prudential regulators and the Secretary of the Treasury" and show that

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17 *See* Alessio Saretto & Heather E. Tookes, *Corporate Leverage, Debt Maturity, and Credit Supply: The Role of Credit Default Swaps*, 26 REV. OF FIN. STUDIES 1190 (March 9, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1780426.

18 At best, a market participant that holds a large SBS position in respect of an issuer and makes an overture to corporate management regarding its thesis as to how the issuer may improve its performance, etc. may be positively received solely based on the merits of its thesis and respect for the investment it has made in accumulating the large SBS position. However, such reception (or any reception whatsoever) is not guaranteed. Corporate management may disregard the market participant because the latter has no influence, actual or perceived, and does not possess any voting rights; its interest is purely economic. Even in the best-case scenario where the market participant is positively received, corporate management may ultimately decline any recommendations, without consequence to the issuer.

19 "Modernization of Beneficial Ownership Reporting," Exchange Act Release No. 34-94211 (Feb. 10, 2022), 87 Fed. Reg. 13,846 (March 10, 2022) (to be codified at 17 C.F.R. § 240.13d-3(e)).

disclosure of such equity securities is "necessary to achieve the purposes of [Section 13]."[20] As such, not only is a public disclosure regime not necessary to achieve the purposes of Rule 10B-1, but it also undermines clearly expressed congressional intent reflected in Section 13.

By contrast, Section 10B of the Exchange Act provides the Commission with the authority to establish limits on the size of positions in SBS and related instruments that may be held by any person, to the extent such limits are "reasonably designed to prevent fraud and manipulation."[21] It also authorizes the Commission to require aggregation of positions and to adopt exemptions from position limits.[22] The focus of Section 10B, therefore, is on the establishment and enforcement of position limits on SBS, and the reporting provisions in Section 10B(d) must be read in that context. Accordingly, subsection (d) cannot be viewed as a general grant of authority with respect to reporting and public dissemination of SBS positions, but rather as an authorization to impose reporting requirements that pertain and are necessary to the enforcement of position limits.[23]

Further, Section 10B(d) is entitled "Large Trader Reporting" and is intended to permit the Commission to require reports of positions in SBS only to the extent necessary to apply and enforce any position limit rules that the Commission adopts, consistent with the mandate of Section 10B to prevent fraud and manipulation. Specifically, Section 10B(d) states that the Commission may require any person effecting transactions in SBS, or related securities or loans, "as set forth in paragraphs (1) and (2) of subsection (a) under this section to report such information as the Commission may prescribe regarding any position or positions" in any SBS or related securities or loans.[24] The fact that this subsection is included in Section 10B, and expressly refers to subsections (a)(1) and (a)(2) of Section 10B, which include the grant of authority to the Commission with respect to position limits, supports the interpretation that the reporting requirement referred to in subsection (d) relates to reports in connection with position limits. The use of the term "Large Trader Reporting" in the sub-heading is intended to limit any reporting to that necessary to enforce position limits, and the Commission's authority under the subsection is limited accordingly.

The purpose of position limits is to assist regulators in preventing and detecting attempts to manipulate or otherwise disrupt the markets through the establishment of limits on positions. Preventing manipulation and market disruption is a core regulatory function, and the public has not generally had access to information gathered in connection with existing position

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20 15 U.S.C. § 78m(o).

21 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 763(h), 124 Stat. 1376, 1778-79 (2010) (codified at 15 U.S.C. § 78j-2).

22 15 U.S.C. § 78j-2(a), (b).

23 Courts have declined to grant regulators general or broad authority, and have struck down regulations, when the regulator fails to ensure that the regulations are consistent with the purpose and requirements of the relevant statutory provisions. *See International Swaps and Derivatives Association, et al.* v. *United States Commodity Futures Trading Commission*, 887 F. Supp. 2d 259 (D.D.C. 2012).

24 15 U.S.C. § 78j-2(d).

limit regimes that are administered under the Exchange Act[25] (or the Commodity Exchange Act)[26] and that are designed for anti-manipulation and anti-disruption purposes. Indeed, if Congress intended to provide the Commission with the authority to require public disclosure of SBS positions, Congress would have intentionally and purposely included language to such an effect.[27] Yet, Congress omitted such language from Section 10B(d), and further evidencing an understanding of its conscious choice to omit such language, Congress elsewhere provided the Commission with the authority to "require registered entities to publicly disseminate…[SBS] *transaction and pricing data*."[28] Given Congress's silence as to public disclosure in Section 10B(d), the Commission's thesis that the statute provides it with the authority to mandate public disclosure is a "climb up a very steep hill."[29]

More instructive still, Congress – in authorizing the Commission to require the public dissemination of certain SBS transaction and pricing data – restricted the Commission to do so "in a manner that does not disclose the business transactions and market positions of any person."[30] Similarly, Congress further authorized SBS data repositories ("**SBSDRs**") to, "on a confidential basis…, make available [SBS] data obtained by the [SBSDR], including individual counterparty trade and position data," to each appropriate prudential regulator and certain other domestic and foreign government agencies.[31]

Congress recognized the unique aspects of SBS markets and tailored the large trader reporting provisions as such. Congress's approach reflects the intention that large trader reporting requirements should be narrowly tailored and limited to instances where the Commission

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25 We note that equity options position limits are established in FINRA Rule 2360(b) and reporting of positions to FINRA is required by FINRA Rule 2360(b)(5). Information filed with FINRA is not routinely made public, which is consistent with the nature and purpose of position limit requirements, as noted above.

26 The CFTC was granted similar authority to impose position limits on futures and swap positions, and it has exercised that authority by adopting a position limit regime with respect to futures and swaps on physical commodities. That regime includes large trader reports as well as the submission of detailed information in connection with hedge exemption requests, which can also be administered by the exchanges. The reports filed with the CFTC by market participants are confidential. *See* "Position Limits for Derivatives," 86 Fed. Reg. 3,236, 3,375 (Jan. 14, 2021).

27 *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (alteration and internal quotation marks omitted).

28 Dodd-Frank Act § 763(i), 124 Stat. at 1780 (codified at 15 U.S.C. § 78m(m)(1)(D)) (emphasis added).

29 *Am. Petroleum Inst. v. SEC*, 953 F. Supp. 2d 5, 14 (D.D.C. 2013) ("where Congress wanted to provide for public availability, it did so explicitly.") (alteration and internal quotation marks omitted); *see Am. Petroleum Inst.*, *supra*, at 17 ("Given these nuances, Congress would have no basis to rely on universal public treatment of Exchange Act reports. And Congress appears to have done no such thing, instead addressing public availability specifically on a number of occasions throughout the Exchange Act rather than relying on an unstated understanding about public access for all reports.").

30 15 U.S.C. § 78m(m)(1)(C)(iii).

31 15 U.S.C. § 78m(n)(5)(G).

has enacted position limits. It does not, as Rule 10B-1 would require, reflect an intention that information about significant numbers of SBS positions should be made available to the public. SBS arrangements are complex contractual arrangements that are customized and negotiated between sophisticated counterparties, and counterparty confidentiality is of the utmost importance in enhancing the liquidity and overall functionality of the SBS markets. The scope of Rule 10B-1, therefore, is contrary to the intended purpose of the large trader reporting regime outlined in Section 10B and exceeds the Commission's statutory authority.

IV. The Commission should modify the Proposal to focus only on regulatory reporting, in a manner similar to the CFTC large trader reporting rules, at thresholds more representative of large directional exposures.

A. The Commission should exhaustively consider whether Regulation SBSR reporting requirements would be equally effective at addressing the perceived risks which the Proposal was intended to address before proceeding to a final rule.

We continue to believe that the Commission should exhaustively consider whether Regulation SBSR[32] reporting requirements would be equally effective at addressing the perceived risks which Rule 10B-1 was intended to address without incurring the collateral costs associated with public, attributed disclosure.[33] We appreciate that Regulation SBSR mandates the reporting of transaction-level, rather than position-level, data. However, it seems intuitive that the Commission, given time and the collection of historical data, could aggregate individual transactions into aggregate positions in a manner that would provide clarity into specific market participants' outstanding exposures. Indeed, as the Commission notes, "registered SBSDRs are required to establish, maintain, and enforce written policies and procedures reasonably designed to calculate positions for all persons with open [SBS] for which the SBSDR maintains records…"[34]

Apart from the statutorily mandated anonymized dissemination of SBSDR data, the Commission identifies two barriers to the use of such data—first, "SBSDRs may not be aware of all positions held by a market participant…,"[35] and second, "SBSDRs are currently permitted to apply a cap to the anonymized dissemination of CDS transactions…"[36] However, our suggestion is not that SBSDR data stand in as a substitute for the position-level data contemplated by Rule 10B-1 (or even that a rulemaking to amend Regulation SBSR is necessary). Rather, we recommend that SBSDR data serve as a starting point for the Commission to aggregate such data into a

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32 *See* 17 C.F.R. § 242.900 *et seq.*

33 Indeed, the Commission previously noted that "the amendments to Regulation SBSR…will result in further progress toward providing a means for the Commission and other relevant authorities to gain a better understanding of the aggregate risk exposures and trading behaviors of participants in the [SBS] market…" "Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information," Exchange Act Release No. 34-78321 (July 14, 2016), 81 Fed. Reg. 53,546, 53,640 (Aug. 12, 2016).

34 Proposal, at 6,657; *see* 17 C.F.R. § 240.13n-5(b)(2).

35 *Id.* at 6,700.

36 *Id.* at n.265.

decision-useful format (and disseminate such data on an anonymized and further aggregated basis). The fact that separate SBSDRs are not aware of all positions held by a market participant or that SBSDRs are permitted to apply certain conventions for public dissemination purposes is irrelevant. Moreover, the Commission already contemplated the possibility that its staff would endeavor to obtain additional information from SBSDRs in connection with Rule 10B-1 reporting, such as counterparty information.[37] Our recommendation obviates the need for this extra step.

Commission staff have indicated that the existing SBSDR data is insufficient, which comes as a surprise to market participants, many of whom use the public Depository Trust & Clearing Corporation ("**DTCC**") Data Repository ("**DDR**") and ICE Trade Vault data in their investment analyses. Likewise, data from CFTC-registered swap data repositories ("**SDRs**") has been available since 2013, and market participants are very comfortable accessing and incorporating the public data in their investment analyses, much the same as other public market data. With public dissemination of SBS transactions by SBSDRs beginning in February 2022, we have heard from market participants that SBS data is even more straightforward to operationalize as the ticker symbols and typically less complex transactions[38] make for easily extractable data sets. Moreover, there are stand-alone data reporting vendors that market participants without such in-house capabilities may engage. It is our understanding that SBS dealers also routinely access the public data for market analyses.

Given the sophisticated analyses the Commission has published in recent years on an array of topics, we would be surprised if Commission staff were not able to perform similar analyses. Of course, the Commission has access to much more data than the public, so if the Commission were to identify any name on which there was an unusually large amount of SBS activity, its staff could focus on those few outliers. We appreciate that SBSDR data was not available when Archegos Capital Management collapsed in 2021. Considering that there are now roughly 18 months of SBSDR data available, we would urge the Commission to use that data to better understand the dynamics of SBS markets and determine what additional data, if any, is needed to meet its policy goals. In so doing, the Commission should reconsider whether Rule 10B-1 is necessary or appropriate.

B. If the Commission elects to proceed to a final rule, the Commission should modify the rule to provide for anonymized and aggregated reporting similar to the CFTC large trader reporting rules.

However, if the Commission elects to proceed with Rule 10B-1, we recommend that the Commission fashion the rule such that it is substantially similar to the CFTC large trader reporting rules.[39] In adopting its position limit rules, for example, the CFTC expressly noted the sensitivity of information submitted by market participants and reminded the exchanges of the

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37 *Id.* at 6,667.

38 Many physical commodity swap transactions are swap spread trades, which are more complex.

39 *See* 17 C.F.R. § 15.00 *et seq.* through 17 C.F.R. § 21.00 *et seq.*

importance of protecting the confidentiality of this information.[40] The comparable regime introduced by the CFTC, therefore, does not involve the public dissemination of non-anonymized position reports, yet such rules provide the CFTC with the information it needs on swap transactions and large swap positions in order to exercise its market oversight functions. The preservation of the confidentiality of each market participant's proprietary investment positions and trading strategies lessens the adverse effects of the rule on swap markets and underlying commodity markets.[41] Thus, the CFTC's rules reflect a balance between the CFTC's goal of "implementing and conducting effective surveillance of economically equivalent physical commodity futures, options, and swaps,"[42] while maintaining the confidentiality of market participants' proprietary investment positions and trading strategies. We believe that a similar approach to SBS position reporting would achieve the Commission's goal of improving oversight of and preventing manipulative behavior in the SBS markets.

The CFTC's rules also reflect its interpretation of a provision of the Dodd-Frank Act that is analogous to the provision under which the Commission proposed Rule 10B-1. Section 730 of the Dodd-Frank Act, consistent with its Section 763(h) counterpart, authorizes the CFTC

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40 "Position Limits for Derivatives," 86 Fed. Reg. 3,236 (Jan. 14, 2021). The CFTC noted that "to the extent that an exchange elects to publicize descriptions of approved non-enumerated bona fide hedges, the Commission cautions that any such data published should not disclose the identity of, or confidential information about, the applicant. Rather, any published summaries are expected to be general (generic facts and circumstances)." *Id.* at 3,375.

41 The CFTC explains that,

> Under the [the CFTC Large Trader Reporting System,] clearing members, [futures commission merchants], and foreign brokers (collectively called reporting firms) file daily reports with the [CFTC] under Part 17 of the CFTC's regulations. The reports show futures and option positions of traders with positions at or above specific reporting levels as set by the [CFTC]. Current reporting levels are found in CFTC Regulation 15.03(b).
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> If, at the daily market close, a reporting firm has a trader with a position at or above the [CFTC's] reporting level in any single futures or option expiration month, the firm reports that trader's entire position in all futures and options expiration months in that commodity, regardless of size.
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> The [CFTC] has the discretion to raise or lower the reporting levels in specific markets to strike a balance between collecting sufficient information to oversee the markets and minimizing the reporting burden on traders that are reportable.
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> Aggregate data concerning reported positions are published by the CFTC in its weekly Commitments of Traders reports. The data are aggregated to protect the identity of any individual reportable trader.
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> Since traders frequently carry futures positions through more than one broker and control or have a financial interest in more than one account, the [CFTC] routinely collects information that enables it to aggregate related accounts.

Commodity Futures Trading Commission, *Large Trader Reporting Program* (last visited May 16, 2023), https://www.cftc.gov/IndustryOversight/MarketSurveillance/LargeTraderReportingProgram/index htm.

42 "Large Trader Reporting for Physical Commodity Swaps," 76 Fed. Reg. 43,851 (July 22, 2011).

to require market participants to report large swaps positions.[43] As the CFTC recognized, Section 730 reporting was a "necessary component of an effective [CFTC] surveillance program, including monitoring compliance with any [position] limits that may be established by the [CFTC]."[44] As discussed in further detail above, Section 730 and Section 763(h) share a common purpose—to require reports of positions in swaps or SBS only to the extent necessary to apply and enforce any position limit rules that the CFTC or the Commission, respectively, may adopt.

In furtherance of striking a balance between the Commission's goal of implementing and conducting effective surveillance of SBS markets and the confidentiality of market participants' proprietary investment positions and trading strategies, we strongly urge the Commission to modify Rule 10B-1 to require only regulatory reporting. Under the CFTC large trader reporting for physical commodity swaps rules, reporting entities (primarily comprised of swap dealers) submit to the CFTC confidential, daily position reports related to their activity in swaps, including the swap positions of their own principal accounts as well as those of their direct legal counterparties when such positions become reportable.[45] Such reports include, among other data elements, the reporting entity, whether a principal or counterparty position is being reported, and the name of the counterparty whose position is being reported.[46] Further, the CFTC retains special call authority—the legal right to request information from traders with large market positions.[47] Disclosure of the information called for is mandatory and failure to comply may result in the imposition of criminal or administrative sanctions.[48]

Likewise, the Commission may require reporting persons to submit confidential positions reports related to their activity in SBS. The Commission may consider initially limiting such reporting to SBS dealers,[49] including the reportable SBS positions of their own principal accounts as well as those of their direct legal counterparties. The data elements included in such reports would include the information currently being proposed to be required by Schedule 10B,[50] with the addition of the Legal Entity Identifier ("**LEI**") of the reporting person's direct legal counterparty if reporting the SBS position of such counterparty. These data elements would remain

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43 Dodd-Frank Act § 730, 124 Stat. at 1702-03 (codified at 7 U.S.C. § 6t(a)).

44 "Large Trader Reporting for Physical Commodity Swaps," 76 Fed. Reg. 43,851, 43,858 (July 22, 2011).

45 *See* 17 C.F.R. § 20.1 *et seq*.

46 17 C.F.R. § 20.4(c).

47 *See* 7 U.S.C. §§ 6i & 12; 17 C.F.R. § 21.00 *et seq.*

48 *See* 7 U.S.C. §§ 9, 213a-1, & 13(c).

49 Limiting the scope of reporting persons to SBS dealers would be consistent with the Commission's rationale for the "reporting hierarchy" of Regulation SBSR that SBS dealers "will have greater technological capability than non-registered persons to report [SBS] as required by Regulation SBSR" and "[have] devoted substantial infrastructure and administrative resources to [their] [SBS] business[es], and thus would be more likely to have the capability to carry out the reporting function than a non-registered counterparty." "Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information," Exchange Act Release No. 34-74244 (Feb. 11, 2015), 80 Fed. Reg. 14,564, 14,600 (March 19, 2015).

50 *See* Proposal, at 6,705 (to be codified at 17 C.F.R. § 240.10B-101).

confidential and undisclosed to lessen the adverse effects of the rule on SBS markets and the underlying cash markets. And, of course, to the extent the Commission requires additional information about a large SBS position, the Commission may exercise its authority (similar to the CFTC's special call authority) to obtain such information from market participants directly.

To the extent that the Commission continues to believe that the alleged benefits of public dissemination accruing to other market participants outweighs the risk of imitative or disruptive trading, we would urge the Commission to disseminate anonymized and aggregated SBS positions on a periodic and sufficiently delayed basis, rather than non-anonymized position reports, similar to the analogous CFTC Commitment of Traders reports.[51] For the purpose of disseminating anonymized and aggregated reports, the Commission should adopt the same frequency—weekly—as the CFTC Commitment of Traders reports.[52] Based on the weekly accumulated data from Schedule 10Bs, we would expect that the Commission would publicly disseminate the following aggregate data points:

(i) The notional amount of the applicable SBS position(s), including such amounts further disaggregated by:

a. Direction (*i.e.*, long or short);

b. Tenor/Expiration;[53] and

c. Product ID, if applicable.

(ii) The Financial Instrument Global Identifier ("**FIGI**") of each underlying security, if applicable,[54] and the LEI of the issuer of each underlying security, if the issuer has an LEI.

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51 *See*, *supra*, n.41.

52 We would expect that the Commission's costs in aggregating and disseminating such data would be minimal. "The Commission estimate[d], at most, approximately 136 reports per week…related to single-name [CDS] thresholds." Proposal, at n.238. The Commission further posited that the "CDS single name market is the representative market for [SBS] in general, hence the Commission expects fewer reports from TRS compared to single-name CDS." *Id.* at n.239.

53 We note that, although it may be straightforward to provide the tenor/expiration of a single-name credit default swap, for example, some SBS do not as easily lend themselves to classification by tenor/expiration. Some SBS have a nominal term or no fixed duration but define counterparty optional early termination ("**OET**") rights. For example, SBS dealer OET rights may require long notice periods or certain event triggers, whereas customer OET rights may simply require one scheduled trading day's notice. We recommend that the Commission permit the reporting of tenor/expiration by "tenor buckets," or ranges, with a catch-all category for SBS with no clear, fixed duration.

54 We agree with the Commission that the use of standard identifiers—namely, FIGI for securities—on Schedule 10B would "provid[e] consistent identification of…securities across datasets and jurisdictions…" Proposal, at 6,688.

This format is consistent, to the extent possible, with the CFTC large trader reporting rules, as well as Regulation SBSR's division of primary and secondary trade information. We strongly believe that the public dissemination of the above data would provide market observers with useful information, including the aggregate notional amounts of SBS positions, which would be equally effective at satisfying the intent of Rule 10B-1: "to alert regulators and the market…that one or more market participants are amassing a large position in [SBS]…without requiring market participants to publicly disclose sensitive or proprietary information about their [SBS] Positions."[55]

C. If the Commission elects to proceed to a final rule, the Commission should modify the rule to provide for thresholds that are representative of large directional exposures.

Moreover, we continue to be concerned that the Commission's proposed thresholds are extremely low, do not adequately take into account the nature of hedging or other offsetting positions, and, therefore, are not representative of large directional exposures. With the exception of lower reporting requirements for net long and short CDS positions, and a potentially lower percentage threshold for equity SBS, Rule 10B-1 generally provides a $300 million gross reporting threshold that applies equally to CDS, debt SBS, and equity SBS.[56] It is not reasonable to suggest that a gross SBS position on less than one percent of the outstanding securities of a large public company or a fully hedged SBS position represents a large position or a position that could pose significant risk to issuers or other market participants.

The proposed gross notional thresholds are more likely to increase the overall number of reports and capture a large number of positions immaterial to addressing asymmetric information problems. As the Commission admits of gross thresholds, "[e]ach uninformative report would dilute the value of each informative report by increasing overall costs of processing and providing the required information to other market participants."[57] Accordingly, we strongly urge the Commission to modify Rule 10B-1 to provide thresholds that are representative of large directional exposures.

Further, the use of FIGI comes at no expense to market participants; no industry body or entity claims copyrights over these descriptors. We strongly urge the Commission to retain the use of FIGI for this reason.

By contrast, CUSIP numbers are nine-position alphanumeric identifiers provided by CUSIP Global Services, which was created by the American Bankers Association, previously operated by Standard & Poor's, and currently operated by FactSet Research Systems. CUSIP Global Services charges issuers for new identifiers and sells licenses to market participants for the use and distribution of its identifiers to the tune of tens of thousands or even hundreds of thousands of dollars per license annually.

55 Proposal, at 6,673.

56 Although the equity SBS reporting thresholds are subject to a percentage threshold test, the definition of reporting threshold contemplates the "lesser of" a percentage threshold test and a $300 million gross notional exposure test. Accordingly, a reporting person would be required to disclose a gross notional equity SBS position of $300 million regardless of the respective SBS equivalent position. *See*, *supra*, n.10.

57 Proposal, at 6,701.

For this purpose, we recommend that the Commission eliminate the notional thresholds in Rule 10B-1(b)(1)(i) (CDS) and (ii) (debt SBS) and replace such thresholds with appropriately tailored percentage thresholds. With respect to debt SBS, the Commission should consider a percentage threshold, calculated as the notional amount of the SBS position divided by the market value of total issuance, of more than 5%. With respect to CDS, the Commission should consider a percentage threshold, calculated as the notional amount of the CDS position divided by the market value of total outstanding bonds, of more than 5%. For this purpose, the notional amount of the CDS position would be calculated by subtracting the notional amount of any long positions in a deliverable debt security underlying the CDS position from the long notional amount of the CDS position.

Similarly, we recommend that the Commission eliminate the notional threshold in Rule 10B-1(b)(1)(iii)(A) (equity SBS) and modify the percentage threshold in sub-paragraph (B) to exclude from the calculation of the SBS equivalent position the underlying equity securities, 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, owned by the holder of the SBS position.

SBS positions that surpass these percentage thresholds are more indicative of material, directional positions. Regulatory reporting under such thresholds would provide the Commission with the ability to monitor for large, concentrated positions, counterparty risk, and fraudulent behavior. The public dissemination of anonymized and aggregated reports would, in turn, provide market observers with decision-useful information as to aggregated directional positions held through SBS on a single reference underlier or narrow-based index or basket (or component thereof).

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We appreciate the opportunity to provide additional comments to the Commission regarding Rule 10B-1, and we would be pleased to meet with the Commission or its staff to discuss our comments. If the staff has questions or comments, please do not hesitate to call Joseph Schwartz, Director and Counsel, or the undersigned at [redacted].

Respectfully submitted,

/s/ Jennifer W. Han

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cc: The Hon. Gary Gensler, Chairman, Securities and Exchange Commission
The Hon. Caroline A. Crenshaw, Commissioner, Securities and Exchange Commission
The Hon. Jaime Lizárraga, Commissioner, Securities and Exchange Commission

The Hon. Hester M. Peirce, Commissioner, Securities and Exchange Commission
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