CITADEL

April 21, 2022

Ms. Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549–1090

Re: Position Reporting of Large Security-Based Swap Positions (File No. S7-32-10)

Dear Ms. Countryman:

We appreciate the opportunity to provide comments to the Securities and Exchange Commission (the "Commission") on the proposal to require certain security-based swap positions (and related instruments) to be publicly reported in an attributed manner within one business day (the "Proposal").[1]

Citadel is a leading investor in the world's financial markets, managing in excess of $46 billion in investment capital on behalf of a diverse array of investors, including pensions (local, corporate, and union), endowments, healthcare providers, foundations, and insurance companies. We have strongly supported the post-crisis reforms to the security-based swaps markets designed to mitigate systemic risk, and increase market transparency, fairness, and competition.[2] This longstanding support notably extends to the Commission's real-time public reporting regime for security-based swap transactions that recently went live in February 2022, which provides transparency regarding the price, size and time of individual transactions while protecting against the disclosure of confidential information by anonymizing the reported data.[3]

Unfortunately, just before this new public reporting regime even went into effect, the Commission proposed an entirely new, arbitrarily-designed, public position disclosure regime for certain security-based swap positions that contemplates the publication on an attributed basis of confidential investment and trading information. This represents an unprecedented and dangerous departure from all of the other public reporting and disclosure frameworks previously implemented by the Commission.

The Proposal raises a number of concerns that the Commission did not adequately consider, including increasing the costs associated with establishing and managing security-based swap positions, facilitating the copycatting of investment and trading strategies, disincentivizing fundamental research, and impairing price discovery, liquidity and market efficiency. All of these consequences of the Proposal will impede the ability of fund managers to continue to deliver

[1] 87 FR 6652 (Feb. 4, 2022), available at: https://www.govinfo.gov/content/pkg/FR-2022-02-04/pdf/2021-27531.pdf.

[2] *See, e.g.,* https://s3.amazonaws.com/citadel-wordpress-prd102/wp-content/uploads/2018/09/13185401/Citadel-Letter-to-SEC-on-Advancing-Security-Based-Swap-Rules-Final.pdf.

[3] Regulation SBSR—Reporting and Dissemination of Security-Based Swap Information, 81 FR 53546 (Aug. 12, 2016), available at: https://www.govinfo.gov/content/pkg/FR-2016-08-12/pdf/2016-17032.pdf.

superior risk-adjusted returns for investors.[4]

Further, by impairing the ability of fundamentally-driven active investment managers to effectively build and manage their portfolios, the Proposal and the myriad related recent position and activity disclosure-related proposals (related to securities lending, beneficial ownership reporting and short position and activity reporting), will collectively have material negative consequences for the wide swath of retail and institutional investors who today benefit from efficient, low cost index funds and other passive investment vehicles. Active managers, who invest time and resources to identify both under-valued and over-valued securities, play a critical role in driving the informed prices and rational allocation of capital that passive investors depend upon. The successful growth of indexing and other passive investment strategies has been underpinned by active management strategies that drive and maintain the efficient pricing of securities. Compromising the ability of active managers to effectively implement their investment theses, including through the use of security-based swaps, would cause securities prices to deviate from their fundamental value and capital to be misallocated, to the detriment of all investors.

Below, we detail why the public disclosure aspect of this Proposal is inconsistent with the Securities Exchange Act of 1934 ("Exchange Act"), lacks a rational basis, and will have unjustifiable impacts on efficiency, competition, and capital formation, and cannot otherwise be sustained under basic principles of administrative law. We also identify more narrowly tailored alternatives that address the Commission's stated objectives, but which the proposing release neglected to adequately consider. Finally, we explain how the Commission's decision not to consider available data resulted in mis-calibrated thresholds that do not accurately reflect market conditions and would capture many more positions and market participants than estimated.

[4] *See, e.g.,* Letter from Harvard Management Company (Mar. 21, 2022), available at: https://www.sec.gov/comments/s7-32-10/s73210-20120781-272961.pdf and Letter from Pension Investment Association of Canada (Mar. 21, 2022), available at: https://www.sec.gov/comments/s7-32-10/s73210-20120562-272726.pdf.

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I. The Proposal's Public Disclosure Requirement Is Unsupported By Law Or Policy.

The Proposal contemplates market participants continuously monitoring security-based swap positions against pre-determined thresholds set by the Commission for swaps referencing equities, credit, and other debt instruments. To the extent a security-based swap position exceeds a threshold, a market participant would be required to file an attributed public report within one business day that sets forth the details of its security-based swap position, along with any other related positions.

The envisaged attributed public disclosure of a market participant's portfolio positions, and the immediacy of such disclosure, fundamentally alters the ability of market participants to keep proprietary investment and trading strategies confidential, with significant consequences for overall price discovery, market efficiency and market integrity. As detailed below, the public disclosure aspect of the Proposal is inconsistent with the Exchange Act, lacks a rational basis, and would reduce efficiency, stifle competition, and deter capital formation. Collectively, this results in the Proposal violating the Administrative Procedure Act ("APA").

A. *The Commission Lacks Statutory Authority To Require The Public Disclosure Of Swaps Positions.*

The Commission lacks statutory authority to require market participants to *publicly* report their security-based swaps positions. Like other federal agencies, the Commission "literally has no power to act . . . unless and until Congress confers power upon it."[5] In the Proposal, the Commission points to Section 763(h) of the Dodd-Frank Act as the source of authority for Proposed Rule 10B-1.[6] But that section, mainly concerning position limits, does not authorize, let alone "clear[ly]" authorize, such a "transformative expansion in [the Commission's] regulatory authority."[7] The Commission has never before required near real-time attributed public disclosure of confidential, proprietary position information, and Section 763(h) is not the start. That section only authorizes the Commission to require certain market participants to disclose their swaps positions to the Commission—not the public at large.[8]

Section 763(h) provides, in relevant part, that the "Commission, by rule or regulation, may require any person that effects transactions for such person's own account or the account of others in any securities-based swap . . . as set forth in [15 U.S.C. § 78j-2(a)(1), (2)] to report such information as the Commission may prescribe regarding any position or positions in any security-based swap."[9] Thus, by its terms, Section 763(h) addresses "report[ing]," not "*public* reporting," as the Proposal repeatedly calls it.[10]

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[5] *N.Y. Stock Exch. LLC v. SEC*, 962 F.3d 541, 553 (D.C. Cir. 2020) (ellipsis in original) (quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)).

[6] *See* Proposal at 6654.

[7] *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014).

[8] *See* 15 U.S.C. § 78j-2(d).

[9] *Id.*

[10] Proposal at 6656, 6657, 6675, 6679, 66 (emphasis added).

If Congress had wished to give the Commission power to require market participants to report security-based swaps *positions* to the public, Congress would have granted that power expressly, as it did with respect to security-based swaps *transactions*. In the paragraph immediately following Section 763(h), Congress explicitly provided for the "public reporting" of "data relating to a security-based swap transaction."[11] Congress further provided that the "Commission may require registered entities to publicly disseminate the security-based swap transaction and pricing data required to be reported."[12] These provisions "show[ ] that '[w]here Congress wanted to provide for' public availability, it did so explicitly."[13] That Congress did not use similar language in Section 763(h), especially in such close proximity and in the very same piece of legislation, "is significant because Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another."[14] Thus, Congress's choice to say "public reporting" in Section 763(i) (concerning security-based swaps transactions), but not in Section 763(h) (concerning security-based swaps positions), shows that Congress meant to treat information-gathering for positions and transactions differently, and for position reports to be kept private.

Other provisions in Section 763(i) confirm this reading. In that section, as discussed above, Congress authorizes the Commission to require the "real-time public reporting" of certain swaps transactions—but only "in a manner that does not disclose the business transactions and market positions of any person."[15] In the same section, Congress authorizes security-based swap data repositories to share "individual . . . position data" with certain regulators, but, again, only on a "confidential basis."[16] The Commission cannot rationally explain why Congress would have gone to significant lengths to prevent transaction reporting (under Section 763(i)) from publicly revealing position information if Section 763(h) had, as the Commission assumes here, already authorized public position reporting.

The Commission's reading of Section 763(h) is in tension with a number of other provisions of the Exchange Act. Throughout the Exchange Act, Congress has required market participants to "report" on a multitude of datapoints—from the purchase or sale of securities,[17] to the use of conflict of minerals,[18] to the equity positions held by large institutional investment managers.[19] In each instance, Congress has explicitly authorized the Commission to provide for the "public"

[11] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 763(i), 124 Stat. 1376, 1779 (2010) (codified at 15 U.S.C. § 78m(m)(1)(A)).

[12] *Id.* at 1780 (codified at 15 U.S.C. § 78m(m)(1)(D)).

[13] *Am. Petroleum Inst. v. SEC*, 953 F. Supp. 2d 5, 14 (D.D.C. 2013) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002)).

[14] *Dep't of Homeland Sec. v. MacLean*, 574 U.S. 383, 391 (2015); *accord Am. Petroleum Inst.*, 953 F. Supp. 2d at 14.

[15] Dodd-Frank Act § 763(i), 124 Stat. at 1780 (codified at 15 U.S.C. § 78m(m)(1)(C)(iii)).

[16] *Id.* at 1782 (codified at 15 U.S.C. § 78m(n)(5)(G)).

[17] *See* 15 U.S.C. § 78k-1.

[18] *See id.* § 78m(p)(A).

[19] *See id.* § 78m(f)(1).

disclosure (or "distribution and publication") of this information.[20] At the same time, Congress has provided instructions to protect information whose release could cause financial harm.[21] But, again, in Section 763(h) Congress did not authorize "public" disclosure, nor did it provide any instructions for the handling of commercially sensitive information. The Commission's reading of Section 763(h) does not respect Congress's "choice of language"—"both what Congress said" in the multitude of other provisions that reference and govern public disclosure, and "what Congress did not say" in Section 763(h).[22]

What the statutory language conveys, the broader regulatory structure confirms. In authorizing the Commission to require the reporting of swaps positions to the agency, Congress explicitly cross-referenced 15 U.S.C. § 78j-2(a)(1), (2).[23] Those provisions, in turn, authorize the Commission to "establish limits . . . on the size of positions in any security-based swap that may be held by any person" in order to "prevent fraud and manipulation."[24] Indeed, those provisions make clear that the relevant statutory provisions pertain to position limits for security-based swaps, not a public disclosure regime. Reading the security-based swaps provisions "together, rather than the [position-reporting provision] in isolation," it is evident that Congress intended position reporting as a tool for the Commission to enforce any position limits, not as a way to independently require the public disclosure of security-based swaps positions.[25]

That is exactly how the Commodity Futures Trading Commission ("CFTC") previously interpreted an analogous provision of the Dodd-Frank Act, which also concerned the reporting of swaps positions. Like Section 763(h), Section 730 of the Dodd-Frank Act authorized an agency (the CFTC) to require market participants to "report[ ]" certain large swaps "position[s]."[26] As the CFTC recognized, Section 730 reporting was a "necessary component of an effective [CFTC] surveillance program, including monitoring compliance with any [position] limits that may be established by the [CFTC]."[27] Section 763(h) has the same underlying purpose—to assist the SEC in enforcing its position limits, not as a way to create an unprecedented public-disclosure regime.[28]

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[20] *See id.* §§ 78k-1(c)(2), 78m(p)(1)(E), 78m(f)(4).

[21] *See id.* §§ 78m(f)(4), 78m(m)(1)(C)(iii).

[22] *Union of Concerned Scientists v. U.S. Nuclear Regulatory Comm'n*, 824 F.2d 108, 115 (D.C. Cir. 1987).

[23] *See* 15 U.S.C. § 78j-2(d) ("The Commission, by rule or regulation, may require any person that effects transactions for such person's own account or the account of others in any securities-based swap . . . *as set forth in [15 U.S.C. § 78j-2(a)(1), (2)]* to report such information as the Commission may prescribe . . . ." (emphasis added)).

[24] 15 U.S.C. § 78j-2(a); *see also id.* § 78j-2(c) (same for self-regulatory organizations).

[25] *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2488 (2021).

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

[27] *See* 76 FR 43851, 43858 (July 22, 2011), available at: https://www.cftc.gov/sites/default/files/idc/groups/public/@lrfederalregister/documents/file/2011-18054a.pdf.

[28] *See* Proposal at 6687 (acknowledging that public-position reporting "may enhance *Commission oversight* of the security-based swap market" (emphasis added)).

B. *The Proposed Rule Is Arbitrary And Capricious Because It Is Unnecessary, Ineffective, And Counterproductive.*

1. The Commission Has Not Demonstrated A Need For Mandated Public Disclosure Of Security-Based Swaps Positions.

The proposed public disclosure rule is a solution in search of a problem. Security-based swaps provide market participants with an efficient way to obtain precise exposure to a reference security, including for hedging purposes.[29] Globally, there are trillions of dollars in notional amount outstanding of security-based swaps.[30] Thus, it is remarkable that the Commission has issued a proposed rule that would require the near real-time attributed public disclosure of confidential, proprietary position information without any persuasive evidence as to why it is necessary.[31]

The Commission's primary justification for the proposed public disclosure rule is an asserted concern that a market participant with a large CDS position might utilize an opportunistic strategy to trigger, delay, or avoid a credit event. The Commission repeats this concern over and over,[32] and posits that a public disclosure regime could empower other market participants to "protect their own interests" by alerting them when another market participant has a "financial incentive" to engage in an opportunistic strategy.[33] But the examples in the "press reports and academic articles"[34] the Commission cites *predate* the protocol designed by the International Swaps and Derivatives Association to address this issue.[35] The Commission has thus "provided *zero* evidence of actual abuse" in the CDS market as it actually stands.[36] "Rules are not adopted in search of regulatory problems to solve; they are adopted to correct problems with existing regulatory requirements that an agency has delegated authority to address."[37] "That is not the situation that we [face] in this case."[38]

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[29] *See, e.g.*, Form 8-K Disclosure of Certain Management Transactions, 67 FR 19914, 19920 (Apr. 23, 2002); OTC Derivative Dealers, 62 FR 67940, 67940 (Dec. 30, 1997Proposal at 6686 (acknowledging that security-based swaps are used in "legitimate market activities, including some hedging activity").

[30] *See, e.g.*, Proposal at 6683 (noting that there was $3.5 trillion in global notional amount outstanding of single-name CDS alone).

[31] *See Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 843 (D.C. Cir. 2006) (Kavanaugh, J.) ("Professing that an order ameliorates a real industry problem but then citing no evidence demonstrating that there is in fact an industry problem is not reasoned decisionmaking.").

[32] *See, e.g.*, Proposal at 6654-55, 6656, 6667, 6670, 6678, 6680, 6690.

[33] *Id.* at 6656.

[34] *Id.* at 6654; *see id.* at 6655 n.21.

[35] *See* Int'l Swaps and Derivatives Ass'n, Inc., *2019 Narrowly Tailored Credit Event Supplement to the 2014 ISDA Credit Derivatives Definitions* (July 15, 2019), available at: https://www.isda.org/a/KDqME/Final-NTCE-Supplement.pdf.

[36] *Nat'l Fuel*, 468 F.3d at 843.

[37] *N.Y. Stock Exch. LLC v. SEC*, 962 F.3d 541, 556-57 (D.C. Cir. 2020).

[38] *Id.* at 557.

In any event, asserted problems in the *CDS* market cannot justify unprecedented public disclosure requirements for other types of security-based swaps, such as total-return swaps. The Commission has not identified any opportunistic trading strategies that supposedly afflict the total-return swaps market, and admits that the "risks attended to the accumulation of large positions in [total return swaps] are different from CDS."[39]

The Proposal thus retreats to a different rationale for requiring public disclosure in the total-return swaps market—but that rationale is equally unavailing. The Commission asserts that "[w]ith [total return swaps], the main risk" is that price fluctuations in the underlying asset "may impair the solvency of the [total-return swap] investor and, as a result, may create default risk for the security-based swap counterparty."[40] The Commission claims that public position reporting may alert market participants to the "risk of default of their counterparties."[41] But, again, the Proposing Release has "presented no evidence" of actual adverse consequences that have resulted from the lack of publicly available position information.[42]

Certain Commissioners' concurring statements (but not the Proposal)[43] cite Archegos Capital Management's default,[44] but that event undercuts any contention that market participants need public disclosure of their counterparties' swaps positions. Archegos had obtained large, concentrated swap positions on which it ultimately defaulted, causing billions of dollars in losses for its dealer counterparties. But, notably, Archegos's dealer counterparties *already* had "access to non-public information from Archegos that revealed that Archegos had . . . concentrated exposure to the same single-name positions [aggregated] across the Street."[45] Archegos's counterparties simply failed to act on that information and properly risk manage their exposure, including through collecting additional margin in a timely manner.[46] Far from supporting the Proposal, the Archegos event demonstrates that private contractual relationships already provide

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[39] Proposal at 6681. The Commission incorrectly assumes that "single-name CDS contracts make up a majority of [the security-based swap] market." However, publicly available data shows that trading activity in equity security-based swaps dwarfs single-name credit default swaps. For example, data published by the DTCC SDR on a typical trading day shows that while 719 new single-name credit default swaps were entered into (accounting for USD 2.4 billion in notional), 100,336 new equity security-based swaps were entered into (accounting for nearly USD 300 billion in notional).

[40] Proposal at 6681.

[41] *Id.*

[42] *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1150 (D.C. Cir. 2011).

[43] The Commission cannot in support of a final rule rely on information contained in a Commissioner's concurring statement but not in the Proposal itself. The views of individual Commissioners are not the views of the Commission itself.

[44] *See* Chair Gary Gensler "Statement on Exchange Act 10B and Rule 9j-1" (Dec. 15, 2021), available at: https://www.sec.gov/news/statement/gensler-10b-rule-9j-1-20211215 and Commissioner Allison Herren Lee "Standing Up the Security-Based Swap Regime: Statement on Proposed Rules for Antifraud, Position Reporting and CCO Support" (Dec. 15, 2021), available at: https://www.sec.gov/news/statement/lee-statement-proposed-rules-antifraud-position-reporting-and-cco-support-121521. *See also* Letter from 85 Law and Finance Professors (Mar. 21, 2022) at page 2, available at: https://www.sec.gov/comments/s7-32-10/s73210-20120780-272960.pdf.

[45] Credit Suisse Group Special Committee of the Board of Directors Report on Archegos Capital Management 26 (July 29, 2021), available at: https://www.credit-suisse.com/about-us/en/reports-research/archegos-info-kit html.

[46] *Id.* at 1.

market participants sufficient information about their counterparties' trading activities. In fact, in the aftermath of the Archegos event, prudential regulators reminded firms to continue to obtain "critical information regarding size, leverage, largest or most concentrated positions, and number of prime brokers with sufficient detail or frequency to determine [a counterparty's] ability to service its debt."[47] Indeed, the Commission has also urged "broker-dealers to seek sufficient information to determine counterparties' aggregate positions in any markets that may experience liquidity concerns."[48]

All in all, the Commission has cited no evidence that public disclosure of position information is needed. Because rules must be "based on some logic and evidence, not sheer speculation," the Commission has no grounds to proceed with this proposal.[49]

2. The Proposed Public Disclosure Rule Will Create Harmful, Counterproductive Consequences.

By making market participants' "trading strategies public (by virtue of disclosing the size of their position),"[50] the proposed rule will create harmful, counterproductive consequences for investors and the broader market. There is a robust academic literature, entirely ignored in the Proposal, that details the significant costs of publicly disclosing confidential trading positions. Such disclosures could facilitate copycat trading, which, in turn, could reduce or eliminate profits an investor may earn from its fundamental market research. Consider:

- Frank (2004) finds that public disclosure of confidential trading positions creates a real risk of copycatting, as after-expense returns of copycat funds are statistically indistinguishable, and possibly higher (reflecting the cost-savings of free-riding), from the after-expense returns of the underlying actively-managed funds.[51]

- Verbeek (2013) also finds that copycatting is a viable strategy if public disclosure of confidential trading positions is required. On average, copycat funds are able to marginally outperform the target, and their relative success has increased since mutual funds were required to file public disclosures quarterly (instead of semi-annually) in 2004.[52]

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[47] SR 21-19: The Federal Reserve Reminds Firms of Safe and Sound Practices for Counterparty Credit Risk Management in Light of the Archegos Capital Management Default (Dec. 10, 2021), available at: https://www.federalreserve.gov/supervisionreg/srletters/SR2119.htm.

[48] TM Staff Statement (Mar. 14, 2022), available at: https://www.sec.gov/news/statement/tm-staff-statement-20220314.

[49] *Sorenson Commc'ns Inc. v. FCC*, 755 F.3d 702, 708 (D.C. Cir. 2014).

[50] Proposal at 6689.

[51] Frank, Mary M., James M. Poterba, Douglas A. Shackelford, and John B. Shoven, 2004, Copycat funds: Information disclosure regulation and the returns to active management in the mutual fund industry, Journal of Law and Economics 47, 515-541.

[52] Verbeek, M., Wang, Y., 2013. Better than the original? The relative success of copycat funds, Journal of Banking and Finance 37, 3454–3471.

- Shi (2016) measures the negative impact on fund performance of publicly disclosing confidential trading positions, finding a drop in alpha of 3-4% after a fund begins filing Form 13F.[53]

- Parida (2011) measures the negative impact on mutual fund performance of filing quarterly public position disclosures (instead of semi-annually), finding that the performance of the highest returning funds drops by 22 basis points per month after transitioning to quarterly disclosures, attributable to the copycatting of strategies.[54]

It is well-established that such free-riding disincentivizes investment managers from expending resources to conduct the very valuable fundamental research that informs their investment theses. These effects, which negatively impact price discovery and market efficiency, have been observed in connection with the quarterly disclosure of position information on Form 13F (for institutional funds) and Form N-Q (for mutual funds), which delay dissemination for at least 45 days.[55] The effects here would be much worse, because the Commission proposes to require the public disclosure of confidential firm trading positions *within one business day*. If copycats are able to make effective use of 45-day old data, it would be that much easier to reverse engineer the positions of firms disclosing on T+1 and undermine the viability of their targets' investment and trading strategies.

3. The Proposed Public Disclosure Rule Cannot Be Squared With The Commission's Longstanding Recognition Of The Cost Of Publicly Disclosing Proprietary Investment And Trading Information.

Shortly after publishing the proposed public disclosure rule, the Commission proposed separate rules regarding the aggregate and delayed disclosure of short sale position data.[56] But, there, the Commission explicitly rejected an alternative proposal that would have required the public disclosure (even on an anonymous basis) of individual investment managers' short positions.[57] The Commission, instead, proposed to require delayed, confidential monthly reporting of positions, which the Commission would aggregate across investment managers before releasing to the public. The Commission opted for this more restrained proposal in light of the copycat concerns detailed above. As the Commission recognized,

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[53] Shi, Z., 2016. The Impact of Portfolio Disclosure on Hedge Fund Performance.

[54] Parida, S., Teo, T., 2011. The Impact of More Frequent Portfolio Disclosure on Mutual Fund Performance. London School of Economics.

[55] *See* Agarwal, V., Jiang, W., Tang, Y., Yang, B., 2013. Uncovering hedge fund skill from the portfolio holdings they hide. Journal of Finance 68, 739–783; Aragon, G., Hertzel, M., Shi, Z., 2013. Why do hedge funds avoid disclosure? Evidence from confidential 13f filings; Journal of Financial and Quantitative Analysis 48, 1499–1518 Ge, W., Zheng, L., 2006. The frequency of mutual fund portfolio disclosure. Unpublished working paper. University of Michigan; Shive, S., Yun, H., 2013. Are mutual funds sitting ducks? Journal of Financial Economics 107, 220–237.

[56] *See Short Positions and Short Activity Reporting By Institutional Investment Managers*, Exchange Act Release No. 94,313 (Feb. 25, 2022).

[57] *Id.* at 173-74.

> [i]nvestment managers . . . compete by using proprietary trading strategies. They typically seek to trade in ways that would not expose their strategies because, if their strategies became known to others, the strategies could lose value and such Managers could also suffer higher trading costs. More specifically, other traders could use copycat trading strategies try to mimic the Managers' strategy, potentially competing away the profitability of the strategy or other traders could anticipate when the Managers might trade, which could result in higher trading costs for the Manager.[58]

The Commission's rules have long reflected a similar concern about copycats exploiting the disclosure of confidential position information. Rule 13f-1, for example, requires certain large institutional investment managers to publicly disclose certain security positions, but delays such disclosure by 45 days,[59] and even allows managers to request that the Commission prevent or delay public disclosure.[60] The Commission's failure to adequately account for the copycat effect here is an "'[u]nexplained inconsistency' in agency policy," and is yet another "reason for holding" the Commission's action to be "arbitrary and capricious."[61]

4. The Commission Neglected To Adequately Consider Reasonable Alternatives

The Commission asserts that security-based swap counterparties would benefit from additional transparency regarding the existence of large positions in order to enhance risk management practices, such as by collecting additional margin.[62] However, the Commission neglected to adequately consider more thoughtfully targeted alternatives that would achieve the stated objective,[63] including:

- **Enhancing Dealer Risk Management Practices**. The Commission directly regulates security-based swap dealers and has implemented several rules designed to enhance dealer risk management practices, including with respect to trading relationship documentation and position management.[64] To the extent the Commission believes further risk management enhancements are required in order to ensure dealers are complying with best practices, including obtaining necessary information regarding

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[58] *Id.* at 125; *see also id.* at 10, 173-74, 175, 179, 182, 186-87.

[59] *See* 17 C.F.R. § 240.13f-1(a)(1).

[60] *See* 15 U.S.C. § 78m(f)(4).

[61] *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016).

[62] *See* Proposal at 6656.

[63] *See Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 242 (D.C. Cir. 2008) ("An agency is required to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives.")

[64] *See, e.g.,* Risk Mitigation Techniques for Uncleared Security-Based Swaps, 85 FR 6359 (Feb. 4, 2020), available at: https://www.govinfo.gov/content/pkg/FR-2020-02-04/pdf/2019-27762.pdf.

counterparty positions and prime broker relationships,[65] targeted amendments to these existing rules could be proposed. For example, the Commission could propose a rule requiring dealers to obtain relevant information concerning counterparties' aggregate positions on a confidential basis.

- **Ensuring Uncleared Security-Based Swaps are Appropriately Collateralized**. The Commission can directly address the main concern highlighted by the Archegos default (i.e. undercollateralized positions) by establishing minimum margin requirements for uncleared security-based swaps. And yet, the Commission's final uncleared margin rules are rife with loopholes and exemptions, such as (a) not requiring dealers to post or collect initial margin for uncleared security-based swaps entered into with another dealer, and (b) exempting clients with less than USD 8 billion in outstanding uncleared notional, which carves-out a significant percentage of total counterparties and trading activity.[66] To the extent the Commission is concerned about undercollateralized security-based swaps, amendments to these existing rules should be proposed.

- **Assessing the Impact of Public Transaction Reporting**. As noted above, the Commission's real-time public reporting regime for security-based swaps recently went live in February 2022, providing transparency regarding the price, size and time of individual transactions to market participants and regulators. The Commission specifically acknowledges that it neglected to consider the impact of this additional transparency in the security-based swap market before issuing the current Proposal. Evidence in the record shows that market participants *already* have significant access to information about their counterparties' positions.[67] And real-time transaction reporting will only add to the suite of information available. Before the Commission proposes an unprecedented public position disclosure requirement, the Commission should at least assess whether real-time transaction reporting, coupled with information that is already available, provides enough information to market participants about their counterparties' positions.

The Commission's failure to adequately consider the obvious, reasonable alternatives above further highlights the complete lack of justification for a market-wide attributed public disclosure regime that involves disclosing confidential investment positions within one business day.

5. The Proposed Thresholds Are Arbitrarily Calibrated.

The Commission proposes a single reporting threshold—USD 300 million gross notional amount—for security-based swaps in three separate asset classes, without giving serious consideration to the significant differences that exist across these three asset classes or providing

[65] *See* SR 21-19: The Federal Reserve Reminds Firms of Safe and Sound Practices for Counterparty Credit Risk Management in Light of the Archegos Capital Management Default (Dec. 10, 2021), available at: https://www.federalreserve.gov/supervisionreg/srletters/SR2119.htm.

[66] 84 FR 43872 (Aug. 22, 2019), available at: https://www.govinfo.gov/content/pkg/FR-2019-08-22/pdf/2019-13609.pdf.

[67] *Supra* at 5-6.

any real justification for that threshold itself. The Commission also has offered no evidence that higher reporting thresholds would not serve the Commission's objectives just as well and with less cost to the industry.[68]

The Commission's proposed reporting thresholds are based on an inadequate analysis that suffers from two underlying defects. *First*, the Commission has not identified any evidence demonstrating a need for public position disclosure in the first place.[69] As a result, the Commission does not—and cannot—link the proposed reporting thresholds to any observed market failure. *Second*, the Commission has rushed out this proposal without first reviewing the data from the Commission's newly-effective transaction reporting rule, as discussed above.

The Commission does not even attempt to defend its decision not to consider such pertinent and readily accessible data. Rather, the Commission asserts that it will simply "consider this newly available data in determining thresholds to use in connection with Security-Based Swap Positions based on equity securities *when adopting a final rule*."[70] But under the notice-and-comment requirements of the APA, an agency cannot develop a rule using secret data, which means that "the most critical factual material that is used to support the agency's position" must be "made public in the proceeding and exposed to refutation."[71] The "information that must be revealed for public evaluation" includes "the technical studies and data upon which the agency relies."[72] Consequently, the Commission is foreclosed from "extensive reliance upon extra-record materials in arriving" at its estimates concerning the proposed rule, unless it provides "further opportunity for comment" on those materials and the Commission's analysis of them.[73] In other words, if the Commission decides to adopt the proposed rule, and it relies on new data to support its analysis of the appropriate thresholds, then the Commission must re-open the comment period so as to avoid violating the requirements of 5 U.S.C. § 553(c).

The unjustified reporting thresholds call the rationality of the entire Proposal into serious question. The Commission admits that the proposed public-disclosure rule will deter (and possibly even foreclose) market participants from establishing positions above the thresholds.[74] But the Commission has made no attempt to show that transactions above the reporting thresholds *should* be deterred, if that were even an appropriate goal. Having admitted that the rule functions not only to require disclosure at the designated position levels, but will also curb positions at and above those levels, the Commission must demonstrate that deterring positions at those levels is justified and beneficial. It makes no such showing. As discussed, the Commission does not link the

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[68] *See Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) (rejecting the FCC's 30% subscriber cap as arbitrary and capricious because the agency failed to "examine[ ] the relevant data and articulate[ ] a satisfactory explanation for its action" (alterations in original)).

[69] *Supra* Part I.B.1.

[70] Proposal at 6671 (emphasis added).

[71] *Chamber of Commerce v. SEC*, 443 F.3d 890, 900 (D.C. Cir. 2006) (internal quotation marks omitted).

[72] *Id.* at 899 (internal quotation marks omitted).

[73] *Id.* at 901.

[74] *See* Proposal at 6687.

reporting thresholds to any observed market failure, nor does it offer even a theoretical basis for believing that positions above the thresholds are undesirable.

Relatedly, by deterring marking participants from establishing positions above the thresholds, the proposed public-disclosure rule has some of the impact associated with position limits. The Commission admits that it would become prohibitively expensive to build positions over the reporting thresholds and that "market participants may refrain from trading with a reporting counterparty."[75] But regulators and market experts have found it exceedingly difficult to determine appropriate position limits for various securities, or even to agree whether position limits are warranted at all. Here, the Commission has made no showing that de facto position limits are warranted or appropriate. And it may not end-run this challenging task by promulgating wholly invented, unsubstantiated position "disclosure" requirements that, by its own admission, operate like position limits.

In addition, the Commission has not substantiated why the proposed rule requires reporting on "a person's *gross* position in a security-based swap."[76] The term "'gross' means the sum of the absolute values of notional amounts outstanding."[77] As a result, if a person had, say, "a $75 million long CDS position and a $75 million short CDS position on the same reference entity or security," the person would need to report a security-based swap position "of $150 million."[78] But that report would not make any sense because the long and short positions would offset each other. The reporting person would have no incentive to engage in an opportunistic strategy and would be at a limited risk of default—but would still need to report a large "gross" position. Because market participants would have no way of knowing whether a reported gross position consisted of smaller offsetting positions or was instead a massive, one-direction bet, the public reports would "likely . . . be too noisy to provide any useful information."[79]

II. The Proposed Public-Disclosure Rule Will Reduce Efficiency, Stifle Competition, And Deter Capital Formation.

The Exchange Act requires the Commission to determine whether a rulemaking will "promote efficiency, competition, and capital formation."[80] The Exchange Act additionally prohibits any rulemaking that "would impose a burden on competition not necessary or appropriate in furtherance of the purposes" of the statute.[81] Neglecting these statutory duties also constitutes an arbitrary and capricious failure to consider statutorily required factors.[82]

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[75] *Id.* at 6687.

[76] *Id.* at 6669.

[77] *Id.* at 6669 n.123.

[78] *Id.*

[79] Comm'r Hester M. Peirce, Dissent Statement on Proposed Security-Based Swap Rules (Dec. 15, 2021), available at: https://www.sec.gov/news/statement/peirce-statement-proposed-security-based-swap-rules-121521.

[80] 15 U.S.C. § 78c(f).

[81] *Id.* § 78w(a)(2).

[82] *See Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (citing *Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1216 (D.C. Cir. 2004)).

To fulfill those responsibilities, the Commission must produce a reasoned evaluation of the costs and ramifications of new regulation. An "estimate" of costs, the United States Court of Appeals for the District of Columbia Circuit has explained,

> would be pertinent to [the Commission's] assessment of the effect the condition would have upon efficiency and competition, if not upon capital formation . . . . [U]ncertainty may limit what the Commission can do, but it does not excuse the Commission from its statutory obligation to do what it can to apprise itself—and hence the public and Congress—of the economic consequences of a proposed regulation before it decides whether to adopt the measure.[83]

A. *The Commission's Assessment of The Existing State Of Efficiency, Competition, And Capital Formation Is Insufficient.*

The Commission's analysis of efficiency, competition, and capital formation is woefully insufficient at the outset because it entirely neglects to "make any finding on the existing level of [efficiency, competition, and capital formation] in the marketplace."[84] "The SEC could not accurately assess any potential increase or decrease" in efficiency, for example, "because it did not assess the baseline level" under the existing regime, making it impossible to make a reasoned assessment of any change.[85]

Here, the Commission's analysis of efficiency, competition, and capital formation makes no findings at all as to the existing state of each factor. Its separate cost-benefit analysis includes a brief reference to the "Baseline" of the security-based swaps market, but this high-level sketch of the market also does not discuss the current state of efficiency, competition, and capital formation.[86]

B. *The Commission's Analysis Of The Specific Factors Of Efficiency, Competition, And Capital Formation Is Inadequate.*

Moving to the specific factors of the analysis of efficiency, competition, and capital formation, the Commission fares no better.

The Commission's entire efficiency, competition, and capital formation analysis appears in a single paragraph. The Commission asserts that public position disclosure would allow market participants to address counterparty risk and assess a reporting person's likelihood of engaging in an opportunistic strategy.[87] This would supposedly increase "market integrity," which would

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[83] *Chamber of Commerce v. SEC*, 412 F.3d 133, 144 (D.C. Cir. 2005).

[84] *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 178 (D.C. Cir. 2010).

[85] *Id.*

[86] Proposal at 6681-83.

[87] *Id.* at 6687.

allow "market participants to trade with more and greater confidence in the market."[88] As a result, the Commission speculates, the proposed public disclosure rule "could lead to increased supply and demand for security-based swaps, leading to greater competition as more security-based swap market participants enter the market."[89] This increased competition would supposedly "lead to greater security-based swap market efficiency as security-based swap prices would more likely reflect fundamental values and risk in more liquid markets."[90] And, according to the Commission, this increase in price efficiency would bleed over to the underlying securities and, in turn, have "some positive impact on capital formation and capital costs" for those securities.[91] This string of theoretical assertions is completely unsubstantiated, and each purported subsequent benefit depends on the previous one. As documented in this and other comment letters, the exact opposite outcomes are likely, with public position disclosure impairing supply and demand, competition, market efficiency, price discovery, and capital formation.

As an initial matter, the Commission's analysis cannot justify the mandated public disclosure of total return swap positions. Opportunistic strategies are not an issue for total return swaps,[92] and *public* reporting is not necessary to ensure that market participants can address their counterparty risks; ensuring adequate disclosure between counterparties would ensure that market participants have all the information they need to manage their counterparty risks, without the negative effects of public disclosure.[93]

The Commission's analysis, moreover, rests on an erroneous factual assumption: that market participants cannot and do not already access the information they need to manage their counterparty risks. The record shows that they can and do: through private contractual relationships, market participants already access information about their counterparties' positions.[94] In addition, the separate and recently implemented transaction reporting rule will only increase the amount of information available: for example, large transactions or increased trading activity could alert a dealer that a counterparty may be establishing a large security-based swap position across multiple dealers, and trigger further inquiry through established channels. The Commission's failure to assess the "baseline level" of information available under the existing regime makes it impossible for the Commission to have "accurately assess[ed] any potential increase or decrease" in efficiency, competition, or capital formation from the proposed rule.[95]

The Commission's failure to adequately determine whether existing or proposed regulations provide sufficient protections compounds the agency's errors. The Commission "recognizes that the Risk Mitigation Rules; Capital, Margin, and Segregation Rules; and Recordkeeping Rules may address similar risks" to the proposed public reporting rule, "to the extent that th[ose] rules are

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[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Supra* at 5.

[93] *Supra* at 9.

[94] *Supra* at 5-6.

[95] *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 178 (D.C. Cir. 2010).

intended to, among other things, promote safety and soundness of SBS Entities, enhance the transparency of obligations under transactions with SBS Entities, protect the ability of security-based swap customers to promptly obtain their property, and promote compliance with financial responsibility requirements for broker-dealers, [security-based swap dealers], and [major security-based swap participants]."[96] The Commission, however, speculates that the proposed public disclosure rule "would afford additional protections" because it applies to "non-SBS Entities."[97] But the Commission offers no evidence to suggest that regulation beyond SBS Entities—security-based swap dealers and major security-based swap participants[98]—is warranted. It is doubtful that non-SBS Entities are establishing large security-based swap positions with each other.[99] Rather, non-SBS Entities are likely trading with SBS Entities, which are governed by the safety, soundness, and transparency rules the Commission recognized. It is thus far from clear what good the proposed public position disclosure rule would do.

The proposed public position disclosure rule will not just fail to improve efficiency, competition, and capital formation; it will damage all three. By exposing investment managers' portfolio positions, the proposed rule will enable copycats to mimic the managers' investment and trading strategies, and impair the ability to build and manage security-based swap positions without undue market impact. As a result, relevant investment and trading strategies will lose value and managers will face higher trading costs.[100] This will disincentivize managers from conducting valuable research, which will reduce price discovery and market efficiency, and negatively impact capital allocation.[101] When managers forego independent research and, instead, seek to copy others' strategies, this leads to herding, which increases volatility.[102] In addition, as prices diverge from their true economic value, investment capital is misallocated, negatively impacting capital formation.

C. *The Commission Has Failed To Assess The Cumulative Impact Of Its Recent Rulemakings.*

Finally, as noted by numerous commenters,[103] the Commission has not assessed the cumulative impact of its myriad recent position and activity disclosure-related proposals on market participants. This Proposal cannot be viewed in isolation, and the public disclosure it contemplates

[96] Proposal at 6687.

[97] *Id.*

[98] *Id.* at 6653.

[99] *See id.* at 6702 ("Based on available information about the security-based swap market, the market, while broad in scope, is largely dominated by entities such as those that will be covered by the [security-based swap dealer] and [major security-based swap participant] definitions.").

[100] Short Position Proposal at 125.

[101] *Id.*

[102] *Id.*

[103] *See generally* Letter from 85 Law and Finance Professors (Mar. 21, 2022) at page 1, available at: https://www.sec.gov/comments/s7-32-10/s73210-20120780-272960.pdf; Letter from the Investment Company Institute (Mar. 21, 2022) at page 20, available at: https://www.sec.gov/comments/s7-32-10/s73210-20120723-272883.pdf; Letter from the Committee on Capital Markets Regulation (Mar. 21, 2022) at page 13, available at: https://www.sec.gov/comments/s7-32-10/s73210-20120760-272940.pdf.

must be assessed along with the additional public disclosure contemplated in recent Commission proposals regarding securities lending, beneficial ownership reporting and short position and activity reporting. In aggregate, these proposals materially undermine the ability of fund managers to protect the confidentially of investment and trading strategies, thereby reducing incentives to engage in fundamental research and negatively impacting overall price discovery and market efficiency as detailed above. Given that the Commission has elected to issue all of these proposals near simultaneously, it has the obligation to assess the cumulative impact of these proposals as part of the relevant economic analysis. In order to adequately consider the proposed public disclosure of security-based swap positions, not just on its own terms but in light of the other proposed disclosure rules, the Commission should align the rulemaking schedules in the various proceedings.

III. The Commission's Cost-Benefit Analysis Is Fundamentally Flawed.

In addition to the statutory requirements analyzed above, the Paperwork Reduction Act and Regulatory Flexibility Act require that the Commission undertake a thorough and accurate analysis of the costs that the proposed rules would impose on regulated entities and the economy as a whole.[104] The APA, for its part, requires that the Commission's economic analysis be reasonable and substantiated, and that the conclusions that the Commission draws from the economic analysis have a reasoned, rational basis in the data the Commission gathers.[105] Guidelines issued by the Commission further require that the data used in such regulatory analysis be "accurate, reliable and unbiased," that it be carefully reviewed by subject matter experts and appropriate levels of management, and that there be "adequate disclosure about underlying data sources, quantitative methods of analysis and assumptions used, to facilitate reproducibility of the information, according to commonly accepted scientific, financial or statistical standards, by qualified third parties."[106]

A. *The Commission Concedes It Cannot Calculate the Costs And Benefits of the Proposal.*

The Commission's economic analysis is replete with frank admissions that it lacks the necessary data to estimate key components of the costs the proposed rule will impose.[107] For example, the Commission acknowledges that the proposed public disclosure rule "would be costly to market participants" because of the effect of copycats,[108] but the Commission "did nothing to estimate and quantify th[ose] costs . . . . Because the agency failed to 'make tough choices about

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[104] *See* 5 U.S.C. §§ 603–04; 44 U.S.C. § 3508.

[105] *See, e.g.*, *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1153–54 (D.C. Cir. 2011).

[106] U.S. Securities and Exchange Commission, Final Data Quality Assurance Guidelines (modified July 18, 2019), available at: http://www.sec.gov/about/dataqualityguide htm.

[107] *See, e.g.*, Proposal at 6680 ("Many of the benefits and costs of re-proposed Rule 9j-1, proposed Rule 10B-1, and proposed Rule 15Fh-4(c) discussed below are difficult to quantify.").

[108] *Id.* at 6689.

which of the competing estimates is most plausible, [or] to hazard a guess as to which is correct,' . . . it neglected its statutory obligation to assess the economic consequences of its rule."[109]

B. *The Commission Vastly Underestimates Costs.*

The estimated costs that the Commission does acknowledge are misleading and far too low. For example, the Commission states that the proposed public disclosure rule "would be costly to market participants because [the position] reports could make [market participants'] trading strategies public (by virtue of disclosing the size of their position), potentially causing their strategy to be less profitable in the future."[110] That is, of course, true, but the Commission misleadingly undersells the point, asserting that the "information provided would be limited to only security-based swaps and related securities, and would not include information about the reporting parties' entire portfolios."[111] The Commission's response is nonsensical. This rulemaking is *about* security-based swaps and related securities. The Commission cannot rationally propose a massively costly rule aimed at those securities, but then downplay that cost because the rule will only wreak havoc on the very transactions it covers.

The Commission also underestimated the number of market participants and positions that would be captured by the proposed public disclosure rule. While some data covering credit default swap activity was considered, this was limited to a "voluntary database where market participants on a voluntary basis submit transactions"[112] rather than the comprehensive data that is required to be reported to data repositories pursuant to Commission rules. Furthermore, given the failure to consider this available swap repository data, it is unclear what (if any) data regarding equities and debt instruments informed the Proposal. The Commission attempts to compensate for its arbitrary decision to ignore available data by asserting that "[w]hile the Commission has limited data regarding the activity of market participants in equity swaps, the Commission believes that the market for security-based swaps is sufficiently representative of the market."[113] However, this assertion reflects the Commission's insufficient understanding of security-based swap markets, as a cursory review of publicly available data shows that trading activity in equity security-based swaps dwarfs single-name credit default swaps. For example, data published by the DTCC SDR on a typical trading day shows that while 719 new single-name credit default swaps were entered into (accounting for USD 2.4 billion in notional), 100,336 new equity security-based swaps were entered into (accounting for nearly USD 300 billion in notional).[114] It is inexcusable for the Commission to ignore available data while grossly underestimating the size of the equity security-

[109] *Bus. Roundtable*, 647 F.3d at 1150 (alteration in original); *see also id.* at 1148–49 ("[T]he Commission acted arbitrarily and capriciously for having failed once again . . . adequately to assess the economic effects of a new rule. Here the Commission inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to ex-plain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters.").

[110] Proposal at 6689.

[111] *Id.*

[112] *Id.* at 6683, n.220.

[113] *Id.* at 6683, n.221.

[114] Data from the DTCC SDR covering March 7, 2022, focusing solely on USD-denominated transactions labeled as "NEW" and "Trade" in order to remove cancels, corrects, and amendments.

based swap market and, therefore, fail to adequately assess the impact of the Proposal on these instruments.

The Commission's estimates of the number of the market participants and positions that would be captured by the proposed thresholds suffer from similar flaws. The Commission admits that it does not leverage actual data to estimate how many market participants and positions would be captured for equity security-based swaps, so "to be conservative, the Commission is doubling the estimate [for credit default swaps]."[115] However, as noted above, the underlying assumption that the credit default swap market is sufficiently representative of the overall security-based swap market is incorrect. The Commission should not rely on data that are "not representative" and cannot plausibly "provide an appropriate basis for" the Commission's decision.[116]

IV. The Commission Must Assess Data From The Newly-Effective Transaction Reporting Requirements Before Proceeding With Related Position Disclosure Requirements.

The Commission must assess data from the newly-effective transaction reporting rules for security-based swaps before proceeding with this rulemaking. The Proposal is premised on the supposed lack of information available to market participants, but a new rule requiring the public disclosure of all security-based swaps transactions has only recently gone into effect. As Commissioner Peirce observed, the Commission should at least "wait[ ] until [it] ha[s] a year or two of security-based swap transaction data" before considering whether "*additional* transparency measures" are warranted.[117] The Commission itself recognizes the relevance of this data, stating that it will "consider this newly available data in determining thresholds to use in connection with Security-Based Swap Positions based on equity securities when adopting a final rule."[118] The Commission has put the cart before the horse. It should consider and analyze all relevant data on security-based swap transactions *before* proposing a rule on related positions that may in fact be entirely unnecessary.

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In conclusion, we believe the Commission has neglected to consider the substantial costs associated with requiring the attributed public disclosure of certain security-based swap positions, which include increasing the costs associated with establishing and managing security-based swap

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[115] Proposal at 6678.

[116] *Masias v. EPA*, 906 F.3d 1069, 1079 (D.C. Cir. 2018); *see also, e.g.*, *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 544 (D.C. Cir. 1983) (rejecting proposed standard where data underlying agency's analysis were "not representative of what most individual small refiners [could] achieve"); *Amendments to Regulation SHO*, Exchange Act Release No. 61,595, 2010 WL 675942, at *32 n.307 (Feb. 26, 2010) (discounting data that were "not representative of typical trading"); *Fall River Power Co.*, Securities Act Release No. 3932, 1958 WL 55542, at *3 (June 4, 1958) (finding statement based on "nonrepresentative sample" to be "materially false and misleading").

[117] Comm'r Hester M. Peirce, Dissent Statement on Proposed Security-Based Swap Rules (Dec. 15, 2021), available at: https://www.sec.gov/news/statement/peirce-statement-proposed-security-based-swap-rules-121521 (emphasis added).

[118] Proposal at 6671.

positions, facilitating the copycatting of investment and trading strategies, disincentivizing fundamental research, and impairing price discovery, liquidity and market efficiency. Such public disclosure is inconsistent with the Exchange Act, lacks a rational basis, and will have unjustifiable impacts on efficiency, competition, and capital formation, and cannot otherwise be sustained under basic principles of administrative law.

Please feel free to call the undersigned at [redacted] with any questions regarding these comments.

Respectfully,

/s/ Stephen John Berger
Managing Director
Global Head of Government & Regulatory Policy