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

August 21, 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: Reopening of Comment Period for Position Reporting of Large Security-Based Swap Positions; Release No. 34-97762; File No. S7-32-10

Dear Ms. Countryman,

Managed Funds Association[1] ("**MFA**") appreciates the opportunity to further provide additional comments to the Securities and Exchange Commission ("**SEC**" or the "**Commission**") on its proposed "Position Reporting of Large Security-Based Swap Positions" rules (the "**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.

As we expressed in our previous two comment letters to the Commission on the Proposal, from a public policy standpoint, 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.

In addition, the Proposal and the Commission's approach to the Proposal are critically flawed on several grounds. Specifically, the Commission has failed to sufficiently consider the economic costs and unintended consequences of publicly revealing confidential, proprietary investment positions and trading strategies, and has failed to meaningfully consider alternative approaches.[3] We are also concerned that the Commission is itself engaging in regulatory arbitrage—proposed Rule 10B-1 undermines clearly expressed congressional intent

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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).

3 *See* Managed Funds Association, *Comment Letter re Notice of Proposed Rulemaking on Position Reporting of Large Security-Based Swap Positions; File No. S7-32-10* (Mar. 21, 2022), https://www.sec.gov/comments/s7-32-10/s73210-20120700-272867.pdf.

reflected in Section 13 of the Exchange Act that requires the Commission, by rule, to determine after consultation with the prudential regulators and the Secretary of the Treasury, that SBS provide incidents of ownership comparable to direct ownership of reference securities to justify a public, attributed disclosure regime. Accordingly, the Proposal exceeds the limit and scope of Section 10B of the Exchange Act, which is expressly focused on establishing limits on the size of SBS positions.[4]

Further, we remain concerned that public disclosure of SBS positions within the time periods and at the extremely low thresholds that would be imposed by proposed Rule 10B-1 will impair price discovery and liquidity in U.S. capital markets.[5] Proposed Rule 10B-1 will make it more costly or impossible for market participants to enter into essential hedging transactions, and will likely result in a significant number of market participants exiting the SBS market altogether.[6]

As further detailed in our second comment letter on the Proposal, we again urge the Commission to instead consider modifying the Proposal to focus only on regulatory reporting (as opposed to public disclosure), in a manner similar to the Commodity Futures Trading Commission's ("**CFTC**") large trader reporting rules, at thresholds more representative of large directional exposures.[7] For ease of reference, a more fulsome summary outlining our concerns from our two prior comment letters is attached and incorporated herein as **Appendix A**.

We write now under separate cover, in part, to respond to the Commission's reopening of the comment period on the Proposal. The Commission took that step to allow public comment on a new Division of Economic and Risk Analysis ("**DERA**") Memorandum, dated June 20, 2023, entitled *Supplemental data and analysis regarding the proposed reporting thresholds in the equity security-based swap market* (the "**DERA Memorandum**").[8] As explained below and in an expert analysis prepared by NERA Economic Consulting ("**NERA**") (the "**NERA Report**"), which is attached and incorporated herein as **Appendix B**,[9] the DERA Memorandum suffers from serious analytical flaws and does not justify the establishment of a public, attributed reporting regime for SBS positions as contemplated in the Proposal.

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4 *See* Managed Funds Association, *Comment Letter re Notice of Proposed Rulemaking on Position Reporting of Large Security-Based Swap Positions; File No. S7-32-10* (May 16, 2023), https://www.sec.gov/comments/s7-32-10/s73210-190219-374542.pdf.

5 *Id.*

6 *Id.*

7 *Id.*

8 Attachment to Release No. 34-97762 (June 20, 2023).

9 Recognizing the importance and significance of economic analysis in the Commission's rulemaking process, we consulted NERA Economic Consulting to prepare an expert opinion report that focuses on the statistical flaws and limitations of the DERA Memorandum. As the NERA Report explains, the DERA Memorandum does not adequately explain or address the economic significance of its statistically limited findings, and thus, the Commission cannot rely exclusively on the DERA Memorandum as its economic basis for adopting a final Rule 10B-1.

Finally, we write to highlight that, in light of the Supreme Court's recent decisions in *West Virginia v. EPA*[10] and *Biden v. Nebraska*,[11] proposed Rule 10B-1 would be precluded by the major questions doctrine because it would be an unprecedented intervention by the Commission in the multi-trillion-dollar SBS market without clear authorization by Congress under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("**Dodd-Frank Act**"). The major questions doctrine represents the principle that an unprecedented claim of administrative authority and exercise of administrative power by an agency on matters of vast "economic and political significance"[12] are unlawful if Congress has not clearly authorized such agency to do so.

Executive Summary

The issues presented by proposed Rule 10B-1 continue to be of great concern to MFA and its members, and we appreciate this extended opportunity to share our views. To be clear, our views in this and prior comment letters in no way express our support for proposed Rule 10B-1's public dissemination requirement. The following is a summary of our positions set forth in this supplemental comment letter, which are explained more fully below.

I. If the Commission adopts a final Rule 10B-1 by relying exclusively on the economic analysis provided in the DERA Memorandum, the Commission will fall short of its statutory requirements under the Administrative Procedure Act ("APA") and also diverge from the Commission's own recommended guidance for economic analysis in rulemakings.

A. The economic analysis in the DERA Memorandum suffers from major data limitations and analytical flaws.

B. *The DERA Memorandum further underscores our concern that the Commission has not meaningfully considered alternative approaches and the Commission is taking an approach contradictory to its own prior actions and assertions.*

C. *The DERA Memorandum does not provide sufficient economic grounds for the Commission to adopt a final Rule 10B-1.*

II. Proposed Rule 10B-1, if adopted as written, would be precluded by the major questions doctrine because it would be an unprecedented intervention by the Commission in the multi-trillion-dollar SBS market without clear authorization by Congress under the 2010 Dodd-Frank Act.

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10 *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

11 *Biden v. Nebraska*, No. 22-506, 2023 WL 4277210 (U.S. June 30, 2023).

12 *West Virginia*, 142 S. Ct. at 2608 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

I. If the Commission adopts a final Rule 10B-1 by relying exclusively on the economic analysis provided in the DERA Memorandum, the Commission will fall short of its statutory requirements under the APA and also diverge from the Commission's own recommended guidance for economic analysis in rulemakings.

A. The economic analysis in the DERA Memorandum suffers from major data limitations and analytical flaws.

As further detailed in the NERA Report, the DERA Memorandum suffers from major data limitations and analytical flaws that severely constrain the reliability and applicability of its findings. Crucially, as the DERA Memorandum acknowledges, "[t]he [SBS data repository ("**SBSDR"**)] data as submitted by security-based swap market participants has several data issues."[13] Although the DERA Memorandum attempts to cure the SBSDR data of such defects, it does not adequately address and explain other known issues.

For example, the DERA Memorandum notes that there were "structural changes in the transaction data reported to SBSDRs after December 5, 2022."[14] This specifically refers to changes the CFTC implemented to address swaps that erroneously appeared in swap data repositories ("**SDRs**") as open swaps despite having been terminated.[15] These structural changes also impact SBS transaction data reported to SBSDRs because the Commission on December 18, 2019 took the step to allow SBS market participants and SBSDRs to comply with certain reporting requirements under the CFTC's swap reporting requirements instead of the applicable SEC requirements.[16] Although the DERA Memorandum heavily implies that the same data issues affecting swap data reported to SDRs also afflicted SBS data reported to SBSDRs during the same timeframe, the DERA Memorandum, without adequate explanation, restricts its analysis to SBS data collected from November 1, 2021, through November 25, 2022. As such, it is unclear why DERA staff nevertheless determined to use the SBS data from this period, because the data would have similarly accumulated substantial errors due to positions being erroneously labeled as open. Accordingly, the Commission should have conducted an analysis during a sample period subsequent to the "structural changes" to the data reported to SBSDRs.

As another example, the DERA Memorandum uses a relatively small sample of 11 Schedule 13D filings to "inform on whether the Schedule 13D Lead Filer would have had to report the equity security-based swap position under the reporting thresholds in proposed Rule 10B-1."[17] However, the DERA Memorandum does not adequately address how this small sample size affects the relevant statistical analysis and does not explain how the analysis accounted for this small sample size, if at all, in accordance with generally accepted principles of statistical analysis. Those principles underscore that small samples necessarily limit the extent to which valid inferences can

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13 *Supra* note 8 at 3, n. 10.

14 *Id.* at 3, n. 9.

15 *Id.*

16 Cross-Border Application of Certain Security-Based Swap Requirements, 85 Fed. Reg. 6270 (Feb. 4, 2020).

17 *Supra* note 8 at 4.

be drawn from a given analysis. Accordingly, the Commission should have conducted an analysis with a sample size representative of the larger population of market participants and sufficient to compute statistical parameters and conduct valid hypothesis testing.

The DERA Memorandum also does not quantify the economic effects of proposed Rule 10B-1 on market conditions (e.g., liquidity, risk, borrowing, investing costs), and does not offer any commentary that would be useful for the Commission in determining whether to proceed with the adoption of a final Rule 10B-1. Specifically, the DERA Memorandum does not even attempt to conduct a quantitative analysis to answer any of the additional questions posed by the Commission relating to the public reporting of SBS positions as part of the reopening of the comment period on the Proposal.

Moreover, the DERA Memorandum fails to consider proposed Rule 10B-1 in conjunction with other existing reporting regimes and other proposed regulations to assess any unintended consequences resulting from interactions with other regulatory actions, as well as assess less burdensome or costly alternatives. Accordingly, the Commission should have conducted a comprehensive, holistic cost-benefit analysis that includes an aggregate review of the impact of interrelated proposed regulations on market participants and an analysis of whether the totality of its regulatory actions would promote efficiency, competition, and capital formation.[18,19]

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[18] We articulate our concerns with the lack of economic analyses that consider the aggregate, or cumulative, impact of interrelated proposals in a comment letter submitted to each of the relevant public comment files. *See* Managed Funds Association, *Comment Letter re Rel. No. 34–93784 (File No. S7–32–10); Rel. No. 34–94062 (File No. S7–02–22); Rel. Nos. IA–5955 (File No. S7–03–22); Rel. Nos. 33–11028; 34–94197; IA–5956; IC–34497 (File No. S7–04–22); Rel. Nos. 33–11030; 34–94211 (File No. S7–06–22); Rel. No. 34-94313 (File No. S7–08–22); Rel. No. 34–94524 (File No. S7–12–22); Rel. Nos. 33–11068; 34–94985; IA–6034; IC–34594 (File No. S7–17–22); Rel. No. IA–6083 (File No. S7–22–22); Rel. No. IA–6176 (File No. S7–25–22); Rel. No. 34-95763 (File No. S7-23-22); Rel. No. 33-11151 (File No. S7-01-23); Rel. No. IA-6240 (File No. S7-04-23)* (July 21, 2023), https://www.sec.gov/comments/s7-32-10/s73210-233079-486762.pdf.

[19] This view is shared by the Commission's Asset Management and Advisory Committee ("**AMAC**"), which wrote:

> Given the breadth, scope, and depth of the regulatory requirements on all registrants and considering the growing aggregate or cumulative impact of compliance costs on the balance sheet health of small advisers/funds, economic analysis done in a vacuum has limited utility. While economic analysis on a rule-by-rule basis is necessary, it is insufficient to provide the Commission (and public commenters) the picture necessary to be fully informed in considering and commenting on rulemaking initiatives.

AMAC, *Final Report and Recommendations for Small Advisers and Funds* (Nov. 3, 2021), https://www.sec.gov/files/final-recommendations-amac-sec-small-advisers-and-funds-110321.pdf.

This view is also shared by Members of Congress. *See* Letter from Congressman Steven Horsford to Gary Gensler, Chair, U.S. Sec. & Exc. Comm'n (May 3, 2023), https://www.sec.gov/comments/s7-03-22/s70322-183839-337242.pdf; *see also* Letter from Bill Huizenga, Chairman, Subcomm. on Oversight & Investigations, H. Fin. Svcs. Comm., & Steve Womack, Chairman, Subcomm. on Fin. Svcs. & Gen. Gov't, H. Appropriations Comm. (July 6, 2023) (concerning Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews, 87 Fed. Reg. 16,886 (Feb. 9, 2022) but highlighting that the Commission must conduct an economic analysis of a proposed rule in conjunction with other related proposals), https://huizenga.house.gov/uploadedfiles/private_funds_letter_to_the_sec_7.6.23.pdf.

B. The DERA Memorandum further underscores our concern that the Commission has not meaningfully considered alternative approaches and the Commission is taking an approach contradictory to its own prior actions and assertions.

The DERA Memorandum also does not analyze whether the Commission could achieve its stated purpose under proposed Rule 10B-1 at a lower cost by evaluating available Regulation SBSR data or modifying or enhancing Regulation SBSR data requirements. As the DERA Memorandum confirms, however, the Commission has the ability to not only implement changes to SBS data required to be reported to SBSDRs under Regulation SBSR but also curate available data for defects to extract additional market insights as the Commission deems appropriate or necessary.[20] We therefore submit that the Commission's concerns in the Proposal regarding the potential limitations[21] of "any public position reporting pursuant to Regulation SBSR"[22] are overbroad and contradict the Commission's own actions and prior assertions.

This only further underscores our concern that the Commission has not meaningfully considered alternative approaches to a public, attributed reporting regime for SBS positions. For example, to the extent the Commission desires to provide market participants and regulators "with access to information that may indicate that a person (or group of persons) is building up a large security-based swap position"[23] to reduce systemic risk and market abuse, this same objective could likely be achieved by better utilizing or modifying SBS data reported under Regulation SBSR instead of creating an unduly burdensome, intrusive, and novel public disclosure regime that would detrimentally impact a wide range and number of market participants.[24]

C. The DERA Memorandum does not provide sufficient economic grounds for the Commission to adopt a final Rule 10B-1.

We previously expressed in our March 21, 2022, comment letter that the Commission has not adequately considered the true costs of proposed Rule 10B-1 as required under the APA. In addition to those concerns, as a result of the deficiencies and flaws described above and in the NERA Report, if the Commission adopts a final Rule 10B-1 by relying exclusively on the economic analysis provided in the DERA Memorandum, the Commission will fall short of its statutory requirements under the APA and also diverge from the Commission's own recommended guidance for economic analysis in rulemakings.

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20 *Id.* at 3, n. 10.

21 *E.g.*, 87 Fed. Reg. at 6657 (". . . [A]ny public position reporting pursuant to Regulation SBSR would need to be completely anonymous with respect to *both* the person building up large, concentrated security-based swap positions, and each of its counterparties.").

22 *Id.*

23 *Id.* at 6656.

24 *Supra* note 4 at 9-10 (". . . [I]t seems intuitive that the Commission, given time and collection of historical data, could aggregate individual transactions into aggregate positions in a manner that would provide clarity into specific market participants' outstanding exposures.").

Specifically regarding the APA, although "[n]o statute expressly requires the Commission to conduct a formal cost-benefit analysis as part of its rulemaking activities,"[25] the D.C. Circuit has held that various statutory provisions, together with the APA's requirement that the Commission's rulemaking be conducted "in accordance with law,"[26] imposes on the Commission a "statutory obligation to determine as best it can the economic implications of the rule."[27]

The DERA Memorandum does not offer **any** meaningful analysis of the economic implications of proposed Rule 10B-1, not least because, as explained above, it relies on inadequate statistical analyses based on limited and flawed data to merely suggest that some market participants would have to report their SBS positions under the proposed public reporting regime. Indeed, the DERA Memorandum fails to address the issue of whether the public reporting of SBS positions is necessary or appropriate as a threshold matter. Further, as explained in the NERA Report, the DERA Memorandum lacks any analysis of whether a dollar or percent reporting threshold is more appropriate given available SBS data reported to SBSDRs pursuant to Regulation SBSR, or whether the number of filers that would have to report their positions under a final Rule 10B-1 is too high or too low. The DERA Memorandum does not address these and other essential open questions in its economic analysis. The Commission thus cannot reasonably rely on the DERA Memorandum to claim to have discharged its obligations to "determine as best it can the economic implications of [proposed Rule 10B-1]."

The APA further requires that the Commission's rulemaking not be "arbitrary and capricious."[28] Although the scope of judicial review under the "arbitrary and capricious" standard is narrow, the Supreme Court held in *Motor Vehicle Manufacturing Association* that a federal agency must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[29] A federal agency's actions are arbitrary and capricious if the agency has:

> . . . relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[30]

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25 Office of the General Counsel, Securities & Exchange Comm'n, Mem. on Current Guidance on Economic Analysis in SEC Rulemakings (Mar. 16, 2012), https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf.

26 5 U.S.C. § 706(2)(A).

27 *Chamber of Commerce v. SEC*, 412 F.3d 133, 143 (D.C. Cir. 2005).

28 *Supra* note 26.

29 *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

30 463 U.S. at 43.

The reviewing court may not attempt to make up for such deficiencies.[31] Courts will, however, "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned."[32]

The DERA Memorandum suffers from such glaring flaws and limitations in its statistical and economic analysis that the Commission cannot reasonably articulate a satisfactory explanation for proceeding with a final Rule 10B-1, and a reviewing court likely cannot reasonably discern the Commission's path from the data examined in the DERA Memorandum. For example, the Commission cannot in good faith rely on an analysis of a mere 11 Schedule 13D filings to draw any meaningful policy conclusions, let alone any valid factual or statistical inferences. The DERA Memorandum does not correct for such and other fatal flaws. When the data underlying the purported findings cannot survive rudimentary academic scrutiny and is ripe for misinterpretation, there cannot reasonably be a "rational connection between the facts found and the choice made."

Finally, if the Commission adopts a final Rule 10B-1 by relying exclusively on the economic analysis provided in the DERA Memorandum, it will diverge from its own recommended guidance for economic analysis in its rulemakings.

According to guidance issued by the Division of Risk, Strategy and Financial Innovation and the Office of the General Counsel (the "**Guidance**"), every economic analysis in SEC rulemaking should include the following elements: "(1) a statement of the need for the proposed action; (2) the definition of a baseline against which to measure the likely economic consequences of the proposed regulation; (3) the identification of alternative regulatory approaches; and (4) an evaluation of the benefits and costs—of the proposed action and the main alternatives identified by the analysis."[33]

As further detailed in the NERA Report, the DERA Memorandum plainly lacks all four elements of the substantive requirements for economic analysis in SEC rulemaking identified in the Guidance. More crucially, however, the DERA Memorandum cannot reasonably form the basis (or even be a meaningful part of) the Commission's economic analysis in ultimately adopting a final Rule 10B-1 because it falls short of its expressly stated objective.

Specifically, the DERA Memorandum purports to respond to commenters' calls to "analyze the security-based swap market using [SBS transaction data reported to SBSDRs]," since "[o]nly approximately one month of these data were available at the time of the [Proposal], and therefore the data were not used in the [Proposal]."[34] However, not only does the DERA Memorandum incorrectly cite to a passage from a commenter's letter as evidence of public calls to analyze SBS transaction data, it also does not provide any commentary on whether public reporting of SBS is necessary or appropriate or what the proposed Reporting Threshold Amount for equity SBS, let alone each asset class, should be.

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31 *Id.*

32 *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974).

33 *Supra* note 25 at 4.

34 *Supra* note 8 at 2, n. 6.

Instead, the DERA Memorandum inexplicably focuses on how many market participants would have been required to report SBS position data under proposed Rule 10B-1. It is unclear, even under the most favorable reading of the DERA Memorandum, exactly what the Commission's takeaway from these findings should be. As a result, the DERA Memorandum does not meaningfully advance the Commission's stated intention in the Proposal that it would consider SBS data reported to SBSDRs pursuant to Regulation SBSR "in determining thresholds to use in connection with [SBS positions] based on equity securities when adopting a final rule."[35]

To fill this analytical void, the Commission instead seeks specific comments from the public on the proposed Reporting Threshold Amount for each asset class (*i.e.*, equity SBS, credit default swaps ("**CDS**"), and non-CDS debt SBS). In response, we submit that the Commission should first conduct its own economic analysis to determine the appropriateness of any proposed thresholds with respect to each asset class, and the DERA Memorandum in its current form is an inadequate and inappropriate substitute for such analysis. Nevertheless, we again urge the Commission to modify the Reporting Threshold Amount for each asset class to be representative of large directional exposures as set forth in our May 16, 2023, comment letter.[36]

The Commission also seeks specific comments from the public regarding whether, among other things: the Reporting Threshold Amount should include the value of the related securities owned by the holder of the SBS position; a final Rule 10B-1 should require the aggregation of SBS positions across entities that are both separately legally established and capitalized; and the Reporting Threshold Amount should include SBS positions entered into by a person with an entity or person controlling, controlled by, or under common control with that person. The DERA Memorandum does not address any of these and other questions posed by the Commission. Again, notwithstanding our belief that the proposed public, attributed reporting regime for SBS positions is unworkable, the Commission should conduct its own economic analysis regarding such questions to meet its obligations under the APA and satisfy its own recommended guidance on the Commission's rulemakings.

II. Proposed Rule 10B-1, if adopted as written, would be precluded by the major questions doctrine because it would be an unprecedented intervention by the Commission in the multi-trillion-dollar SBS market without clear authorization by Congress under the Dodd-Frank Act.

Proposed Rule 10B-1, if adopted as proposed, would be precluded by the major questions doctrine because it would be an unprecedented intervention by the Commission in the multi-trillion-dollar SBS market without clear authorization by Congress under the Dodd-Frank Act. The major questions doctrine provides that an agency's assertion of "unheralded regulatory

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35 87 Fed. Reg. at 6,671.

36 *Supra* note 4 at 14-15.

power over a significant portion of the American economy"[37] must be supported by **clear** congressional authorization.[38]

The Supreme Court for the first time used the term "major questions doctrine" last year in the seminal *West Virginia v. EPA* decision to refer to "an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."[39] This body of law "teaches that there are 'extraordinary cases' . . . in which the 'history and breadth of the authority that [the agency] has asserted,' and the historical significance of that assertion provide a 'reason to hesitate before concluding that Congress' meant to confer such authority."[40]

In short, the central tenet of the major questions doctrine addresses "not whether something should be done," but rather "who has the authority to do it."[41] The Supreme Court made abundantly clear in both *West Virginia*[42] and *Biden v. Nebraska*[43] that an agency's assertion of administrative authority of vast economic and political significance must be supported by "clear congressional authorization."[44] Without it, the agency's action represents "one branch of government arrogating to itself power belonging to another."[45]

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37 *West Virginia*, 142 S. Ct. at 2608.

38 *See Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021).

39 *West Virginia*, 142 S. Ct. at 2609.

40 *Id.* at 2608 (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159-160).

41 *Biden,* 2023 WL 4277210 at *12.

42 In *West Virginia*, the Supreme Court rejected the Environmental Protection Agency's ("**EPA**") Clean Power Plan Rule by invoking the major questions doctrine, holding that, although the EPA's assertions "had a colorable textual basis," it was ultimately implausible that Congress had empowered the agency to "substantially restructure the American energy market" through an ancillary provision of the Clean Air Act "that was designed to function as a gap filler and had rarely been used in the preceding decades." *West Virginia*, 142 S. Ct. at 2610.

43 The Supreme Court in *Biden* held that the Secretary of Education's student loan forgiveness program was unlawful under the major questions doctrine because the "staggering" economic and political significance of the Secretary's assertion of authority drastically departed from the "extremely modest and narrow" scope of "past waivers and modifications [of student loans] under the [Higher Education Relief Opportunities for Students Act of 2003 ("**HEROES Act**")]." *Biden*, 2023 WL 4277210 at *12-13. Put differently, "'[n]o regulation premised on' the HEROES Act 'has even begun to approach the size or scope' of the Secretary's program," and the student loan forgiveness program at issue "'conveniently enabled [the Secretary] to enact a program' that Congress has chosen not to enact itself." *Id.* at *13 (quoting *West Virginia*, 142 S. Ct. at 2614).

44 *Biden*, 2023 WL 4277210 at *15 (citing *West Virginia*, 142 S. Ct. at 2427).

45 *Biden*, 2023 WL 4277210 at *13.

According to a recent statement by SEC Chair Gary Gensler, as of June 7, 2023, the SBS markets were approximately $8.5 trillion by gross notional value.[46] At the end of 2022, the forwards and swaps linked to U.S. equities accounted for $3.492 trillion of the $6.919 trillion outstanding total notional amount of equity-linked contracts globally.[47] An agency rule that would require, as proposed Rule 10B-1 would, for any person who owns an SBS position that exceeds a certain threshold amount to publicly disclose such positions thus constitutes an obvious assertion of regulatory authority over a "significant portion of the American economy."[48] The sheer "breadth of the authority [the Commission] has asserted" alone provides a "'reason to hesitate before concluding that Congress' meant to confer such authority."[49]

The Commission in the Proposal cites to Section 10B of the Exchange Act, which Congress adopted under the Dodd Frank Act,[50] as authorizing the Commission to promulgate a rule that would require any person who owns an SBS position that exceeds the threshold amount set by the rule to report and publicly disclose such positions through a Schedule 10B filing. Specifically, the Commission in the Proposal selectively quotes the below language from Section 10B(d) of the Exchange Act as the source of the Commission's authority to:

> . . . require any person that effects transactions for such person's own account or the account of others in any securities-based swap or uncleared security-based swap and any security or loan or group or narrow-based security index of securities or loans . . . to report such information as the Commission may prescribe regarding any position or positions in any security-based swap or uncleared security-based swap and any security or loan or group or narrow-based security index of securities or loans and any other instrument relating to such security or loan or group or narrow-based security index of securities or loans.[51]

Contrary to the Commission's sweeping assertion of authority, however, as we expressed in our second comment letter to the Commission on proposed Rule 10B-1, the focus of Section 10B is on the establishment and enforcement of position limits on SBS, and is intended to permit the Commission to require reporting of SBS positions only to the extent necessary to apply and enforce any position limit rules that the Commission adopts. Section 10B(d) necessarily must be read within this context and limitation,[52] and the Commission's unprecedented and expansive

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46 SEC Chair Gary Gensler, *Statement on Rule 9j-1 and Rule 15fh-4(c)* (June 7, 2023), https://www.sec.gov/news/statement/gensler-statement-security-based-swaps-060723.

47 Bank for Int'l Settlements, BIS Derivatives Statistics, tbl. D8 (2023), https://stats.bis.org/statx/srs/table/d8?f=pdf.

48 *West Virginia*, 142 S. Ct. at 2608 (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159-160).

49 *Id.*

50 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).

51 87 Fed. Reg. at 6,654 (citing 15 U.S.C. § 78j-2(d)).

52 ". . . 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

reading of Section 10B would thus effect a "'fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation' into an entirely different kind."[53]

Indeed, if Congress had intended to delegate to the Commission the authority to require the public disclosure of SBS positions under Section 10B of the Exchange Act, it would have done so expressly. However, Section 10B of the Exchange Act confers no such express authority to the Commission, and "Congress certainly has not conferred a like authority upon [the Commission] anywhere else"[54] in the Dodd-Frank Act. In addition, none of the other statutory provisions to which the Commission cites as authority in the Proposal[55] provide the Commission with the clear and express congressional authorization the major questions doctrine requires.

As such, just as in *West Virginia*, where the Supreme Court found it "'highly unlikely that Congress would leave' to 'agency discretion' the decision of how much coal-based generation there should be over the coming decades,"[56] it is also highly unlikely that Congress had intended to leave to Commission discretion the decision of whether to require the public disclosure of SBS positions, much less in conjunction with the underlying securities owned by the holder of the SBS position, as well as any options, futures, or any other derivative instruments based on the same class of securities. Such politically and economically significant "tradeoffs involved in such a choice are ones that Congress would likely have intended for itself."[57]

Perhaps cognizant of the narrow scope of Section 10B of the Exchange Act as intended by Congress under the Dodd-Frank Act, the Commission in the Proposal concedes that it "has not previously proposed rules using its authority under Section 10B with respect to . . . reporting of large positions in security-based swaps."[58] Instead, the Commission appeals to its "observations of the security-based swap market," which "suggest a number of potential benefits of requiring reporting."[59] Given, however, that courts consistently presume that "Congress intends

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securities or loans. 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." *Supra* note 4 at 7.

53 *West Virginia*, 142 S. Ct. at 2612 (quoting *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 231 (1994)).

54 *West Virginia*, 142 S. Ct. at 2612.

55 87 Fed. Reg. at 6,708 (citing 15 U.S.C. §§ 78b, 78c(b), 78i(i), 78i(j), 78j, 78j-2, 78o, 78o-10 and 78w(a)).

56 *West Virginia*, 142 S. Ct. at 2613 (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 160).

57 *West Virginia*, 142 S. Ct. at 2613.

58 87 Fed. Reg. at 6,667.

59 *Id.*

to make major policy decision itself, not leave those decisions to agencies,"[60] the question is "not whether something should be done,"[61] but rather "who has the authority to do it."[62]

Much like the Clean Power Plan promulgated by the EPA at issue in *West Virginia* and the student loan forgiveness program in *Biden,* proposed Rule 10B-1 would represent an unprecedented exercise of the Commission's authority. Quite simply, the Commission has **never** exercised its authority under Section 10B(d) to require the reporting, let alone public disclosure, of SBS positions. The Commission's claim of authority under Section 10B(d) to now require the reporting and public disclosure of SBS positions thus would amount to a discovery of "an unheralded power representing a transformative expansion of its regulatory authority"[63] under Section 10B(d) of the Exchange Act.

Further, the Supreme Court has explained that, under the major questions doctrine, when an important issue "has been the subject of earnest and profound debate across the country," an agency's claim of delegated authority "is all the more suspect."[64] The Commission, since originally issuing the Proposal on December 15, 2021, has opened the Proposal for public comment three times—once as it was first issued, again on October 7, 2022, then again on June 20, 2023.

At the time of this writing, the public has submitted over 642 comment letters to the Commission, with that number expected to grow even larger as the latest comment period comes to a close. The Commission does not typically receive nearly as many public comments on its other rulemaking initiatives, and it is apparent from even a cursory review of these comments addressing the Proposal that the proposed public disclosure requirement of SBS positions is "the subject of earnest and profound debate across the country."[65] Retail investors, market participants, trade associations, legislators and academics alike have submitted comments from all corners of the country, each often at odds over whether the proposed reporting and public disclosure regime would advance the Commission's mission of investor protection, fair and orderly markets and efficient capital formation.

* * *

We appreciate the opportunity to provide supplemental comments to the Commission regarding proposed 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

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60 *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

61 *Biden,* 2023 WL 4277210 at *12.

62 *Id.*

63 *West Virginia*, 142 S. Ct. at 2595 (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)).

64 *West Virginia*, 142 S. Ct. at 2614 (quoting *Gonzales v. Oregon*, 546 U.S. 243, 267-68 (2006)).

65 *Id.*

do not hesitate to call Joseph Schwartz, Director and Counsel, or the undersigned at (202) 730-2600.

Respectfully submitted,

/s/ Jennifer W. Han

Jennifer W. Han
Executive Vice President
Chief Counsel & Head of Global Regulatory Affairs
Managed Funds Association

cc: The Hon. Gary Gensler, Chairman, Securities and Exchange Commission
The Hon. Hester M. Peirce, Commissioner, Securities and Exchange Commission
The Hon. Caroline A. Crenshaw, Commissioner, Securities and Exchange Commission
The Hon. Mark T. Uyeda, Commissioner, Securities and Exchange Commission
The Hon. Jaime Lizárraga, Commissioner, Securities and Exchange Commission
Dr. Haoxiang Zhu, Director, Division of Trading and Markets, Securities and Exchange Commission
Dr. Jessica Wachter, Chief Economist and Director, Division of Economic and Risk Analysis, Securities and Exchange Commission

APPENDIX A

Summary Outline of Concerns Set Forth in MFA Comment Letters dated March 21, 2022, and May 16, 2023

Summary

MFA Comment Letter dated March 21, 2022

1. The Commission has not adequately considered the costs and adverse consequences of public disclosure of SBS positions on SBS and underlying securities markets, and the participants in these markets.

    A. Public, non-anonymized disclosure of SBS and related positions[1] should not be required by the Commission, as it will be seriously detrimental to SBS markets and the underlying markets and will not improve the quality of information available to market participants or enhance the integrity of the markets.

    B. The Commission did not conduct a sufficient cost-benefit analysis, as required under the Administrative Procedure Act.

    C. The Commission did not adequately consider less burdensome alternative methods of achieving the desired benefits of proposed Rule 10B-1.

        i. The standard regulatory approach to large position reporting does not require fully disclosed public reporting and yet has been effective in accomplishing their regulatory purposes.

        ii. The Commission inappropriately associates the collapse of Archegos with a broader lack of public transparency in the SBS markets. The appropriate response to such a one-time failure is not to mandate a sweeping public disclosure regime, but instead to ensure that SBS counterparties have in place adequate risk-management procedures.

2. Proposed Rule 10B-1 exceeds the Commission's statutory authority under Section 10(d) of the Exchange Act.

3. If the Commission believes, after further consideration of the costs of the Proposal, that a rulemaking is still necessary and appropriate, it can achieve its goals without excessive disruption of markets and the imposition of undue burdens on market participants by adopting less burdensome requirements under a regulatory reporting rule similar to the CFTC's large trader reporting rules.

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[1] The Commission seeks specific comments on whether a final Rule 10B-1 should require "the inclusion of related securities owned by the holder of the security-based swap position" in the calculation of the Reporting Threshold Amount. As we previously expressed in our March 21, 2022, comment letter in response to the Proposal, such a requirement is unworkable and would force investors to choose between either publicly disclosing their entire trading strategy or pursuing a riskier investment strategy without the use of SBS.

4. If the Commission believes, after such further consideration, that a rulemaking is still necessary and appropriate, the Commission should ensure that its approach to position reporting in the final rule takes into account all of the additional direct and indirect operational and strategic costs associated with compliance.

    A. The Commission failed to consider available data in setting the reporting thresholds, resulting in reporting requirements that are excessively burdensome and inconsistent with the Commission's stated goals.

    B. The Proposal's reporting requirements place an excessive operational burden on market participants which is disproportionate to the perceived benefits of the proposed Rule.

    C. The requirements under proposed Rule 10B-1 to aggregate SBS positions across independent business units unnecessarily increase compliance costs and deter market participation.[2,3]

    D. Proposed Rule 10B-1 places U.S. SBS markets and market participants at a competitive disadvantage compared to non-U.S. SBS markets and market participants.

    E. Non-anonymized disclosure of SBS positions should be limited to regulatory and/or direct counterparty disclosure until the SEC has conducted a full cost-benefit analysis with appropriate data.

MFA Comment Letter dated May 16, 2023

1. Elsewhere the Commission 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.

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[2] The Commission seeks specific comments on whether a final Rule 10B-1 should require "aggregation of security-based swap positions across entities that are both separately legally established and capitalized." As we previously expressed in our March 21, 2022, letter in response to the Proposal, we continue to believe that an aggregation requirement is inconsistent with the mandate of Section 13's beneficial ownership reporting requirements. If the Commission nevertheless proceeds with an aggregation requirement in the final rule, we recommend that SBS positions be aggregated at the entity level in order to preserve anonymity. The preceding recommendation in no way expresses our support for proposed Rule 10B-1's public dissemination requirement.

[3] The Commission also seeks specific comments on whether a final Rule 10B-1 should require "the Reporting Threshold Amount to include security-based swap positions entered into by a person with an entity or person controlling, controlled by, or under common control with that person." Again, as we expressed in our March 21, 2022, letter in response to the Proposal, such a requirement would impose significant and unnecessary compliance costs that greatly exceed the Commission's estimated implementation cost of $101,740.

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.

    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.

APPENDIX B

NERA Economic Consulting Report on the DERA Memorandum

NERA ECONOMIC CONSULTING

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August 21, 2023

[1] Dr. Patrick Conroy is a Managing Director in NERA's Securities and Finance Practice and specializes in economic analysis of securities and finance issues. Dr. Conroy has provided evidence in US federal district and state court proceedings, and in European, Asian, and Latin America venues. In addition, he has provided opinions at various arbitrations and mediations. Dr. Conroy served as Chair of NERA's Securities and Finance Practice for a six-year term. Prior to joining NERA, Dr. Conroy was an economist at the US Securities and Exchange Commission where he conducted research on ECNs, foreign securities, IPOs, underwriting, mutual funds, and securities fraud, and provided support for policy areas such as market microstructure and market regulation. Dr. Conroy received his BA in foreign policy from American University and his Ph.D. in economics from the University of Miami.

[2] Jianghao Liu is a Senior Consultant in NERA's Securities and Finance Practice and focuses on market manipulation, securities class actions, and complex investment and trading strategy analysis. Mr. Liu has presented economic analysis to regulatory agencies and conducted statistical analyses involving a wide range of financial products, including equities, fixed-income instruments, futures, and options. Mr. Liu received his BA in economics and BS in business administration from the University of California, Berkeley, and his MA in quantitative methods in the social sciences from Columbia University.

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I. Introduction and Summary of Opinions

1. We have been asked by Managed Funds Association ("**MFA**") to prepare a memorandum in response to the Division of Economic and Risk Analysis ("**DERA**") Report on the Securities and Exchange Commission's ("**SEC**" or the "**Commission**") proposed Exchange Act Rule 10B-1 and its proposing release "Position Reporting of Large Security-Based Swap Positions" ("**proposed Rule 10B-1**").[3] The SEC added the DERA Report to the public comment file on June 20, 2023, to "provide supplemental analysis related to the economic effects of proposed Rule 10B-1."[4]

2. Based on our assessment, we have reached the following opinions:

   a. If the SEC were to adopt a final Rule 10B-1 based on the economic analysis in the DERA Report, it would not fulfill its obligations under the Administrative Procedure Act ("**APA**") to assess to the best of its ability the economic consequences of proposed Rule 10B-1. Specifically, the DERA Report is lacking in more robust methods of data analysis, such as statistical testing to evaluate the significance of results and comparative tools that consider the variety of investment strategies and investor types. The DERA Report also fails to satisfy the Commission's own recommended guidance for economic analysis in rulemaking, including a comparison of economic impact against relevant benchmarks and analysis of alternative reporting regimes.

   b. The DERA Report contains numerous data limitations and adjustments that are not sufficiently addressed and, thus, have an unknown impact on results. As such, it is not possible to reliably assess the significance of any analysis or evaluate if the data and associated period of analysis are

[3] Division of Economic and Risk Analysis, "Supplemental data and analysis regarding the proposed reporting thresholds in the equity security-based swap market," Commission File No. S7-32-10. ("**DERA Report**"); SEC, "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," *Federal Register* 87, no. 24 (February 2022): 6652, https://www.federalregister.gov/d/2021-27531.

[4] DERA Report, pg. 3.

sufficient to provide the best representation of security-based swap ("**SBS**") reporting. Given the significance of proposed Rule 10B-1 on market participants, a more rigorous analysis must be conducted to consider the reliability of the underlying data and methodology.

c. There are several issues with the analysis of SBS positions based on Schedule 13D filing events which stem from the failure to meet the SEC's obligation to evaluate the economic implications of proposed rules to the best of its abilities through rigorous statistical analysis. As a result of these issues, the DERA Report fails or is unable to provide guidance on whether reporting of SBS positions is necessary or appropriate or whether the number of entities that would have to report under the proposed rule is too high or too low. These issues include:

    i. No distinction between reporting persons and lead filers, as well as the types of beneficial ownership filings;

    ii. Absence of discussion on the class or aggregation of securities considered in computing beneficial ownership;

    iii. Lack of support for the choice of reporting day window; and

    iv. Use of a small sample size (11 observations) without showing that it is sufficient to compute statistical parameters and conduct valid hypothesis testing.

d. Similarly, the analysis regarding activist investors does not provide guidance on whether reporting of SBS positions is necessary or appropriate and includes additional limitations that undermine its findings:

    i. Inability to identify a representative sample of activist investors due to the underlying sample being potentially both overcounted and undercounted;

ii. No evaluation of the proper methodology for computing gross positions, such as offsetting positions and differences across asset classes;

iii. Lack of discussion on how investment strategies and macroeconomic conditions can influence the economic impact of reporting thresholds; and

iv. No consideration of relevant benchmarks when assessing the relative significance of reporting requirements, as well as associated compliance costs.

e. The DERA Report is subject to the same issues and limitations as discussed above in its analysis of the impact of SBS reporting on market participants broadly. In addition, the report does not consider whether changes in reporting requirements would affect any particular group disproportionately, especially given that market participants have diverse investment strategies and purposes. Such an analysis is essential because any associated costs and benefits will vary depending on the investor type.

3. Neither the DERA Report nor the reopening release for proposed Rule 10B-1 provide supplemental data or analysis related to the anticipated economic effects of public, attributed dissemination of SBS positions. Rather, the DERA Report is limited to a discussion of reporting thresholds for equity SBS, without addressing the issue of whether public reporting of SBS positions is necessary or appropriate or considerations related to the other classes of SBS to which proposed Rule 10B-1 would apply (*i.e.*, credit default swaps ("**CDS**") and non-CDS debt SBS). Accordingly, the DERA Report has limited application and lacks the potential to be informative for the purpose of further evaluating proposed Rule 10B-1.

II. Comments on the DERA Report

4. The SEC's proposed Rule 10B-1 would require reporting of SBS positions, positions in securities or loans underlying the SBS positions, and positions in instruments relating to the underlying. Proposed Rule 10B-1 would "require any person with a security-based swap position that exceeds a certain threshold to promptly file with the Commission a schedule disclosing certain information related to its security-based swap position."[5]

5. While proposed Rule 10B-1 covers SBS under multiple asset classes, including equity SBS and debt SBS,[6] the DERA Report considers specifically equity SBS positions.[7] If the analysis of equity SBS positions was intended to address the lack of economic analysis in the Proposing Release with respect to equity SBS positions, the same deficiency remains unresolved with respect to non-equity SBS positions. Moreover, the DERA Report is undermined by data limitations and lack of rigorous statistical analysis.

A. Issues in the Underlying Data

6. The primary data source in the DERA Report is SBS data reported to security-based swap data repositories ("**SBSDRs**"), which includes SBS data reported since November 2021 (the "**SBSDR Data**").[8] The analysis is restricted to data reported to SBSDRs from November 1, 2021, through November 25, 2022 (the "**Sample Period**").

7. While the DERA Report cites to Commodity Futures Trading Commission ("**CFTC**") Letter No. 22-06 to explain the structural changes in the data starting December 5, 2022, it does not explain how swap data repositories ("**SDRs**"), which are discussed in the CFTC letter, are related to the SBSDR Data or how DERA's methodology would be affected by data

[5] SEC, "Reopening of Comment Period for Position Reporting of Large Security-Based Swap Positions," Release No. 34-97762, June 20, 2023, https://www.sec.gov/files/rules/proposed/2023/34-97762.pdf.

[6] SEC, "Prohibition Against Fraud, or Deception in Connection with Security-Based Swaps; Prohibition against Undue Influence over Chief Compliance Officers; Position Reporting of Large Security-Based Swap Positions," Release No. 34-93784, December 15, 2021, pg. 3, https://www.sec.gov/files/rules/proposed/2021/34-93784.pdf.

[7] DERA Report, pg. 3.

[8] SEC, "SEC Approves Registration of First Security-Based Swap Data Repository; Sets the First Compliance Date for Regulation SBSR," Press Release, May 7, 2021. ("Today's SEC action sets Nov. 8, 2021, as the first compliance date for Regulation SBSR, which governs regulatory reporting and public dissemination of security-based swap transactions.").

issues at SDRs.[9] For example, CFTC Letter No. 22-06 notes that "[s]waps that erroneously appear in SDRs as open swaps, despite having been terminated, account for a significant number of existing swap data errors that staff have identified. This type of error results in the accumulation of erroneously open swaps at the SDRs over time, which impedes staff's use of the swap data."[10] By citing to CFTC Letter No. 22-06, the DERA Report appears to suggest that the SBSDR Data during the Sample Period is affected by the same issues that affected swap data reported to SDRs prior to December 5, 2022. As such, it is unclear why DERA staff nevertheless determined to use SBSDR Data from the Sample Period, because the SBSDR Data may have accumulated substantial errors due to positions being erroneously labeled as open.

8. CFTC Letter No. 22-06 also does not detail other types of data errors that CFTC staff found in swap data reported to SDRs prior to December 5, 2022, making it difficult to analyze the impact similar or identical errors would have had on DERA's analysis of the SBSDR Data reported to SBSDRs pursuant to Regulation SBSR during the Sample Period. For instance, it would be helpful to understand if there were unique factors in these errors that would make the Sample Period biased or if market factors (such as interest rates) are important as a control for this period. These data considerations are needed to critically evaluate the soundness of the proposed analysis.

9. In addition, the DERA Report makes no mention of whether the errors identified in CFTC Letter No. 22-06 are corrected for in the Sample Period. Such unknown probability of errors in SBS reporting further undermines the reliability of the SBSDR Data. In the data curation process described in footnote 10, the DERA Report describes "removing erroneous observations," but there is no reference to the erroneously open SBS in the provided examples of errors addressed in the data—"*e.g.*, notional amount reported in non-existing currencies, notional

[9] CFTC, "Staff Advisory on Reporting of Errors and Omissions in Previously Reported Data." Letter No. 22-06, June 10, 2022, https://www.cftc.gov/csl/22-06/download. The letter discusses swaps that erroneously appear as open at SDRs and provide instructions for correcting such errors. In 2019, the SEC stated that they would allow SBS market participants as well as SBSDRs to comply with certain CFTC swap reporting requirements instead of the applicable SEC requirements. See SEC, "Cross-Border Application of Certain Security-Based Swap Requirements," Release No. 34-87780, https://www.sec.gov/files/rules/final/2019/34-87780.pdf. While the SEC has allowed market participants to follow CFTC rules in reporting SBS transactions data, it is unclear why the DERA Report cites to a CFTC letter when discussing data issues in the SBSDR Data.

[10] CFTC, "Staff Advisory on Reporting of Errors and Omissions in Previously Reported Data." Letter No. 22-06, June 10, 2022, https://www.cftc.gov/csl/22-06/download, pg. 2.

amounts per report greater than $1 trillion, etc."[11] Indeed, it is unclear precisely how even these listed errors are accounted for. Footnote 10 also discusses data adjustments, including standardizing counterparty information, converting notional amounts to USD, and standardizing reference entity identifier types.[12] These descriptions lack sufficient detail on the impact of these issues on the data, such as the relative importance of each adjustment and how many observations are removed following each adjustment.

10. Furthermore, there is no breakdown of the 133,025 reference securities in the SBSDR Data which would have been important in determining if specific securities in certain sectors are more likely to be held in large quantities.[13] The DERA Report excludes 28% of reference securities included in contracts traded by market participants in the SBSDR Data.[14] This exclusion is not discussed in sufficient detail for the public to assess whether it would have resulted in a material change in conclusions. For example, footnote 14 states that "these 28% of referenced securities represent an estimated 15.1% of the gross notional amount for the Sample Period" but does not explain the significance of the exclusion or whether it would impact the total mix of securities in the data.[15]

11. Lastly, footnote 16 states that Schedule 13D amendments are not considered in the analysis, only the initial filings. The impact of amendments on subsequent conclusions is unclear, as it is possible that an erroneous entry may cause certain positions to be overreported or underreported or for positions to be reported using the wrong identifier. It is also uncertain if corrections occur more frequently for particular types of investors which can affect the impact of reporting thresholds. Given that data on Schedule 13D amendments does exist and provides a more accurate picture of investor holdings, it is necessary to include such information in the analysis, as well.

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[11] DERA Report, pg. 3.

[12] DERA Report, pg. 3.

[13] DERA Report, pg. 4.

[14] DERA Report, pg. 4. ("We include the 72% of such reference securities that are standardized to a consistent and identifiable reference identifier in our Sample Period and exclude the remaining 28%.").

[15] DERA Report, pg. 4.

B. Schedule 13D Filing Events

12. The DERA Report uses Schedule 13D events to identify SBS positions in the SBSDR Data that correspond to a beneficial ownership position reported in a Schedule 13D filing. This is done by identifying Schedule 13D Reporting Persons and identifying their reported equity SBS positions, identified by Legal Entity Identifiers ("**LEI**"), in the 30 days prior to and following the filing date. There are several issues with the analysis of Schedule 13D filing events, including the distinction between reporting persons and lead filers, distinctions in types of beneficial ownership filings, class of securities considered in computing beneficial ownership, and choice of reporting day window.

13. While the DERA Report distinguishes between Schedule 13D Lead Filers and Schedule 13D Reporting Persons, there is no clear explanation of the significance of analyzing Schedule 13D Lead Filers as a separate category and how it relates to Schedule 13D Reporting Persons.[16] In the discussion of Schedule 13D filing events, there is no mention of Schedule 13G filings or changes from Schedule 13G to 13D. Schedule 13D and 13G filings are both beneficial ownership reports—13G filings are a shorter alternative to 13D for investors who qualify for an exemption, including through passive investing. Activist investors are required to file Schedule 13D.[17] In assessing the economic impact of SBS reporting, such a consideration is important because active and passive investors have different investment strategies and operating structures. Thus, any associated costs will vary depending on the reporting requirements and investor type.

14. Additionally, it appears that the DERA Report does not consider all non-equity holdings and relevant parties when computing beneficial ownership, potentially obscuring the full extent of beneficial ownership. For example, the DERA Report has cautioned that "[t]here are significant limitations to our ability to perfectly identify equity security-based swap positions associated with a Schedule 13D filing" and that it "may not identify all holdings in the SBSDR Data that are associated with Schedule 13D Reporting Persons."[18]

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[16] DERA Report, pg. 4. ("In the Schedule 13D filings data for the Sample Period, there are 1,184 initial filings, with 1,102 unique "Schedule 13D Lead Filers" who reported 3,516 unique "Schedule 13D Reporting Persons."").

[17] Legal Information Institute, Cornell Law School, "17 CFR § 240.13d-1 - Filing of Schedules 13D and 13G," https://www.law.cornell.edu/cfr/text/17/240.13d-1.

[18] DERA Report, pg. 5.

15. There is no clear explanation of what constitutes the "class" of equity securities referenced in the Schedule 13D filings. For instance, futures and options holdings may factor into the reporting thresholds in proposed Rule 10B-1, and the SEC has proposed to include cash-settled derivatives in the computation of beneficial ownership.[19] Such an analysis is essential because, first, proposed Rule 10B-1 requires consideration of derivative holdings, and second, any associated costs and benefits will vary depending on the interaction and aggregate impact of the two proposals.

16. While the SEC has requested public comments on the appropriate thresholds for non-equity SBS positions, the DERA Report does not itself address what the appropriate reporting threshold for non-equity SBS positions (*i.e.*, CDS and non-CDS debt SBS) should be under proposed Rule10B-1 or provide any guidance relating to this topic. As discussed above, if the Commission intended to address with the DERA Report the lack of adequate economic analysis in the Proposing Release with respect to equity SBS positions, this same deficiency remains unresolved with respect to non-equity SBS positions.

17. There is no indication of whether it is feasible to include related parties. While the SEC has requested comments on whether positions by related parties should be aggregated, the DERA Report does not explain considerations when computing exposures across related parties or provide any guidance relating to this topic.

18. In identifying relevant positions, the DERA Report considers equity SBS positions in the 30 days prior to and following the filing date, for a total of 61 reporting days (the "**Event Period**").[20] However, there are no cites to literature or academic support for the 61-reporting day window used for the Event Period. Thus, it is not possible to determine if 61 days is a reliable measurement period and assess the sensitivity of results to changes in the reporting window length. An examination into the reporting period can provide additional guidance on reporting thresholds, for example, whether and to what extent certain filers are more likely to delay

[19] The SEC's proposal "Modernization of Beneficial Ownership" would "deem holders of certain cash-settled derivative securities as beneficial owners of the reference equity securities". SEC, "Reopening of Comment Period for Modernization of Beneficial Ownership," Release Nos. 33-11180; 34-97405, pg. 1.

[20] DERA Report, pg. 4. ("We consider equity security-based swap positions up to 30 reporting days before and after the filing date (for a total of 61 reporting days) of each Schedule 13D filing.").

reporting positions. It can also provide insight into reporting patterns by multiple related parties, a key component of proposed Rule 10B-1 on which the SEC has requested comments.

19. Besides specific issues related to the analysis of Schedule 13D filing events, the number of filings during the Sample Period is small and, therefore, may not be representative of the larger population. There is no statistical testing provided to assess this issue. It appears that the entirety of the "Equity Security-Based Swap Positions, in Reference to Schedule 13D Filing Events" section of the DERA Report is based on the 11 Schedule 13D filings identified.[21] There is no discussion on how this relatively small sample is sufficient to compute statistical parameters and conduct valid hypothesis testing. In fact, the *Reference Guide on Statistics* discusses several concerns with small samples, such as difficulties in validating the underlying assumptions and computation of confidence intervals and unreliability associated with "large standard errors, broad confidence intervals, and tests having low power."[22]

20. The SEC is subject to requirements, outlined in its own publications, for the standards of economic analysis used in a cost-benefit analysis for a proposed action. To meet the requirements as outlined in the "Current Guidance on Economic Analysis in SEC Rulemakings," the economic analysis needs to include "(1) a statement of the need for the proposed action; (2) the definition of a baseline against which to measure the likely economic consequences of the proposed regulation; (3) the identification of alternative regulatory approaches; and (4) an evaluation of the benefits and costs—both quantitative and qualitative—of the proposed action

[21] DERA Report, pg. 5. ("In 11 Schedule 13D filings, we observe Schedule 13D Reporting Persons—18 Scheduling 13D Reporting Persons in total across the 11 filings—who entered into an equity security-based swap position that referenced the class of equity securities in the Schedule 13D filing.").

[22] Kaye, David H. & Freedman, David A., "Reference Guide to Statistics," *Reference Manual on Scientific Evidence*, Federal Judicial Center, 3rd ed. (2011), pg. 255. For further discussion of the role of sample size in statistical analysis, see Appendix C in Wooldridge's *Introductory Econometrics*. Asymptotic analysis, on which statistical and econometric analysis often rests, depends on the size of the sample. See Page 790: ("Large sample properties concern the sequence of estimators obtained as the sample size grows, and they are also depended upon in econometrics. Any useful estimator is consistent. The central limit theorem implies that, in large samples, the sampling distribution of most estimators is approximately normal."). Small samples limit the extent of analysis that can be done. See Page 763: ("Asymptotic analysis involves approximating the features of the sampling distribution of an estimator. These approximations depend on the size of the sample. Unfortunately, we are necessarily limited in what we can say about how "large" a sample size is needed for asymptotic analysis to be appropriate; this depends on the underlying population distribution. But large sample approximations have been known to work well for sample sizes as small as n=20.") The sample size of 11 Schedule 13D filings is below this threshold. Woolridge, Jeffrey, *Introductory Econometrics: A Modern Approach*, 5th ed. (2013), pgs. 790, 763.

and the main alternatives identified by the analysis."[23] The APA also imposes on the SEC a "statutory obligation to determine as best it can the economic implications of the rule."[24] If the SEC adopts a final Rule 10B-1 in exclusive reliance on the economic analysis in the DERA Report, it would fail to meet its requirements under the APA, as well as its own recommended guidance for economic analysis.[25] For example, the DERA Report contains no analysis that shows that the sample size of 11 Schedule 13D filing events would qualify as a sufficiently large sample size for statistical analysis. In addition, the absence of significance testing and statistical models means that it is not possible to draw any valid inferences from the results, as well as conduct a full cost-benefit analysis.[26] Further, there is no affirmative discussion or evidence that this sample size is representative of the overall population of all Schedule 13D Reporting Persons.[27]

21. Given the small sample size, the following results do not provide guidance on whether a dollar or percent reporting threshold is more appropriate or whether the number of filers that would have to report their positions is too high or low.

[23] Office of the General Counsel, SEC, "Current Guidance on Economic Analysis in SEC Rulemakings," March 16, 2012, https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf, pg. 4-5.

[24] Office of the General Counsel, SEC, "Current Guidance on Economic Analysis in SEC Rulemakings," March 16, 2012, https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf, pg. 3.

[25] Additionally, any expert testimony based on the DERA Report would likely fail to meet the requirements of the *Daubert* standard and would be inadmissible in court. The *Daubert* standard requires statistical evidence to be based on principles "sufficiently established to have general acceptance in the field to which it belongs." See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

[26] The use of statistics is essential in drawing inferences. For example, see Kaye, David H. & Freedman, David A., "Reference Guide to Statistics," *Reference Manual on Scientific Evidence*, Federal Judicial Center, 3rd ed. (2011), 240. ("If a pattern in the data is the result of chance, it is likely to wash out when more data are collected. By applying the laws of probability, a statistician can assess the likelihood that random error will create spurious patterns of certain kinds. Such assessments are often viewed as essential when making inferences from data.").

[27] The importance of representative samples is discussed in the *Reference Guide on Statistics*. See Kaye, David H. & Freedman, David A., "Reference Guide to Statistics," *Reference Manual on Scientific Evidence*, Federal Judicial Center, 3rd ed. (2011), pg. 222. ("External validity is about using a particular study or set of studies to reach more general conclusions. A carefully randomized controlled experiment on a large but unrepresentative group of subjects will have high internal validity but low external validity… To extrapolate from the conditions of a study to more general conditions raises questions of external validity.").

a. The gross position on only one of these filings exceeds the $300 million reporting threshold.[28]

b. The gross position on four of these 10 Schedule 13D filings exceeds the $150 million threshold.[29]

c. "In four of the nine filings, the equity security-based-swap exposure is less than the 2.5% reporting threshold in proposed Rule 10B-1, and the Schedule 13D Lead Filer would not have to report."[30]

d. "In two filings, the swap exposure exceeds the 5% reporting threshold in proposed Rule 10B-1, and these two Schedule 13D Lead Filers would have had to report."[31]

e. "In the remaining three filings, the equity security-based swap exposure is over 2.5% but less than 5%, in which instance the Schedule 13D Lead Filer would have had to report under proposed Rule 10B-1 only if the combined beneficial ownership exposure and equity security-based swap exposure on the Schedule 13D filing were more than 5%."[32]

22. Instead, these results provide a general overview of the data and are limited to showing that some entities would have to report their positions under proposed Rule 10B-1. Further, as noted in footnote 23, the sample of observations on each day is even smaller, ranging

[28] DERA Report, pg. 5. ("The average gross position on a Schedule 13D filing varies from $70 to $170 million over the Sample Period, and the maximum gross position exceeds $300 million only on 1 day (day 11 in Figure 1).").

[29] DERA Report, pg. 6. ("The gross position on four of these 10 Schedule 13D filings, while less than $300 million, exceeds the other reporting dollar threshold in proposed Rule 10B-1 (specifically, the $150 million threshold), and the Schedule 13D Lead Filer might have had to report depending on the extent of additional equity and derivative exposure on the Schedule 13D filing.").

[30] DERA Report, pg. 10.

[31] DERA Report, pg. 10.

[32] DERA Report, pg. 10.

from 4 to 8 observations daily in Figure 1.[33] The sample size in Figures 2A to 2D is reduced from 11 filings to just 9 filings.[34]

C. Positions Across Activist Investors

23. In its analysis of equity SBS positions for activist investors, the DERA Report does not justify how the data examined is representative of the population of activist investors. For example, the DERA Report alternately states that the sample of activist investors may be overcounted or undercounted. Footnote 35 states that the list of Schedule 13D filers may be over-inclusive but does not explain how it is determined that some filers analyzed as potential activist investors may not be engaged in activist strategies.[35] Conversely, the DERA Report cautions that the number of activist investors may be undercounted due to limitations in identifying such investors.[36] In both of these instances, the DERA Report does not explain the ramifications of such data limitations on subsequent results and conclusions. In addition, the report caveats that the size of positions may also be undercounted as some positions may fail to be attributed to a given activist investor due to data limitations.[37] Therefore, the DERA Report fails to address whether the sample analyzed in the report is truly representative of the entire population of activist investors and likewise fails to provide (based on the available data) any standard statistical measures used to evaluate the significance of these variables.

24. In computing gross position size, the DERA Report considers the absolute value of both long and short positions. However, the SEC has requested comments on whether short positions may be used to offset the value of long positions.[38] In this regard, the DERA Report

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[33] DERA Report, pg. 5.

[34] DERA Report, pg. 10. ("Two Schedule 13D filings from Figure 1 are not plotted as the Schedule 13D Reporting Persons on these filings do not hold any equity security-based swaps before the filing date…").

[35] DERA Report, pg. 12. ("When it comes to activism, this list of Schedule 13D filers may be over-inclusive in that some small portion of Schedule 13D filers may not be involved in activist investor strategies.").

[36] DERA Report, pg. 12. ("Hence, the analysis may undercount the number of activist investors who might need to file Schedule 10B when aggregating both beneficial ownership and equity security-based swap positions.").

[37] DERA Report, pg. 12. ("Critically, to be included in our sample, the equity security-based swap position must be held by the GLEIF intra-affiliate entities, whose LEI we obtain and search for in the SBSDR database. However, many activist investors are associated with many different funds or other entities, any of which may be party to an equity security-based swap. We are aware of many cases in which an activist investor has equity security-based swap exposure through an entity other than the parent or child entity.").

[38] SEC, "Reopening of Comment Period for Position Reporting of Large Security-Based Swap Positions," Release No. 34-97762, June 20, 2023, https://www.sec.gov/files/rules/proposed/2023/34-97762.pdf, pg. 6. See entry 2c

does not provide guidance on whether it is appropriate to consider offsetting positions or positions across asset classes, such as equities and options. Also, the use of long positions for hedging net short exposures may not be directly comparable to another entity that only has short positions.

25. Further, the DERA Report does not, or is unable to, address the variety of investment strategies or macroeconomic conditions that inform the behavior of activist investors. These factors may be significant in considering the economic impact of reporting thresholds, as disclosure requirements may disrupt the ability of activist investors to engage in proprietary strategies and campaigns. As an example, a study on whether proposed Rule 10B-1 would impact liquidity and price discovery would help activist investors assess the viability of their investment strategies under the proposed reporting requirements. However, the DERA Report does not address the anticipated economic effects of public, attributed dissemination of SBS positions.

26. The DERA Report also does not include relevant benchmarks in the presentation of certain summary statistics which would have provided insight on whether the increased number of reporting entities would be too high or low, as well as any associated compliance costs. For instance, the DERA Report describes how, on a given day, an activist investor's gross position in a referenced security was, on average, $8.41 million and activist investors took an aggregate daily average gross position amounting to 1.19% of the total gross market outstanding.[39] It is unclear if these figures would be too big or too small when compared to a relevant benchmark.

27. Finally, the DERA Report does not consider relevant benchmarks or macroeconomic context in its presentation of activist investors with gross positions exceeding certain thresholds. For example, Figures 3A, 3B, 4A, and 4B show trends over time, but they do not provide any meaningful context for whether the observed counts are too high or low. They also do not consider macroeconomic conditions or factors specific to each investor. Figure 3B shows a marked decline in investors with gross positions exceeding $300 million around June 2022, but the DERA Report does not provide an explanation for this trend. As with the previous

in section Request for Comment. ("Such final rule permits offsetting of security-based swap positions with identical terms (e.g., offsetting long positions with short positions, but only if the security-based swap positions reference the same product identifier)?").

[39] DERA Report, pg. 12.

section, these results are limited to presenting a general summary of the data and showing that some entities would have to report their positions under proposed Rule 10B-1.

D. Positions Across Market Participants

28. The DERA Report is subject to the same issues and limitations as discussed above in its analysis of the impact of SBS reporting on market participants broadly. For example, Figures 5A, 5B, 6A, 6B, 7A, 7B, 8A, 8B, 9A, 9B, 10A, and 10B show trends over time, but they do not provide any meaningful context for whether the observed counts are too high or low. Each figure shows marked increases around November 2021, but the DERA Report does not provide an explanation for this trend. Figures 6B and 8B, which reflect the number of gross positions that exceed certain dollar thresholds, show marked inclines and declines around November 2022, but the DERA Report does not provide an explanation for this trend or why it inheres in the data for dollar, but not percent, reporting thresholds.

29. The DERA Report's discussion of positions across various market participants is also subject to major data limitations and fails to address the economic impact of proposed Rule 10B-1 on market participants. Moreover, there is no analysis of specific classes of market participants beyond activist investors, limiting the scope of the analysis. The DERA Report's findings include the same caveats on data limitations as its discussion of positions across activist investors and does not explain how these caveats would affect subsequent results and conclusions.[40] By grouping all other market participants into a single category, the DERA Report ignores the reality that investors are engaged in diverse investment strategies and, thus, would react differently to the proposed regulation.

30. Further, the DERA Report does not consider any other specific trading strategies among other market participants, focusing only on activist investors. It is unclear how one should compare statistics on market participants broadly to activist investors, whether the differences are statistically meaningful, or whether any change in reporting requirements would affect any particular group disproportionately. These are factors that should have been considered, but are

[40] DERA Report, pg. 14. ("The analysis is again limited to equity security-based swaps that reference U.S. listed securities, and it is subject to the same limitations we previously identified in our analysis of equity security-based swap positions associated with activist investors.").

not addressed, in the DERA Report. While the DERA Report extensively discusses reporting requirements in relation to activist investors, which comprise "only 3.2% of the 3,516 Schedule 13D Reporting Persons"[41] in the SBSDR Data, it does not consider the impact on other investors from the remaining 96.8% of Schedule 13D Reporting Persons.

31. For example, the Organisation for Economic Co-operation and Development ("**OECD**") collects data on institutional investors within several different categories, arguing that the general term is too broad to make meaningful conclusions about ownership engagement and business model.[42] These categories are institutional investors (including pension funds, investment funds, and insurance companies), alternative institutional investors (including hedge funds, private equity firms, exchange-traded funds, and sovereign wealth funds), and asset managers.[43] While there is some overlap in assets under management ("**AUM**") due to fund structure, in 2011, traditional institutional investors held $73.4 trillion in AUM globally, alternative institutional investors held $11.3 trillion, and asset managers held $63 trillion.[44] Hedge funds specifically made up a smaller subset of alternative institutional investors, holding only 2% of the assets held by institutional investors.[45] Activist hedge funds would represent an even smaller subset of hedge funds. By focusing solely on activist investors, the DERA Report fails to consider the economic impact on each sub-group of other market participants.

32. In accordance with the APA and the SEC's obligation to evaluate the economic implications of proposed rules through rigorous statistical analysis, a more detailed analysis would need to include a combination of the following analyses and discussions for market

[41] DERA Report, pg. 12.

[42] Çelik, S. & Isaksson, M, "Institutional Investors as Owners: Who Are They and What Do They Do?", *OECD Corporate Governance Working Papers*, No. 11 (2013), https://doi.org/10.1787/22230939, pg. 3.

[43] Çelik, S. & Isaksson, M, "Institutional Investors as Owners: Who Are They and What Do They Do?", *OECD Corporate Governance Working Papers*, No. 11 (2013), https://doi.org/10.1787/22230939, pg. 8. The OECD further acknowledges that this is an incomplete breakdown of the types of institutional investors. ("We are fully aware that this list of institutional investors is incomplete. Other categories, like closed-end investment companies, proprietary trading desks of investment banks, foundations and endowments could obviously be added. Partly because of a lack of reliable data and partly because we want to keep the presentation as simple as possible, we have not sought to include all possible types of institutional investors in this paper.").

[44] Çelik, S. & Isaksson, M, "Institutional Investors as Owners: Who Are They and What Do They Do?", *OECD Corporate Governance Working Papers*, No. 11 (2013), https://doi.org/10.1787/22230939, pg. 9-15.

[45] Çelik, S. & Isaksson, M, "Institutional Investors as Owners: Who Are They and What Do They Do?", *OECD Corporate Governance Working Papers*, No. 11 (2013), https://doi.org/10.1787/22230939, pg. 14.

participants to draw informed conclusions about the full economic impacts of proposed Rule 10B-1:

a. An analysis of the anticipated economic effects of public, attributed dissemination of SBS positions;

b. An analysis of the other classes of SBS (*i.e.*, CDS and non-CDS debt SBS) to which proposed Rule 10B-1 would apply;

c. An analysis of the differences between different reporting thresholds, including whether a value-based or percent-based system would be more or less beneficial and/or costly;

d. A discussion of the context or investment strategy for investors that might be impacted by the reporting requirements, including any unforeseen costs;

e. A discussion of how investor behavior might change, including a breakdown by major investor types, as a result of increased reporting requirements and different thresholds;

f. An analysis of proposed Rule 10B-1, other existing reporting regimes, and other proposed regulations to assess any unintended consequences resulting from interactions with other regulatory actions, as well as assess less burdensome or costly alternatives; and

g. An analysis of economic impact using statistical tools and econometric techniques to quantify the effect of proposed changes on market conditions, such as liquidity, risk, borrowing, and investing costs.

III. Conclusion

33. If the SEC adopts a final Rule 10B-1 in exclusive reliance on the economic analysis in the DERA Report, it will fail to meet its requirements under the APA to "determine as best it can the economic implications of the rule." In particular, the DERA Report does not consider more robust methods of data analysis, such as the use of significance testing and statistical models to draw inferences, as well as an economic analysis that accounts for the variety of investment strategies and investor types. The DERA Report could have also addressed certain data issues using alternative data sources that are more reliable and representative of market participants broadly. Moreover, the supporting quantitative analysis in the DERA Report is subject to numerous data limitations resulting from DERA staff's use of multiple data sources, such as difficulties identifying relevant SBS positions. Thus, it is not possible to evaluate the reliability of the supporting quantitative analysis in the DERA Report without further analysis of the rate of error resulting from these data limitations.

34. Similarly, if the SEC adopts a final Rule 10B-1 in exclusive reliance on the economic analysis in the DERA Report, it will also fail to satisfy the Commission's own recommended guidance for economic analysis in rulemaking. The DERA Report does not examine the economic impact of proposed Rule 10B-1 against relevant benchmarks, analyze alternative reporting regimes, or evaluate the proposed regulation's relevant costs and benefits. A rigorous statistical analysis of the economic benefits in a public rulemaking should account for certain factors, such as prevailing market and industry conditions, differing investment strategies, profiles of market participants, and macroeconomic factors, or explain why controlling for such factors is unnecessary. In this regard, the DERA Report does not adequately address the impact of proposed Rule 10B-1 on Schedule 13D filers, activist investors, or market participants broadly.

35. As a result of the noted substantial data limitations and the lack of a rigorous quantitative analysis, the DERA Report in its current form is unable to provide actionable guidance on whether reporting of SBS positions is necessary or appropriate or the economic effects of public reporting of SBS positions generally and the proposed reporting thresholds more specifically, including what the appropriate reporting thresholds should be and how market participants would be affected by the proposed reporting requirements. As such, it is not possible, based on the analysis presented in the DERA Report, to assess the market and economic impact of

proposed Rule 10B-1. If a reasonably robust cost-benefit analysis is not possible at this time due to data limitations, then there is insufficient analytical support to warrant the adoption of a final rule.

36. Further, the DERA Report does not offer any opinion on the additional questions posed by the SEC relating to the reporting of SBS positions, including if related securities held by the same holder should be included and if the holdings of related parties should be aggregated when determining whether a reporting threshold is met.[46] Instead, the report provides a general overview of the SBSDR Data and summary statistics showing that some entities would have to report their positions under proposed Rule 10B-1.

[46] SEC, "Reopening of Comment Period for Position Reporting of Large Security-Based Swap Positions," Release No. 34-97762, June 20, 2023, https://www.sec.gov/files/rules/proposed/2023/34-97762.pdf. See entries 2a-h in section Request for Comment.