

August 17, 2023

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

Re: *Reopening of Comment Period for Position Reporting of Large Security-Based Swap Positions (File No. S7-32-10)*

Dear Ms. Countryman:

The Investment Company Institute¹ is writing to offer additional comment on the Securities and Exchange Commission's ("Commission") proposed Rule 10B-1 ("Reporting Proposal"), which would, on a T+1 basis, (i) require any person with a security-based swap position of a certain size to promptly file a Schedule 10B that discloses information related to the position; and (ii) publicly disseminate those reported positions.² Based on our review of the Division of Economic and Risk Analysis (DERA) staff's additional economic analysis,³ we remain concerned that the Commission does not comprehensively consider the scope of participants and positions to which the proposed rule would apply.⁴ This requires clarifying, among other aspects, the extent of

¹ The [Investment Company Institute](https://www.ici.org) (ICI) is the leading association representing regulated investment funds. ICI's mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. ICI's members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in other jurisdictions. Its members manage \$31.2 trillion invested in funds registered under the US Investment Company Act of 1940, serving more than 100 million investors. Members manage an additional \$8.7 trillion in regulated fund assets managed outside the United States. ICI also represents its members in their capacity as investment advisers to certain collective investment trusts (CITs) and retail separately managed accounts (SMAs). ICI has offices in Washington DC, Brussels, London, and Hong Kong and carries out its international work through [ICI Global](https://www.ici.org/global).

² *Reopening of Comment Period for Position Reporting of Large Security-Based Swap Positions*, Exchange Act Release No. 34-97762 (June 20, 2023), 88 Fed. Reg. 41338 (June 26, 2023).

³ *Memorandum of the Staff of the Division of Economic and Risk Analysis, Supplemental data and analysis regarding the proposed reporting thresholds in the equity security-based swap market* (June 20, 2023) ("DERA Staff Memorandum"), available at <https://www.sec.gov/comments/s7-32-10/s73210-207819-419422.pdf>.

⁴ See Letter from Sarah A. Bessin, Associate General Counsel and Nhan Nguyen, Assistant General Counsel, ICI, to Vanessa Countryman, Secretary, Securities and Exchange Commission at 8 (Mar. 21, 2022) ("ICI SB Swap Reporting Letter") (stating that the Commission must provide more robust economic analysis that relies on multiple different sources of relevant available transaction and position data), available at <https://www.sec.gov/comments/s7-32-10/s73210-20120723-272883.pdf>; Letter from Sarah A. Bessin, Associate General Counsel and Nhan Nguyen, Assistant General Counsel, ICI, to Vanessa Countryman, Secretary, Securities and Exchange Commission (May 16,

aggregation that may be required and the number of non-equity-based security-based swap positions that would likely be subject to reporting. We urge the Commission at a minimum to address these questions in its economic analysis to assess the proposal's impact more accurately.

We are especially concerned that the Commission requests comment on how the proposed aggregation requirement should inform the reporting thresholds without first providing clear guidance, as we and others have requested, regarding the extent to which aggregation would be required. Specifically, we have requested that the Commission confirm—consistent with certain statements made in the proposal—that aggregation would not be required between separate security-based swap positions held by individual funds or other clients (*e.g.*, separately managed accounts) managed by a common investment adviser.⁵ The Commission's request for precise recommendations on reporting and dissemination thresholds, based on the DERA staff memorandum, is premature in the absence of clarity on the scope of market participants potentially subject to proposed Rule 10B-1, as the number of market participants subject to the rule has direct implications for the rule's operational burdens and its effects on market liquidity.

We also note that DERA's analysis falls short in addressing the implications of proposed Rule 10B-1 for the broad universe of market participants—including regulated funds and other managed accounts—that may be subject to the rule's mandatory reporting and public dissemination requirements. For example, the proposed rule would require a market participant in some instances to include the value of all the underlying equity securities and other related positions that it owns to determine whether a reporting obligation exists.⁶ A significant portion of

2022), available at <https://www.sec.gov/comments/s7-32-10/s73210-20128791-294590.pdf>. In addition to our comments in this letter, we also reiterate all the points and recommendations we made in our prior letters.

⁵ We previously pointed out that the Commission specified in its economic analysis that Rule 10B-1 would “require reporting by the party with the swap exposure. . . [and] not the investment adviser who trades on behalf of [a client].” This is consistent with the fact that the adviser's clients, not the adviser itself, bear the economic risk exposure of a security-based swap. ICI SB Swap Reporting Letter at 5-7. We have also asked the Commission to consider whether it intends for a “group” under proposed Rule 10B-1's aggregation requirement to have the same meaning as it does in the context of Sections 13(d) and 13(g) of the Exchange Act. *See* Letter from Susan Olson, General Counsel and Sarah A. Bessin, Associate General Counsel, ICI, to Vanessa Countryman, Secretary, Securities and Exchange Commission (Apr. 7, 2022) (“ICI Beneficial Ownership Letter”) (requesting that the Commission revise its proposed approach to determining when a “group” exists for purposes of Section 13(d) and 13(g) of the Exchange Act).

⁶ Rule 10B-1 would require a person to include the value of all of the underlying equity securities owned by the person as well as the delta-adjusted notional amount of any options, security futures or other derivatives instruments based on the same class of equity securities if the security-based swap position alone exceeds a \$150 million gross notional amount; or all of the underlying equity securities owned by the person, 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, once a security-based swap equivalent position alone represents more than 2.5 percent of a class of equity securities. *See* Proposed Rule 10B-1(b)(1)(iii)(A)-(B).

DERA's analysis, however, is based only on position information obtained from Schedule 13D filings and FactSet data relevant to activist activity, which would not include all of the underlying and related positions that may be subject to reporting. Many industry participants (such as most ICI members) file beneficial ownership positions on Schedule 13G, not Schedule 13D and thus, DERA's analysis does not reflect the full scope of market participants to which the proposed rule would apply.⁷ To ensure that its economic analysis more accurately reflects the market participants to which proposed Rule 10B-1 would apply, as well as the full scope of positions that would be reported under the proposed rule, we recommend that the Commission consider additional sources of relevant available data that may be available in other Commission filings.⁸

Importantly, to gauge how proposed Rule 10B-1 would apply to market participants more accurately, the Commission must extend its analysis to other categories of security-based swaps, (*i.e.*, credit default swaps and debt-based total return swaps) and use that data to further inform any final rule. Without the benefit of such additional analysis on the level and nature of security-based swap activity in each affected category, the Commission risks setting reporting thresholds at levels that do not achieve the optimal balance between promoting transparency and risk reduction, on the one hand, and the risks associated with disclosing sensitive trading information, on the other. Performing this analysis may reveal an even larger number of security-based swap positions exceeding the designated thresholds in DERA's analysis, which may further support raising those thresholds in any final rule. Setting thresholds higher based on such data would be consistent with the Commission's policy objectives by providing transparency and insight into the largest positions that the Commission seeks to identify for risk oversight purposes without including the unhelpful "noise" of smaller, and potentially more numerous, positions that do not pose meaningful risks to the market.⁹

⁷ ICI members may acquire beneficial ownership of more than 5 percent of a covered class of equity securities, but they typically do so in the ordinary course of business and with no intent of changing or influencing the control of the issuer. These regulated funds and advisers typically meet the definition of a Qualified Institutional Investor and thus are eligible to file on Schedule 13G, rather than Schedule 13D. *See* ICI Beneficial Ownership Letter at 5.

⁸ In the case of regulated funds, DERA should further examine Form N-PORT data, where security-based swap positions, underlying equity holdings, and holdings with different payoff profiles are reported separately from one another. *See* ICI SB Swap Reporting Letter at 7 n.23.

⁹ In its analysis of equity-based security-based swap positions generally across all market participants over the specified sample period, DERA identifies the number of market participants with at least one gross position that would exceed certain specified dollar and percentage thresholds, including the thresholds proposed under Rule 10B-1. DERA Staff Memorandum at 14-20. However, DERA does not draw any explicit conclusions as to whether it believes that the estimated numbers of affected market participants support or otherwise justify the proposed thresholds. We urge the Commission to provide further explanation or analysis in this respect. We also recommend that the Commission improve its analysis by expanding its sample period of data beyond the one-year period of November 2021 to November 2022, notwithstanding the structural changes in the data reported after December 2022. *Id.* at 3.

Ms. Vanessa Countryman
August 17, 2023
Page 4

* * *

Thank you for the opportunity to provide further comments on the Reporting Proposal. If you have any questions, please contact Sarah Bessin at [REDACTED] or Nhan Nguyen at [REDACTED].

Regards,

/s/ Sarah A. Bessin

Sarah A. Bessin

Deputy General Counsel

/s/ Nhan Nguyen

Nhan Nguyen

Assistant General Counsel

cc: The Honorable Gary Gensler
The Honorable Hester M. Peirce
The Honorable Caroline A. Crenshaw
The Honorable Mark T. Uyeda
The Honorable Jaime Lizárraga

Haoxiang Xu, Director
Carol M. McGee, Assistant Director, Office of Derivatives Policy
Division of Trading and Markets