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ELLIOTT INVESTMENT MANAGEMENT L.P.
360 S ROSEMARY AVE, 18TH FLOOR, WEST PALM BEACH, FL 33401

August 21, 2023

Via Electronic Mail

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

Re: **File No. S7-32-10; Reopening of Comment Period for Position Reporting of Large Security-Based Swap Positions; Release No. 34-99762**

Dear Secretary Countryman:

We write in response to the above-cited release, which reopens the comment period on the portion of Release No. 34-93784 relating to *Position Reporting of Large Security-Based Swap Positions* (Dec. 15, 2021). The Commission took that step to allow 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 Rule 10B-1 Memorandum").[1] As explained below, the DERA Rule 10B-1 Memorandum suffers from serious analytical flaws and actually undercuts rather than supports the adoption of position reporting for security-based swaps as proposed by the Commission in the Rule 10B-1 Rulemaking Proposal.[2]

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[1] Attachment to Release No. 34-97762; File No. S7-32-10 (June 20, 2023). We note that the DERA Rule 10B-1 Memorandum was not published in the Federal Register. *See* 88 FED. REG. 41338 (June 26, 2023). We discuss below the import of that fact.

[2] File No. S7-32-10; *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*, Release No. 34-93784 (Dec. 15, 2021) (the "Rule 10B-1 Rulemaking Proposal"). On June 7, 2023, the Commission adopted Rule 9j-1 (prohibiting fraud, manipulation or deception in connection with security-based swaps) and Rule 15Fh-4(c) (prohibiting undue influence over chief compliance officers) under the Securities Exchange Act of 1934, as amended (the "Exchange Act"). Release No. 34-97656 (June 7, 2023). In adopting these new rules, the Commission stated that it was "not finalizing Rule 10B-1 . . . as it continues to consider comments received" (*Id.* at p. 8). The DERA Rule 10B-1 Memorandum solely addresses proposed Rule 10B-1, which is the provision contained in the Rule 10B-1 Rulemaking Proposal regarding position reporting of large security-based swap positions. Thus, all references herein to the Rule 10B-1 Rulemaking Proposal are to the portion thereof relating to proposed Rule 10B-1. All citations herein to the Rule 10B-1 Rulemaking Proposal utilize the pagination of the "Conformed to Federal Register version" that is posted on EDGAR.

This submission supplements our prior comment letters regarding the Rule 10B-1 Rulemaking Proposal[3] as well as the Commission's proposal to amend Regulation 13D under the Exchange Act. As we have observed previously, we believe that these rulemaking proposals are interrelated.[4] We believe our Rule 10B-1 Comment Letters demonstrate significant shortcomings of the Rule 10B-1 Rulemaking Proposal, including the significant threat the proposal, if adopted, would pose to activism and thus to the vibrancy and efficiency of the U.S. financial markets. Our review of the DERA Rule 10B-1 Memorandum has only reinforced the seriousness of our concerns.

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[3] *See* Letter from Richard B. Zabel, General Counsel & Chief Legal Officer, Elliott Investment Management L.P., to Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission, dated Jan. 13, 2022, requesting an extension of the comment period for the Rule 10B-1 Proposing Release; Letter from Richard B. Zabel, General Counsel & Chief Legal Officer, Elliott Investment Management L.P., to Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission, dated March 21, 2022, re: Release No 34-93784 (Dec. 15, 2021) (our "Original Rule 10B-1 Comment Letter"); and Letter from Richard B. Zabel, General Counsel & Chief Legal Officer, Elliott Investment Management L.P., to Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission, dated August 18, 2022, re: Effect of *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), on Pending Release Nos. 34-93784, 33-11030, and 34-94211 (August 18, 2022) (our "First Supplemental Rule 10B-1 Comment Letter" and, together with our January 13, 2022 request regarding the duration of the comment period and our Original Rule 10B-1 Comment Letter, our "Rule 10B-1 Comment Letters"). Our Rule 10B-1 Comment Letters did not comment on the Commission's concurrent proposal to adopt Rules 9j-1 and 15Fh-4(c).

[4] On February 10, 2022, toward the end of the comment period on the Rule 10B-1 Rulemaking Proposal, the Commission issued Release Nos. 33-11080; 34-97405, *Modernization of Beneficial Ownership Reporting* (Feb. 10, 2022). (the "13(d) Rulemaking Proposal"). We have submitted several comment letters in response to the 13(d) Rulemaking Proposal and subsequent Commission releases relating thereto. *See* Letter from Richard B. Zabel, General Counsel & Chief Legal Officer, Elliott Investment Management L.P., to Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission, dated April 11, 2022, re: Release Nos. 33-11030, 34-94211 (Apr. 11, 2022) (our "Original 13(d) Comment Letter"); Letter from Richard B. Zabel, General Counsel & Chief Legal Officer, Elliott Investment Management L.P., to Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission, dated August 18, 2022, re: Effect of *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), on Pending Release Nos. 34-93784, 33-11030, and 34-94211 (August 18, 2022) (our "First Supplemental 13(d) Comment Letter"); Letter from Richard B. Zabel, General Counsel & Chief Legal Officer, Elliott Investment Management L.P., to Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission, dated November 18, 2022, re: Response to the Comment Letter Submitted by Wachtell, Lipton, Rosen and Katz on October 4, 2022 (our "Second Supplemental 13(d) Comment Letter") and Letter from Richard B. Zabel, General Counsel & Chief Legal Officer, Elliott Investment Management L.P., to Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission, dated June 27, 2023, re: DERA Rule 10B-1 Memorandum relating to the 13(d) Rulemaking Proposal (our "Third Supplemental 13(d) Comment Letter" and, together with our Original 13(d) Comment Letter, our First Supplemental 13(d) Comment Letter and our Second Supplemental 13(d) Comment Letter, our "13(d) Comment Letters").

In our 13(d) Comment Letters, we have noted that many of the issues with the 13(d) Rulemaking Proposal also apply to the Rule 10B-1 Rulemaking Proposal, and that the potential combination of the 13(d) and Rule 10B-1 Rulemaking Proposals would compound the problems created by each Rulemaking Proposal individually. Because the timing of the release of the Commission's 13(d) Rulemaking Proposal effectively prevented us from making this point in our Original Rule 10B-1 Comment Letter, we re-filed our Original Rule 10B-1 Comment Letter as an exhibit to our Original 13(d) Comment Letter to make clear the interrelationship of the two rulemaking proposals. Given that the Commission released the DERA Rule 10B-1 Memorandum shortly before the comment deadline for the DERA 13(d) Memorandum, we were also effectively prevented from commenting on the interrelationship of these two rulemakings in our Third Supplemental 13(d) Comment Letter. To continue to demonstrate the interrelationship between the Rule 10B-1 Rulemaking Proposal and the 13(d) Rulemaking Proposal, we are refiling our Third Supplemental 13(d) Comment Letter (including the supplemental report submitted as Exhibit A thereto by Craig M. Lewis, the Madison S. Wigginton Professor of Finance at Vanderbilt University's Owen Graduate School of Management, Professor of Law at Vanderbilt Law School, and a former Commission Chief Economist and Director of DERA, entitled "Review of the Supplemental Data and Analysis on Certain Economic Effects of Proposed Amendments Regarding the Reporting of Beneficial Ownership") as Exhibit B to this comment letter. We also discuss examples of the interrelationship between the two Rulemaking Proposals below.

Elliott Investment Management L.P. ("Elliott") is a leading multi-strategy investment advisor and one of the oldest firms of its kind under continuous management. Elliott invests in a wide range of areas to protect and grow the assets of our investors, which include approximately 101 educational endowments, more than 180 foundations, and more than 100 private and public pension plans, among others, which are often advised by their own dedicated advisors. Elliott's active investments in public equities have become one of our most significant and impactful efforts, resulting over the past decade in more than 140 disclosed engagements with public companies, and more in which our dialogue with the company remained private. The views expressed herein are those of Elliott and are not expressed as views of any other firm or person.[5]

We also submit for the Commission's consideration, as Exhibit A hereto, a supplemental report, dated August 21, 2023, entitled "Review of Supplemental Data and Analysis Regarding the Proposed Reporting Thresholds in the Equity Security-Based Swap Market" (the "Lewis Report") from Craig M. Lewis, the Madison S. Wigginton Professor of Finance at Vanderbilt University's Owen Graduate School of Management, Professor of Law at Vanderbilt Law School, and a former Commission Chief Economist and Director of DERA. Professor Lewis's prior tenure as Director of DERA affords him unique insight into the flaws contained in the DERA Rule 10B-1 Memorandum, as well as in the original economic analysis[6] that was provided as part of the Commission's Rule 10B-1 Rulemaking Proposal (as to which Professor Lewis commented as part of our Original Rule 10B-1 Comment Letter[7]).

As a threshold matter, we note that the Request for Comment section of Release No. 34-97762 focuses, in paragraphs 1 and 2 thereof, solely on the reporting threshold amount provisions of the Rule 10B-1 Rulemaking Proposal. The last paragraph of the Request for Comment section (which is an unnumbered paragraph) contains a broader request for comments regarding the analysis contained in the DERA Rule 10B-1 Memorandum generally. The DERA Rule 10B-1 Memorandum contains discussion of aspects of the Rule 10B-1 Rulemaking Proposal in addition to the reporting threshold amount. Accordingly, and in response to the final unnumbered paragraph of the Request for Comment section of Release No. 34-97762, our comments below are not limited to the reporting threshold amount provision of the Rule 10B-1 Rulemaking Proposal.

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5 While we only speak for ourselves and not on behalf of other activists in this comment letter, in several instances we share our views regarding how the activist market operates generally. Those observations are intended to reflect not only how we operate, but also how, in our experience, peer activists operate as a general matter. Over time, reaction to and support for our Rule 10B-1 Comment Letters and our 13(d) Comment Letters from numerous parts of the market has confirmed to us that we have accurately described the activist market and the concerns raised by the Commission's proposed approaches.

6 While the Administrative Procedure Act (the "APA") calls for a cost-benefit analysis for any proposed rulemaking, the Commission chooses to call these analyses "economic analyses." We use the Commission's term "economic analysis" herein to refer to the APA's mandated "cost-benefit analysis." As in many instances we do not believe that DERA's analysis in the DERA Rule 10B-1 Memorandum constitutes an economic analysis as required under the APA, we also use the term "empirical analysis."

7 *See* Lewis, Review of the Economic Analysis for Proposed Rule 10B-1 on the "Position Reporting of Large Security-Based Swap Positions" (March 21, 2022), submitted as Exhibit B to our Original Rule 10B-1 Comment Letter.

1. Overview

In high-level summary, our comments on the DERA Rule 10B-1 Memorandum are as follows:

- The Commission sought to justify the Rule 10B-1 Rulemaking Proposal as a response to the Archegos incident and also to alleged "informational asymmetries" relating to net short activist strategies in the CDS market. Activist investing such as we and our peer firms practice (which is distinct from CDS net short activism) was not mentioned in the Rule 10B-1 Rulemaking Proposal. The DERA 10B-1 Memorandum does not refer to Archegos or to informational asymmetries arising from net short CDS activist strategies, but focuses exclusively on activist investors such as Elliott and our peers. If the Commission seeks to change its justification for the adoption of Rule 10B-1, it must re-propose the rulemaking so as to provide a persuasive economic analysis that aligns with the Commission's underlying analysis.
- The data that is assembled by DERA is deeply flawed in many respects. This includes the use by DERA of a database to identify prominent activists that states that Elliott (and other prominent activists) have no assets under management, which is clearly not the case. This also includes reliance by DERA on inapposite CFTC regulations to attempt to justify unusual decisions made by DERA to exclude from its analysis data contained in the SEC's Security-Based Swap Data Repository.
- DERA asserts an unsupported and incorrect opinion that "many" activist investors use affiliates to shield position reporting in security-based swaps.
- DERA continues to disregard in this "economic analysis" the interaction of the Commission's 10B-1 Rulemaking Proposal and the Commission's 13(d) Rulemaking Proposal on the markets generally and on activist investing specifically.
- As was the case with DERA's supplemental memorandum relating to the Commission's 13(d) Rulemaking Proposal, DERA's Rule 10B-1 Memorandum contains numerous incorrect references and citations.

In the Rule 10B-1 Rulemaking Proposal, the Commission put forth two justifications for the adoption of Rule 10B-1: (i) prevention of a recurrence of the Archegos Capital Management incident, and (ii) addressing vague and unsubstantiated allegations of "informational asymmetry" in the market for certain cash-settled security-based swaps.[8] Our Original Rule

[8] As in our Original Comment Letter, we focus herein solely on cash-settled security-based swaps, as the security-based swaps described by the Commission in the Rule 10B-1 Rulemaking Proposal and by DERA in the DERA Rule 10B-1 Memorandum (total return swaps and credit default swaps) are cash-settled products. *See* Section 3(a)(68)(A) of the Exchange Act (defining cash-settled security-based swaps as transactions that settle by payment of cash in an amount determined pursuant to the terms of the transaction, and not by physical delivery of the underlying reference security); *see also* our Original Rule 10B-1 Comment Letter at p. 2, n. 1. Thus, all references herein to "security-based swaps" (or similar references) refer solely to equity derivative products that are cash settled.

10B-1 Comment Letter discussed at length why neither justification supports the Commission's proposal to adopt Rule 10B-1.[9]

The DERA Rule 10B-1 Memorandum makes no reference to these original justifications advanced by the Commission, but instead focuses only on "activism," broadly defined. We are not surprised that DERA does not present data attempting to justify the Rule 10B-1 Rulemaking Proposal as a means of preventing the next Archegos. Even if data relevant to this issue exists, we highly doubt it would show that this Proposal would prevent another incident like Archegos. Moreover, if such supporting data existed, we would have expected DERA to present it.[10]

As to the Commission's additional claim that the existence of "informational asymmetries" justifies the Rule 10B-1 Rulemaking Proposal, we note that in the Rule 10B-1 Proposing Release the Commission referred to net short activism as constituting the informational asymmetry justifying the adoption of proposed Rule 10B-1.[11] As we have previously noted, the Commission has failed to demonstrate that any such asymmetry actually exists in that context that has an adverse impact on the markets. We have also noted that if any such activity constituted fraudulent or misleading behavior, the Commission already possesses strong remedial tools.[12] If, as implied by the DERA Rule 10B-1 Memorandum, the justifications for proposed Rule 10B-1 have now shifted to the types of activism described by DERA, then we note that this "informational asymmetry" justification tied to net short activism should no longer be relevant – but that statement is not made in the DERA Rule 10B-1 Memorandum.

We remain concerned that the Commission's use in the Rule 10B-1 Rulemaking Proposal of the vague "informational asymmetry" term is simply a pejorative synonym for activist investing. As we noted in our 13(d) Comment Letters, the Commission's (and DERA's) rulemaking proposals and related materials in the context of the 13(d) Rulemaking Proposal are replete with such references. We have discussed in our various comment letters that this alleged linkage is unwarranted for a variety of reasons, including that such "asymmetries" reflect the normal functioning of capital markets. Thus, these references to informational asymmetries are nothing more than an unsubstantiated and unwarranted claim of market failure as an attempt to justify these unjustified regulatory proposals.[13]

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9 *See, e.g.*, our Original Rule 10B-1 Comment Letter at pp. 3, 14-17.

10 And of course that is true because Archegos, as we and others have emphasized, did not occur because of a risk inherent in security-based swaps. Instead, the massive losses that Archegos inflicted on many of its counterparties occurred because of the dishonesty of Archegos and complete abdication of risk management by those counterparties. Security-based swaps were merely the instrument involved. *See, e.g.*, our Original Rule 10B-1 Comment Letter at pp. 14-17.

11 *See* Rule 10B-1 Rulemaking Proposal at pp. 114-17.

12 *See* our Original Rule 10B-1 Comment letter at pp. 3, 18, 26.

13 *See* our Original Rule 10B-1 Comment Letter at pp. 3, 16. *See also* our Original 13(d) Comment Letter at pp. 29, 30 for a discussion of the Commission's "information asymmetry" claim in the context of the Commission's 13(d) rulemaking proposal. *See also* the Rule 10B-1 Rulemaking Proposal at p. 150 (in which the Commission, in the Economic Analysis section of the proposing release, makes the following statement, which is the only reference to "market failure" in the entire Rule 10B-1 Rulemaking Proposal: "These thresholds limit the number of reporting parties that would be required to report and the related costs (including related to compliance and analyzing this information), while still addressing the market failure as a result of the adverse selection caused by asymmetric information in the market."). We note that this statement is not only not contained in the Commission's evaluation of the Rule 10B-1 Rulemaking Proposal, it is completely bereft of supporting analysis or evidence. *See also* Sanford J. Grossman & Joseph E. Stiglitz, *On the Impossibility of Informationally Efficient Markets*, 70 AM. ECON. REV. 393 (1980).

The Rule 10B-1 Rulemaking Proposal did not refer to activism at all,[14] and neither Archegos nor any of the financial institutions that were its victims were activist investors. Yet, DERA now produces an empirical analysis for the Rule 10B-1 Rulemaking Proposal that, for the first time, attempts to illustrate the effect of the rulemaking proposal on activists, and wholly disregards the proposed rule's impact on those that were involved in the Archegos incident. Of course, we and other market participants commented on the Rule 10B-1 Rulemaking Proposal because, despite the absence of explicit references to activism in that Proposal, the Commission's underlying intent was nonetheless clear. Thus, we and other commenters noted the failure of the Commission to acknowledge, much less evaluate, the significant costs that the rule, if adopted, would impose on activism generally if activists such as Elliott are in fact the Commission's main focus in proposing Rule 10B-1. The DERA 10B-1 Memorandum now makes explicit what was implied in the Commission's Rule 10B-1 Rulemaking Proposal – that activist investors such as us are the target of this proposed rulemaking.

As we note herein and as is noted in the Lewis Report, the analysis contained in the DERA 10B-1 Memorandum is fundamentally flawed. There is, however, at least the glimmer of an acknowledgment that Rule 10B-1, if adopted, will affect the activist market. We of course agree with that point, although we do not believe DERA has accurately or adequately evaluated this issue. It is a fundamental principle of administrative procedure that the economic analysis of a proposed rulemaking needs to tie to the regulator's justifications for that rulemaking; it would be arbitrary and capricious for an agency to consider the economic impacts of its proposal on only some aspects of the market without analyzing the effects on the supposed problems that, according to the agency, made regulation necessary in the first place. If, in fact, the Commission now seeks to justify the Rule 10B-1 Rulemaking Proposal on the backs of activist investors such as Elliott, the Commission must re-propose the rule in its entirety, with its justifications contained in the proposal and supported by economic analysis.[15] As we discuss in detail below, a new empirical analysis that attempts to better characterize the "baseline," standing alone, cannot achieve this shift, even were the empirical analysis analytically sound (as is not the case here).[16]

We remain mystified by the Commission's continued bias against activism, especially when, as we note below, DERA's own data clearly shows that exponentially more investors benefit from activism (for most at no cost) than those few who sell of their own accord before the activist's intent is known.[17] As with the DERA 13(d) Memorandum, the DERA Rule 10B-1 Memorandum's analysis focuses solely on attempting to quantify the impact of the rulemaking

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[14] The Rule 10B-1 Rulemaking Proposal contained three references to "net short activism," which is a trading strategy in the CDS market that is distinct from the broader form of activism to which DERA refers throughout the DERA Rule 10B-1 Memorandum. The Rule 10B-1 Rulemaking Proposal contained no reference to any other form of activist investing.

[15] *See Conn. Light & Power Co. v. Nuclear Reg. Comm'n*, 673 F.2d 525, 528 (D.C. Cir. 1982) (for interested parties to have meaningful opportunity to comment on proposed rule, notice of proposed rulemaking must "provide an accurate picture of the reasoning that has led the agency to the proposed rule"); Mem. from the Div. of Risk, Strategy, and Fin. Innovation (RFSI) and Off. of the Gen. Counsel, Current Guidance on Economic Analysis in SEC Rulemakings 16 (Mar. 16, 2012).

[16] *See Tex. Ass'n of Mfrs. v. U.S. Consumer Prod. Safety Comm'n*, 989 F.3d 368, 383 (5th Cir. 2021) (agency "violated the APA's notice-and-comment procedures by not adequately allowing for comment after it changed its primary justification for the rule but before adopting a final rule.").

[17] As we discuss in greater detail below, DERA has determined that annual gains from activism exceed estimated losses therefrom by a factor of 148 times. *See* DERA 13(d) Memorandum at Tables 4-5; *see also* our Third Supplemental 13(d) Comment Letter, Section 4.B.

proposal on activist investors. While DERA cites data demonstrating that Rule 10B-1, if adopted, would negatively affect activists, DERA attempts to show that the magnitude of adverse impact will be tolerable for the activist community. DERA provides no empirical basis justifying this assertion. It is, in fact, simply an unsubstantiated opinion posing as an economic analysis. Absent a discussion of how these costs compare to purported benefits, the analysis cannot withstand scrutiny under the APA.[18]

DERA's definition of "prominent activists" is based on the same deeply flawed data set upon which DERA relied in its 13(d) Memorandum (which, for example, astonishingly claims that Elliott has no assets under management). DERA also makes a casual, yet wholly unsubstantiated, assertion that "many" activist investors maintain equity security-based swap exposure through "an entity other than the parent or child entity." As we discuss below, this is, to our knowledge of the market practices of our peer firms, an incorrect assertion (and we confirm that it is incorrect as to us). If the Commission or DERA has data that supports this bald assertion, it should have been produced for public evaluation. In the absence of any such corroborating data, the assertion is simply unfounded speculation that cannot be taken into account by the Commission in this rulemaking proposal and should be withdrawn.

DERA points to several issues in data that the Commission is now receiving on a private basis from market participants under Regulation SBSR. DERA states that it had to manually "curate" this data to render it usable for purposes of its analysis, although it oddly refers to a CFTC release (which relates to data for swaps *other* than security-based swaps, which are solely within the SEC's regulatory jurisdiction). This "curated" data is then supplemented by data manually pulled by DERA from 11 Schedule 13D filings. The fact that data generated pursuant to Regulation SBSR is not yet sufficient to be reliable is not at all surprising given the recent implementation of that regulation. But this shortcoming demonstrates a point made in our Original Rule 10B-1 Comment Letter: that given the recent effective date of Regulation SBSR, it is premature for the Commission to propose a separate new data-reporting mandate relating to the security-based swap market.

Finally, the Lewis Report details a number of problems with the data analysis and collection methods used in the DERA Rule 10B-1 Memorandum.[19]

We continue to urge the Commission to abandon its proposal to adopt new Rule 10B-1 in any form and instead to rely upon resources that are currently at the Commission's disposal (and do not entail public disclosure of proprietary trading information).

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[18] *See, e.g.*, *Michigan v. EPA*, 576 U.S. 743, 752–53 (2014) (agencies must "pa[y] attention to the advantages and the disadvantages of [their] decisions" and act unreasonably when they adopt rules whose benefits are far outweighed by their costs); *Motor Veh. Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency action is arbitrary and capricious where it "fail[s] to consider an important aspect of the problem"); *Chamber of Commerce of the U.S. v. SEC*, 412 F.3d 133, 144-5 (D.C. Cir. 2005) (the requirement that Commission rulemaking be conducted in accordance with law imposes on the Commission a "statutory obligation to determine as best it can the economic implications of the rule.").

[19] The entirety of the Lewis Report focuses on these issues. *See, e.g.*, Lewis Report at pp. 7, 9, 10-11.

2. The DERA Rule 10B-1 Memorandum Seeks to Justify the Rule 10B-1 Rulemaking Proposal on a Basis that the Commission did not Assert, and that DERA does not Justify

The Commission sought to justify the adoption of proposed Rule 10B-1 on two bases: (i) prevention of a recurrence of the Archegos Capital Management incident, and (ii) vague and unsubstantiated allegations of "informational asymmetry" in certain security-based swap markets. DERA, in its attempt to "provide supplemental analysis related to the economic effects of proposed Rule 10B-1,"[20] jettisons both of these purported justifications. In fact, the words "Archegos" and "asymmetry" do not appear in the DERA Rule 10B-1 Memorandum.[21]

Instead, DERA pivots to a world in which the Rule 10B-1 Rulemaking Proposal is now focused solely on activist investors such as Elliott, and attempts to perform an empirical analysis predicated upon the implicit assertion that the impact of Rule 10B-1 on activist investors will be tolerable for the activists. We have significant concerns with the validity of the data that is relied upon in reaching that conclusion (which the Lewis Report describes in greater detail), but we have equally significant concerns with the fundamental inadequacy of the analysis itself. If this is intended to be a comprehensive economic analysis rather than an attempt to fill a gap in the proposed rule's baseline, it fails. An economic analysis must measure the costs, measure the benefits, and then weigh each against the other. Simply presuming that identified costs are not material when compared to purported benefits that are neither quantified numerically nor established factually does not constitute a valid economic analysis. Any rulemaking relying upon such an "analysis" is at high risk not only of being substantively incorrect, but also of being found to be arbitrary and capricious in violation of the APA.[22]

We also note that, while DERA unmoors itself from the Commission's original justifications in the Rule 10B-1 Rulemaking Proposal, it does not acknowledge this shift in direction. We thus cannot evaluate why this shift has occurred, or whether there is a valid basis for it. Similarly, DERA's supplemental memorandum is wholly distinct from the economic analysis contained in the Rule 10B-1 Rulemaking Proposal. While DERA now focuses exclusively on activism, DERA's original economic analysis did not even consider activist investors outside of the far narrower realm of net short activism in the CDS market. Again, no

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[20] DERA Rule 10B-1 Memorandum at p. 3.

[21] As we noted in our Original 10B-1 Comment Letter, the Archegos incident was simply an egregious risk management failure at a number of significant financial institutions in their interactions with a single high-risk client with a checkered history. We also noted that, in our experience, the market had evolved post-Archegos so that most if not all dealers now engage in more prudent risk management practices when facing highly leveraged clients. *See* our Original 10B-1 Comment Letter at pp. 14-17. While the losses incurred by those financial institutions were massive, there was no threat to the markets as a whole, and no need for central banks or prudential regulators to intervene to stabilize the situation. Thus, Archegos was not a market failure, and the Commission has failed to demonstrate why this single incident warrants the adoption of the Rule 10B-1 Rulemaking Proposal.

[22] *See, e.g.*, *Michigan*, 576 U.S. at 752-53. Although not expressly noted in the DERA Rule 10B-1 Memorandum, we remind the Commission of a point made in our Original Rule 10B-1 Comment Letter: the Commission's attempt in the Rule 10B-1 Rulemaking Proposal to justify the Rule as a potentially helpful data collection requirement does not, without more, constitute a valid basis for rulemaking. *See NYSE v. SEC*, 962 F.3d 541, 555 (D.C. Cir. 2020) ("The Commission has no delegated authority to promulgate a 'one-off' regulation . . . that imposes significant, costly, and disparate regulatory requirements merely to secure information that *may or may not* indicate to the SEC whether there is a problem worthy of regulation.") (emphasis in original). *See* our Original Rule 10B-1 Comment Letter at n. 44.

explanation is provided for this wholesale paradigm shift -- an omission that in itself is at odds with the APA's requirement of reasoned decisionmaking.[23]

To the extent DERA's shift in focus suggests that the Commission is altering the rationale for this rulemaking, that shift is flatly inconsistent with basic tenets of the APA. To comply with the APA's requirement that an agency give notice and an opportunity to comment on proposed rules, an agency must allow interested parties an opportunity "to participate in a meaningful way in the discussion and final formulation of rules."[24] Interested parties cannot participate in a "meaningful way" without knowing why the agency is considering taking the action it is proposing to take. As the D.C. Circuit has explained, "[i]f the notice of proposed rule-making fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency's proposals," and the agency may thus "operate with a one-sided or mistaken picture of the issues at stake in a rule-making."[25] Should the Commission attempt to adopt Rule 10B-1 based on a new justification not included in the Rule 10B-1 Rulemaking Proposal, it will have deprived interested parties of a meaningful opportunity to comment on the Commission's actual reasons for imposing this rule, and will have thus violated the APA's notice-and-comment requirement.

The Commission cannot circumvent the requirements of notice-and-comment rulemaking by having DERA, a Division of the Commission, advance a new justification for the rulemaking in the DERA Rule 10B-1 Memorandum. The APA is explicit that a "notice of proposed rule-making" must be "published in the Federal Register" and include, among other things, "reference to the legal authority under which the rule is proposed" or "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[26] The requirement that proposals be published in the Federal Register is one of "the most fundamental of the APA's procedural requirements,"[27] and ensures that the public has at least the opportunity to understand the reasons why the agency is considering acting.[28] The DERA Rule 10B-1 Memorandum, which lacks the required contents of a "notice of proposed rule making" and was not published in the Federal Register, but is instead only available on the SEC's EDGAR website, cannot satisfy those requirements.[29] Nor does it purport to do so, but is instead styled only as a "a memorandum that provides supplemental data and analysis related to anticipated economic effects of the [Rule 10B-1 Rulemaking Proposal]"[30] Accordingly, it is entirely unclear if the Commission itself is even considering relying on any purported justifications for rulemaking contained in the DERA Rule 10B-1 Memorandum. If the Commission wishes to completely change the rationale for its proposal mid-stream, then to comply with the notice of proposed

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[23] *Cf., e.g.*, *Michigan*, 576 U.S. at 743; *Dept. of Homeland Security v. Regents of the Univ. of California*, 140 S.Ct. 1891, 1905 (2020); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-14 (2009).

[24] *Conn. Light*, 673 F.2d at 528.

[25] *Id.*

[26] 5 U.S.C. § 553(b).

[27] *Transp. Div. v. Fed. R.R. Admin.*, 988 F.3d 1170, 1180 (9th Cir. 2021).

[28] *Rodway v. USDA*, 514 F.2d 809, 815 (D.C. Cir. 1975) ("Only publication in the Federal Register meets the APA requirement of constructive notice.").

[29] Although the Commission's release reopening the comment period for the Rule 10B-1 Rulemaking Proposal was published in the Federal Register, 88 Fed. Reg. 41338 (June 26, 2023), the DERA Rule 10B-1 memorandum was not included in that release as published in the Federal Register.

[30] 88 Fed. Reg. 41338, 41339-40 (June 26, 2023).

rulemaking procedures described above, it must re-propose the regulation.[31] Playing regulatory pin-the-tail-on-the-donkey requires, at a minimum, that the Commission pick a donkey.

The shift likely occurred because the Commission's original justifications proved sickly to the point of unviable under even mild examination. DERA thus pivoted to targeting activism explicitly, but in doing so the basis for the Rule 10B-1 proposal went from unviable to dead on arrival. This is because DERA, in its 13(d) Memorandum, produced data demonstrating that the value of annual gains from activism exceed the losses estimated by DERA to have been caused by activism by a factor of *148 times*.[32] While we disagree with a number of the definitional and analytical predicates underlying the allegation that activism creates harms for investors, even if we assume DERA's quantification of purported harms to be correct, the benefits of activism massively outweigh the costs. This is fatal to the Commission's Rule 10B-1 Rulemaking Proposal in its current form.

Clearly, DERA has useful data as to the benefits of activism, yet it does not refer to this data in its Rule 10B-1 Memorandum. This leads one to ask why DERA has shifted its economic analysis to focus on the subset of investors in security-based swaps that engage in activism generally, having previously focused its entire economic analysis in the Rule 10B-1 Rulemaking Proposal on different components of the relevant market. DERA is silent on this question in its Rule 10B-1 Memorandum.[33] The shift in the DERA Rule 10B-1 Memorandum either carelessly overlooked the data from the 13(d) Memorandum or reflects that the Commission has in this particular instance, as we have previously suggested, decided that the insular part of the market it wants to protect are the (1) officers and directors of under-performing companies whom activists hold to account and (2) the tiny (and unquantified by the Commission) fraction of shareholders who sell their stock for their own independent reasons and purportedly would not have had they known of the activist's position earlier. To protect these select few, the Commission would overturn a system that is remarkably beneficial to the majority of investors – by a factor of 148 times. Beyond arbitrary and capricious, this is just bad regulation.

3. DERA's Data on Activists is Flawed

DERA defines "prominent activist" by reference to a FactSet database.[34] This is the same resource that DERA used to define activists in the DERA 13(d) Memorandum. As we noted in our Third Supplemental 13(d) Comment Letter, this resource is riddled with errors, not the least of which is the remarkable assertion that Elliott has no assets under management.[35] This error (and many others like it) compromises the validity of any analysis that is based upon such flawed data.

In addition, DERA relies upon data gleaned from a manual review of Schedule 13D filings performed by DERA staff. This raises a series of questions, many of which are addressed

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31 *See Tex. Ass'n of Mfrs.*, 989 F.3d at 383.

32 *See* DERA 13(d) Memorandum at Tables 4-5 (estimating annual gains from activism at $13.8 billion, as compared with estimated annual losses due to activism of $93 million); *see also* our Third Supplemental 13(d) Comment Letter, Section 4.B.

33 We acknowledge that DERA does cite to academic literature for the proposition that activists generate value for all investors. *See* DERA Rule 10B-1 Memorandum at n. 3. However, DERA refers to these authorities without any analysis. We find this odd given DERA's publication (in the DERA 13(d) Memorandum) of its own analysis of data that supports this point.

34 *See* DERA Rule 10B-1 Memorandum at n. 32.

35 *See* our Third Supplemental 13(d) Comment Letter, Section 3.A.

in detail in the Lewis Report. In addition to those concerns, we note that DERA utilized data reported to the Commission pursuant to Regulation SBSR, but felt compelled to "curate" such data because of data issues contained therein.[36] DERA also limited the time range of Regulation SBSR data that it considered due to "structural changes in the transactional data reported . . . after December 5, 2022."[37] This truncation calls into question the applicability and accuracy of the data derived from the Regulation SBSR database upon which DERA attempts to rely, as discussed in greater detail in the Lewis Report.

The fact that DERA found that Regulation SBSR data was not yet reliable[38] directly supports one of the key points we made in our Original Rule 10B-1 Comment Letter: with the very recent effective date of Regulation SBSR, it was premature for the Commission to propose a new data requirement for the security-based swap market given the significant amount of data that the Commission had just started receiving under that regulation.[39] It is not at all surprising to find that there are issues with the quality of some of that data -- all the more reason to allow time for the Commission and the market to iron out kinks in the implementation of Regulation SBSR. Once these teething issues have been addressed, the Commission can carefully evaluate the data that it receives (without the need to potentially compromise the integrity of that data by manually curating it) to determine whether the additional position reporting that Rule 10B-1 would mandate is necessary or appropriate.[40]

DERA's reliance upon Schedule 13D filings by "prominent activists" is also concerning, if only because DERA's analysis is comprised of only 11 Schedule 13D filings in which "prominent activists" held security-based swap positions over a sample period of approximately 13 months. Even a cursory review of publicly available data would make clear that this vastly underrepresents activist activity during the measurement period. Yet we have no ability to evaluate why DERA feels compelled to supplement the data it receives under Regulation SBSR with such limited Schedule 13D data.

Each of these concerns calls into question the accuracy and representativeness of the data DERA has considered in preparing the DERA Rule 10B-1 Memorandum. We believe that data derived from such a suspect underlying set of resources will be skewed or otherwise flawed.[41] DERA does not evaluate whether its data sets contain any such skewing or other

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[36] *See* DERA Rule 10B-1 Memorandum at n. 10 and accompanying text.

[37] *Id.*, at n. 9 and accompanying text. See Part 6 of this Comment Letter for a detailed discussion of this point.

[38] See DERA Rule 10B-1 Memorandum, p. 3 ("The Sample Period is limited to this date range because of structural changes in the transaction data reported to SBSDRs after December 5, 2022"); *see also*, *id.* at n. 10 ("The SBSDR data as submitted by security-based swap market participants has several data issues").

[39] *See* our Original Rule 10B-1 Comment Letter, Section 4 (portion entitled "The Proposed Rule is Premature") and Section 6.

[40] We and Prof. Lewis have also observed that the Commission has access to confidential data showing with precision who was on each side of every trade in the equities markets, via the Consolidated Audit Trail. It does not appear that DERA considered this source in its compilation of data for the DERA Rule 10B-1 Memorandum. *See* our Third Supplemental 13(d) Comment Letter at n. 39. In addition, the Commission has access to relevant data contained in filings of Schedules 13D, 13G, 13F and Form N-PORT.

[41] As but one example, we note that DERA asserts in the DERA Rule 10B-1 Memorandum that activists only hold $8.41 million notional amount in security-based swaps for a given position on a given day. While we cannot speak to aggregate positions of peer activists firms, and we do not purport to comment on our historical security-based swap exposures (as such data is highly confidential and proprietary information of our firm), we find that it defies credulity to conclude that aggregate market activity in security-based swap products by investors commonly understood to be activist investors is this small over any period of relevance for a given activist campaign. This

issues, suggesting that DERA has "fail[ed] to consider an important aspect of the problem."[42] Instead, DERA acknowledges that it has found it difficult to compile data that accurately characterizes the security-based swap positions of activist investors.[43] At a minimum, this acknowledgement, combined with the various of flaws in DERA's data that (not surprisingly) exist, begs the question of why DERA and the Commission now seek to justify adoption of Rule 10B-1 solely based upon market activities of activist investors. Not only has no credible theory for a change in regulatory approach been proffered, DERA now admits "significant limitations" in its ability to compile relevant data in the portion of the market to which it has shifted its focus. This raises important questions about the validity of the analysis contained in the DERA Rule 10B-1 Memorandum, and also suggests that any consideration of the imposition of publicly available position reporting obligations in this market is premature.[44]

As we noted previously, we understand that there are other sources of data on this point that appear to be more accurate than the FactSet resource.[45] We would be happy to share our thoughts on these additional data sets with the Commission or DERA.

4. DERA Makes an Unsupported Allegation that Activists Use Affiliates to Shield Position Reporting of Security-based Swaps

In an apparent attempt to justify its difficulties in identifying security-based swap positions associated with activist investors, DERA makes the following statement:

> [M]any 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.[46]

There is a lot to unpack in this statement, but given the context in which it is made (DERA's acknowledgement that it has encountered "significant limitations" in ascertaining security-based swap utilization by activist investors), this passage is clearly intended to justify, at least in part, DERA's difficulties in identifying such information. While we allow for the possibility that DERA has seen some evidence of the utilization of affiliates to hold positions,[47] it is quite troubling that DERA makes a categorical assertion that it is "aware of many" such cases without providing any basis for that assertion – particularly in light of DERA's acknowledged difficulties

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massive understatement, of course, then undermines DERA's attempt to establish the flawed proposition that the costs that would be imposed on activists if Rule 10B-1 is adopted will be tolerable.

42 *State Farm*, 463 U.S. at 43.

43 *See* DERA Rule 10B-1 Memorandum, p. 12 ("Our analysis is subject to significant limitations in our ability to identify equity security-based swap positions associated to an activist investor.").

44 We note that we have submitted a FOIA request to the Commission seeking, among other things, the data assembled by DERA for evaluation in the DERA Rule 10B-1 Memorandum. Freedom of Information Act Request submitted by Thomas R. Brugato of our counsel Covington & Burling LLP on July 12, 2023 and acknowledged by the Commission's Office of FOIA Services on July 13, 2023 (FOIA Tracking Number 23-02870-FOIA). We have not yet received a substantive response to that request, so we are unable to ascertain how the issues described above may have affected the conclusions drawn by DERA. We also note that we have yet to receive a substantive response to our FOIA request filed on June 1, 2023 with respect to the DERA Rule 10B-1 Memorandum relating to the 13(d) Rulemaking Proposal. *See* our Third Supplemental 13(d) Comment Letter at n. 79 and accompanying text.

45 *See* our Third Supplemental 13(d) Comment Letter at p. 6.

46 *See* DERA Rule 10B-1 Memorandum, p. 12 (emphasis added).

47 We of course are not able to directly evaluate this assertion, as we have not been granted access to DERA's data that we have requested pursuant to FOIA. *See* note 44, *supra*.

in ascertaining this information. If this is based upon Schedule 13D filings reviewed by DERA, we note they only identified 11 such filings as relevant to their analysis. Such a small sample cannot provide a basis for the broad sweep of this assertion. We also note that DERA has, seemingly arbitrarily, excluded holdings of affiliates from its analysis.[48] This is of course contrary to Section 13(d), which generally requires aggregation of positions held by affiliates in reporting beneficial ownership under that statutory provision and the Commission's related regulations.

While we of course cannot speak specifically as to the practices of peer activist firms generally, we can confirm that we do not utilize portfolio companies or other entities in our structure to hide or obfuscate security-based swap positions, and we believe that our peer activist firms also comply with their Commission-mandated disclosure obligations.[49]

We also note that this suggestion that activists are not complying with existing reporting requirements under Section 13(d) is not supported by any citation to authority of any kind (case law, academic or otherwise) or any record of enforcement by the Commission against this alleged practice. It is yet another unfounded attack on activism generally, in this instance implying that activists structure their security-based swap transactions to mask their positions from any disclosure obligations that may otherwise apply. Either the Commission has simply looked the other way on this supposedly violative practice it identifies, or it does not in fact exist in any significant way. As we have noted previously,[50] it is troubling that an unsubstantiated, unjustified and pejorative suggestion such as this could be made in a document prepared by a regulator as part of an active notice-and-comment process. This bias, which has pervaded and persisted in the Commission's submissions, will undercut the principle that the agency's rulemaking must not be arbitrary and capricious in any future judicial review.

5. DERA Fails to Consider the Interaction of the Rule 10B-1 Rulemaking Proposal with the Commission's Roughly Concurrent 13(d) Rulemaking Proposal

As we have observed previously, the Commission's Rule 10B-1 Rulemaking Proposal raises issues of significant import to the markets, which interact directly with aspects of the Commission's 13(d) Rulemaking Proposal. In addition, we have also observed that the potential combination of these rulemakings would compound the problems posed by each rulemaking separately.[51] However, due to the lack of Commission analysis on this issue and the Commission's utilization of unduly compressed comment periods for such significant rulemakings, we have been effectively precluded from commenting on this.

We submitted a comment letter to the Commission on January 13, 2022 requesting an extension of the comment period on the Rule 10B-1 Rulemaking Proposal to 120 days.[52] As the

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48 *See* DERA Rule 10B-1 Memorandum, p. 5, n. 21.

49 We note in this regard that if a position is reportable on Schedule 13D or 13G, the fact it is held by an affiliate should not enable the parent to avoid the disclosure obligation. We further note that hedge accounting rules under U.S. Generally Accepted Accounting Principles would, as a general matter, compel the location of a derivatives position with the legal entity that owns the risk to which the derivative product relates.

50 We are, unfortunately, used to this by now. *See* our Third Supplemental 13(d) Comment Letter at p. 19 (noting DERA's unfounded and unsubstantiated allegation that activists aid and abet insider trading).

51 *See* our Third Supplemental 13(d) Comment Letter, Section 2 (discussion of the interaction of the two proposed rulemakings in the context of commenting on the DERA 13(d) Memorandum); *see also* our Original 13(d) Comment Letter at pp. 1-3, 26.

52 *See* note 3, *supra*.

Commission did not respond to that comment letter, or to similar letters submitted by other interested market participants, we did not formally request an extension of the similarly brief comment period for the 13(d) Rulemaking Proposal. This concern has been exacerbated by the overlap of comment periods relating to these two rulemakings.[53] We also note that concern with the Commission's shift to utilizing unduly short comment periods has not been limited to these two rulemakings.[54]

There are several areas of interaction between the Commission's Rule 10B-1 Rulemaking Proposal and its 13(d) Rulemaking Proposal. Each Rulemaking Proposal will, if adopted in anything close to their proposed forms, cause significant and adverse changes that will impair the ability of activist investors to ply their trade, to the significant detriment of the markets and investors as a whole. We describe those issues in detail in our Rule 10B-1 Comment Letters and our 13(d) Comment Letters. If both rulemaking proposals are adopted, those adverse effects will be amplified. Nowhere in the economic analysis for either Rulemaking Proposal (either as initially promulgated by the Commission or as supplementally provided by DERA) is this interaction acknowledged, much less considered. Each of the points noted below were discussed at length in our corresponding Original Comment Letters. We note them here to demonstrate how these effects will interact if both Rulemaking Proposals are adopted by the Commission.

Both Rulemaking Proposals in effect use disclosure as a tool to frustrate activism, including as follows:

- If adopted, Rule 10B-1 would, by requiring next-day public disclosure of security-based swap positions in excess of very low thresholds, enable market participants to herd into positions that an activist seeks to build, effectively removing the economic benefit that an activist needs to realize to compensate it for the very significant costs it incurs in developing, testing and implementing a given investment thesis.

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53 Comment periods for the proposed rulemakings and subsequent DERA Memoranda have been as follows:

Release	*Date of Issuance*	*Expiration of Comment Period*
Rule 10B-1 Rulemaking Proposal	December 15, 2021	March 21, 2022
Section 13(d) Rulemaking Proposal	February 10, 2022	April 11, 2022
DERA 13(d) Memorandum	April 28, 2023	June 27, 2023
DERA Rule 10B-1 Memorandum	June 20, 2023	August 21, 2023

While comment periods are calibrated to publication of a proposed rulemaking in the FEDERAL REGISTER, we provide the date of issuance by the Commission on its EDGAR website, as market participants learn of these releases prior to publication in the FEDERAL REGISTER.

As we note in footnote 4 above, in each of the pairs of releases identified above, the latter-issued release came out sufficiently close to the due date for comments on the earlier-issued release that we were not able to address the interaction of both releases in the initially submitted letter in detail. Note in particular that the DERA Rule 10B-1 Memorandum was issued by the Commission a mere week before the due date of comments on the DERA 13(D) Memorandum. While the time difference with respect to the initial rulemaking proposals was longer, given the complexity of the rulemaking proposals and the volume of our comment letters (including two expert reports accompanying our Original Rule 10B-1 Comment Letter and one expert report accompanying our Original 13(d) Comment Letter), we were similarly precluded from evaluating this interaction in detail in our Original Rule 10B-1 Comment Letter.

54 *See, e.g.*, Amicus Curiae Brief of Manhattan Institute in Brief for Petitioner and Vacatur, *Chamber of Commerce of the U.S. v. SEC*, No. 23-60255 (5th Cir. 2023), Section 2 (45-day comment period in proposed rulemaking regarding stock repurchases "falls well outside of past norms").

- The proposed changes to Section 13(d) would greatly expand the definition of "group", effectively preventing engaged shareholders from communicating with each other given the unreasonable legal peril they would face given the broad subjectivity of the proposed new definitions.
- The proposed changes to Section 13(d) likely would cause derivatives dealers to refrain from trading with known activists, given the risk that their firms could be viewed to be part of a Section 13(d) group for doing nothing more than engaging in their existing business of dealing in derivatives.

Each of these examples, in isolation, shows that both rulemaking proposals, if adopted, will impair efficiency, competition, and capital formation, or "ECCF" (which the Commission is statutorily mandated to enhance in all rulemakings) by enabling managements and boards of underperforming companies to shield themselves from activist investors, not by improving their performance, but instead by hiding behind these new rules.

When these two proposed rulemakings are combined, however, the impact on activism, and ECCF generally, will be far more profound. Herding will squeeze, if not eliminate, returns an activist (and aligned non-activist holders) can achieve. Imprecise and overbroad subjectivity in the definition of group will discourage shareholders who are dissatisfied with the performance of a given company from engaging with other shareholders – instead, they likely will just sell, perpetuating the entrenchment of incumbent sub-par management and boards. This will chill healthy market discussion. And derivatives dealers will refrain from trading with known activists, further impairing an activist's ability to build its investment, which is a necessary component of any activism campaign. Taken together, these effects far more profoundly impair activism, and thus ECCF and the markets generally, than any of these effects would in isolation.

Yet there is no acknowledgement or analysis (economic or otherwise) of these or other compounding effects in any of the Commission's writings on these Rulemaking Proposals. This is a fundamental failure of the requirement to provide an economic analysis that evaluates the costs, and benefits, of a proposed rulemaking. If two regulations, released at the same time, set for simultaneous Commission review, and scheduled for roughly simultaneous adoption,[55] are both directly targeted at activists and are reviewed independently, it undermines a thorough economic analysis. By breaking a regulation into multiple parts and examining each part separately, a comprehensive economic analysis can always be sidestepped. This "head in the sand" approach is not in accordance with the mandates of the APA or Commission guidelines.

We are not the only market participant to object to the Commission's failure to consider the interaction of concurrently, proposed regulations. As we have noted previously, the Commission, in its apparent haste to adopt proposed Rule 10B-1, failed to explain why it proposes to mandate public disclosure of highly sensitive trade position data when it has

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[55] In the portion of the most recent Agency Rule List published by the General Services Administration's Office of Information and Regulatory Affairs relating to pending rulemakings of the Commission, the Commission estimates that both the Rule 10B-1 Rulemaking Proposal (after giving effect to the separation of the Rule 10B-1 proposal from the other proposed rules that were proposed concurrently with Rule 10B-1 but subsequently adopted separately) and the 13(d) Rulemaking Proposal will be completed in October 2023. *See* https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=3235&csrf_token=ABBAA84824C29E01B566B0472A6E99E59C730916821A14613C79DE7F48AC8EAEF4CA3A7C929E9B10E667F119BAA4958D5293.

historically acknowledged the importance of protecting this information, opting in roughly concurrent rulemakings for privately disclosed data or publicly disclosed aggregated and anonymized data.[56] A recent comment letter filed in response to the reopening of the Rule 10B-1 comment period also makes this point, noting the Commission's inconsistent treatment of trade position information across three different and roughly concurrently rulemakings.[57]

6. The DERA Rule 10B-1 Memorandum Contains Numerous Inaccurate Citations to Authority

We note below several instances in the DERA Rule 10B-1 Memorandum in which citations do not accurately characterize the underlying authority, cite blatantly incorrect or inapposite authority, or in which less substantive but nonetheless troubling administrative errors have made their way into the record.

- Footnote 6: The explanatory parenthetical to the citation to our Original Rule 10B-1 Comment Letter inadvertently repeats the text of the explanatory parenthetical in Footnote 8, resulting in a citation (in Footnote 6) that contains no substance.
- Footnote 8: While, unlike in Footnote 6, the explanatory parenthetical to Footnote 8 does accurately reflect text contained in our Original Rule 10B-1 Comment Letter, that text does not support the proposition in the text of the DERA Rule 10B-1 Memorandum. It is not accurate to state that activists' strategies necessarily entail only the acquisition of minority stakes, and we do not make that assertion in our Original 13(d) Comment Letter.
- Footnote 8: In addition to the issue noted in the immediately preceding bullet point, we struggle to understand the relevance of the explanatory parenthetical included in the citation to the letter from Robert E. Bishop and Frank Partnoy, as that extracted statement also does not support the proposition in the text that activists only acquire minority stakes.
- Footnote 9: DERA cites to a CFTC rulemaking in its discussion of "structural changes in the transaction data reported to SBSDRs". An SBSDR is a Security-Based Swap Data Repository, which is regulated by the Commission pursuant to Regulation SBSR.[58] The CFTC does not have regulatory authority over security-based swaps – that authority resides exclusively with the Commission. The CFTC's swap reporting regulations only relate to swaps *other* than security-based swaps,[59] and thus are wholly inapposite to the security-based swaps that are the subject of proposed Rule 10B-1. Yet DERA seeks to justify excluding securities-based swap data from a significant period of time in its economic analysis due to issues with the *CFTC's* swap data. This citation is no more relevant to DERA's attempt to justify its limitation on data analysis for purposes of Rule 10B-1 than would be a citation to Hammurabi's Code, as neither

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56 *See* our Original Rule 10B-1 Comment Letter at pp. 21-22.

57 Comment Letter submitted by the Alternative Investment Management Association in response to Commission Release No. 34-99762 (Aug. 11, 2023).

58 The Commission's Regulation SBSR is set forth at 17 CFR Part 242.

59 The CFTC's regulation of SDRs (Swap Data Repositories) is set forth at 17 CFR §49.12.

> Hammurabi had, nor does the CFTC have, jurisdiction over security-based swaps.[60]

The Lewis Report details further issues with the accuracy, or reliability, of data that is contained in the DERA Rule 10B-1 Memorandum.

As we have noted previously, we are disappointed by the extent and bent of substantive errors in citations in the DERA Memoranda.[61] We are, in fact, stunned that the Commission would publish analysis that incorrectly cites CFTC guidance as authority for a matter subject to the exclusive jurisdiction of the Commission. The pattern supports our prior conclusion that it is difficult to justify these errors, in each case, as mere inadvertence. It further undermines why the public should have any confidence in the Commission's asserted bases for its proposals when its analysis is riddled with errors uniformly biased in one direction. It also demonstrates the Commission's failure to provide an economic analysis to the 10B-1 Rulemaking Proposal that meets the standard required by the APA.

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In noting the foregoing concerns with the DERA Rule 10B-1 Memorandum, we have not repeated the substance of the many other concerns we expressed in our Rule 10B-1 Comment Letters. Those concerns remain unaddressed by the Commission, and thus continue to preclude adoption of the Rule 10B-1 Rulemaking Proposal because, despite the issuance of the DERA Rule 10B-1 Memorandum, the Commission has still failed to establish the need for the intrusive public disclosure that the Rule 10B-1 Rulemaking Proposal would require. The Commission has also still failed to address the fact that, as noted in our Original Rule 10B-1 Comment Letter, the Commission's claim of statutory authority is incorrect. Further, the Commission has failed consider more tailored approaches that could achieve its stated goals (as those goals appear to have shifted, based upon the DERA Rule 10B-1 Memorandum). Even apart from the constitutional and statutory barriers to implementation of the Rule 10B-1 Rulemaking Proposal (which we detail in our Original Rule 10B-1 Comment Letter, to which we refer for a full description of these concerns), we continue to believe that such an extreme rewriting of the market rules should not be undertaken without a clear-cut empirical basis for doing so. Notwithstanding the issuance of the DERA Rule 10B-1 Memorandum, the Commission has yet to offer any such basis, jumping as it does from shaky rationale to shaky rationale.

We respectfully urge the Commission, again, to abandon the Proposed Rule. The Commission already possesses a number of means by which to evaluate trading behavior in the security-based swap market (whether it be the trading of activists or other investors) without compelling the public disclosure of proprietary trading information and causing the significant

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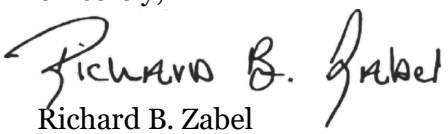
[60] We are unable to attempt to gauge the impact on DERA's analysis of the omission of this data, as the data set (as curated by DERA) is not publicly available and, as noted above, we have not received a substantive response to our FOIA request for this data. *See* note 44, *supra*. Thus, we cannot say how this odd exclusion of data affects DERA's ultimate conclusions. All we can say is that the exclusion is difficult to justify and likely introduces errors into the analysis.

[61] *See* our Third Supplemental 13(d) Comment Letter at n. 50 and accompanying text (describing a series of incorrect and, in some instances, misleading citations contained in the DERA 13(d) Memorandum).

damage to the U.S. markets that we and other commenters have described. These means include data submitted to the Commission under Regulation SBSR, under the Consolidated Audit Trail regulations, on Schedules 13D, 13G and 13F, and on Form N-PORT. The federal securities law also provides the Commission with a bevy of powerful prohibitions against fraud and manipulation that afford the Commission the authority to pursue misbehavior that it may uncover from these various data sources. Unless and until the Commission demonstrates that there is in fact a market failure in the security-based swap market meriting regulatory intervention, and that the myriad data sources currently available to the Commission are insufficient to enable it to appropriately respond, the Commission's Rule 10B-1 Rulemaking Proposal cannot be adopted in compliance with the APA.

Sincerely,



Richard B. Zabel

General Counsel & Chief Legal Officer
Elliott Investment Management L.P.
360 S Rosemary Ave, 18th Floor
West Palm Beach, FL 33401

cc: The Hon. Gary Gensler, SEC Chair
The Hon. Caroline A. Crenshaw, SEC Commissioner
The Hon. Jaime Lizárraga, SEC Commissioner
The Hon. Hester M. Peirce, SEC Commissioner
The Hon. Mark T. Uyeda, SEC Commissioner

Exhibit A

Lewis Report on the DERA Rule 10B-1 Memorandum

Review of Supplemental Data and Analysis Regarding the Proposed Reporting Thresholds in the Equity Security-Based Swap Market

Craig Lewis[1]

August 21, 2023

[1] I am the Madison S. Wigginton Professor of Finance at Vanderbilt University's Owen Graduate School of Management and a Professor of Law at Vanderbilt Law School. From 2011 to 2014, I was the chief economist of the Securities and Exchange Commission (the "Commission"), where I also served as director of the Division of Economic and Risk Analysis. At the Commission, I focused on economic analysis in the financial regulatory process, and oversaw activities related to agency policy, rulemaking, and risk analysis. This comment letter was commissioned by Elliott Investment Management L.P. I was supported by staff of Global Economics Group, who worked under my direction.

Overarching Comments:

- The Division of Economic and Risk Analysis's ("DERA") supplemental memorandum on the proposed reporting thresholds in the security-based swap market ("DERA Rule 10B-1 Memorandum") does not cure any of the flaws of the economic analysis contained in the Rule 10B-1 Rulemaking Proposal ("Proposed Rule").[2] My original assessment of the economic analysis was attached as Exhibit B to Elliott Investment Management L.P.'s ("Elliott") comment letter dated March 21, 2022 (the "Lewis Study").[3]

- Despite not a single reference to activist investors in the Proposed Rule, the DERA Rule 10B-1 Memorandum shifts course and spends considerable time addressing the impact of reporting thresholds on activist investors.[4] However, DERA ultimately remains silent on any *economic* impacts to activists that would derive from the Proposed Rule.

- Similar to DERA's supplemental memorandum on the economic analysis of beneficial ownership reporting ("DERA 13(d) Memorandum"), the DERA Rule 10B-1 Memorandum fails to provide any discussion of how the Securities and Exchange Commission ("Commission") plans to use its analysis or its view of the implications of the analysis.[5] This is a disconcerting trend where commenters point out concerns that DERA failed to address in a proposing release to which DERA responds by preparing a "supplemental" memo to address commenter-identified gaps but without a complete economic analysis or an interpretation of the results.

- Since November 2021, the Commission has had access to security-based swap ("SBS") data reported to Security-Based-Swap Data Repositories ("SBSDRs") pursuant to Regulation SBSR.[6] However, DERA does not use the new SBS data to address the economic implications or the validity of either of the Commission's two original justifications provided in the Proposed Rule for public SBS position reporting.[7]

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[2] 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, Release No. 34-93784 (Dec. 15, 2021); 87 FR 6652 (Feb. 4, 2022); Memorandum of the Staff of the Division of Economic and Risk Analysis, Supplemental data and analysis regarding the proposed reporting thresholds in the equity security-based swap market, attachment to Release No. 34-97762; File No. S7-32-10 (June 20, 2023).

[3] Letter from Richard B. Zabel, General Counsel & Chief Legal Officer, Elliott Investment Management L.P., to Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission, dated March 21, 2022, re: Release No 34-93784 (Dec. 15, 2021).

[4] The Proposed Rule contains references to "net-short activism,"—a trading strategy involving the CDS market, which is different than the form of activist activities that DERA refers to in the DERA Rule 10B-1 Memorandum. *See* Proposed Rule at p. 6656.

[5] Memorandum of the Staff of the Division of Economic and Risk Analysis, Supplemental data and analysis on certain economic effects of proposed amendments regarding the reporting of beneficial ownership (Apr. 28, 2023), available at https://www.sec.gov/comments/s7-06-22/s70622-20165251-334474.pdf.

[6] Proposed Rule at p. 6671.

[7] Proposed Rule at p. 6656.

- Given the significance the Commission placed on net-short debt activism for necessitating the near real-time disclosures of SBS positions, the DERA Rule 10B-1 Memorandum should have provided data to support its concerns about this activity. If there is no evidence of this behavior over the SBSDR sample period, then DERA should acknowledge this to the public.

- The Commission also sought to justify the Proposed Rule by pointing to the Archegos Capital Management incident, an episode that resulted in losses at several large banks that served as counterparties to Archegos' SBS positions.[8] DERA, however, now with data available to analyze and quantify the presence of concentrated counterparty exposure from SBS positions, often excludes dealer counterparties from its SBS analysis and does not provide any support for broader market failure concerns. If DERA found any instances in which the proposed reporting thresholds would alert market participants to the existence of concentrated exposures to counterparties, that data should be reported for the public to address through comments.

- In addition to DERA's new conceptual focus on activist investors, the DERA Rule 10B-1 Memorandum suffers from serious sampling selection flaws that call into question the validity of its work and often results in DERA understating the number of entities that would be required to report position data.

  - The DERA Rule 10B-1 Memorandum covers the 13-month period from November 1, 2021 to November 25, 2022. DERA excludes the 6-month plus period following November 25, 2022 because of a change in the structure of the transaction data; it is striking that DERA is willing to drop over one-third of the available sample simply because they do not want to address changes in the data's format.[9]

  - A significant issue for DERA is that they have not analyzed non-swap position data (equity securities, as well as the appropriate values of any options, futures, or other derivative instruments in a subject underlying security) for the vast majority of potential reporting entities. Meaning the data relied on in the DERA Rule 10B-1 Memorandum is insufficient to determine the number of reports that would have had to be filed.

  - DERA failed to analyze Schedule 13G filings and amendments to both Schedule 13D and 13G filings, which would further increase the number of SBS positions investor activists and large position holders would have to disclose.[10]

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[8] SEC Proposes Rules to Prevent Fraud in Connection With Security-Based Swap Transactions, to Prevent Undue Influence over CCOs and to Require Reporting of Large Security-Based Swap Positions, Release No. 2021-259 (Dec. 15, 2021).
[9] DERA Rule 10B-1 Memorandum at p. 3.
[10] DERA Rule 10B-1 Memorandum at p. 4.

- DERA found additional affiliate and 13D Reporting Person connections to the equity SBS market that it did not analyze.[11]
- DERA unnecessarily limited its analysis of reporting thresholds for Schedule 13D Reporting Persons to positions built within 30 days of the Schedule 13D filing despite having transaction data over the 60 days preceding the initial Schedule 13D filing.[12]

[11] DERA Rule 10B-1 Memorandum at p. 5.
[12] DERA Rule 10B-1 Memorandum at p. 8.

Table of Contents

I. Background

I was commissioned by Elliott to assess the supplemental analysis in the DERA Rule 10B-1 Memorandum. This follows my assessment of the original economic analysis included in the Proposed Rule, which was attached as Exhibit B to Elliott's comment letter dated March 21, 2022.[13]

Although DERA claims its supplemental analysis pertains to the "economic effects" of Proposed Rule 10B-1, this is not the case.[14] The supplemental report from DERA merely summarizes certain equity SBS data and related position information as it relates to the proposed position reporting thresholds, not the broader economic effects of the rule, such as an analysis of its costs and benefits, or the implications it might have on efficiency, competition, and capital formation (referred to as "ECCF").

The introduction in the DERA Rule 10B-1 Memorandum is confusing regarding this aspect. Footnote 3 in the document refers to three comment letters that DERA specifically reviewed, which urged the Commission to analyze Regulation SBSR data as part of the proposed rulemaking.[15] Following their review of these letters, DERA states it prepared the supplemental analysis of reporting thresholds.[16] However, two letters that were referenced (one from Elliott and the other from John L. Thornton, R. Glenn Hubbard and Hal S. Scott) make it clear that their call to use SBSDR data is actually a request for the Commission to study the data to determine if their concerns around counterparty risk and credit default swap ("CDS") opportunistic strategies remain and requires public position reporting, not just a simple analysis of reporting thresholds.[17]

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[13] Letter from Richard B. Zabel, General Counsel & Chief Legal Officer, Elliott Investment Management L.P., to Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission, dated March 21, 2022, re: Release No 34-93784 (Dec. 15, 2021).

[14] DERA Rule 10B-1 Memorandum at p. 3.

[15] DERA Rule 10B-1 Memorandum at p. 1.

[16] DERA Rule 10B-1 Memorandum at p. 3. The proposed reporting thresholds for a Schedule 10B vary depending on the type of SBS. Here are the details. For credit default swaps the proposed thresholds are as follows: a.) a long notional amount of $150 million; b.) a short notional amount of $150 million; c.) a gross notional amount of $300 million. For equity SBS there are two thresholds that determine whether a position is reportable, based on the notional amount and the percentage of outstanding shares attributable to the position, regardless of settlement type (physical or cash): a.) the notional amount threshold is $300 million and is calculated by adding the gross equity SBS notional value (the sum of long and absolute short positions) and any shares held directly or indirectly through derivative contracts (e.g., call and put options), but only if the gross notional amount of the equity SBS position exceeds $150 million; b.) the percentage threshold is more than 5% of a class of equity securities, provided that the equity SBS position represents more than 2.5% of a class of equity securities. The total number of shares is calculated as the sum of the shares associated with the gross equity SBS notional value and any shares held directly or indirectly through derivative contracts (e.g., call and put options). *See* Proposed Rule at pp. 6670-2.

[17] Letter from Richard B. Zabel, General Counsel & Chief Legal Officer, Elliott Investment Management L.P., to Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission, dated March 21, 2022, re: Release No 34-93784 (Dec. 15, 2021) at p. 18 ("The Commission began requiring transaction reporting for SBS under Regulation SBSR only recently, on November 8, 2021, and must complete and publish a report using the data collected no later than two years following the initiation of public dissemination of SBS

DERA's response is part of a concerning trend that has emerged in its review of rulemakings pertaining to beneficial ownership and position reporting. After conducting an initial economic analysis, DERA has been responding to concerns raised by commenters about missing important economic effects in the proposed release. Instead of revising and re-proposing with a thorough economic analysis, The Commission has DERA issue a "supplemental" memo claiming to address these concerns. Moreover, in both the supplemental DERA 13(d) Memorandum and the supplemental DERA Rule 10B-1 Memorandum, DERA's responses lack a clear interpretation of their findings in the manner consistent with its statutory obligation to determine as best it can the economic implications of a proposed rule.[18]

From my examination, the supplemental DERA Rule 10B-1 Memorandum fails to rectify the shortcomings in the Proposed Rule's economic analysis. DERA does not utilize Regulation SBSR as it should — to justify the need for the Proposed Rule and examine its key market effects. This would include an analysis of the potential costs that could result from decreased investor activism and reduced incentives for market participants to build positions beyond the set reporting thresholds. In other words, DERA's handling of these issues appears superficial, and its approach doesn't adequately support or evaluate the implications of the Proposed Rule. In essence, it partially augments an incomplete description of the "baseline" contained in the Proposed Rule. Since these memos are not substitutes for rigorous economic analysis, at a minimum, the Commission should be obligated to repropose.

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transaction data. The Commission does not identify information that it needs in order to address its concerns in the cash-settled SBS market that is not available under Regulation SBSR. The Commission should evaluate whether the new Regulation SBSR reporting program sufficiently addresses its concerns, and should complete its statutorily mandated data collection report for consideration by Congress, before proposing, much less seeking to implement, additional, highly burdensome public disclosure requirements on cash-settled SBS market participants."); Letter from John L. Thornton and R. Glenn Hubbard Co-Chairs, and Hal S. Scott, President, Committee on Capital Markets Regulation, to Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission, dated March 21, 2022, re: Release No 34-93784 (Dec. 15, 2021) at pp. 11-12 ("In addition, both policy rationales for the proposal—i.e., prevention of manufactured credit events and enhanced risk management—will already be served by the existing regime of anonymized regulatory and real-time public reporting for security-based swaps via security-based swap data repositories ("SBSDR"), just coming online now These existing reporting requirements will allow regulators and the market to identify elevated activity in certain security-based swaps that is informative as to whether there could be large positions in specific security-based swaps, without threatening liquidity in such swaps in the way public disclosure of a position holder's identity would. The CBA does not quantify the marginal benefits that a new public identification requirement would provide over and above the existing anonymized framework established by Congress and only now coming into force under the SEC's security-based swap rules. The SEC should allow SBSDR reporting to take full effect and study the related data before imposing extensive reporting requirements that present a clear risk of negative impacts to security-based swap markets and to capital formation that depends on such markets to hedge risk.").

[18] Current Guidance on Economic Analysis in SEC Rulemakings ("Guidance") (Mar. 16, 2012) at p. 3, available at https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf.

II. DERA's Economic Analysis of Rule 10B-1 Remains Flawed

A. DERA Neglected to use SBSDR Data to Identify Evidence of a Market Failure

The Commission attempted to justify the Proposed Rule by arguing that public transparency of SBS positions will mitigate against the effects of (1) net-short debt activism and other CDS opportunistic strategies and (2) risk posed by the concentrated exposure of a counterparty.[19] However, the Commission failed to support either of these two justifications for instituting the Proposed Rule with any documentation of episodes causing broader market harm or systemic evidence of counterparty risk exposure of concentrated positions. This would be a necessary first step to establish a market failure where disclosure of position data is warranted.[20]

As noted in the Lewis Study, the Archegos episode does not support the Commission's call for regulatory changes.[21] The special committee appointed by the Board of Directors of Credit Suisse, the counterparty that suffered the highest losses in dealing with Archegos, reported that the business and risk personnel at the bank, "had all the information necessary to appreciate the magnitude and urgency of the Archegos risks, but failed at multiple junctures to take decisive and urgent action to address them."[22] After the Proposed Rule was announced, UBS, which had acquired Credit Suisse, agreed to pay regulators in the U.S. and U.K. nearly $400 million in fines due to Credit Suisse's inadequate management of counterparty credit risk with Archegos. When settling, UBS stated that it was already improving its operational and risk management procedures in response to the incident.[23] This episode did not lead to any external concerns or systemic risks. In fact, the market held the executives accountable for their poor business practices, resulting in their termination and changes to business operations in response to the event.

At the time the Proposing Release was first made public, the Commission noted that it had one month of equity SBS transaction data from registered SBSDRs, which limited its ability to analyze that data and develop an economic baseline around its claimed justifications for the Proposed Rule.[24] This belies the fact that DERA has used swap data to support earlier rulemakings and has been able to request the pertinent data from the DTCC and other market participants, which it decided (without

[19] Proposed Rule at p. 6656.
[20] Lewis Study at pp. 7-8.
[21] Lewis Study at pp. 12-13.
[22] Credit Suisse Group Special Committee of The Board of Directors Report on Archegos Capital Management (July 29, 2021) at p. 2, available at https://www.credit-suisse.com/about-us/en/reports-research/archegos-info-kit.html.
[23] UBS to Pay Nearly $400 Million in Fines to Settle Credit Suisse's Archegos Failures; Fed says Credit Suisse engaged in 'unsafe and unsound' credit-risk management practices in its dealings with investment firm, The Wall Street Journal (July 24, 2023).
[24] Proposed Rule at p. 6671.

explanation) not to do in this case.[25] Now, however, the Commission has access to more than 18-months of SBS positions in hand and the ability to address the scale of the correlated counterparty risk (as well as opportunistic CDS strategies).

Instead of addressing the unfulfilled baseline definition gap and addressing the scale of the two factors it used to justify the Proposed Rule, the DERA Rule 10B-1 Memorandum turned its attention to activist investors and the impact of reporting thresholds on these market participants. This is an ironic turn of events—the Proposing Release failed to even mention activist investors and the impact Rule 10B-1 would have on their market function. Now with more expansive regulatory data on SBS positions, DERA elects to direct its supplemental analysis almost entirely on activists and does not attempt to better evaluate the SBSDR data at its disposal in order to assess the baseline and its original justifications for Rule 10B-1.

If DERA found any instances in which the proposed reporting thresholds would alert market participants to the existence of concentrated exposures to counterparties that could be considered to have systemic risk implications, that data should be presented to the public for comment. Similarly, if there is no support for its justification, then the public needs to be notified of that outcome.

B. The Commission Failed Again to Analyze the Impact of the Proposed Rule on Shareholder Activists

The Lewis Study and several other commenters noted that DERA's economic analysis for the Proposed Rule failed to recognize that Rule 10B-1 would have the negative effect of significantly reducing incentives for investor activism.[26] Outside of this rulemaking, DERA and the Commission have acknowledged that there is considerable economic value shared amongst activist investors and shareholders from corporate governance and operational improvement initiatives.[27]

The ability of activist investors to acquire large economic stakes at prices that do not fully reflect the expected value of their future engagement is an important source of incentives to engage in such activities. Preemptively revealing this information to the market will cause prices to adjust to the information of the activist investor's involvement before the investor can acquire its full desired

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[25] Memorandum of the Staff of the Division of Risk, Strategy and Financial Innovation, Security-Based Swap Block Trade Definition Analysis (Jan. 13, 2011), available at https://www.sec.gov/files/s73410-12.pdf and Memorandum of the Staff of the Division of Risk, Strategy and Financial Innovation, Information regarding activities and positions of participants in the single-name credit default swap market (Mar. 15, 2013), available at https://www.sec.gov/files/s73910-154.pdf.

[26] Lewis Study at pp. 14-15; Letter from John L. Thornton and R. Glenn Hubbard Co-Chairs, and Hal S. Scott, President, Committee on Capital Markets Regulation, to Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission, dated March 21, 2022, re: Release No 34-93784 (Dec. 15, 2021) at p. 8; Letter from Emilie Aguirre et al., to Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission, dated March 21, 2022, re: Release No 34-93784 (Dec. 15, 2021) at pp. 2-10; Letter from Lucian A. Bebchuk, James Barr Ames Professor of Law, Economics, and Finance, and the Director of the Program on Corporate Governance at Harvard Law School, to Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission, dated March 20, 2022, re: Release No 34-93784 (Dec. 15, 2021) at pp. 2-4.

[27] DERA 13(d) Memorandum at pp. 11-12.

position. The result is a decrease in the profits from employing an activist campaign, which reduces incentives for investors to engage in such activities or makes it impractical for them to do so.

Although the DERA Rule 10B-1 Memorandum recognizes now that Rule 10B-1 will require reporting by activist investors, it does not cure the flaw of the DERA's original economic analysis—that there has not been an economic investigation of the costs the Proposed Rule on market participants and the corresponding ECCF effects due to a loss in investor activism. DERA's supplemental data analysis simply focuses on attempting to quantify the impact of the Proposed Rule's reporting thresholds on activist investors. Additionally, DERA has not attempted to analyze whether the impact on activists can be justified. This is striking given that the original intent of the Proposed Rule was to address CDS opportunistic strategies and counterparty exposure—not activist activities. Why is it necessary for activist investors to bear the burden of the Commission's proposal if it will not further serve the desired benefits of Rule 10B-1?

If the Commission now believes that public reporting of activist positions is needed, the Commission needs to articulate this view and discuss the economic effects—something that is now absent. These omissions do not comply with the Commission's internally established standards on economic analysis.[28] Since a fulsome economic analysis would necessarily include a discussion of the impacts of the rule on shareholder activism as it relates to ECCF, the current economic analysis is deficient.

The Commission's previous work suggests that the economic cost associated with increased activist position disclosure would be significant. DERA determined investors of companies involved in activist campaigns disclosed via Schedule 13D filings gained $13.8 billion annually (2011- 2021) across an average of 216 campaigns per year.[29] The loss of a single campaign due to advanced disclosure would be more than $60 million on average.

Under Proposed Rule 10B-1 DERA determined that on a *single day*, up to 63 activist investor SBS positions would surpass the $300 million disclosure threshold, and upwards of 30 positions would exceed the 5% of market capitalization threshold for disclosure.[30] DERA should determine how many of these Rule 10B filings would reveal activist campaigns prematurely and calculate the benefits shareholders derived from such campaigns. As I will discuss below, DERA's analysis likely underestimates the positions needing reporting. However, even a small decline in the number of campaigns, because of reduced profitability, would result in significant economic costs. Imposing such a considerable economic burden on a group of investors without clear reasons related to the Commission's original disclosure goals renders the economic analysis arbitrary and capricious. This approach could ultimately harm shareholders.

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[28] Guidance at pp. 7-15.
[29] DERA 13(d) Memorandum at p. 18.
[30] DERA Rule 10B-1 Memorandum at pp. 13-14. Frustratingly, the DERA Rule 10B-1 Memorandum does not attempt to determine the total number of activist investor positions that would require reporting across the sample period and how many of those were related to disclosed activist campaigns.

C. DERA has not Addressed the Other Serious Flaws in its Economic Analysis

The Commission has not yet addressed a series of additional flaws in its economic analysis documented in the Lewis Study and through other commenters.[31] Importantly, the Commission's key position that SBS position reporting will enhance liquidity was premised on the incorrect assumption that the Proposed Rule will not materially change the level of market participation.[32]

All large SBS position holders—not just activist investors—will face reduced participation incentives. Investors with strong reputations will become less profitable as other investors front-run their proprietary trading strategies. Reduced incentives to trade and collect marketplace information to make informed trades will have a deleterious effect on price discovery.

Relatedly, DERA's analysis of the capital formation effects from the public position reporting hinges on the unsubstantiated claim that position holder transparency will increase the price efficiency in the underlying securities markets, which then would have a "positive impact on capital formation and the cost of capital for the underlying entities."[33] As noted in the Lewis Study, it is likely that the Proposed Rule will reduce price efficiency and therefore have exactly the opposite effect —less capital formation and higher costs of capital.[34] With less price discovery, asymmetric information between management and investors will increase, resulting in greater adverse selection costs.

III. Sample Selection Issues

The DERA Rule 10B-1 Memorandum focuses on the equity SBS market and aims to determine the number of market participants required to report positions, with a focus on activist investors. However, it's unclear why the supplemental analysis emphasized activist investors when they were not considered in the Proposed Rule. This raises the concern that the analysis is meant to reassure activist investors that reporting burdens would not be onerous and prevent legal challenges based on an inadequate economic analysis.

Unfortunately, the DERA Rule 10B-1 Memorandum is incomplete. The Commission analyzed data in an expedient manner, overlooking opportunities for a more rigorous and comprehensive understanding of the SBS market. While feasible, a more thorough analysis would have required

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[31] See generally the Lewis Study; Letter from John L. Thornton and R. Glenn Hubbard Co-Chairs, and Hal S. Scott, President, Committee on Capital Markets Regulation, to Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission, dated March 21, 2022, re: Release No 34-93784 (Dec. 15, 2021); Letter from Emilie Aguirre et al., to Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission, dated March 21, 2022, re: Release No 34-93784 (Dec. 15, 2021); Letter from Lucian A. Bebchuk, James Barr Ames Professor of Law, Economics, and Finance, and the Director of the Program on Corporate Governance at Harvard Law School, to Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission, dated March 20, 2022, re: Release No 34-93784 (Dec. 15, 2021).

[32] Proposed Rule at pp. 6687-6689.

[33] Proposed Rule at p. 6687.

[34] Lewis Study at p. 21.

significantly more effort. As a result, the approach used to analyze reporting thresholds appears rushed and suffers from various deficiencies, making any conclusions drawn from the analysis unreliable.

A. DERA Failed to Use SBSDR Data Available for Analysis

The DERA Rule 10B-1 Memorandum covers a 13-month period from November 1, 2021, to November 25, 2022. However, DERA excludes the data from the 6-month plus period following November 25, 2022 because of a change in the structure of the transaction data; it is striking that DERA is willing to drop over one-third of the available sample simply because they do not want to address changes in the data's underlying format.[35] DERA has not analyzed equity SBS data from any other source making its SBSDR data even more critical to its analysis.

As evidence of a rushed analysis, DERA cites a June 10, 2022 Commodity Futures Trading Commission ("CFTC") advisory informing certain market participants that they must provide notice to the CFTC using a Swap Data Error Correction Notification Form when data errors will not be corrected in a timely manner.[36] It is not apparent that this release addresses a real "structural change" that limits the data's usability. After this release the CFTC did document a change in the swaps data structure that modifies 14 data elements for various swap data reporting topics; however, DERA did not reference this notice as the structural change.[37] Regardless of whether it is error reporting or uncited data modifications, there are concerns with DERA's work here: 1.) DERA does not provide any explanation to the public as to how this CFTC advisory is related to the Commission's SBSDR data; 2.) DERA does not explain how data corrections or changes to the data structure render the data that it just recently started to receive unusable; 3.) it is problematic that the Commission is requesting more SBS data yet it has not even been able to analyze a substantial percentage of the equity SBS data it currently has in its possession to justify its proposal.

B. DERA's Sample Selection Procedures Understate the Number of Entities that Would be Required to Report Equity SBS Position Data

The DERA Rule 10B-1 Memorandum's review of the equity SBS market has three separate analyses that cover the November 1, 2021 to November 25, 2022 time period:

1.) Equity Security-Based Swap Positions, in Reference to Schedule 13D Filing Events: This analysis uses 13D filings by activist investors to assess the filing rates for the notional amount and percentage ownership thresholds for a small set of activist investors where DERA has equity SBS and equity position data.[38]

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[35] DERA Rule 10B-1 Memorandum at p. 3.
[36] *See* CFTC Letter No. 22-06 (June 10, 2022), available at https://www.cftc.gov/csl/22-06/download.
[37] CFTC, CFTC's Division of Data Announces Limited Modifications to the Technical Specification for Parts 43 and 45, (Sept. 15, 2022), available at https://www.cftc.gov/PressRoom/PressReleases/8584-22.
[38] DERA Rule 10B-1 Memorandum at pp. 4-11.

2.) Equity Security-Based Swap Positions, Generally Across Activist Investors: This analysis uses a broader set of "activist" investors by relying on a list of shareholder activists identified by FactSet to analyze equity SBS position data. A limitation of this analysis is that it does not include non-swap position data (including equity securities, and the appropriate values of any options, futures, or other derivative instruments in the subject underlying security).[39]

3.) Equity Security-Based Swap Positions, Generally Across Market Participants: An analysis of all equity SBS positions. As with the analysis described in point 2.) above, this analysis does not include non-swap position data.[40]

All three analyses have data limitations that understate filing rates by equity SBS market participants. We discuss the limitations of the equity SBS positions, in reference to schedule 13D filing events in Section III.C. The main problem with the remaining two analyses is they only consider equity SBS positions and ignore the number of equity shares held directly by the potential filers and related positions held indirectly through derivative contracts (e.g., call and put options). Presumably, the Commission included a requirement to include the direct and indirect holdings of equity because it believes their inclusion is material. Although such an analysis would be time-consuming, it is feasible given the data available to DERA. The analysis could have been conducted as follows: i) identify a list of the entities that participate in the equity SBS market; ii) where possible, match equity SBS market participants to their associated Form 13F or Form N-PORT to determine their most recent equity positions prior to November 1, 2021; iii) utilize the Consolidated Audit Trail (CAT) data to estimate the time series of equity positions over the sample period by adjusting for transactions in equity and equity-linked securities;[41] and iv) replicate the analyses in the DERA Rule 10B-1 Memorandum using the combined SBS and equity-linked position data.

C. DERA's Analysis of 13D Filing Data

DERA's analysis of equity SBS positions reported in Schedule 13D filing events relies on Commission filings made by activist investors. This is an *expedient* way to analyze equity SBS as 13D filings include equity and equity-linked positions, such as call options and put options. This empirical design accommodates a more fulsome analysis of the proposed reporting thresholds and is similar in spirit to my suggested approach discussed in Section III.B. Unfortunately, DERA only identifies eleven relevant 13D filings. A sample size of eleven is too small to draw meaningful inferences and should be considered, at best, anecdotal. It should not be used to make generalizations about the entire population of equity SBS market participants or what might occur over a longer time period. Ideally, DERA should have either started their sample period earlier or waited for more data to accumulate to better understand broader trends. The brevity of DERA's sample period raises

[39] DERA Rule 10B-1 Memorandum at pp. 11-14.
[40] DERA Rule 10B-1 Memorandum at pp. 14-20.
[41] The Commission has relied Consolidated Audit Trail data to support other recent regulatory proposals. *See,* for example, Order Competition Rule, Release No. 34-96495; File No. S7-31-22 (Dec. 14, 2022).

questions about why they didn't address the data reporting format problems mentioned in Section III.A.

Since some large investors' activist campaigns follow passive positions reported in a Schedule 13G, which is the short-form beneficial ownership disclosure, it would have made sense for DERA to include Schedule 13G filings in its supplemental analysis. DERA implicitly recognizes the relevance of 13G filings when it notes in its Schedule 13D filing events analysis: "[i]n two out of the nine filings, the initial Schedule 13D filing was made after the Schedule 13D Lead Filer had previously reported on Schedule 13G without changing the amount of beneficial ownership."[42] Ignoring 13G filings underestimates the number of times an activist investor would be required to report equity SBS positions.

Additionally, several data filters employed by DERA to conduct its analysis have the unintended consequence of understating the number of projected filings.

1.) DERA comments that there are instances where they are unable to identify the reference security. Given the small number of firms considered, it should be relatively easy to resolve this issue using hand-collection efforts. If identification is not possible, more explanation is needed.[43]

2.) Footnote 21 notes that "[t]hrough manual searches, we found six additional Schedule 13D filings within our sample period in which an affiliate of the Reporting Person had equity security-based swap exposure on the Schedule 13D filing date. These are not included in the below analysis as we require the Reporting Person to have direct exposure to both the equity security-based swap and the beneficial ownership."[44] It is unclear why their exclusion is relevant to analyzing whether an entity would be required to report an equity SBS position. On net, this will understate the estimate of the number of filings. By excluding affiliates from their analysis, it appears that DERA implicitly acknowledges a reporting loophole in which affiliated entities can take positions that do not need to be reported on 13D filings.

3.) Footnote 16 indicates that DERA did not consider amended Schedule 13D filings. Since an amended filing could include corrected position amounts, it could affect the analysis in an indeterminate manner.[45]

4.) DERA limited their analysis to equity SBS positions 30 reporting days before and after each Schedule 13D filing. They didn't clarify the reason for this time restriction. Ideally, DERA should have reviewed all open swap positions that came before or after a Schedule 13D/G filing, including the 60-day period during which Schedule 13D Reporting Persons are required to disclose any transactions in the class of securities reported. Although Footnote 29

[42] DERA Rule 10B-1 Memorandum at p. 10.
[43] DERA Rule 10B-1 Memorandum at p. 4.
[44] DERA Rule 10B-1 Memorandum at p. 5.
[45] DERA Rule 10B-1 Memorandum at p. 4.

of the DERA Rule 10B-1 Memorandum suggests that SBS positions shift around the time of the 13D filing, this is not pertinent when calculating the total reports required. This method could lead to an underestimation of the projected filings.[46]

IV. Conclusion

My review of the DERA Rule 10B-1 Memorandum and the corresponding Proposed Rule 10B-1 reveals a series of critical concerns and shortcomings. The DERA Rule 10B-1 Memorandum fails to adequately address the original flaws highlighted in the economic analysis and exhibits a marked shift in focus towards activist investors without explaining why or providing an economic assessment of the impact on this cohort of investors (or on the market generally). This pattern reflects a broader trend, where DERA prepares supplemental memos that fail to fully address commenter-identified gaps and then fails to interpret the results of these analyses, an approach that was also seen in the DERA 13(d) Memorandum. Furthermore, recent SBSDR data that could have either supported, contradicted, or provided a fresh viewpoint to DERA's claims has been overlooked. The fact that the DERA Rule 10B-1 Memorandum only sampled a specific 13-month period and left out more than a third of the available data casts further uncertainty on the credibility of its research. DERA did not completely consider non-swap position data in their work. This oversight leads to an undercount of the entities that would need to report, weakening the clarity and effectiveness of the Commission's proposed reporting criteria. Given these issues, both the Proposed Rule and DERA's analytical method warrant a comprehensive review.

[46] DERA Rule 10B-1 Memorandum at p. 8.

Exhibit B

Elliott Investment Management Comment Letter, dated June 27, 2023, on the DERA 13(d) Memorandum

Including, as Exhibit A thereto, the Lewis Report on the DERA 13(d) Memorandum

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360 S ROSEMARY AVE, 18TH FLOOR, WEST PALM BEACH, FL 33401

June 27, 2023

Via Electronic Mail

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

Re: **File No. S7-06-22; Reopening of Comment Period for Modernization of Beneficial Ownership Reporting; Release Nos. 33-11080; 34-97405**

Dear Secretary Countryman:

We write in response to the above-cited release, which reopens the comment period on Release No. 33-11030, *Modernization of Beneficial Ownership Reporting* (Feb. 10, 2022). The Commission took that step to allow comment on a new Division of Economic and Risk Analysis ("DERA") Memorandum, dated April 28, 2023, entitled "Supplemental data and analysis on certain economic effects of proposed amendments regarding the reporting of beneficial ownership" (the "DERA 13(d) Memorandum").[1] As explained below, the DERA 13(d) Memorandum suffers from serious analytical flaws and does not justify the changes in existing law that are promoted by the Commission in the 13(d) Rulemaking Proposal.[2]

This submission also supplements our prior comment letters[3] regarding the 13(d) Rulemaking Proposal and Commission's proposal to adopt Rule 10B-1, which, as we have

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1 Attachment to Release Nos. 33-11080; 34-97405; File No. S7-06-22 (Apr. 28, 2023).

2 File No. S7-06-22; Modernization of Beneficial Ownership Reporting, Release Nos. 33-11030, 34-94211 (Feb. 10, 2022) (the "13(d) Rulemaking Proposal"). All citations herein to the 13(d) Rulemaking Proposal utilize the pagination of the "Conformed to Federal Register version" that is posted on EDGAR.

3 *See* Letter from Richard B. Zabel, General Counsel & Chief Legal Officer, Elliott Investment Management L.P., to Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission, dated April 11, 2022, re: Release Nos. 33-11030, 34-94211 (Apr. 11, 2022) (our "Original 13(d) Comment Letter"); Letter from Richard B. Zabel, General Counsel & Chief Legal Officer, Elliott Investment Management L.P., to Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission, dated August 18, 2022, re: Effect of *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), on Pending Release Nos. 34-93784, 33-11030, and 34-94211 (August 18, 2022) (our "First Supplemental 13(d) Comment Letter"); and Letter from Richard B. Zabel, General Counsel & Chief Legal Officer, Elliott Investment Management L.P., to Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission, dated November 18, 2022, re: Response to the Comment Letter Submitted by Wachtell, Lipton, Rosen

observed previously, are interrelated.[4] We believe our 13(d) Comment Letters demonstrate significant shortcomings of the 13(d) Rulemaking Proposal, including the significant threat the proposal, if adopted, would pose to activism and thus to the vibrancy and efficiency of the U.S. financial markets. Our review of the DERA 13(d) Memorandum has only reinforced the seriousness of our concerns.

Elliott Investment Management L.P. ("Elliott") is a leading multi-strategy investment advisor and one of the oldest firms of its kind under continuous management. Elliott invests in a wide range of areas in order to protect and grow the assets of our investors, which include approximately 101 educational endowments, more than 180 foundations, and more than 100 private and public pension plans, among others, which are often advised by their own dedicated advisors. Elliott's active investments in public equities have become one of our most significant and impactful efforts, resulting over the past decade in more than 140 disclosed engagements with public companies, and more in which our dialogue with the company remained private. The views expressed herein are those of Elliott, and are not expressed as views of any other firm or person.[5]

We also submit for the Commission's consideration, as Exhibit A hereto, a supplemental report (the "Lewis Report") from Professor Craig M. Lewis, the Madison S. Wigginton Professor of Finance at Vanderbilt University's Owen Graduate School of Management, Professor of Law at Vanderbilt Law School, and a former SEC Chief Economist and Director of DERA. Professor Lewis's prior tenure as Director of DERA affords him unique insight into the flaws contained in the DERA 13(d) Memorandum, as well as in the original cost-benefit analysis that was provided

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and Katz on October 4, 2022 (our "Second Supplemental 13(d) Comment Letter" and, together with our Original 13(d) Comment Letter and our First Supplemental 13(d) Comment Letter, our "13(d) Comment Letters").

[4] As noted in our Original 13(d) Comment Letter, we believe that many of the issues with the 13(d) Rulemaking Proposal also apply to the Commission's proposal to adopt new Rule 10B-1 under the Securities Exchange Act of 1934, File No. S7-32-10; Proposed 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, Release No. 34-93784 (Dec. 15, 2021) (the "10B-1 Rulemaking Proposal"). While the Commission recently adopted the other rules that were proposed in the 10B-1 Rulemaking Proposal, it stated that it was "not finalizing Rule 10B-1 . . . as it continues to consider comments received" (Release No. 34-97656 at p. 8). In addition, the Commission recently reopened the comment period for the 10B-1 Rulemaking Proposal to afford the opportunity to comment upon an additional memorandum, dated June 20, 2023, submitted by DERA entitled "Supplemental data and analysis regarding the proposed reporting thresholds in the equity security-based swap market" (the "DERA 10B-1 Memorandum" and, collectively with the DERA 13(d) Memorandum, the "DERA Memoranda"). *See* Attachment to Release No. 34-97762; File No. S7-32-10 (June 20, 2023). Given that the Commission has released the DERA 10B-1 Memorandum shortly before the comment deadline for the DERA 13(d) Memorandum, we are effectively prevented from commenting on both DERA Memoranda in a single comment letter. While we discuss aspects of the interrelationship between the 13(d) Rulemaking Proposal and the 10B-1 Rulemaking Proposal, including how the potential combination of the Commission's 13(d) and 10B-1 Rulemaking Proposals would compound the problems created by each Rulemaking Proposal individually, in this comment letter, we are forced by the timing of the Commission's release of the DERA 10B-1 Memorandum to submit our comments on that document separately. For further background on our concerns with the 10B-1 Rulemaking Proposal, *see* Letter from Richard B. Zabel, General Counsel & Chief Legal Officer, Elliott Investment Management L.P., to Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission, re: Release No. 34-93784 (March 21, 2022) (our "10B-1 Comment Letter").

[5] While we only speak for ourselves and not on behalf of other activists in this letter, in several instances we share our views regarding how the activist market operates generally. Those observations are intended to reflect not only how we operate, but also how, in our experience, peer activists operate as a general matter.

as part of the Commission's 13(d) Rulemaking Proposal (as to which Professor Lewis commented as part of our Original 13(d) Comment Letter[6]).

1. Overview

The DERA 13(d) Memorandum and the 13(d) Rulemaking Proposal both rest on the same flawed premise: that shareholder activism harms the U.S. capital markets as a general matter, and a subset of investors specifically – thus warranting fundamental changes to longstanding SEC regulations.[7] As with the Commission's analysis in the 13(d) Rulemaking Proposal, the DERA 13(d) Memorandum simply assumes that activism causes those "harms," but does not provide any supporting evidence.

A careful analysis of the data in the DERA 13(d) Memorandum reveals that activism does *not* cause the harms posited by the Commission and in fact benefits investors and fortifies the securities market. Indeed, the empirical evidence discussed in the DERA 13(d) Memorandum *disproves* the Commission's assumption about activism and nullifies the purported basis for regulatory intervention.

We also note that the DERA 13(d) Memorandum's focus appears to be on the Commission's proposal to shorten the filing deadline for an initial Schedule 13D from 10 days to five days after a person acquires more than 5% of a covered class of equity securities. There is no discussion of other significant aspects of the 13(d) Rulemaking Proposal, including the proposal to redefine the concept of "group" as it relates to Section 13(d) or the proposal that cash-settled equity derivatives be deemed to confer beneficial ownership of the underlying securities for purposes of Section 13(d).[8] We objected to both of these proposals in our Original 13(d) Comment Letter. The DERA 13(d) Memorandum contains broad and unsubstantiated claims regarding investor behavior, investor "harm", and alleged market malfunctions, often using pejorative or otherwise inappropriate labels in a result-oriented manner – mirroring the 13(d) Rulemaking Proposal's arguments in support of these additional rule changes. We are thus concerned that the Commission may be using a Trojan horse approach, intending to rely upon portions of the DERA 13(d) Memorandum to justify conclusions concerning aspects of the 13(d) Rulemaking Proposal other than the shortening of the Schedule 13D filing deadline, despite DERA's explicit admission that it is unable to perform an economic analysis regarding those issues.

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6 *See* Lewis, Review of the Economic Analysis for Proposed Rule Amendments to Modernize Beneficial Ownership Reporting (Apr. 11, 2022), submitted as Exhibit B to our Original 13(d) Comment Letter (the "Original Lewis 13(d) Report").

7 As we have noted previously, the Commission's characterization of the proposed changes to Section 13(d) as mere "modernizations" is misleading. *See* Part V.A. of our Original 13(d) Comment Letter. The 13(d) Rulemaking Proposal constitutes a fundamental change to longstanding law, which is neither warranted on a substantive basis, nor justified on an economic basis.

8 DERA admits in the DERA 13(d) Memorandum that while they have attempted to quantify the costs and benefits of the proposal to shorten the Schedule 13D filing deadline from the point of view the impact on activist campaigns, DERA cannot quantify the costs or benefits of the other components of the 13(d) Rulemaking Proposal:

> [W]e note that this analysis reflects one aspect of the overall potential impact of the proposed amendments, and that other effects of the proposed amendments may not be readily quantified.

DERA 13(d) Memorandum at p. 11.

We continue to urge the Commission to abandon or significantly amend the 13(d) Rulemaking Proposal. We also urge the Commission not to rely upon broad and unsubstantiated assertions in the DERA 13(d) Memorandum, as opposed to evidence-based and reasoned decision-making as required by the Administrative Procedure Act, to justify any action that the Commission may elect to take with regard to the 13(d) Rulemaking Proposal.

2. The Commission Has Failed to Acknowledge or Evaluate the Interaction of the 13(d) Rulemaking Proposal and the 10B-1 Rulemaking Proposal

As noted above, our 13(d) Comment Letters speak to the cumulative impact that the 10B-1 Rulemaking Proposal and the 13(d) Rulemaking Proposal would have if both were adopted by the Commission. Given the relationship between the two proposals, and the apparent refusal of the Commission to proceed incrementally, we have urged the Commission to evaluate the cumulative costs and benefits of the proposals, in addition to assessing each of them on a stand-alone basis.[9] The Commission has failed to do so, and thus cannot evaluate whether the cumulative adverse impact of the two proposals will be greater than the sum of the cumulative adverse impacts of each proposal. This "blind empirical leap" seems to us an irresponsible risk for a regulator to take with what is a well-functioning market.

The serial release of the two DERA Memoranda is yet another example of the Commission's unwillingness to evaluate the cumulative impact of these proposed rulemakings. In addition, by releasing the DERA 10B-1 Memorandum a mere week before the closing of the comment period for the DERA 13(d) Memorandum, the Commission precludes the submission of comment letters evaluating these proposals on a collective basis prior to the deadline for comment on the DERA 13(d) Memorandum. This pattern of scattershot releases and cramped timing for responses continues even though it has been the source of much criticism from the market, academics and Congress throughout this process.[10] It calls into question the Commission's responsiveness to serious process as well as substantive issues that have been raised throughout. We urge the Commission to include in the comment letter file for the 13(d) Rulemaking Proposal all comment letters received regarding the DERA 10B-1 Memorandum, to ensure that analyses of the interaction of the two proposals are considered for both proposed rulemakings.

We also note that the DERA 13(d) Memorandum continues the Commission's use of certain pejorative and inappropriate terminology that is found in both the 13(d) Rulemaking Proposal and the 10B-1 Rulemaking Proposal. This terminology includes multiple references to "opportunistic traders" as a derogatory label for trading on information that is not known to the market generally. It also includes invocations of "information asymmetry" suggesting that different views regarding a company's prospects requires public disclosure prior to trading as if

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[9] To that end, our Original 13(d) Comment Letter included, as an exhibit, the full text of our Rule 10B-1 Comment Letter (including the two experts' reports submitted therewith), to ensure that our discussion of the issues with that rulemaking was included in the Commission's comment letter file on the 13(d) Rulemaking Proposal.

[10] The Commission's utilization of aggressively brief comment periods for these and other rulemaking proposals has been objected to by a number of commenters. In the context of the 10B-1 Rulemaking Proposal, these objections included a request submitted by bipartisan members of Congress that the comment period be extended (see www.sec.gov/comments/s7-32-10/s73210-20112652-265433.pdf) and a separate comment letter from us making the same request (see Letter from Richard B. Zabel, General Counsel & Chief Legal Officer, Elliott Investment Management L.P., to Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission, dated January 13, 2022). As the Commission did not respond to these requests, we did not formally request an extension of the similarly brief comment period for the 13(d) Rulemaking Proposal.

such information were material non-public information coupled with a duty to disclose. Notably, there is not corresponding pointed language about irresponsible, non-performing or governance-abusing companies, managers and directors. We do not seek such countervailing pointed language; we seek unbiased analysis. We discuss our concerns with this terminology below. Our concerns with these concepts in the DERA 13(d) Memorandum apply equally to both the 10B-1 and 13(d) Rulemaking Proposals.

3. The DERA 13(d) Memorandum Suffers from Two Fundamental Deficiencies

The DERA 13(d) Memorandum relies on two flawed definitions that undermine DERA's analysis in its entirety.

A. Definition of "Prominent Activists"

DERA uses the term "Prominent Activist" throughout the DERA 13(d) Memorandum and defines that term by reference to the FactSet SharkRepellent database. Specifically, the DERA 13(d) Memorandum equates "Prominent Activist[s]" with entities classified by the database as a "Sharkwatch 50" activist investor.[11] While Elliott is correctly included in that database as an activist of prominence, the database is riddled with errors. For example, according to FactSet, Elliott has *zero* assets under management and *zero* equity assets.[12] This is obviously incorrect (the thumbnail description of Elliott on page 2 above, which is identical to that contained in each of our 13(d) Comment Letters, clearly refers to the breadth and scope of our operations). Two other quite prominent activist investors (TCI Fund and Icahn) also both show as having zero assets under management. And a number of activists that are well-known as prominent participants in this space are not on the list.

In addition to these glaring errors, of the 50 "Prominent Activists" in the FactSet database, 14 are no longer in operation or have not engaged in activism for at least four years (including one entity that reorganized under Chapter 11 of the Bankruptcy Code in 2019),[13] three operate exclusively outside of the United States (and thus are not relevant to an analysis of the effects of activism on the U.S. markets), and seven engage solely in specific narrow subsets of activism (relating to closed-end mutual funds or regional banks) involving entities with far smaller capitalizations than is typical for the activist firms that we believe the Commission is focused upon in the 13(d) Rulemaking Proposal.[14] These are such superficial errors that it raises the question of whether DERA performed even a cursory check that the data they were relying on was accurate and current.

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[11] We note that there are only 49 entities on the list that is cited by DERA, and the link to that list is no longer operative.

[12] The following is a screenshot of an extract of the FactSet data as to our firm:

SharkWatch 50 (Key Activists)							
Name	Key Individual(s)	Equity Assets ($mil)	AUM ($mil)	Total Campaign	High Impact	Open	Closed
Elliott Management Corp.	Paul Elliott Singer	0	0	232	156	6	226

[13] Pershing Square, Greenlight Capital, Wynnefield Capital, Raging Capital, Highland Capital, Osium Partners, FrontFour Capital, Privet Fund, Red Mountain Capital, VIEX Capital, Carlson Capital, Clinton Group, Sandell Asset Management and Marcato Capital.

[14] To our understanding, Cevian Capital operates exclusively in Europe, save for one U.S. activism campaign it carried out in 2018. Oasis Management (Hong Kong) operates solely in Asia, and Crystal Amber Advisers operates solely in the U.K. (and has not initiated an activist campaign in any market since 2019). Karpus, Bulldog Investors and City of London Investment engage in activism solely with respect to closed-end funds, and Basswood Capital, PL Capital, Stillwell Value and Clover Partners engage in activism solely with respect to regional banks.

While we fundamentally disagree that activism as practiced by Elliott and other peer activists constitutes a category of investment activity that harms the U.S. capital markets and warrants a regulatory response, using such obviously flawed data to attempt to support this premise is particularly concerning. To the extent that the data relied upon by the Commission to support its flawed proposition that activism creates harms is not accurate, the conclusions drawn from that data are at best unreliable, if not flatly incorrect.[15] As but one potential example, to the extent that an investor that is incorrectly identified by DERA or the Commission as a Prominent Activist engages in a transaction that only benefits that investor, but not other shareholders in the relevant company, then that transaction is not activism. If and to the extent that that transaction gives rise to regulatory concern, those concerns would not apply to activism, as the nature of the underlying transaction would be factually distinct.

We understand that there are other sources of data on this point that appear to be more accurate than the FactSet Sharkwatch resource. We would be happy to share our thoughts on this with the Commission or DERA.

B. Categorization of Schedule 13D Filings

DERA's analysis relies upon a review of over 15,000 initial Schedule 13D filings over an 11-year period (2011 through 2021). These filings are divided into two categories for purposes of the DERA 13(d) Memorandum:

- "Corporate Action Filings" (defined as filings relating to beneficial ownership acquired in events such as "mergers and acquisitions, IPOs, other restructurings, private placements or compensation awards");[16] and
- "Non-corporate Action Filings" (defined as filings "typically associated with the accumulation of shares in open-market trading through a sequence of multiple transactions and are more likely to discuss potential plans and proposals that are commonly viewed as characteristic of activist campaigns").[17]

We are puzzled that the only explicit reference to M&A transactions in this analysis is in a category that is not viewed as indicative of "the accumulation of shares in open-market trading through a sequence of multiple transactions" – a fundamental strategy of hostile bidders in M&A transactions, and in fact the behavior that Congress was most concerned about when it enacted the Williams Act.[18] We do not understand why the distinction drawn by DERA is relevant to any aspect of the 13(d) Rulemaking Proposal.

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[15] *See, e.g.*, *United States v. Castleman*, 572 U.S. 157, 182 (2014) (Scalia, J., concurring) (rejecting agency definitions based on the principle that "*falsus in uno, falsus in omnibus*").

[16] DERA 13(d) Memorandum, p. 3 at text accompanying n. 8.

[17] DERA 13(d) Memorandum, p. 3 at text accompanying n. 10.

[18] Perhaps DERA is seeking to capture in the "Corporate Action Filing" category the conversion of shares in a target company to shares of the acquiring firm following consummation of an M&A transaction. But this is of course *not* the part of an M&A transaction that the disclosure mandate of Section 13(d) is designed to address. Instead, Section 13(d)'s primary function is to ensure that the market (investors as well as public companies) is aware of the assembly of a position by a potential acquiror (or by an a potential activist) at the appropriate time. This activity would appear to constitute a "Non-corporate Action Filing" under DERA's nomenclature. This means that Schedule 13D filings with respect to a single M&A transaction would likely end up in both categories, resulting in potential double counting. This would appear to call into question the accuracy of any data as assembled on the basis of these definitions.

We note further that the "Non-corporate Action Filings" category, which is central to DERA's analysis, is a category that is, by DERA's own admission, likely overstated "and subject to some possible error."[19] This is no doubt true because DERA apparently includes in its data even those investors who may have proposed no activist plans or might not be viewed as an activist investor. The magnitude of this overstatement is unclear, but it is a significant data point to not have quantified, and it is not clear why DERA chose not to. Further, in DERA's examples of what constitutes activist plans,[20] DERA provides a list that omits activist proposals that seemingly align with important policies of the Commission, such as improved governance structures for shareholders to express their views, increasing diversity among directors, and environmental and other ESG issues the company should pursue. Including these in the list might present a more objective spectrum of activist proposals that would be negatively affected by DERA's analysis, and by the 13(d) Rulemaking Proposal.

4. DERA's Economic and Substantive Analysis Is Flawed in Multiple Respects

The DERA 13(d) Memorandum's attempt to develop a cost-benefit analysis for the proposal to shorten the Schedule 13D filing deadline from 10 to five days is, in some instances, refreshingly candid – demonstrating that the benefits of activism vastly exceed the unquantified, and unestablished, harms that the Commission has ascribed to activism, as we describe below.[21] In other instances, DERA's analysis is deeply flawed.

A. Two Fundamental, Yet Unjustified, Assumptions

The analysis contained in the DERA 13(d) Memorandum is predicated upon two fundamental and interrelated assumptions, neither of which is evaluated by DERA (either in the DERA 13(d) Memorandum or in the cost-benefit analysis contained in the 13(d) Rulemaking Proposal). We also note that these points are assumed, but not established, by the Commission in the 13(d) Rulemaking Proposal. They are thus nothing more than unsubstantiated assertions made by the Commission in the 13(d) Rulemaking Proposal and repeated, but not justified, by DERA.

1. Unsupported Assertion That Activism Warrants Specific Regulatory Attention

The DERA 13(d) Memorandum describes the DERA Staff's efforts to categorize Section 13D filings by Prominent Activists, as distinct from "Other Institutions" and "Other Individuals."[22] This categorization proceeds with no discussion or analysis of why activists (prominent or otherwise) warrant separate regulatory scrutiny. Putting aside our concerns with the facially incorrect data upon which DERA relies (as discussed above), the Administrative Procedure Act requires that when a federal agency issues a rule, the agency must "articulate a

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We note that Schedule 13D filings relating to activism efforts likely would not be subject to potential double counting, as, unlike an M&A transaction, an activist does not seek to acquire control of a public company – only to influence that company to change its operations and practices so as to improve performance for the benefit of the company's shareholders. Given the focus on activists in the DERA 13(d) Memorandum (as well as in the 13(d) Rulemaking Proposal), this dichotomy calls into question conclusions that the Commission seeks to draw as to activists (as compared to acquirors of companies) on the basis of this data.

[19] DERA 13(d) Memorandum at n. 11.

[20] *Id.* at n. 10.

[21] *See* Section 4.B. below.

[22] *See, e.g.*, Table 1 of the DERA 13(d) Memorandum and accompanying text.

satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[23] The cost-benefit analysis of any such proposal must therefore evaluate whether the costs of the proposal are more than offset by its anticipated benefits. As discussed in Section 4.B. below, DERA's data demonstrates that the benefits of activism far exceed any estimated costs. Not only has the Commission failed to discuss *why* activism warrants a significant departure from longstanding practices, DERA has validated the point that activism benefits the market. This lack of any empirical or analytical support for the proposition that activism creates harms that require a regulatory response demonstrates just how misguided the 13(d) Rulemaking Proposal is.

2. False Notion That Sales by a Stockholder of a Company that Subsequently Becomes the Subject of an Activist Campaign Constitute a Harm Due to an "Information Asymmetry" Warranting Regulatory Intervention

The DERA 13(d) Memorandum simply assumes that other investors suffer harm when they sell their shares in a company shortly before an activist investor discloses a campaign relating to that company.[24] DERA does not evaluate whether the fact that an activist happens to be concurrently developing a thesis as to that public company is in fact an "information asymmetry" that warrants regulatory intervention, nor does it evaluate the costs of seeking to protect stockholders who decide to sell shares of a public company that subsequently becomes the subject of an activist campaign. This "harm" assumption is flawed for several reasons.

This scenario is by no means unique to activists. If a hostile bidder is considering launching a tender offer for a public company, there will be a period during which neither the target nor the market will be aware of the bidder's intent or of the information that led the bidder to form that intent. There is no suggestion that this situation constitutes an "information asymmetry" warranting regulatory intervention. Yet, without analysis, the fact that an *activist* may be considering action regarding a public company is assumed by DERA to meet this threshold. A short-seller may take a short position, even a large one, and be prepared to release a report once she fills her position, which may move the stock price massively, and this will generally happen without any prior interaction with the company (unlike most activist situations) and yet short-sellers are not required to disclose their positions because of a supposed "information asymmetry."[25] Indeed, any investor (talented or otherwise) that develops a view as to the prospective fortunes of a given public company may decide to acquire, or sell, stock in that company. By definition, any shareholder who sells or buys and ends up facing this investor is not aware of that investor's analysis (the investor's view is by definition private). The federal securities laws do not view this as a harm, or seek to expand beneficial ownership reporting to capture any such "informational asymmetry" that may exist in this

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[23] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)); *see also Advocates for Hwy. & Auto Safety v. Fed. Motor Carrier Safety Admin*, 429 F.3d 1136, 1145 (D.C. Cir. 2005) (agency acted arbitrarily and capriciously by "adopt[ing] a rule with little apparent connection to the inadequacies it purports to address").

[24] DERA 13(d) Memorandum at p. 20; *see also id.* at pp. 24, 25 and 26.

[25] As we noted in our Original 13(d) Comment Letter, the Commission believes that while the confidentiality of short sellers should be protected, activists are not entitled to similar protection despite the similarity in the value of their proprietary trading strategies and the damage to that value that public disclosure would cause. Original 13(d) Comment Letter, n. 121.

situation.[26] Why? Because forced premature disclosure frustrates and chills private research, which is an engine for the market at all levels.[27] Informational differences are an essential part of a well-functioning securities market, as discussed further in the Lewis Report.

The Supreme Court has also expressly rejected this theory. In *Rondeau v. Mosinee Paper Corp.*,[28] an investor assembled a beneficial ownership position in a public company that exceeded 5% without filing a Schedule 13D. The investor acknowledged that he was not aware of his obligation to make such a filing, and he ceased acquiring shares and filed a Schedule 13D upon learning of this obligation. The company sued, seeking equitable relief for the violation of Section 13(d). In seeking to justify such relief, the company claimed that "an injunction is necessary to protect the interests of shareholders who either sold their stock to petitioner at pre-disclosure prices or would not have invested had they known that a takeover bid was imminent."[29] In denying that equitable relief was warranted, the Court held:

> [T]he principal object of the Williams Act is to solve the dilemma of shareholders desiring to respond to a cash tender offer, and it is not at all clear that the type of "harm" identified by respondent is redressable under its provisions.[30]

The Court then noted that "those persons who allegedly sold at an unfairly depressed price have an adequate remedy by way of an action for damages."[31] This demonstrates that one may not simply presume that all shareholders who purchased or sold without knowledge of a bidder's intent are "harmed" for purposes of the federal securities law. Instead, each shareholder (or the shareholder class, if so certified) would need to demonstrate and quantify such harm. Of course, the *Rondeau* decision evaluates the presence of this alleged "harm" in the context of a situation in which a Schedule 13D filing was clearly required. The Commission's (and DERA's) assumption that such a "harm" also occurs when no such filing is required does not withstand scrutiny. If this position were nonetheless to result in promulgation of any aspect of the 13(d)

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[26] For a cogent discussion of this point, see Matt Levine's March 24, 2022 Bloomberg column entitled "*The SEC Wants to Stop Activism*," under the sub-caption "*Activism*," which column was extracted and submitted as a comment letter on the 13(d) Rulemaking Proposal by Simon Lorne, who formerly served as General Counsel of the Commission. See www.sec.gov/comments/s7-06-22/s70622-273347.htm.

[27] *See, e.g.*, *Dirks v. SEC*, 463 U.S. 646, 657-58 (1983) ("We reaffirm today that '[a] duty [to disclose] arises from the relationship between parties . . . and not merely from one's ability to acquire information because of his position in the market.'").

This position is also reflected in the Commission's well-established "mosaic theory," which acknowledges that investors who, by virtue of their own expertise and efforts, develop analyses of public companies perform a service to the market. In the adopting release for Regulation FD, which prohibits selective disclosure by public companies, the Commission stated:

> Analysts can provide a valuable service in sifting through and extracting information that would not be significant to the ordinary investor to reach material conclusions. We do not intend, by Regulation FD, to discourage this sort of activity. The focus of Regulation FD is on whether the issuer discloses material nonpublic information, not on whether an analyst, through some combination of persistence, knowledge, and insight, regards as material information whose significance is not apparent to the reasonable investor.

Selective Disclosure and Insider Trading, 65 FED. REG. 51716, 51722 (Aug. 24, 2000). The mosaic theory applies to all investors; the focus on analysts in the Regulation FD adopting release was an example relevant to the context of that rulemaking.

[28] 422 U.S. 49 (1975).

[29] *Id.* at pp. 59-60.

[30] *Id.* at p. 60.

[31] *Id.*, citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 595 (1952) (Frankfurter, J., concurring).

Rulemaking Proposal on the basis of this ill-advised theory of "harm," the Commission will have in effect disregarded contrary and longstanding Supreme Court authority without acknowledging it is doing so or providing any justification for departing from controlling precedent.

Neither DERA (nor the Commission more generally) attempts to explain *why* market participation by activists prior to announcement of their campaign warrants different treatment than market participation by hostile bidders, short-sellers or other investors with a view as to the prospects of a public company. Yet, the DERA 13(d) Memorandum appears to attempt to justify the shortening of the Schedule 13D filing deadline solely by focusing on the activities of activists, although the resulting change (if this proposal is adopted by the Commission) will affect *all* market participants.[32] Because the DERA 13(d) Memorandum "treats similarly situated p[arties] differently" without "provid[ing] an adequate explanation" for doing so, its analysis is by definition arbitrary and capricious.[33]

The flaw in DERA's approach cannot be repaired through further economic analysis, as the facts underlying the purported basis for regulatory intervention simply reflect the normal functioning of an efficient market. The view of the prospects of a stock of a given public company will, by definition, be different for a buyer as opposed to a seller, and a well-functioning market efficiently moves the investment to the party who has a greater desire to own the exposure. Differing views of an issuer's prospects is not an "information asymmetry" warranting any form of regulatory intervention, particularly where those differing views are the product of painstaking research and original analysis performed by one of the parties to the transaction. To borrow the Commission's terminology, if an information asymmetry exists as between an activist and a shareholder who, unaware of the activist's impending plans, sells, the activist has caused that asymmetry to exist as a result of the activist's expensive, time-consuming and proprietary analysis of the underlying company, an analysis that the selling shareholder has not performed or for other reasons does not care about. Taken to its logical extreme, the only way to address this "information asymmetry" would be to compel every investor to make public all of its research regarding a given company prior to trading. This is not required by existing law, nor could it be – it is an absurd outcome that would be functionally impossible to implement. To require a market participant to share that information with the market would remove the very incentive that the market provides to perform such an analysis –

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[32] We observed the testimony of Haoxiang Zhu, Director of the Division of Trading and Markets, to the House Financial Services Committee's Subcommittee on Capital Markets on June 22, 2023, during which he was asked a similar question by a member of that subcommittee in the context of the 10B-1 Rulemaking Proposal. Mr. Zhu's justification of the differential treatment proposed by the Commission was that the short sale provision and Rule 10B-1 arise under different statutory provisions, and Rule 10B-1 is intended to provide transparency of large concentrated positions, whereas the short sale rulemaking apparently was motivated by a different concern. The fact that these rules would exist under different statutory provisions (which is also true with respect to the 13(d) Rulemaking Proposal) has nothing to do with why one category of investor is entitled to confidentiality while another is not. And, as we note in our 10B-1 Comment Letter, the Commission has not provided any justification for the assumption that the goals of Section 10A of the Exchange Act require public disclosure, rather than confidential disclosure to the Commission for its analysis and review, and Director Zhu's response at the hearing did not provide any insight on this question.

[33] *Etelson v. Off. of Pers. Mgmt.*, 684 F.2d 918, 926 (D.C. Cir. 1982); *Burlington N. and Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 776 (D.C. Cir. 2005).

to reap the economic benefits of that differentiated analysis. This will impair activism, depriving the market of a powerful remedy for poor corporate governance.[34]

The Commission's attempt to characterize the efforts of activists as creating harms to other shareholders is also misguided as it introduces a normative judgment into some, but not all, trading behavior – in effect introducing a wealth redistribution scheme under the guise of investor protection. In the zero-sum world of investing, the transfer of wealth to one investor necessitates the extraction of wealth from another. The Commission does not acknowledge, much less analyze, the key question of why one investor should be preferred over the other in this situation. Therefore, the attempt by DERA to evaluate the costs and benefits of the 13(d) Rulemaking Proposal must fail, because the flawed underlying premise of the rulemaking proposal cannot support a rational cost-benefit analysis.[35]

By way of contrast, trading on the basis of material non-public information is quite correctly prohibited under federal securities law. That prohibition is predicated upon the investor that is in possession of such information having a duty to disclose that information prior to trading on it or otherwise refrain from trading. This duty applies, as a general matter, to those who have access to a company's proprietary, non-public information – such as senior executives, board members, and outside advisers. This duty does not apply to an investor with a view as to the company that is based upon publicly available information. The development of such a view is permitted, in fact encouraged, by the mosaic theory, which is recognized by the Commission and under federal securities law. The Commission's attempt to frame an activist's view as to a given company, a view that the activist developed on her own and without access to the company's material non-public information, as somehow creating an information asymmetry warranting a regulatory response is misguided. And nothing in the DERA 13(d) Memorandum cures the flaws inherent in the Commission's misguided analysis.

DERA estimates that annual gains from activism exceed the losses estimated by DERA to have been caused by activism by a factor of *148 times*.[36] This is data that DERA puts forth, but then ignores, throughout its cost-benefit analysis, although there is extensive academic literature demonstrating that activism generates sustainable benefits for the market.[37]

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34 Brav, Jiang & Li, *Governance by Persuasion: Hedge Fund Activism and Market-Based Shareholder Influence*, OXFORD RSCH. ENCYCLOPEDIA OF ECON. AND FIN. (2022) ("Brav") at p. 1 ("shareholder engagement by activist hedge funds has evolved to become both an investment strategy and a remedy for poor corporate governance.").

35 DERA's analysis also fails to acknowledge that the legislative history of the Williams Act makes clear that Congress elected a ten-day filing period (after considering, and initially adopting, a five-day filing period) to afford market participants sufficient time to assemble positions confidentially while protecting the market's overall need to know of the buyer's actions. Or, to again borrow the Commission's terminology, an "information asymmetry" was explicitly built into the Williams Act. As we discuss in our Original 13(d) Comment Letter, while the Commission seeks to justify shortening the Schedule 13D filing deadline by reference to the fact that technology now affords more speed to market participants, that truism does not address whether Congress's intentionally created "information asymmetry" should be shortened. Congress was not focused on the time needed to type, or transmit to the Commission for filing, a Schedule 13D in arriving at the duration of the Schedule 13D filing period.

36 *See* DERA 13(d) Memorandum at Tables 4-5 (estimating annual gains from activism at $13.8 billion, as compared with estimated annual losses due to activism of $93 million). We discuss this data in greater detail in the following sub-section of this letter.

37 *See, e.g.*, Brav at p. 66 (summarizing the analysis contained in Section 4 of that article that activism generates sustainable gains for shareholders); authorities cited in n. 3 of our 10B-1 Comment Letter (same conclusion).

While DERA's data, on its face, demonstrates the failure of the Commission's efforts to justify the 13(d) Rulemaking Proposal as a necessary regulatory response to activism, even this data understates the net value of activism to the markets. The Commission's analysis in the 13(d) Rulemaking Proposal (which DERA parrots in the DERA 13(d) Memorandum) is that it need only consider the supposed (and speculative) foregone gains of selling shareholders. The countervailing actual *gains* of investors who do not choose to sell their shares and then, at no cost to themselves, benefit from the results of the activist's efforts are not acknowledged by the Commission, but are buried in DERA's data alongside (and undifferentiated from) gains realized by shareholders who were never considering selling their shares. And, of course, some sellers may very well have sold for their own reasons having nothing to do with lack of knowledge of the activist's views, in which case any foregone gains would not constitute a loss to such a seller. DERA's simplistic analysis, while generating data that proves our point as to the benefits of activism, in fact likely understates the amount of that benefit by overstating the amount of harm alleged to be caused by activism. Of course, whether the net annual gain generated by activism is as DERA estimates or (as we expect) far greater, either outcome proves that the Commission's attempt to justify the 13(d) Rulemaking Proposal as a response necessitated by activism is irreparably flawed.[38]

We also note that in the 13(d) Rulemaking Proposal, the Commission refers to "potentially informed trading" occurring in the marketplace around activist campaigns. We acknowledge that ill-advised market participants in possession of material non-public information may convey that information to others. This "tipping" behavior is already prohibited by the federal securities laws, as noted above. And neither the Commission nor DERA provide any evidence of actual trading of this nature actually occurring.[39] Given the existence of a meaningful remedy, we would expect that any proposal to create new regulatory provisions to address already-proscribed behavior would evaluate and quantify the need for this new tool, including a discussion of why the existing remedy fails to curb the improper behavior. However, the Commission never demonstrates that such trading does in fact occur at a volume warranting significant changes in longstanding regulations. In fact, it is our understanding that the Commission has not brought a significant number of insider trading enforcement actions that arose out of trading in the context of an activist's campaign (and the Commission cites no such cases in the 13(d) Rulemaking Release). To that end, descriptions by the Commission and DERA of this phenomenon consistently use the modifier "may" (and cite to authorities using that modifier or making blanket assertions without any evidentiary support).[40] This suggests that there is not a market failure here warranting this significant regulatory response. DERA points to increases in trading volumes as potential evidence of "potentially informed trading." Of course, trading volumes could spike in the time preceding the filing of a Schedule 13D for any number of reasons (including other market participants correctly anticipating the identity of a soon-to-be subject of activism based on their own analysis, the soon-to-be subject of activism

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38 *See, e.g.*, *State Farm*, 463 U.S. at 43 (agency action arbitrary and capricious where agency "fail[s] to consider an important aspect of the problem").

39 We note (as does Professor Lewis in the Lewis Report) that the Commission has access to confidential data showing with precision who was on each side of every trade in the equities markets, via the Consolidated Audit Trail. If such "potentially informed trading" was in fact occurring with frequency sufficient to justify the 13(d) Rulemaking Proposal, the Commission (including DERA) has access to the data that would so demonstrate.

40 13(d) Rulemaking Proposal, pp. 51-52 and n. 88; DERA 13(d) Memorandum, pp. 20-21.

encountering its own adverse developments that increase focus on the stock, or trading activity triggered by quant or high-speed traders).

DERA's reliance upon vague allegations that "potentially informed trading" *may* occur, without consideration of remedies already available to the Commission to restrict such activity, does not provide an adequate basis upon which to construct a cost-benefit analysis justifying any shortening of the Schedule 13D filing deadline. These flawed underlying assumptions compromise the validity of any cost-benefit analysis of this proposal.

B. As DERA's Data Shows, The Benefits of Activism Far Outweigh Any Alleged Costs

In the cost-benefit analysis contained in the 13(d) Rulemaking Proposal, the Commission stated that it was unable to provide a reasonable estimate of the effects of the proposed amendments, as it did not have all the inputs needed for the many variables it identified as relevant to such a quantification.[41] We presume that the DERA 13(d) Memorandum is intended to rectify this inadequacy, at least in part. We welcome the Commission's attempt to improve upon the clearly inadequate economic analysis contained in the 13(d) Rulemaking Proposal.

However, we have significant concerns about many aspects of the updated cost-benefit analysis in the DERA 13(d) Memorandum. As described in this comment letter and the Lewis Report, even if one were to assume, *arguendo*, that DERA's various unsubstantiated assumptions are correct and thus assume that activism creates "information asymmetries" that constitute harms warranting regulatory intervention by the Commission, the DERA 13(d) Memorandum clearly shows that the economic benefits of activism vastly outweigh any such assumed harms.

As noted above, DERA's evaluation of historical Schedule 13D filings from 2011-21 shows that the aggregate increase in shareholder value from activism was $13.8 *billion* per annum, with campaigns initiated by Prominent Activists (as such term is defined by DERA) comprising between 24.6% (for full-stake campaigns) and 37.5% (for less than full-stake campaigns) of these totals.[42] In comparison, DERA's data from the same dataset shows that the "harms" assumed to occur to shareholders who sell prior to public announcement of an activist's campaign aggregate only $93 *million* per annum.[43]

Notwithstanding our significant concerns with a number of the definitional and analytical predicates underlying this data, assuming *arguendo* that this data is accurate, the annual gains to shareholders generated by activism from 2011-2021 are *148 times greater* than the annual losses to shareholders who sold shares in companies that subsequently became the subject of an activist's campaign during that period.[44] We disagree that there are any harms to shareholders in this context for the reasons described above. This data nonetheless provides exponentially strong support for the point that we made in our Original 13(d) Comment Letter, and that has been made repeatedly over the years by any number of activists, academics, reporters and market participants (as well as by other commenters on the 13(d) Rulemaking

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41 13(d) Rulemaking Proposal, Section III.A.

42 DERA 13(d) Memorandum, Table 4.

43 *Id*. at Table 5. We cannot ascertain from this data whether these alleged harms arise in activist campaigns initiated by Prominent Activists or all activists, nor can we ascertain whether the distinction between full-stake campaigns and other campaigns noted by DERA in Table 4 applies to the data in Table 5.

44 Even if activism were to be impaired, rather than eliminated, by the 13(d) Rulemaking Proposal, the costs of any such impairment will far outweigh any potential benefits that the rulemaking might otherwise generate.

Proposal) – activism creates sustainable value for shareholders, and thereby strengthens the U.S. capital markets.[45] Given that disparity, the 13(d) Rulemaking Proposal cannot be "necessary or appropriate in the public interest or for the protection of investors,"[46] and thus it would be arbitrary and capricious for the Commission to adopt the 13(d) Rulemaking Proposal.[47]

Despite the clarity of this data, it is not otherwise mentioned in the DERA 13(d) Memorandum – there is no evaluation by DERA of the relevance of this information to the 13(d) Rulemaking Proposal. We are left to our own devices to ascertain the import of this data, which is actually the elephant in the room. We feel compelled to highlight this information so as to ensure that it receives the attention it warrants as the Commission considers the DERA 13(d) Memorandum.[48]

C. The Presence of Harmful Conduct is Assumed, Not Demonstrated

We note some particularly troublesome drafting in the same section of the DERA 13(d) Memorandum that contains the data confirming our contention that activism creates positive value for market participants. The section in which this data is presented (Section 3) is captioned "Potential Effects Associated with Certain Selling Shareholders." One would expect, from this caption, a discussion of the range of *effects* (both positive and negative) that DERA believes occur. Instead, every other reference in this section uses the word *harm* rather than *effect* (including in the very first sentence of Section 3). There is no discussion anywhere in this section of any "effects" other than harms. As noted above, this presumption of harm is wholly unsupported, and it appears that DERA seeks to mask this shortcoming by the use of the more benign term "effect" in the caption.

Of even greater concern is the first sentence of the first paragraph of Section 3 of the DERA 13(d) Memorandum. That sentence reads as follows:

> A number of commentators suggested that the economic analysis in the Proposing Release could have been enhanced by a quantitative analysis of the potential harms to selling shareholders under the current Schedule 13D filing deadline.

In support of this proposition, DERA provides the following footnote:

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45 In addition to the various sources to which we cited for this proposition in our Original 13(d) Comment Letter, for a more recent source, see *Investor Activism – Seize the day (and the board)* in the Leaders section of THE ECONOMIST, May 27, 2023 at p. 14.

46 *See* Sections 13(d) and 23(a)(1) of the Exchange Act, which are among the statutory provisions that the Commission cites for the authority to adopt the 13(d) Rulemaking Proposal. Both of these provisions require that any rulemaking adopted by the Commission pursuant to such statutory authority must be necessary or appropriate or in the public interest or for the protection of investors.

47 *See, e.g.*, *Michigan v. EPA*, 576 U.S. 743, 752–53 (2014) (in the context of a proposed rulemaking authorized by a statute mandating that any rulemaking must be necessary or appropriate, agencies must "pa[y] attention to the advantages and the disadvantages of [their] decisions" and may not act unreasonably by adopting rules the benefits of which are far outweighed by the costs thereof; "[n]o regulation is 'appropriate' if it does significantly more harm than good.").

48 *See, e.g.*, *State Farm*, 463 U.S. at 43 (agencies may not "fai[l] to consider an important aspect of the problem").

> *See, e.g.*, Lewis Study (exhibit to letter from Elliott) (stating that the Commission "could have estimated the *benefits* to selling shareholders" and presenting one potential approach for such an analysis).[49]

This is of course a reference to the Original Lewis 13(d) Report, which supports our position. Note that DERA's footnote, which refers to a suggestion by Professor Lewis that the Commission could have estimated the *benefits* to selling shareholders of activism, is cited to support the proposition that "a number of commentators" suggested that an analysis of potential *harms* could have enhanced the original cost-benefit analysis prepared by DERA. The Original Lewis 13(d) Report is the *only* authority cited by DERA in the entire DERA 13(d) Memorandum for the proposition that there are harms to shareholders from activism, when in fact the cited authority supports precisely the opposite proposition. This is, with all due respect to DERA and the Commission, a blatantly misleading citation and, once it is eliminated as incorrect, leaves DERA with no support for the theory of "harm" to selling shareholders.[50]

We note, in the same paragraph in which this ill-advised citation occurs, DERA's suggestion that a potential harm is caused by "potentially informed, opportunistic traders" that *may* (yes, that word, again) become aware of a potential campaign prior to disclosure by the activist.[51] We have already discussed the problem with attempting to perform a quantitative analysis of events that may, or may not, occur in the absence of any empirical data as to likelihood of occurrence. Anything *may* happen; the question is what has *actually* happened.

We would also note that activists[52] have significant incentives to maintain the confidentiality of their strategies until they are ready to make public disclosure. Premature disclosure brings forward the market reaction that DERA has acknowledged – prices rise, because activists generally create value for all shareholders, so other investors exhibit herd behavior and emulate the activist's trades. That dynamic, in turn, makes it more expensive for the activist to acquire the exposure to the company's stock it desires, impairing the value of the activist's campaign. We of course cannot say that leaks never happen, and we acknowledge the

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[49] DERA 13(d) Memorandum at n. 55 (emphasis added). The language from the Original Lewis 13(d) Report that DERA summarizes in its footnote 55 can be found at page 3 of the Original Lewis 13(d) Report. That language reads in its entirety as follows:

> The Commission could have estimated the benefits to selling shareholders and the costs associated with reductions in the aggregate [of] investor activism. Once again, the Commission chose not to perform this analysis. I offer one possible path toward quantification.

This language comprised one of three bullet points in the Original Lewis 13(d) Report provided in support of the proposition that "the Commission's cost-benefit conclusions are unsupported by any quantitative analysis." Original Lewis 13(d) Report at p. 3.

[50] Unfortunately, this is not the only example of misleading citation to authority in the DERA 13(d) Memorandum or in the 13(d) Rulemaking Proposal. *See* footnotes 71, 72 and 80 and respective accompanying text; *see also* our Original 13(d) Comment Letter at note 102 and accompanying text (describing the Commission's citation in the 13(d) Rulemaking Proposal to a law review article for the proposition that cash-settled equity derivatives have been used with the aim of accumulating a significant position of control in public companies, but omitting the subsequent conclusion in the same article that disclosure of economic interests created by cash-settled equity derivatives should not be required). It appears difficult to justify these errors as mere inadvertence.

[51] *Id.* at n. 57 and accompanying text. *See also id.* at n. 60 and accompanying text ("further evidence led them to suggest . . .", "institutions unusually accessing EDGAR filings for issuers prior to Schedule 13D filings each appeared to engage in this activity . . .".)

[52] As noted above, we only speak for our own firm in this letter and not on behalf of other investment managers that participate in activism. However, our characterizations of how activists engage with the markets reflect our extensive experience in this space generally, and are not solely descriptions of how Elliott acts.

source cited by DERA for the proposition that certain brokers may leak information regarding the trading activity of one client to other preferred clients.[53] Of course, if any such leak occurs, the activist has nothing to do with that behavior. The broker that leaked its client's trading information has violated its obligations under provisions of the federal securities law other than Section 13(d) (as well as the broker's obligation to its client), and has subjected itself to enforcement action by the Commission. Justifying the imposition of new regulatory impediments on activism by pointing to improper behavior by unaffiliated brokers or other unaffiliated market participants is a *non sequitur*, as well as a patently improper basis upon which to attempt to justify a consequential rulemaking that will upend decades-long regulations. This errant regulatory focus on the activist, rather than on the offending opportunistic parties, raises the question we have raised before – whether the Commission is for some mysterious reason carrying water for the corporations and their advisors who want to insulate underperforming executives and Boards from activism.[54]

D. DERA Acknowledges a Significant Potential Cost of the 13(d) Rulemaking Proposal But Fails to Analyze It

DERA estimates that approximately one-third of Schedule 13D filers would be adversely affected by shortening the Schedule 13D filing deadline.[55] This is a consequential acknowledgement, but DERA struggles to evaluate its potential impact on the market. In fact, DERA states that they are "unable to predict how, if at all, a particular filer may change its behavior in response to a shortened filing deadline."[56] DERA does note, however, that if some subset of Schedule 13D filers were to abandon campaigns, approximately $810 million in increased shareholder value would be foregone,[57] and that "academic studies have found that lower levels of activist ownership are associated with smaller increases in shareholder value."[58] It is noteworthy that DERA does not identify any quantifiable countervailing benefits from shortening the Schedule 13D filing deadline against which to compare these acknowledged costs.

It is also important to note DERA's acknowledgement that market participants could adjust behavior so as to avoid the effect of a shortened Schedule 13D filing deadline, but DERA is unable to say how they might do so.[59] We are very confident that the regulatory uncertainty

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53 DERA 13(d) Memorandum at n. 61 and accompanying text.

54 As we noted in our Original 13(d) Comment Letter (at p. 2), we remain mystified as to why the Commission, charged with the protection of all investors, continues to advocate for a rule that would impair the ability of activists to spark healthy debate and create value for shareholders of companies with which an activist engages. We are hopeful that the provision by DERA in the DERA 13(d) Memorandum of data supporting the sustainable value creation point will assist the Commission in concluding that the costs of the 13(d) Rulemaking Proposal far outweigh any potential benefits.

55 DERA 13(d) Memorandum at Figure 3 and accompanying text at p. 15.

56 *Id*. at p. 19.

57 *Id*. at text accompanying n. 53. We do not see how this estimate in forfeited shareholder value was determined, given the far larger amount of value that DERA acknowledges is created by activism earlier in the DERA 13(d) Memorandum. *Id*. at Table 5.

58 *Id*. at text accompanying n. 54.

59 *Id*. at pp. 11, 19. DERA does suggest that activists could adapt to a shortened filing deadline by taking certain actions in lieu of abandoning campaigns, such as "reducing their total economic stake, adding to their stake after the filing date, or accumulating shares more quickly during the proposed new filing window." *Id*. at p. 19. As postulated by DERA, these are suggested as costless options, which is patently absurd. Each of these "options" would fundamentally alter how an activist assembles its exposure to a given company in ways that would impair the ability of an activist to pursue a particular campaign. We would be happy to share our thoughts as to why these options are neither cost-free nor viable with the Commission or its Staff.

that the 13(d) Rulemaking Proposal (and/or the 10B-1 Rulemaking Proposal) will impose will increase the cost of activism and will result in a reduction of the frequency with which activists will engage in campaigns, and we and others have conveyed this view to the Commission frequently.[60] This is, of course, a cost to the market, for the reason stated in this section of the DERA 13(d) Memorandum: "academic studies have found that lower levels of activist ownership are associated with smaller increases in shareholder value."[61] Thus, DERA confirms that the 13(d) Rulemaking Proposal will impose costs on the market, which it is unable to quantify with precision. That does not excuse the Commission from considering those costs in deciding whether the 13(d) Rulemaking Proposal is either "necessary" or "appropriate." Instead, in considering the 13(d) Rulemaking Proposal, the Commission must seek to evaluate those costs, taking into consideration the views expressed in comment letters regarding the likely impact of this and related rulemaking proposals on activism.[62] This uncertainty demonstrates that the Commission lacks a basis upon which to conclude that the benefits of the 13(d) Rulemaking Proposal outweigh the costs. When coupled with DERA's acknowledgment of an unquantified cost to a meaningful subset of market participants from a shortening of the Schedule 13D filing deadline, the bottom line is that the Commission lacks a cost-benefit analysis sufficient to establish that the 13(d) Rulemaking Proposal will in fact be beneficial to the U.S. capital markets (and, as noted above, the Commission has also failed to demonstrate the existence of any harm under the current structure). As such, any such conclusion will not meet the requirements of the Administrative Procedure Act.[63]

E. DERA Misapprehends How Activists Operate

The "Market Trends" section of the DERA 13(d) Memorandum suggests that activists operate solely by accumulating minority equity stakes rather than full control.[64] This appears to be based upon the Brav article, which is cited by DERA.[65] Professor Brav measures the size of activists' stakes in target firms based solely upon purchases as reported on Schedule 13D filings.[66] However, in the same article, Professor Brav and his co-authors state that an activist also "must rely upon support from fellow shareholders,"[67] and then devotes an entire section of the article to the analysis of the role of other investors in activist campaigns.[68] This is consistent with our descriptions of how activists operate.[69]

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60 In addition to various comment letters submitted to the Commission, this view was expressed at the Investor Advisory Committee (the "IAC") held on September 21, 2022, not only by me but by other speakers on the panels that were held that day.

61 *Id.* at p. 19, citing authority in fn. 53. As noted above, we are also very confident that the cost to the market will be far greater than the $810 million annual cost noted in the DERA 13(d) Memorandum at n. 54; instead it would be the a meaningful component of the $13.8 billion annual increase in shareholder value attributable to activism as set forth in Table 4 of the DERA 13(d) Memorandum.

62 *See* nn. 46-47, *supra,* and accompanying text for a discussion of the cost-benefit analysis that is mandated by any regulation supported by a statutory grant of authority setting a standard of "necessary or appropriate."

63 *See id.*

64 *Id.* at p 10 (referring to "strict minority stakes" held by activists).

65 Brav, *supra*, as cited in the DERA 13(d) Memorandum at n. 35.

66 Brav, p. 28 and Table 2.

67 *Id.*, at p. 11. *See also id.* at p. 6 ("Activists . . . do not seek full control but operate by 'influencing control'").

68 *Id.* at pp. 69-79.

69 *See, e.g.,* our 10B-1 Comment Letter at p. 8.

DERA's reference to the ownership metric in Professor Brav's article is thus correct in isolation, but DERA omits the very important further point that an activist's efforts consist of more than acquiring the strict minority stake in the company's stock that an activist typically holds. Such a minority stake, by itself, rarely will enable an activist to influence a given company. Activists assemble exposure to a company in a number of ways, only one of which is by purchasing long positions in the equity of the company, and they can only influence a given company through the force of their reasoning and the ability to convince other shareholders of the merits of their position. All of this entails effort and costs extending beyond the activist's equity and economic exposures to the company.

It is not clear to us the point that DERA seeks to make in this citation to Professor Brav's article, but to the extent DERA seeks to base any aspect of its economic analysis on the presumption that an activist engages solely by means of a "strict minority stake" in the company's stock, that analysis is based on a fundamentally flawed assumption (and one that is not supported by the authority cited by DERA for the proposition).

F. DERA's Extensive Discussion of Abnormal Returns Does Not Demonstrate Anything Improper

DERA provides an extensive discussion of "abnormal returns" in the DERA 13(d) Memorandum. This analysis appears to have been provided, at least in part, in response to a suggestion by Professor Lewis in the Original Lewis 13(d) Report. Professor Lewis noted that such an analysis could facilitate a proper assessment of potential gains to market efficiency, but noted that the Commission chose not to perform this analysis in the 13(d) Proposing Release.[70]

The data provided in the DERA 13(d) Memorandum regarding abnormal returns does not suggest any meaningful correlation between activism and realization of such returns, only that some degree of abnormal returns do occur during the period between a Schedule 13D trigger date and current filing deadline. We note that Figure 2 to the DERA 13(d) Memorandum shows that returns continue to increase after the current Schedule 13D filing deadline for a given event, in an amount that far exceeds the increase in returns between the fifth day preceding the filing deadline and the current filing deadline. There is no discussion of what may cause those gains, or, importantly, whether, if the filing period is shortened, the gains that the Commission labels as "abnormal" in the five-day window prior to filing will simply shift to the period after the new filing deadline.

We also note that there is no attempt to exclude from this analysis any returns that accrued because the Schedule 13D filer publicly disclosed its intent after the trigger date but before filing the Schedule 13D – which is not an uncommon occurrence. In this context, given DERA's quantification of the significant extent by which gains from activism exceed any perceived harms therefrom, any "abnormal returns" may be nothing more than the market's positive reaction to an activist's public declaration of intent. In short, despite the extensive discussion of abnormal returns, and the somewhat pejorative juxtaposition of that concept alongside a discussion in which activism is incorrectly presumed to inflict harms on the U.S.

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[70] *Id*. at n. 79, citing to the Original Lewis 13(d) Report at p. 3. The Original Lewis 13(d) Report cites to two academic studies as examples of the analysis of abnormal returns suggested by Professor Lewis. DERA cites to one such report in the DERA 13(d) Memorandum (Bebchuk, et al., *Pre-Disclosure Accumulations by Activist Investors: Evidence and Policy,* 39 J. CORP. L. 1 (2013)), but for a proposition unrelated to the quantification of abnormal returns (DERA 13(d) Memorandum at n. 33).

markets, there is no data supporting the proposition that activism is the cause of returns that are other than the results of an efficient market.

G. *DERA Makes an Unwarranted Suggestion that Activism Constitutes Unfair Trading that Saps Public Trust in the Securities Markets*

DERA takes the case of "potentially informed, opportunistic traders" to a particularly troublesome extreme at the end of the DERA 13(d) Memorandum. Although neither DERA nor the Commission have established that activists are in any way complicit in any information leakage that may occur in the context of activist campaigns, DERA couples an unsubstantiated allegation that such trading occurs with the truism that "lessening an informational advantage that some market participants may perceive to be unfair could enhance trust in the securities markets."[71] What is, of course, completely lacking in this pairing of concepts is anything other than the unestablished assumption that activism somehow begets trading that diminishes trust in the capital markets. This allegation is in effect an *ad hominem* attack on activism generally, implying that activists aid and abet insider trading. DERA does not suggest that this is a claim with any basis in demonstrated facts, but it is troubling that such an unjustified suggestion could find itself in a document prepared by a regulatory authority as part of an active notice and comment exercise. It seems like the sloppy coda to biased analysis. If, and to the extent, such opportunistic trading occurs, it is not the activists that are so trading. Suggesting that regulatory steps need to be taken to restrict activism to protect the markets against behavior that is carried on by unaffiliated parties and is already proscribed by the federal securities laws does not withstand even the slightest scrutiny.

H. *DERA Makes an Unwarranted Characterization of the Scope of the Commission's Investor Protection Mandate under Section 13(d)*

In its struggle to demonstrate that activism harms the U.S. capital markets, DERA advances the completely novel theory that the investor protection goal that underlies Section 13(d) includes the impact of "activist campaigns on investors other than shareholders of the targeted issuers."[72] The Williams Act was adopted to protect investors in companies that were targets of contests for corporate control or other efforts to influence the ownership or management policies of public companies. Congress was also focused on protecting the market for corporate control. Hostile takeovers (the primary focus of Congress at the time of the enactment of the Williams Act) and activism make public companies stronger by providing a means for shareholders to directly influence underperforming boards and management of public companies.

DERA does not cite any authority supporting this expansion of the SEC's authority under Section 13(d) to include the protection of investors other than investors in the voting securities

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[71] *Id.* at p. 27. We also note that the authorities cited in support of the anodyne proposition that trust in the markets is a good thing are similarly anodyne, and (in all but one instance) wholly unrelated to activism. The 2008 Guiso article (cited in n. 76 of the DERA 13(d) Memorandum) surveyed Dutch households and Italian banking customers to ascertain the effect of trust on stock market participation. The three articles cited in n. 77 analyzed the impact of trust on markets from several different perspectives, with the only article that focused on activism (the 2018 Back et al. article) concluding that "the association between liquidity and asymmetric information of the activist may be indeterminate . . ." None of these sources supports the bald allegation in the DERA 13(d) Memorandum that activism is in fact contributing to an erosion of trust in the markets.

[72] *Id.* at p. 13. *See also Id.* at p. 19 at text following n. 53 for a similarly stark and unsupported suggestion that costs or benefits that may accrue to shareholders of non-targeted companies and debtholders warrant quantification.

of companies that are the subject of Schedule 13D (or Schedule 13G) filings. This is because no such authority exists. There is no reference in any provision of the Williams Act, or in any regulation adopted by the Commission thereunder, or, perhaps most importantly, in the extensive legislative history of the Williams Act, that provides (or even suggests) that Congress's concern in adopting the Williams Act included stakeholders in issuers other than targets or holders of debt securities of targets. The Supreme Court has stated:

> The purpose of the Williams Act is to insure that public shareholders who are confronted by a cash tender offer for *their* stock will not be required to respond without adequate information regarding the qualifications and intentions of the offering party.[73]

Perhaps most obviously, Section 13(d) does not impose any obligation on a filer of a Schedule 13D (or 13G) to provide any disclosure regarding the potential impact of the investment on any company other than the one in which the filer has acquired stock.[74] And, as pointed out in the Lewis Report, DERA's suggestion that adverse effects of activism on third party suppliers or other counterparties to companies that are the subject of an activist effort is flatly inconsistent with internal Staff guidance on the performance of cost-benefit analyses, which view enhanced competition and efficiency as gains, not costs, for cost-benefit analysis purposes.

DERA's cavalier floating of this unwarranted concept as an issue warranting consideration by the Commission is arbitrary and capricious. There is no basis in law for the suggestion, as it flatly contradicts longstanding Supreme Court precedent as well as a well-established Commission position. It was not raised in any manner in the 13(d) Rulemaking Proposal,[75] yet there it is, in the DERA 13(d) Memorandum, cited as a fact in need of no empirical support, inviting the Commission to rely upon it in a final rule. Any attempt to justify regulatory action by this blatantly incorrect securities law analysis will invite challenge under

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73 *Rondeau*, *supra*, 422 U.S. at 58 (emphasis added). Immediately following this passage, the *Rondeau* court cites a discussion contained in the Senate Report on the Williams Act that describes "the dilemma facing such a shareholder". That discussion focuses solely on a shareholder in a company that is the subject of a tender offer. *Id*. at fn. 8, *citing* S. Rep. No. 550, 90th Cong., 1st Sess., 2 (1967). *See also* 5 Louis Loss, Joel Seligman & Troy Paredes, *Securities Regulation* (6th ed. 2021) at p. 52 ("The legislative history thus shows that the sole purpose of the Williams Act was the protection of investors who are confronted with a tender offer.").

74 We of course acknowledge that investor protection is at the heart of the Commission's mission, and we share the Commission's focus on protecting all investors. However, there is no basis for importing into the broad concept of "investor protection" the idea that all investors are entitled to protection in all cases under all aspects of the federal securities laws and the Commission's regulations, and, as noted above, the authority cited by the Commission for the 13(d) Rulemaking Proposal that refer to "investor protection" are subject to an appropriateness standard that mandates a particularly reasoned form of cost-benefit analysis. *See* nn. 46-47 and 62 and accompanying text, *supra*.

75 See footnote 144 to the 13(d) Rulemaking Proposal, which defines "market participant" (as that term is used in the 13(d) Rulemaking Proposal) as follows:

> [A]ny investor in or trader of a covered class, as determined in [the 13(d) Rulemaking Proposal]. The term has been used to account for the foreseeable possibility that a large blockholder may need to consult with persons who are not investors or traders, such as outside counsel, broker dealers, filing agents and others in connection with having to make its initial Schedule 13D filing.

The reference to "investors" embedded in this definition is limited to investors in voting common stock of a company that is the subject of a Schedule 13D filing. The DERA 13(d) Memorandum's suggestion that other investors (whether investors in debt securities of such an entity, or investors in debt or equity securities of unrelated issuers) is a proper concern of the Commission under Section 13(d) is not only fanciful, it is inconsistent with the Commission's own position as enumerated in the 13(d) Rulemaking Proposal.

the Administrative Procedure Act, and also will be susceptible to challenge under the Supreme Court's decision in *FCC v. Fox Television Stations* and related decisions.[76]

I. Concerns Regarding the Reliability of the Data Generally

Note 3 to the DERA 13(d) Memorandum concedes that the number of Schedule 13D filings received by the Commission in 2020 was overstated in the 13(d) Rulemaking Proposal by a factor of two – 5,288 filings actually received as compared to 10,542 filings as reported in the 13(d) Rulemaking Proposal. DERA asserts that this error was due to the inclusion of "duplicate records" in the initial calculation.

What DERA does not say is whether the data for the *other* years analyzed in the Memorandum (2011-21) is reliable, or if similar double counting (or other) issues affected that data. At a minimum, a mistake of this magnitude supports the claims that we and others have been making that the Commission is not allowing sufficient time for complex rulemakings such as this to be properly evaluated, presented for comment, and commented upon.[77] The Commission's error also suggests that similar double counting or other issues may be present in the other years of the review period – it does not appear that DERA has had the opportunity to scrub that data.

As we note above, we also believe that infirmities in the definitions used by DERA to organize its review of historical Schedule 13D/G filing data may introduce additional imprecision into the data.[78] While we have submitted a FOIA request to the Commission seeking, among other things, the data assembled by DERA for evaluation in the DERA 13(d) Memorandum, we have not yet received a substantive response to that request, so we are unable to ascertain how the issues described above may have affected the conclusions drawn by DERA.[79]

5. DERA Correctly Concludes That Regulatory Structures in Other Jurisdictions Are Not Relevant Here.

In our Second Supplemental 13(d) Comment Letter, we described why, contrary to the suggestion by Wachtell, Lipton, Rosen & Katz in a supplemental comment letter filed by that law firm with the Commission, corporate control concepts contained in the law of other jurisdictions are not germane to the 13(d) Rulemaking Proposal. We are gratified by DERA's concurrence in that view.[80]

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[76] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (agencies are free to change their existing policies if they meet a three-part test requiring a reasoned explanation for the change, none of which are met in this instance: (i) the agency must "display awareness that it is changing position"; (ii) the "agency may not depart from a prior policy *sub silentio* or simply disregard rules that are still on the books, and (iii) the agency must show that there are good reasons for the new policy;); see also *Ramaprakash v. FAA, 346 F.3d 1121, 1124 (D.C. Cir. 2003)* (agency "must provide a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored").

[77] See n. 10, *supra*.

[78] See n. 18, *supra*.

[79] Freedom of Information Act Request submitted by Thomas R. Brugato of our counsel Covington & Burling LLP on June 1, 2023, and acknowledged by the Commission's Office of FOIA Services on that date (FOIA Tracking Number 23-02407-FOIA).

[80] DERA 13(d) Memorandum, n. 45. We note that, in reaching this conclusion, DERA claims that "several commentators" suggested that deadlines for reporting the acquisition of meaningful ownership stakes in other countries are relevant to the 13(d) Rulemaking Proposal, but does not identify any other commentators that have

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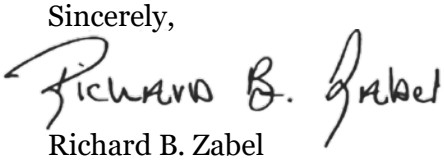
The strength of the U.S. capital markets is due in no small part to the nuanced and balanced regulatory structure created by the Williams Act and implemented by the Commission's regulations and other actions in the 55 years since that Act's enactment. Congress's thoughtful analysis, and the Commission's adherence to Congress's intent, has provided public companies and their shareholders with knowledge of tender offers and activist campaigns while preserving the salutary effects of these events on underperforming companies and Boards. As discussed in our 13(d) Comment Letters, the 13(d) Rulemaking Proposal threatens to compromise fundamental attributes of the U.S. securities regulatory system without justification.

The DERA 13(d) Memorandum helpfully demonstrates the value that activism creates for the market and all investors, yet accepts without question or analysis the Commission's flawed proposition that activism harms the U.S. capital market, warranting regulatory response. We continue to urge the Commission to abandon or significantly amend the 13(d) Rulemaking Proposal.[81]

Sincerely,



Richard B. Zabel

General Counsel & Chief Legal Officer
Elliott Investment Management L.P.
360 S Rosemary Ave, 18th Floor
West Palm Beach, FL 33401

cc: The Hon. Gary Gensler, SEC Chair
The Hon. Caroline A. Crenshaw, SEC Commissioner
The Hon. Jaime Lizárraga, SEC Commissioner
The Hon. Hester M. Peirce, SEC Commissioner
The Hon. Mark T. Uyeda, SEC Commissioner

advocated for this proposition. We are not aware of any comment letter (other than the Wachtell comment letter and our Second Supplemental 13(d) Comment Letter), that has advocated for (or otherwise analyzed) this position (and of course our Second Supplemental 13(d) Comment Letter did not support it).

[81] We note that the IAC provided its recommendations to the Commission as to both the 13(d) Rulemaking Proposal and the 10B-1 Rulemaking Proposal on June 22, 2023. While we are disappointed that the IAC's recommendations as to the 13(d) Rulemaking Proposal do not reflect, or even acknowledge, the testimony provided at the September 2022 IAC meeting that opposed the changes proposed by the Commission, we are particularly surprised that the Commission saw fit to request that the IAC finalize its recommendations prior to the Commission's receipt of comments on the DERA 13(d) Memorandum, and only two days after the issuance of the DERA 10B-1 Memorandum. This suggests that the Commission views the subsequent economic analyses performed by DERA for these rulemaking proposals, and the public comments thereon, are not relevant to the IAC's consideration of these rulemaking proposals. That is a troubling conclusion, which undercuts the validity of the IAC's recommendations.

Exhibit A

Lewis Report on the DERA 13(d) Memorandum

Review of the Supplemental Data and Analysis on Certain Economic Effects of Proposed Amendments Regarding the Reporting of Beneficial Ownership

Craig Lewis[1]

June 27, 2023

[1] I am the Madison S. Wigginton Professor of Finance at Vanderbilt University's Owen Graduate School of Management and a Professor of Law at Vanderbilt Law School. From 2011 to 2014, I was the chief economist of the Securities and Exchange Commission (the "Commission"), where I also served as director of the Division of Economic and Risk Analysis. At the Commission, I focused on economic analysis in the financial regulatory process, and oversaw activities related to agency policy, rulemaking, and risk analysis. This comment letter was commissioned by Elliott Investment Management L.P. I was supported by staff of Global Economics Group, who worked under my direction.

Overarching Comments:

- After reviewing market trends and analyzing baseline data, the Division of Economic and Risk Analysis's ("DERA") supplemental memorandum on the economic analysis of beneficial ownership reporting ("DERA 13(d) Memorandum") does not make a supportable case for shortening the beneficial ownership filing deadline or for any other aspect of the original 13(d) rulemaking proposal ("Proposed Rule").[2] Rather, the DERA 13(d) Memorandum presents an analysis of the baseline and potential benefits that supports the existing reporting regime and highlights the risks of the proposed changes.

- Activist investors benefit shareholders of public companies through improved corporate governance initiatives that result in increases in shareholder value. The DERA 13(d) Memorandum estimates the increase in shareholder value of companies involved with activist campaigns disclosed (in part) through Schedule 13D filings to be $13.8 billion annually (2011- 2021).[3]

- In aggregate, non-activist investors benefit far more from activist campaigns than from the low risk of being a selling shareholder between the proposed Schedule 13D filing deadline and the actual filing date. The benefits are so much greater than the costs that the loss in shareholder value from one fewer activist campaign annually ($128 million on average) due to the Proposed Rule would be larger than the aggregate "harm" to selling shareholders across all campaigns in a year ($93 million).[4]

- Despite commentor objections, DERA continues to refer to selling shareholders as "harmed" investors – though DERA does so without economic justification.[5] When viewed from the standpoint of ex-ante economic efficiency, investors would prefer activist involvement and the associated gains, even if it means that they might miss the gains from a particular activist campaign if they sold between the proposed deadline and actual filing date (the so-called "harm").

- The DERA 13(d) Memorandum reports that over the recent decades, there has been no meaningful change in the average level of beneficial ownership reported in Schedule 13D

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[2] Memorandum of the Staff of the Division of Economic and Risk Analysis, Supplemental data and analysis on certain economic effects of proposed amendments regarding the reporting of beneficial ownership (Apr. 28, 2023), available at https://www.sec.gov/comments/s7-06-22/s70622-20165251-334474.pdf ("DERA 13(d) Memorandum"); Modernization of Beneficial Ownership Reporting, Release No. 34-94211 (Feb. 10, 2022), 87 FR 13846 (Mar. 10, 2022) ("Proposed Rule").
[3] DERA 13(d) Memorandum at p. 18.
[4] DERA 13(d) Memorandum at pp. 18; 25.
[5] Craig Lewis, Review of the Economic Analysis for Proposed Rule Amendments to Modernize Beneficial Ownership Reporting, Exhibit B to letter from Elliott Investment Management (Apr. 11, 2022), available at https://www.sec.gov/comments/s7-06-22/s70622-279518.pdf; Letter from Jeffrey N. Gordon, Columbia Law School (Jun. 20, 2022), available at https://www.sec.gov/comments/s7-06-22/s70622-20132543-303070.pdf.

filings.[6] This contradicts the Securities and Exchange Commission's ("Commission") position that a need for updating beneficial ownership disclosures is attributable to technological advances that facilitate the rapid accumulation of large beneficial ownership positions, leading to investor protection concerns.[7]

- DERA's attempt to characterize declines in shareholder value to the suppliers and close competitors of activist targeted issuers as a *cost* in their economic analysis is anti-competitive and a reversal of the Commission's public guidance on economic analysis that treats enhanced competition (which can lead to lower prices and higher quality) as a benefit of a rule.[8]

[6] DERA 13(d) Memorandum at p. 10.
[7] Proposed Rule at p. 13852.
[8] DERA 13(d) Memorandum at p. 13; Current Guidance on Economic Analysis in Commission Rulemakings, March 16, 2012, at p. 11, available at: https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf.

Table of Contents

I. Background

I was commissioned by Elliott Investment Management L.P. ("Elliott") to assess the economic analysis in the DERA 13(d) Memorandum. This follows my review of the original economic analysis included in the Proposed Rule.[9] My assessment of the original economic analysis was attached as Exhibit B to Elliott's comment letter dated April 11, 2022 (the "Lewis Study").[10]

As I noted in the Lewis Study, the Commission's position that overall investors and market participants would benefit from a reduction in information asymmetry was left unsupported in the Proposed Rule.[11] In response to suggestions made in the Lewis Study and other comment letters, the Commission has provided a supplemental analysis of one aspect of the Proposed Rule –the potential economic effects of shortening the Schedule 13D filing deadline from ten days to five days.[12]

DERA conducts extensive additional analysis, but often presents the results without explanation, leaving the public to infer the economic implications of their work. Unstated, but discernible from the DERA 13(d) Memorandum, is the fact that non-activist investors gain significantly more from activist campaigns than from the minimal risk of being a selling shareholder during the time between the proposed Schedule 13D filing deadline and the actual filing date. The Commission's initial assumption – that shortening the filing deadline would benefit market participants by reducing information asymmetry – is not defensible. Any decrease in activism due to the Proposed Rule would result in costs to market participants that cannot be offset by selling shareholders. This is not surprising, considering the limited number of selling shareholders (those who sell between the proposed and actual Schedule 13D filing deadline) compared to the overall group of shareholders in a targeted firm, who typically gain from activist campaigns.

Beyond the shortening of the filing deadline, the DERA 13(d) Memorandum notes that other effects of the Proposed Rule may not be readily quantified, which includes changes to group definitions and deems holders of certain cash-settled derivative securities as subject to beneficial ownership reporting.

> *However, we note that this analysis reflects one aspect of the overall potential impact of the proposed amendments, and that other effects of the proposed amendments may not be readily quantified.*[13]

This is an important admission, as the Commission does not have economic support for the remainder of its modernization proposal. Similar to the economics of the shortened filing window, market participants should not expect benefits from the remainder of the proposal. Any reduction of

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[9] Proposed Rule at p. 13876-91.
[10] Craig Lewis, Review of the Economic Analysis for Proposed Rule Amendments to Modernize Beneficial Ownership Reporting, Exhibit B to letter from Elliott Investment Management (Apr. 11, 2022), available at https://www.sec.gov/comments/s7-06-22/s70622-279518.pdf (the "Lewis Study").
[11] Proposed Rule at p. 13877; Lewis Study at. pp. 8-9.
[12] DERA 13(d) Memorandum at pp. 11; 20.
[13] DERA 13(d) Memorandum at p. 11.

shareholder activism caused by the proposed changes would have large implications as it impacts all the investors of an activist engaged company, whereas any "benefits" from alternative group definitions and derivative disclosure would accrue to a small set of investors that choose to sell shares in the short windows of time that immediately precede public disclosure of activism. Ex-ante, market participants would favor activist involvement and the associated gains over the incremental changes in market behavior from a small subset of investors.

II. Potential Effects of Activist Campaigns and Potential Effects Associated with Selling Shareholders

A. Selling Shareholders and Shareholder Activism

Information asymmetry is an essential feature of securities markets.[14] The possibility of informational differences motivates investors to engage in research with the expectation that they may be rewarded if they identify profitable trading opportunities. If this research leads to improved price discovery, some investors will have access to more or better information than others. This can create a competitive advantage for those with superior information and can potentially affect the pricing and trading of securities.

Activist investors rely on their ability to generate informational asymmetries through their research and understanding of the fundamental value of a firm. Activists work to uncover opportunities for firm improvement that are not reflected in the target's current share price. Activists then use this information to push for changes in the target firm's operations, board, or strategies, with the goal of increasing the firm's value. In essence, activists leverage information asymmetries for the benefit of all shareholders by seeking to improve the firm's performance and thus its share price.

The current beneficial ownership reporting rules require investors owning more than 5% of a firm's securities to publicly disclose their holdings, which can reveal the presence of an activist investor and possibly their intentions. By proposing to shorten the filing window from ten days to five days, the Commission is attempting to reduce information asymmetry without demonstrating that there is a need to do so.[15] By forcing activist shareholders to reveal their positions earlier, the Proposed Rule primarily benefits short-term or selling investors, who could leverage this publicly available information without having to perform the same level of research as an activist investor.

This could lead to selling shareholders gaining an 'economic windfall' as they can use the information disclosed by activist investors for their own short-term gains, whereas the activists are more focused on sustainable forms of value creation. The proposal to shorten the filing window suggests that the Commission believes that to make markets function more efficiently, selling shareholders – who may hold less optimistic views on the economic value of target firms – should

[14] Grossman, Sanford J., & Joseph E. Stiglitz, On the Impossibility of Informationally Efficient Markets, The American Economic Review. 70.3 (1980): 393-408.
[15] Proposed Rule at pp. 13847; 852.

receive additional opportunities to benefit from the fundamental research done by other market participants, rather than conducting their own active research. However, the Commission seems to have misunderstood the problem. The transmission of economically valuable information from investors carrying out fundamental research to selling shareholders is an unanticipated bonus, not a "harm" as it is currently labeled. The Proposed Rule disincentivizes activist investors from performing in-depth research and engaging in activism, which would in turn have broader implications for corporate performance, securities markets, and potentially deleterious effects on competition and capital formation.

B. The Risks Associated with a Reduction of Activist Activity Far Outweigh the Economic "Harm" Experienced by Selling Shareholders

The DERA 13(d) Memorandum calculates the economic effect of shareholder activism (see Table 4 of the DERA 13(d) Memorandum) and the "potential harms to selling shareholders under the current Schedule 13D filing deadline" (see Table 5 of the DERA 13(d) Memorandum).[16] DERA estimates that the benefits to shareholders of companies involved with activist campaigns disclosed (in part) through Schedule 13D filings to be $13.8 ***billion*** annually (2011- 2021).[17] By comparison, the aggregate "harm" to selling shareholders across all campaigns is $93 ***million*** annually.[18]

Before discussing the implications of DERA's analysis, it is important to note DERA continues to describe certain activity related to selling shareholders as "harmed" without providing support for that characterization. As I discussed in the Lewis Study, the Proposed Rule's prescribed transfer of economically valuable information from activist investors to selling investors would result in an economic windfall (and not a "harm") that *benefits* sellers rather than the investors concerned with creating additional economic value. I noted in the Lewis Study that the Commission could have provided estimates of the windfall *benefits* the Proposed Rule would transfer to selling shareholders; yet, in the DERA 13(d) Memorandum to justify DERA's analysis they mischaracterize my study as a call for a quantification of *harms*.

[16] DERA 13(d) Memorandum at pp. 18; 25.
[17] DERA 13(d) Memorandum at p. 18.
[18] DERA 13(d) Memorandum at pp. 25. DERA provides a description of how it identified its set of activist campaigns, the process suffers from both Type I and Type II errors that impact that size of its measurements. A Schedule 13D is classified as an activist investment by DERA if it includes a tabular trading history as determined by text analysis (the text analysis is left undescribed and therefore we are unable to immediately evaluate DERA's process), which the DERA notes some portion of the activities with no tabular table reflect actual transactions and potential activist activities no classified as such. Additionally, as DERA notes, their process leads to some prominent activist activities being misidentified as "corporate action filings." Approximately 253 of the Schedule 13Ds classified as corporate action filings are made by prominent activists (12,657 x 2.0%) (see footnote 9 of the DERA 13(d) Memorandum), this represents 7.6% of DERA's sample of non-corporate action [253/(253+3067)]. DERA could have alternatively analyzed a set of Schedule 13D filed by prominent activists to avoid assignment errors.

A number of commenters suggested that the economic analysis in the Proposing Release could have been enhanced by a quantitative analysis of the potential harms to selling shareholders under the current Schedule 13D filing deadline.[19]

Despite the reference to a number of commenters, the Lewis Study is the only comment letter cited at this part of the DERA 13(d) Memorandum. Setting aside the mischaracterization of my original analysis, the DERA 13(d) Memorandum analysis of the effects on market participants does not support the Commission's position that overall investors will benefit from the Proposed Rule.[20] Consider DERA's estimates of activism benefits and "harms" in a scenario where a shortened reporting window discourages an activist from initiating a *single* campaign in a year. As per Table 4 of the DERA 13(d) Memorandum, the average rise in shareholder value for a campaign that requires more than five days to develop a position is $128 million.[21] This suggests that the lost benefits from a single deterred activist campaign would surpass DERA's estimated total "harm" for selling shareholders per year ($93 million) across an of average 123 campaigns per year from 2011-2022.[22] Since the elimination of just one activist campaign is likely a very conservative estimate, the DERA 13(d) Memorandum does not provide economic justification for reducing the reporting window.

To understand this better, consider DERA's approach to estimating the overall "harm" to selling shareholders – a methodology that is similar to a calculation of ill-gotten gains the Commission might make during an enforcement process when information is improperly withheld from shareholders. This analogy to ill-gotten gains is implicitly how the Commission perceives the profits activists make after the proposed five-day reporting window. The DERA 13(d) Memorandum calculates the total "harm" as the product of abnormal trading volume (excluding the filer's trades) and the change in share price on the days following the proposed five-day reporting window. Abnormal trading volume is determined as the trading volume that exceeds the average daily trading volume in the 60-day period that started 120 days before the filing trigger date.[23] As per the calculations in Table 5, the trades on any given day are assumed to have been executed at the average of that day's closing price and the closing price of the preceding day. The "harm" per share traded is considered as the difference between that price and the closing price one day after the filing date.[24]

DERA uses abnormal trading volume as an indicator of the level of informed, opportunistic trading. They believe the expected volume likely represents trading between uninformed investors, causing no harm.[25] The abnormal volume (excluding filer trading) is then seen as the level of informed trading. This interpretation assumes that the activist has informed select investors about the upcoming campaign before its public announcement and every share exchanged with the opportunistic investor(s) is "harmed." These assumptions are problematic for four reasons: 1)

[19] DERA 13(d) Memorandum at p. 20.
[20] Proposed Rule at p. 13877.
[21] DERA 13(d) Memorandum at p. 18.
[22] DERA 13(d) Memorandum at pp. 25.
[23] DERA 13(d) Memorandum at pp. 22.
[24] DERA 13(d) Memorandum at pp. 25.
[25] DERA 13(d) Memorandum at pp. 21.

activists may announce upcoming campaigns before filing a Schedule 13D; 2) market participants might be able to deduce a significant position is being built by analyzing trading volume;[26] 3) they overlook market makers and day traders (trading participants who open and close their position between the proposed deadline and the filing date); 4) unaffiliated parties like brokers may be trading ahead of an activist campaign, not because it was "leaked" to them but because they learned about the campaign and are breaching their fiduciary duties. In regard to 3), traders that buy and sell during the reporting window would likely represent a material portion of the abnormal volume and would not be impacted. DERA could have used consolidated audit trail ("CAT") data that contains information on which traders were participating in the market to estimate a precise measure of the impact but did not do so. Given DERA's willingness to use CAT data in the recently proposed Order Competition rule, the analysis of "informed" trading is an obvious setting to utilize CAT data.[27]

Finally, DERA's estimate of price change (average of current and previous day's closing prices minus the previous close) inaccurately measures the harm to selling shareholders, as it includes price changes due to general market fluctuations.[28] A more accurate harm estimate would account for abnormal price changes by adjusting for overall stock market variations.

Generally, the large disparity between the benefits to shareholders from activist campaigns and DERA's estimates of "harm" to selling shareholders is not surprising. The announcement of an activism campaign is associated with a positive stock price reaction that benefits *all shareholders* of a target firm while only *a small subset of shareholders* comprise the marginal increase in trading volume between the proposed filing date and the actual filing date, which DERA estimates to be 1.2% of all shares outstanding.[29] Providing selling shareholders with a windfall of value generated through other investors' fundamental research cannot be justified if it risks eliminating benefits to many shareholders from activist involvement.

III. Technology and Other Advancements are not a Basis for Amending Beneficial Reporting

The Proposed Rule pointed to technology and other advancements as a basis for updating beneficial ownership reporting – including the speed at which positions are built and the size of positions needed by activists to engage in campaigns.

> *…in light of the technological advances and the rapid pace with which trading activities and large accumulations of beneficial ownership can occur in the financial markets today as compared to when the deadline was enacted in 1968, we*

[26] Nickolay Gantchev & Chotibhak Jotikasthira, Institutional Trading and Hedge Fund Activism, 64 MGMT. SCI. 2930 (2018).
[27] Order Competition Rule, Release No. 34-96495 (Dec. 14, 2022), 88 FR 128 (Jan. 3, 2023).
[28] DERA 13(d) Memorandum at pp. 25.
[29] DERA 13(d) Memorandum at pp. 25.

are concerned that the current delay in reporting market-moving information on Schedule 13D raises investor protection concerns.[30]

However, the DERA 13(d) Memorandum reports that there has been no meaningful change in the average level of beneficial ownership reported in Schedule 13D filings and does not support the Commission's initiating concern related to investor protection. According to the DERA 13(d) Memorandum,

> *…[in] at least one study, there has been no material change in the average level of beneficial ownership reported in Schedule 13D filings between 1994, the advent of electronic filing, and 2007. Our own analysis of how the statistics reported in this study compare to beneficial ownership reported in more recent initial Schedule 13D filings, from 2011 to 2021, supports the observation that the average level of beneficial ownership reported in Schedule 13D filings has not meaningfully changed in recent decades.* [31]

DERA did not make data available on the size of beneficial ownership positions over the time covered in its analysis or about the speed of accumulation of beneficial ownership positions though they have the data available to present. Regarding whether lower ownership stakes have become more consequential, DERA noted that from their perspective it is uncertain if that is the case.[32] The combination of these admissions indicate there is no support for the justifications provided by the Commission in the Proposed Rule.

IV. DERA is Misplaced in Its Assignment of a Cost to Activist Targets' Competitors and Suppliers

DERA perceives the potential for increased competition and efficiency improvements stemming from activist involvement with issuers as a downside, or 'cost', of implementing the Proposed Rule. This viewpoint is inconsistent with its declared goals of economic analysis. The following statement from the DERA 13(d) Memorandum articulates their perspective:

> *[R]esearch has found that issuers that are the suppliers and close competitors of the targeted issuers, in certain circumstances, experience decreases in shareholder value around an activist campaign, which researchers have associated with cost-cutting and increased efficiency at the target issuer…Thus, any reduction in activism may be accompanied by additional positive or negative effects on other investors.*[33]

[30] Proposed Rule at p. 13852.
[31] DERA 13(d) Memorandum at p. 10.
[32] DERA 13(d) Memorandum at p. 10.
[33] DERA 13(d) Memorandum at p. 13.

The Commission's March 2012 public guidance on economic analysis in rulemakings (the "Guidance") makes it clear that efficiency gains and competition should be viewed as benefits within the cost-benefit analysis of proposed rules not as costs:

> *Typically, the economic benefits of a rule include likely gains in economic efficiency such as… enhanced competition, which can lead to reduced prices or higher quality…*[34]

The literature referenced by DERA to support its point about *negative effects* of activism makes it clear that associated impacts to competitor and supplier firms are actually in line with the same efficiency and product *benefits* the Commission has stated it is looking for in its economic analysis.

> *The effects on rivals' product market performance is commensurate with post-activism improvements in target's productivity, cost and capital allocation efficiency, and product differentiation.*[35]

> *Suppliers can avoid squeezing effects also by building up a new customer base and by creating new markets. More specifically, they can develop products at higher quality in order to gain a cost advantage or differentiate their products away from other suppliers to increase their customer base.*[36]

V. Conclusion

Despite a statutory obligation to determine as best it can the economic implications of a proposed rule,[37] key economic elements presented in the DERA 13(d) Memorandum are left without interpretation, leaving it up to the public to infer the economic implications of their work. The unstated but discernable conclusion is that there is insufficient support for shortening the beneficial ownership filing deadline or, for that matter, for adopting any of the other changes proposed by the Commission in the Proposed Rule. Instead, the DERA 13(d) Memorandum reinforces the validity of the existing reporting regime and emphasizes the risks associated with proposed changes.

DERA's analysis acknowledges the significant benefits that activist investors bring to shareholders through improved corporate governance initiatives, resulting in increased shareholder value. As demonstrated by DERA's own analysis, non-activist investors benefit more from activist campaigns than from the low risk of being a selling shareholder between the proposed filing deadline and the actual filing date. The potential loss in shareholder value from reducing the number of

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[34] Guidance at pp. 10-11.
[35] Hadiye Aslan & Praveen Kumar, The Product Market Effects of Hedge Fund Activism, 119 J. FIN. ECON. 226 (2016), at. p 1 (cited by DERA in n. 42 of the DERA 13(d) Memorandum).
[36] Hadiye Aslan, Shareholders Versus Stakeholders in Investor Activism: Value for Whom?, 60 J. CORP. FIN. 101548 (2020), at p. 31 (cited by DERA in n. 42 of the DERA 13(d) Memorandum).
[37] Guidance at p. 3.

activist campaigns annually due to the Proposed Rule would exceed the aggregate “harm” to selling shareholders.

The DERA 13(d) Memorandum documents that contrary to the Commission's claims of technological advances necessitating updates to beneficial ownership disclosures that there has been no meaningful change in the average level of beneficial ownership reported in Schedule 13D filings over recent decades. This challenges the notion that investor protection concerns arise from the rapid accumulation of large beneficial ownership positions.

Lastly, DERA’s inclusion of declines in shareholder value for suppliers and close competitors of activist targeted issuers as a cost in their economic analysis is anti-competitive and contradicts their previous guidance on economic analysis, which treated enhanced competition as a benefit of a proposed rule.

The DERA 13(d) Memorandum does not provide a persuasive case for shortening the beneficial ownership filing deadline (or for making any other changes to Section 13(d)). Rather, it supports the existing reporting regime, highlights the benefits of activist involvement, undermines the justifications for updated disclosures, and raises concerns about DERA's economic analysis approach.