



June 27, 2023

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

**Re: Reopening of Comment Period for Proposed Rulemaking on Modernization of Beneficial Ownership Reporting (File No. S7-06-22)**

Dear Ms. Countryman:

The Securities Industry and Financial Markets Association (“SIFMA”)<sup>1</sup> and SIFMA’s Asset Management Group (“SIFMA AMG”) appreciate the opportunity to respond to the Securities and Exchange Commission (the “Commission”) on the reopening of its Modernization of Beneficial Ownership Reporting proposal (the “Proposal”).<sup>2</sup>

As we have said in the past, we support transparency reforms that are properly calibrated to make markets more efficient and competitive and to give the Commission and other regulatory authorities the information necessary to monitor for risks to financial stability or market integrity. As we have also noted, however, we have serious questions and concerns about the expansiveness of the Proposal, which would make sweeping changes despite identifying few, if any, problems not already well-addressed by existing regulations. Unfortunately, as we describe

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<sup>1</sup> SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry’s one million employees, we advocate on legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

SIFMA AMG brings the asset management community together to provide views on U.S. and global policy and to create industry best practices. SIFMA AMG’s members represent U.S. and global asset management firms whose combined assets under management exceed \$45 trillion. The clients of SIFMA AMG member firms include, among others, tens of millions of individual investors, registered investment companies, endowments, public and private pension funds, UCITS and private funds such as hedge funds and private equity funds.

<sup>2</sup> Reopening of Comment Period for the Proposed Modernization of Beneficial Ownership Reporting, 88 Fed. Reg. 28440 (May 4, 2023) and Notice of Proposed Rulemaking on Modernization of Beneficial Ownership Reporting, 87 Fed. Reg. 13846 (Feb. 10, 2022).

below, the materials released by the Commission in connection with reopening the Proposal do not address these issues.

I. SIFMA and SIFMA AMG Reiterate the Comments Provided to the Commission on the Original Proposal

SIFMA and SIFMA AMG commented in detail on the Proposal on behalf of our memberships, which include many types of market participants, many of whom are market intermediaries that provide liquidity, promote capital formation and market efficiency through market-making operations and facilitate transactions for customers and asset managers. These services are critical not only for institutional market participants, but for retail investors and savers as well. We re-affirm and reiterate our earlier comments on the Proposal.<sup>3</sup> We also write now to provide additional comments in the context of the Proposal's reopening.

II. The Additional Economic Analysis Included in the Proposal is Overly Narrow and Does Not Justify the Extensive Changes Contemplated in the Proposal

We welcome the release of additional analysis and data from the Division of Economic and Risk Analysis (“**DERA**”) related to the Proposal's economic effects.<sup>4</sup> Marshaling empirical evidence is both legally necessary and intellectually vital for informed debate about market regulation. On the other hand, the DERA memorandum is conspicuously narrow in scope. It relates to a single part of the Proposal, filing deadlines, considered in a single context, that of activist investing. While that may be an important issue, it is both a narrow one and one where the Proposal was obviously intended to change the status quo.

By contrast, the DERA memorandum does not address the critical absence of data or analysis needed to justify the other extensive changes contemplated in the Proposal, at least some of which appear likely to have unintended consequences. The sweeping changes in the Proposal would be complicated and costly, while the reasoning behind many of them involves highly theoretical and thinly supported theories of market participants' behavior. Unfortunately, the DERA memorandum does little, if anything, to improve this situation. Rather, the Proposal continues to provide little to no cost-benefit analysis and to lack sufficient analysis of why the amendments are justified and what effects they might have on markets and capital formation.

III. The Proposal Makes Significant Changes to Widely Relied-Upon Definitions that Will Disrupt the Market and Require Significant Operational and Systems Changes Without a Clear Justification for Those Changes or a Reasonable Transition Period

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<sup>3</sup> See letters on the Proposal from SIFMA <https://www.sifma.org/resources/submissions/sec-proposed-amendments-to-beneficial-ownership/> (Apr. 11, 2022) and SIFMA AMG <https://www.sifma.org/resources/submissions/sifma-amg-on-sec-proposed-amendments-to-beneficial-ownership/> (Apr. 11, 2022).

<sup>4</sup> Memorandum from DERA, Supplemental data and analysis of certain economic effects of proposed amendments regarding the reporting of beneficial ownership (April 28, 2023).

As our letters discuss in detail, the Proposal would, among other things, dramatically expand the existing, well-understood and widely relied-upon definition of “beneficial ownership” by including certain cash-settled derivatives and by broadening the concept of a “group”; require accelerated filings by persons who are, by definition, passive holders; and, particularly for dealers and other institutions, require expansions and upgrades of reporting and monitoring systems without clear justification or a reasonable transition period. In our view, the three most urgent problems with the Proposal are:

- the expansion of the “group” concept, with the potential that by merely transacting with respect to a security derivative, whether or not cash-settled, or potentially even other instruments, a “group” may have been formed between the dealer and the customer, with each unwittingly and unintentionally becoming subject to Section 16 of the Exchange Act as a member of a greater-than-10% beneficial owner group<sup>5</sup>;
- the expansion of the definition of beneficial ownership to include certain cash-settled derivatives,<sup>6</sup> potentially requiring, among other consequences, parties to cash-settled derivatives to re-calculate daily their beneficial ownership, defined in a variable way that would change based on factors outside of their control; and
- the acceleration of the filing deadlines for Schedules 13D and 13G, which fail to adequately distinguish between control and non-control purposes, will add unnecessary costs, and do not appear to address demonstrated issues. Again, the DERA memorandum, by focusing on a small subset of issues relating to filing deadlines, is not relevant to most of the deadline-related changes and unintended consequences that the Proposal would visit on market participants other than activist investors, particularly financial intermediaries who are users of Schedules 13D and 13G, many of which are filed in the ordinary course.

#### IV. The Commission Fails to Provide Sufficient Support for the Proposal and, Therefore, Does Not Satisfy its Obligations Under Sections 3(f) and 23(a)(2) of the Exchange Act

We must respectfully note again that the stated rationales for these proposed changes are, on the whole, exceedingly theoretical. Even as supplemented by the DERA memorandum, the Proposal continues to ignore, minimize, or draw unwarranted conclusions with respect to existing provisions of current Regulation 13D-G that can be used to solve the purported problems that the Proposal identifies. By focusing on theoretical harms; failing to engage seriously with the question whether new or different rules would be needed to combat them; and failing to consider costs, the Proposal falls far short of providing a sound justification for the significant amendments being made. For these reasons, the Commission continues not to have

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<sup>5</sup> SIFMA also discussed the need for a comprehensive safe harbor for dealing activities of market intermediaries should any such rule be adopted. *See* SIFMA April 11, 2022, Letter, pp. 9 – 16.

<sup>6</sup> In this letter, unless the context requires otherwise, we use “cash-settled derivative” to indicate a derivative with respect to a referenced Section 12–registered voting equity security that is required to be settled exclusively in cash and that is not a security-based swap.

satisfied its obligations under Sections 3(f) and 23(a)(2) of the Exchange Act with respect to the Proposal. A much more rigorous and detailed analysis of costs and benefits, including market effects, would clearly be necessary as part of a full re-proposal before the Commission could move forward with this rulemaking.

V. The Broad Impact of the Proposal Coupled with the Commission’s Expansive Regulatory Agenda that Impacts Many Interconnected Rules and Industry Operations and the Commission’s Use of Compressed Comment Periods Requires a Re-Proposal

The Proposal would require re-proposal even if it were the only outstanding rule proposal, which it is not. Rather, the Proposal would make many interdependent changes to important areas of the law, at once, with compressed periods for public notice and comment, on the basis of little substantial analysis of costs and benefits, and at a time when critically related proposals are also outstanding, still with little clarity about their ultimate direction and resolution. These factors make the need for re-proposal as acute today as it was when we submitted our original letter.<sup>7</sup>

Most notably, the Commission’s proposal on position reporting of security-based swaps (the “**10B Proposal**”)<sup>8</sup> remains outstanding and was re-opened for comment just one week before the deadline for further comments on this Proposal.<sup>9</sup> As set forth in the 10B Proposal, new Schedule 10B would have different filing triggers and thresholds and report a different set of information than in Schedules 13D/G, while including some of the same information. In addition, the reopening release for the 10B Proposal requests comment on fundamental topics such as position reporting thresholds and was accompanied by its own, separate DERA study. To the extent that the mix of publicly available information is relevant to commenting on the Proposal, that mix depends on the outcome of the 10B Proposal, and vice versa. The sensible course continues to be that the Commission should consider comments on this Proposal and on the 10B Proposal, then re-propose both rules together, and with more robust cost analyses, for further notice and comment. Any final amendments to Regulations 13D-G and 10B must also be accompanied by a reasonable phase-in period.

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<sup>7</sup> We and 24 other trade associations have previously expressed to the Commission our concern regarding the problematic duration of short comment periods for these types of important rule changes; *See* SIFMA, *Importance of Appropriate Length of Comment Periods*, <https://www.sifma.org/resources/submissions/importance-of-appropriate-length-of-comment-periods/>.

<sup>8</sup> 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, 87 Fed. Reg. 6652 (Dec. 15, 2021).

<sup>9</sup> Reopening of Comment Period for Position Reporting of Large Security-Based Swap Positions, 88 Fed. Reg. 41338 (Jun. 26, 2023).

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We appreciate the opportunity to comment on the Proposal. If you have any questions or comments, please contact the undersigned.

Sincerely,

A handwritten signature in black ink, appearing to read "Kyle Brandon". The signature is fluid and cursive.

Kyle Brandon  
Managing Director, Head Of Derivatives Policy  
SIFMA

A handwritten signature in black ink, appearing to read "William C. Thum". The signature is fluid and cursive.

William C. Thum  
Managing Director and Assistant General Counsel  
SIFMA AMG

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