asset management group

August 21, 2023

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

Re: ***Reopening of Comment Period for Position Reporting of Large Security-Based Swap Positions (the "Proposed Rule")[1] (File No. S7-32-10)***

Dear Ms. Countryman:

The Asset Management Group of the Securities Industry and Financial Markets Association ("SIFMA AMG")[2] appreciates the opportunity to provide comments to the Securities and Exchange Commission (the "Commission" or "SEC") in response to the Commission's above-captioned reopening of the comment period ("Reopening Release")[3] on the security-based swap ("SBS") position reporting requirements set forth in proposed Rule 10B-1 under the Securities Exchange Act of 1934 (the "Exchange Act") and proposed Schedule 10B.

Executive Summary

While SIFMA AMG generally supports rules which seek to increase transparency, promote market integrity, and reduce misconduct, it is important that such rules are designed to achieve those goals while minimizing any adverse effects on pricing, liquidity, and hedging risks. We are concerned that if the Proposed Rule is adopted without many of the changes suggested in this letter, market participants will be reluctant to engage in SBS for bona fide hedging and investment purposes due to the complexity, uncertainty and risks introduced by the new requirements.

We acknowledge and agree that the Commission should have the information it needs to adequately surveil and monitor the market from a stability and integrity perspective, however, it is important that the reporting regime introduced to achieve this does not have an unnecessary chilling effect on legitimate market activity.

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[1] SEC Release No. 34-93784 (December 15, 2021), 87 Fed. Reg. 6652 (February 4, 2022) (the "2022 Release").

[2] 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.

[3] Release No. 34-97762 (June 20, 2023), 88 Fed. Reg. 41338 (June 26, 2023).

We are disappointed that the Reopening Release and associated economic analysis ("DERA Memo")[4] do not address the core concerns we raised in our previous letter dated March 22, 2022 (the "2022 SIFMA AMG Comment Letter").[5] Most notably the Reopening Release and DERA Memo do not address concerns that the data captured by Proposed Rule 10B-1 would be misleading and confusing when publicly disseminated. They also do not address the risk that opportunistic traders could cherry-pick that data to reverse engineer and front run other market participants' trading strategies.

The Reopening Release and DERA Memo do not attempt to quantify or describe how the benefits of position-level disclosure under Proposed Rule 10B-1, on top of the already extensive transaction-level reporting under Regulation SBSR, would outweigh these costs and risks, in addition to the operational costs and burdens of establishing and maintaining new reporting systems and processes. Such costs and burdens would be present even if the Commission limited Proposed Rule 10B-1 to regulatory, and not public, reporting—as firms would still be required to expend significant resources to implement the rule with no material incremental benefit to the Commission, given that the Commission already has access to the data needed to understand and monitor the SBS markets, as evidenced by the DERA Memo itself.

In addition to the foregoing shortcomings, the DERA Memo inexplicably focuses on a subset of available data for equity SBS to the exclusion of other asset classes. In the 2022 Release, the Commission expressly acknowledged the existence of limitations associated with the heavy use of Form N-PORT data for purposes of setting the Reporting Threshold Amounts, as the universe of Form N-PORT filers is limited to registered investment companies, as opposed to all market participants in scope for the Proposed Rule.[6] Despite the Commission's own acknowledgement of obvious data limitations in its original economic analysis, the supplemental analysis set out in the DERA memo fails to expand the dataset to available SBSR data that would have enabled more comprehensive analysis to be performed with respect to the SBS trading activity of non-investment funds, particularly with respect to CDS and non-CDS debt SBS. If SBSR data had been included in the analysis for non-equity asset classes, the number of SBS

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[4] In connection with the Reopening Release, the Commission's Division of Economic and Risk Analysis ("DERA") released a memorandum providing "[s]upplemental data and analysis regarding the proposed reporting thresholds in the equity security-based swap market." Memorandum from DERA to SEC File No. S7-32-10 (June 20, 2023), *available at* https://www.sec.gov/comments/s7-32-10/s73210-207819-419422.pdf.

[5] Letter from Lindsey Keljo, Head – SIFMA Asset Management Group, and William Thum, Managing Director and Associate General Counsel SIFMA AMG to Vanessa Countryman, Secretary of the Commission, dated March 21, 2022, *available at* https://www.sifma.org/wp-content/uploads/2022/03/SIFMA-AMG-Comment-SEC-SBS-Large-Position-Reporting.pdf.

[6] *See e.g.,* 87 Fed. Reg. 24 at 6697, footnote 259 ("The Commission recognizes that Form N-PORT reporting filers *may not be representative* of the 'average' trading entity in the security-based swap market and in particular, the 'average' trading entity in the [debt] total return . . . swap market. The Commission believes that Form N-PORT-reporting investment funds are likely to . . . participate in a *smaller number* of transactions . . .") (emphasis added).

positions subject to reporting under the Proposed Rule would almost certainly have been considerably more numerous. Many such positions would not have constituted the type of large SBS positions intended to be captured by the proposed rulemaking.]

We respectfully ask the SEC to amend and revise the Proposed Rule as follows:

1. As public disclosure of SBS positions and related holdings will have an adverse impact on managers and their clients, any public dissemination of such information should be deferred indefinitely until the Commission has collected and analyzed data and considered alternatives to public reporting to achieve the objectives of the Proposed Rule. Any public reporting should be implemented at the ultimate parent level; thereby permitting public disclosure in an aggregated and anonymized manner.

2. Where an investment adviser has discretionary authority over a client's SBS trading, the Proposed Rule should clarify that SBS positions only have to be reported at the advisee client level and not at the investment adviser level.

3. For separately managed accounts, reporting of SBS positions should only be required at the level of each separate pool of assets managed. If reporting is not so limited, the Proposed Rule should allow adequate time after the parties become aware that a reporting threshold has been exceeded (based on the aggregate positions across all assets of the sole beneficial owner) before the SBS position must be reported.

4. There should be a transition period of at least 24 months to give market participants adequate time to undertake the significant work required to implement the new requirements.

5. The reporting threshold amounts should be amended and recalibrated to reflect the different trading and liquidity characteristics of the categories of SBSs and related underlying instruments and markets.

6. To avoid unnecessary and potentially misleading reporting, amended reports should only be required following a material acquisition or disposition relating to a previously reported SBS position.

7. In terms of the information which must be reported, the Proposed Rule should be specific as to what "related" instruments need to be reported in Schedule 13B.

8. The obligation to report an SBS position should not be triggered based on the involvement of U.S. personnel in arranging, negotiating, and executing any SBS transaction as non-dealers will have no way of knowing whether U.S. personnel are involved and therefore whether a reporting obligation exists.

9. If the Commission adopts Proposed Rule 10B-1, it should substantially increase the reporting threshold amounts.

Discussion

1. **There should be no public reporting of SBS positions.**

> ***Public disclosure of SBS positions and related holdings will have an adverse impact on managers and their clients. Public dissemination should be deferred until after the Commission has conducted a further public comment process that allows alternatives to be evaluated in light of the results of initial reporting requirements.***

SIFMA AMG believes that managers and their clients will be adversely impacted by public disclosure of their SBS positions and related holdings. Such public dissemination will create opportunities for front running and copycatting strategies, including through the reverse engineering of proprietary trading strategies. It will also threaten the value of fundamental research paid for by managers and investors by revealing through public reporting the analysis in that research. All of these negative consequences will hinder investment performance and increase costs for investors. The risks are particularly acute in our view given the low reporting thresholds and the next day reporting contemplated under the Proposed Rule. For example, if multiple days are required for an investor to effect a change in a position, market participants will easily be able to front run that investor's transactions in the middle of a trading strategy due to the next day reporting requirement.

As part of that cost/benefit analysis, we believe the Commission should consider alternative frameworks for SBS position reporting, such as the Commodity Futures Trading Commission ("CFTC") large (physical commodity) swaps reporting regime for the purposes of infirming CFTC position limits. Under that regime, swap dealers file routine position reports for principal and direct counterparty swap positions when such positions become reportable. A special call can be issued by the CFTC to have the swap dealer's counterparties file a non-routine report with information concerning their reportable positions. A similar approach in the context of SBS would put the responsibility on security-based swap dealers to report large SBS positions (thus reducing the burden on end user market participants) but also allow the Commission, upon special call, to request information concerning reportable positions from these other market participants. This type of regime would facilitate the SEC's market surveillance interests (as it has for the CFTC), without creating undue burdens for market participants, especially end-user clients.[7]

[7] Unlike dealers who have established swap and/or SBS reporting systems to meet various direct reporting obligations, end users generally do not have such systems to leverage for the SEC's proposed large SBS position reporting regime. The SEC's cost-benefit analysis seems to assume that "many" of the 850 estimated respondents scoped into proposed Rule 10B-1 would be reporting parties pursuant to Regulation SBSR and thus able to leverage some of the technology used in order to build systems to comply with proposed Rule 10B-1 (see 87 Fed. Reg. at 6678); however, only about 50 entities are expected to register as SBSDs, meaning that nearly 800 respondents

We also question whether public reporting of SBS positions is required at all to assist with improving risk management and better informing SBS pricing and believe these goals can be achieved in other ways. For example, it is not clear to us how the information to be made public—which under the Proposed Rule could be extremely voluminous—will allow individual investor, particularly retail investors, to identify potentially fraudulent or manipulative purposes or discern an intention by an investor to act against its interests as a debt holder. In our experience, the information to be disclosed could be interpreted to mean any number of things, and there is no evidence to suggest market participants will be able to interpret the information as suggested. Given the costs and potential harm to investors of public disclosure, we think there needs to be a stronger basis to conclude such information will achieve these goals before forcing market participants to reveal proprietary information to the entire market.

Another benefit of public disclosure cited in the Proposed Rule is that such information will alert market participants to concentrated exposures, similar to the concentrated exposures which resulted in the collapse of Archegos Capital Management in 2020. Again, we do not see why public reporting as contemplated in the Proposed Rule is needed to achieve this goal. The Commission should be able to obtain the required information using data gleaned from reporting under Regulation SBSR. As the staff of the SEC Division of Trading and Markets recognized, [8] prime brokers are already able to seek such information directly from their counterparties. In fact, in the case of Archegos, the issue in many cases was not a lack of information or access to information but rather a failure on the part of some prime brokers to follow appropriate risk management practices and procedures. If the Commission is concerned about protecting prime brokers from concentrated exposures, we respectfully submit it would be better to focus on assessing the consistent effectiveness of risk management requirements applicable to prime brokers and how they manage counterparty credit risk as opposed to mandating public disclosure of large amounts of information which prime brokers can already obtain directly from their counterparties.[9]

Given the magnitude of the issues and concerns, we believe it is premature at this stage to contemplate public reporting of SBS positions. Public reporting can only be considered and evaluated as part of another proposing release once the Commission—with the benefit of industry feedback—has had an opportunity to reconsider the Proposed Rule in terms of scope, timing, and granularity.

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would not have existing reporting system capabilities and/or frameworks to build upon for proposed Rule 10B-1 purposes.

[8] *TM Staff Statement*, Division of Trading and Markets, March 14, 2022.

[9] An example of this type of action was the publication by the Federal Reserve of SR Letter 21-19 on December 10, 2021, reminding firms of safe and sound practices for counterparty credit risk management in light of the Archegos Capital Management default.

If at any point in time the Commission elects to mandate public reporting despite the severe adverse consequences detailed above, we strongly recommend that public reporting be applied at the ultimate parent level of a corporate or financial group, as opposed to at the individual entity level. Specifically, SBS positions entered into by individual entities within the same group should be aggregated horizontally and vertically, such that only the ultimate parent would be obligated to report the sum total of the SBS positions entered into by its direct and indirect subsidiaries in a manner that anonymizes the identity of the individual subsidiaries. This approach would serve to mitigate the various negative consequences associated with public reporting, including those that arise from the disclosure of proprietary and sensitive information.

2. **Reporting of SBS positions should be at the advised client level and not at the investment adviser level for all managed accounts.**

The Commission should clarify that SBS positions held by Managed Funds should be reported at the level of the Managed Fund and not the investment adviser.

Investment advisers regularly transact in SBSs on behalf of advised funds and other investment vehicles (each a "Managed Fund") over which they exercise discretionary investment authority. The Proposed Rule does not explicitly address how SBS positions acquired by such Managed Funds should be reported and when (if at all) an investment adviser should be considered to be the owner or seller of an SBS position for the purposes of reporting.

The reporting obligation in the Proposed Rule applies to "the ***owner*** or ***seller*** of a security-based swap position that exceeds the reporting threshold amount." The words owner and seller are not defined. It is important for the reasons outlined below to clarify that investment advisers—when acting as reporting persons—should report positions at the individual Managed Fund level as opposed to reporting the aggregate SBS positions of all their advisee clients.

We submit that, with the exception of separately managed client accounts (which are discussed in detail below), the policy objectives behind the Proposed Rule will be best achieved if SBS positions are only reported at the level of the individual Managed Fund. Any reporting of aggregate SBS positions at the investment adviser level (particularly where the investment adviser has a large number of Managed Funds and other advisee clients which transact in SBS) would not allow market participants to identify exposures attributable to any individual Managed Fund. For an investment adviser that transacts in SBS for a large number of Managed Funds, a requirement to aggregate SBS positions across all Managed Funds and report the aggregate number could result in a large volume of reports being made public even though no individual Managed Fund managed by that investment adviser owns SBS positions in excess of a reporting threshold.

3. **<u>Reporting SBS Positions of SMA clients should be at the managed asset level for each investment adviser and not across all investment advisors for a beneficial owner.</u>**

The Commission should adjust the reporting obligation to allow for SBS positions of SMA Clients to be reported at the level of the managed assets.

In contrast to the Managed Funds discussed immediately above (where a single investment adviser has discretionary authority over the assets of an advisee entity), certain institutional clients allocate assets to multiple investment advisers to be managed separately by each investment adviser through separately managed accounts ("<u>SMAs</u>"). In an SMA arrangement, a single legal entity (i.e., the sole beneficial owner) ("<u>SMA Client</u>") uses multiple, separate investment advisers.

Based on the structure of SMAs, it is not possible for the investment advisers to report SBS positions as contemplated under the Proposed Rule. Investment advisers do not currently know the aggregate SBS positions of their SMA Clients. From an operational perspective, it would be next to impossible for SMA Clients to collect, analyze and assemble information from each of its investment advisers to be able to report SBS position information within the timelines contemplated in the Proposed Rule. Also, such an effort would result in significant costs and require material changes to the current SMA structure. Even if as a practical matter aggregate SBS position information across SMAs could be produced, it almost certainly cannot be done within the reporting timelines contemplated in the Proposed Rule.

In addition to not being feasible, such aggregation does not help serve the objectives of the Proposed Rule. Because of the independence of trading decisions of the investment advisers (each of which have separate trading positions with multiple dealers), aggregating SBS positions across them would actually impede the ability to observe the activity of a single investment adviser on behalf of a single SMA Client (such as building up a large SBS position for an individual SMA Client).[10]

4. **<u>Even with the recommended changes, a 24-month implementation period must be provided.</u>**

***Market participants will require an adequate transition period to implement the requirements of the Proposed Rule*.**

The Proposed Rule would introduce a novel and complex set of reporting requirements for participants in the SBS markets. Given the complexity of the proposed reporting threshold tests

[10] Again, this point ties into the SEC's apparent goal of monitoring for the build-up of a large SBS position; however, we also wish to note that – to the extent the SEC is concerned with activist intent behind trading activity – investment advisers are subject to fiduciary standards and other guardrails that are incompatible with engaging in activist strategies (e.g., "net-short debt activism") and, indeed, those that file Schedule 13G, even make a passivity certification.

and inclusion of both SBS and related securities in the reporting obligation, in addition to developing the systems required to monitor trading activity and report positions (including establishing necessary connectivity with custodians and venues), firms will also need to develop and roll-out compliance and training programs for their personnel.

We submit that a transition period of at least 24 months following publication of a final rule is warranted and necessary.

5. **Reporting threshold amounts should be amended to reflect a directional position after excluding certain transactions.**

The Commission should revisit the proposed reporting threshold amounts to exclude gross positions and other information that is not material.

The reporting threshold amounts must reflect the different trading and liquidity characteristics of the underlying instruments that SBSs reference. A market participant should only trigger reporting if it has a directional position that exceeds a threshold on a *net* basis, after excluding certain hedging positions. If reporting is not done on a net basis, much of the position information that is reported will not be informative and may be potentially misleading.

In calculating reporting threshold amounts, a market participant should not aggregate positions held across independent business units or positions managed by independent account controllers. In our experience, this is how reporting is done in the context of Section 13 and we agree a similar approach is appropriate under the Proposed Rule.

From April 2022, the Commission has had historical SBS information pursuant to Regulation SBSR, and the Commission should calibrate the reporting threshold amounts with the benefit of a much more fulsome set of data that is representative of the SBS markets.

6. **Amendments to reports should only be required following material position changes.**

Amendments should only be required following a material acquisition or disposition related to a previously filed SBS position report.

To focus the filing of amended reports on events that involve a material change in a reporting person's trading or investment strategy, Proposed Rule 10B-1 should only require an amended report following a material acquisition or disposition relating to a previously reported SBS position. It is important that the requirement to file amendments is not triggered by events with respect to instruments underlying SBS that market participants cannot reasonably be expected to know or monitor on a constant basis.

7. **<u>Clarify the range of "related" instruments covered by Schedule 10B</u>.**

Requirement to report "related" instruments should be replaced with specific guidance as to what to report.

The requirement to report "related" instruments is extremely ambiguous. Market participants may not be able to determine what constitutes a related instrument and such a vague standard would result in inconsistent decision-making as to what instruments to report. The Commission should replace Item 8 of Schedule 10B with an expanded list of enumerated instruments required to be disclosed within Items 6 and 7 of Schedule 10B.

8. **<u>The cross-border scope should be scaled back</u>.**

The Proposed Rule's territorial scope should be scaled back to only capture relevant SBS positions.

It would be problematic if an SBS were reportable under the Proposed Rule solely on the basis that is reportable under the limb of Rule 908(a) which requires reporting for an SBS where it is connected with a non-US person's SBS dealing activity and arranged, negotiated or executed by personnel of such non-U.S. person located in a U.S. branch or office, or by personnel of an agent of such non-U.S. person located in a U.S. branch of office.

When transacting with non-U.S. SBS dealers on behalf of clients, our members generally have no idea if U.S. personnel are involved in the transaction. Therefore, they would not have the ability to know if the transaction should have been reported under Regulation SBSR and therefore should be reported by them under the Proposed Rule. For this reason, the scope of the cross-border provisions should be amended.

9. **<u>If the Commission adopts Proposed Rule 10B-1, it should substantially revise the levels and calculation methods for reporting threshold amounts.</u>**

The Reopening Release requests comment on several aspects of Proposed Rule 10B-1's reporting threshold amounts (for which we have recommended significant changes). While we offer responses to the Commission's questions, our responses can only be viewed in the context of our other recommendations.

A. *In general, the Commission requests comments on the proposed Reporting Threshold Amount for each asset class (e.g., equity security-based swaps, CDS, non-CDS debt security-based swaps, etc.)*

We note that: (i) in the case of investment advisers and managed accounts, SBS positions should only be reported at the advisee client level and not at the investment adviser level; (ii) for

separately managed accounts, reporting of SBS positions should only be required at the level of each separate pool of assets managed; (iii) the thresholds should apply on a net basis; and (iv) certain positions should be excluded altogether (including inter-affiliate and hedging-related positions).

In addition, the results of the analysis set out in the DERA Memo suggest that the Reporting Threshold Amounts should be set at much higher levels than proposed. Even in the absence of aggregation, and even when hypothetical thresholds were set at the maximum tested levels under both the gross notional and percentage tests for equity SBS ($1 billion and 10%, respectively), hundreds of positions still exceeded such thresholds on a daily basis during the sample period. If the DERA analysis had incorporated SBS positions in other asset classes, as well as material amendments to existing SBS positions in all asset classes, even more numerous positions would almost certainly have exceeded these thresholds. The foregoing suggests that setting the thresholds above the maximum levels tested in the study would be optimal from a policy perspective. Specifically, higher thresholds would provide the Commission with specific insight into the most concentrated and risky SBS positions in the market without the distraction and noise created by the reporting of numerous other smaller positions that do not pose meaningful risk to dealer counterparties, referenced entities or the system as a whole.

B. With respect to each asset class, should the Reporting Threshold Amount in any final rule be higher or lower than the proposed Reporting Threshold Amount if:

(i) Consistent with the Proposed Rule, such final rule requires, at an interim threshold, the inclusion of the value of related securities owned by the holder of the security-based swap position in the calculation of the Reporting Threshold Amount?

As noted above, the requirement to report "related" instruments is extremely ambiguous. Market participants may not be able to determine what constitutes a related instrument and such a vague standard would result in inconsistent decision-making as to what instruments to report. Once the definition is appropriately amended, if the value of related securities is included, then the Reporting Threshold Amount should be higher.

(ii) Such final rule does not require the inclusion of related securities owned by the holder of the security-based swap position in those calculations?

The thresholds should not be lower merely because related securities would not be included. The reporting threshold amounts should be amended and recalibrated to reflect the different trading and liquidity characteristics of the categories of SBSs and related underlying instruments and markets.

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

Any final rule must recognize offsetting positions. The thresholds should apply on a net basis and the recognition of netting should not be limited to offsetting SBS positions with identical terms as this question suggests (for example, an SBS position can be offset by a position in the referenced security). Also, as noted above, the Commission should not lower the thresholds merely because it allows for netting as the Proposed Rule is (or should be) focused on large, directional positions.

(iv) Consistent with the Proposed Rule, such final rule requires aggregation of security-based swap positions by any person (and any entity controlling, controlled by or under common control with such person) or group of persons, who through any contract, arrangement, understanding or relationship, after acquiring or selling directly or indirectly, any security-based swap, is directly or indirectly the owner or seller of a security-based swap position that exceeds the Reporting Threshold Amount?

If the final rule requires such aggregation, then the thresholds should be set higher, however, a market participant should not be required to aggregate positions held across multiple managed accounts.

(v) Such final rule does not require aggregation of security-based swap positions across entities that are both separately legally established and capitalized (unless a guarantee exists)?

As noted above, any final rule should not set the thresholds lower merely because disaggregation is allowed.

(vi) Such final rule does not require aggregation of security-based swap positions across entities that are both separately legally established and capitalized (unless a guarantee exists), unless acting as a group with a common purpose?

See response to (v), above.

(vii) Such final rule requires aggregation of security-based swap positions established by transactions effected for such person's own account and of security-based swap positions established by transactions effected for the account of others when that person shares in the economic risk in the other accounts or otherwise controls the account?

See response to (iv), above.

(viii) Such final rule does not require the Reporting Threshold Amount to include security-based swap positions entered into by a person with an entity or person controlling, controlled by, or under common control with that person?

See response to (v), above.

(ix) Such final rule requires or does not require aggregation or inclusion of transactions pursuant to any combination of the options listed in items (a) through (h) above?

See response to (v), above.

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On behalf of SIFMA AMG, we appreciate the opportunity to respond to the Proposed Rule and the Reopening Release and your consideration of our comments and recommendations. If you have any questions or require additional information, please do not hesitate to contact us by calling William Thum at (202) 962-7381.

Sincerely,

William C. Thum
Managing Director and Associate General Counsel

cc: The Hon. Gary Gensler, SEC Chairman
The Hon. Hester M. Peirce, SEC Commissioner
The Hon. Caroline A. Crenshaw, SEC Commissioner
The Hon. Mark T. Uyeda, SEC Commissioner
The Hon. Jaime Lizárraga, SEC Commissioner
Director Haoxiang Zhu, SEC Division of Trading and Markets