April 11, 2022

Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0609

Re: File No. S7-06-22; Modernization of Beneficial Ownership Reporting; Release Nos. 33-11030; 34-94211

Dear Ms. Countryman,

We are law and finance professors who study and teach topics related to Release Nos. 33-11030; 34-94211 (the "Proposed Beneficial Ownership Rules" or the "Release"), the proposed rules on the modernization of beneficial ownership reporting. We thank the Commission for the opportunity to comment on the Release.

Many of us also submitted a comment letter ("Comment Letter from 85 Law and Finance Professors,"[1] attached as Exhibit A) on Release No. 34-93784 (the "Proposed Swaps Rules"), the proposed rules on the prohibition against fraud, manipulation, or deception in connection with security-based swaps; prohibition against undue influence over chief compliance officers; and position reporting of large security-based swap positions. The Proposed Beneficial Ownership Rules and the Proposed Swaps Rules intertwine, and we believe the Commission should consider and analyze the comment letters for the Proposed Beneficial Ownership Rules and the Proposed Swaps Rules together.

Our comments here—which echo those in the Comment Letter from 85 Law and Finance Professors—are straightforward: we urge the Commission to consider more fully both the available data, and the literature cited in Exhibit A, in its analysis of the Proposed Beneficial Ownership Rules.[2]

Although the title of the Release includes the word "Modernization," and there is some discussion in the Release about improvements in technology,[3] the Commission correctly recognizes that the essential policy issue posed in the Release involves balancing the requirement

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[1] Based on a textual analysis of comment letters posted on the Commission's website, the Comment Letter from 85 Law and Finance Professors was signed by more than twice as many academics as any other comment letter on a proposed rule in the history of the Commission. Like that letter, this comment letter was drafted by staff of the International Institute of Law and Finance, a non-profit, non-partisan corporation, with assistance from many of the professors who have signed this letter. No signatories to this letter received compensation for the letter.

[2] The Comment Letter from 85 Law and Finance Professors noted that the Proposed Swaps Rules did not consider any of the literature on shareholder activism. Although the Proposed Beneficial Ownership Rules address certain articles in the literature on shareholder activism, we urge the Commission to consider additional data and academic literature not referenced in the Release.

[3] *See, e.g.*, Release, at 14-15 (discussing differing views of the timing of disclosure).

that material information be timely disseminated versus the competing interest that undue burdens not be imposed in the change of control context.[4] Properly striking this balance requires a careful weighing of potential costs and benefits.[5]

The cost-benefit analysis in the Release states repeatedly that the Commission has been unable to quantify the economic effects of the proposed amendments, including potential increases in costs and potential harm to investors.[6] As professors of law and finance who study and teach topics related to those in the Release, we understand that it can be difficult to quantify with precision the costs and benefits of a proposed rule. Nevertheless, we believe it is important to analyze available data and academic research, particularly with respect to the important portions of the Release where the Commission says it is unable to quantify economic effects, and where the effects of the Proposed Beneficial Ownership Rules could be significant and far reaching. We believe the Commission should do more.

Indeed, the Commission has done more, both with respect to previous rules, and in portions of the Release. Past Commission rulemakings provide paradigms of robust economic

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[4] *See* Release, at 16 ("In enacting Section 13(d), including its original mandate of a 10-day filing deadline in 1968, Congress considered the need to strike an appropriate balance between, on the one hand, providing adequate disclosures to investors and, on the other hand, not unduly burdening those engaging in change of control transactions.").

[5] The introductory paragraph to the analysis of "Potential Benefits and Costs of the Proposed Amendments" in the Release summarizes the Commission's consideration of potential costs and benefits: "We have considered the potential costs and benefits associated with the proposed amendments. Overall, we believe the proposed amendments to Regulation 13D-G would benefit investors and market participants by providing more timely information relating to significant stockholders as well as potential changes in corporate control, facilitating investor decision-making, reducing information asymmetry and improving price discovery in the market. We also recognize that the proposed amendments could impose costs on the affected parties. For instance, the proposed amendments could increase the costs for blockholders to influence or control an issuer and potentially inhibit shareholder activism and its goal of improving corporate efficiency. A discussion of the anticipated economic costs and benefits of the proposed amendments is set forth in more detail below." Release, at 118. The Commission further notes, "We also expect the proposed amendments to affect compliance burdens" and discusses those potential burdens. *Id.* at 119.

[6] *See, e.g.*, Release, at 110 ("Where we are unable to quantify the economic effects of the proposed amendments, we provide a qualitative assessment of the potential effects and encourage commenters to provide data and information that would help quantify the benefits, costs and potential impacts of the proposed amendments on efficiency, competition and capital formation."); Release, at 122 ("As discussed in Section III.A, we are not able to quantify the potential harm to investors due to data limitations."); Release, at 140 ("We are unable to quantify the potential increase in costs related to the proposed shortened Schedule 13D and 13G filing deadlines due to the lack of data. For example, we lack data to estimate how the proposed amendments would affect blockholders' ability to initiate corporate change because such ability would depend on their target share accumulation level, the liquidity of their target stocks and their acquisition plans."); Release at 144 ("We are unable to quantify these costs related to beneficial ownership disclosure, because we lack data on the current use of cash-settled derivative securities to provide reasonable estimates on how such use would change."); Release, at 148 ("We are unable to quantify the costs of our amendments related to group formation. Because we lack data on how many groups may not be reporting beneficial ownership because of the misimpression that an agreement is required, we cannot provide reasonable estimates on how such reporting practices would change.").

analyses of the potential costs and benefits of a rule based on available data and academic literature.[7]

Moreover, the portion of the Release addressing questions about shortening the 10-day filing deadline for an initial Schedule 13D filing includes both quantitative and qualitative analysis based on available data and academic literature.[8] Not all of us would agree with the Commission's economic analysis in this area, and there are important segments of the literature that are not cited, as well as questions about the precise quantification of potential costs that shortening the filing deadline to five days would impose, particularly when the shares of targeted companies are relatively illiquid. Nevertheless, the Release provides both quantitative and qualitative analysis of the costs and benefits, and reasonable people can disagree, based on this evidence and analysis, about the potential costs and benefits of this particular aspect of the Proposed Beneficial Ownership Rules.

But the Commission has access to other data regarding securities transactions and filings that bear on other sections of the Proposed Beneficial Ownership Rules, as well as to findings in the academic literature, that the Release does not reference.[9] For example, although the Release suggests that the Commission lacks "data to estimate how the proposed amendments would affect blockholders' ability to initiate corporate change because such ability would depend on their target share accumulation level, the liquidity of their target stocks and their acquisition plans,"[10] the Commission in fact has data regarding accumulation levels, liquidity, and acquisition plans with respect to past interventions by activists (and to academic literature using such data). To the extent the Commission confronts "data limitations" with respect to other areas, such as the current use of cash-settled derivatives,[11] it could request such data from market participants. If the Commission needs data regarding "how many groups may not be reporting beneficial ownership because of the misimpression that an agreement is required,"[12] it could conduct a survey. Many of us, including authors of studies cited in the Comment Letter from 85 Law and Finance Professors, would be willing to help the Commission with these relatively straightforward data gathering exercises.

We want to highlight in particular the dearth of data and academic research presented in the Release supporting the proposed amendments to Rules 13d-5 and 13d-6, which would govern the circumstances under which persons will be deemed to have formed a "group" that would be subject to beneficial ownership reporting obligations.[13] There is little cost-benefit analysis,

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[7] *See, e.g.*, Universal Proxy, Release No. 34-93596, at 68-172, available at https://www.sec.gov/rules/final/2021/34-93596.pdf (economic analysis of potential costs and benefits).
[8] *See* Release, at 14-16, 119-34.
[9] *See* Exhibit A. To the extent the Commission lacks data or academic findings necessary to analyze the costs and benefits of a proposed rule, it could engage directly with the academic community to help answer open questions, or propose new rules requesting the necessary data, instead of requiring public disclosure of data to all market participants (with resulting effects, including unintended consequences).
[10] *See* Release, at 140.
[11] *See* Release, at 122, 144.
[12] *See* Release, at 148.
[13] The Release states that "[t]hese amendments would make clear that the determination as to whether two or more persons are acting as a group does not depend solely on the presence of an express agreement

quantitative or qualitative, in this important portion of the Release. As to the potential benefits of the proposed "group" amendments,[14] the Release cites just one law review article and one law review comment, both published during 2016, in support of the assertion that groups of blockholders "may" work together to gain control of corporate boards without making appropriate disclosure.[15] As to costs, the Release cites just one article, the classic investigation

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and that, depending on the particular facts and circumstances, concerted actions by two or more persons for the purpose of acquiring, holding or disposing of securities of an issuer are sufficient to constitute the formation of a group." Release, at 78. These amendments, as the Release recognizes, raise concerns among investors as to whether their communications or other activities would constitute formation of a group. See Release, at 90 ("We recognize that our proposal to amend Rule 13d-5, as discussed above, may raise concerns among investors as to whether their communications and other activities with other investors would constitute the formation of a group. We also recognize the possibility that additional exemptions may be warranted to address situations in which beneficial ownership reporting under Section 13(d) or 13(g) by a group would be unnecessary from an investor protection standpoint or even contrary to the public interest. Specifically, we are aware that activity exists among shareholders, investors, holders of derivatives and other market participants that may, absent an exemption, implicate Sections 13(d)(3) and 13(g)(3). For example, institutional investors or shareholder proponents may wish to communicate and consult with one another regarding an issuer's performance or certain corporate policy matters involving one or more issuers. Subsequently, those investors and proponents may take similar action with respect to the issuer or its securities, such as engaging directly with the issuer's management or coordinating their voting of shares at the issuer's annual meeting with respect to one or more company or shareholder proposals."). The need for more precise economic analysis is especially high with respect to these issues given the ambiguity of the language in the Release. Among the terms in just one paragraph in the Release that could raise significant questions for investors who are uncertain whether particular communications or activities might lead them to be deemed to be part of a group are terms such as "solely," "only," "indirectly," "purpose," "effect," and "contemplated." *See* Release, at 147.

[14] Although the Release references reducing "information asymmetry" as a potential benefit to investors and market participants related to the "group" amendments, see Release, at 150, it does not reference the vast academic literature related to this concept or analyze the purported benefit based on data or the academic literature. The Release includes similar unsupported assertions about "information asymmetry" elsewhere as well. *See* Release, at 109, 118-19, 121-123, 125, 142, 150. It is difficult for us to comment specifically on these assertions without understanding their basis, so we simply note here the absence of any discussion.

[15] *See* Release, at 144-45 (citing Carmen X. W. Lu, *Unpacking Wolf Packs*, 125 YALE L.J. 773 (2016) and John C. Coffee, Jr. & Darius Palia, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance*, 41 J. CORP. L. 545 (2016)). The publication of these articles followed a period of significant comment from practitioners about the potential dangers of shareholder activism, including several publications cited in both these publications and the Release. See id. at nn. 16, 19, 88, 210, 241, 262 (citing petition from Wachtell, Lipton, Rosen & Katz); see also Coffee & Palia, *Wolf at the Door*, 41 J. CORP. L. at 594 (citing the same Wachtell petition). As noted in the Comment Letter from 85 Law and Finance Professors, the cited law review article discussed the potential issue that activists "may" work together (in the same way as is suggested by the use of the word "may" in the Release), but the authors of that article further stated that "[t]his is an unexplored area, and we express no firm conclusion." *Id.* at 596. Moreover, also as noted in the Comment Letter from 85 Law and Finance Professors, there is no evidence cited in the Release of shareholder activists, or anyone, using swaps to engage in the kind of "reciprocity" suggested in this article. *See id.* at 595 (suggesting that activists "may prefer to share the gains among themselves by using an organizational structure that unites a number of funds into a loosely knit organization (i.e., the 'wolf pack') that may acquire 25% or more of the target."). Likewise, the law review comment cited in the Release does not introduce new data or quantitative analysis, but instead

of agency costs published in 1976 by Michael Jensen and William Meckling.[16] In this area in particular, we believe the Commission could benefit from additional analysis, not only of available data and the literature cited in Exhibit A, but also potentially new data.[17]

In sum, given the importance of the Proposed Beneficial Ownership Rules, we believe the Commission should now properly study the various questions presented in the Release with the benefit of available data and the academic literature cited in Exhibit A. To the extent the Commission lacks data with respect to particular aspects of its proposals, we believe the cost-benefit analysis in any final rule would benefit from additional data and assistance from the academic community, as noted above. We thank the Commission for its consideration of our comments regarding the Proposed Beneficial Ownership Rules.

Respectfully,

- Afra Afsharipour, *Professor of Law and Senior Associate Dean for Academic Affairs, UC Davis School of Law*
- Olufunmilayo Arewa, *Shusterman Professor of Business & Transactional Law Temple University, Beasley School of Law*
- Hadiye Aslan, *Associate Professor of Finance, Georgia State, J. Mack Robinson College of Business*
- Jordan M. Barry, *John B. Milliken Professor of Law and Taxation, USC Gould School of Law*
- Bernard Black, *Nicholas J. Chabraja Professor, Northwestern University Pritzker School of Law and Kellogg School of Management*
- Barbara Bliss, *Associate Professor of Finance, Knauss School of Business, University of San Diego*
- Arnoud W.A. Boot, *Professor of Finance, Amsterdam Center for Law & Economics, University of Amsterdam, the Netherlands*

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relies on an early draft of the cited law review article, along with some of the other literature cited in the Comment Letter from 85 Law and Finance Professors. We note that the practitioner authors of the publications most frequently cited in the law review article, the law review comment, and the Release did not submit comments on the Proposed Swaps Release.

[16] *See* Release, at 146 (citing Michael C. Jensen, and William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976)). The Release also describes several additional potential costs, including chilling shareholder engagement and communications, as well as compliance and other costs. *See* Release, at 145-48.

[17] For example, the Commission could examine the composition of the investor base of targeted companies during the period prior to the filing of Schedule 13Ds, to determine whether particular categories of investors are net sellers, and therefore are not harmed in aggregate, during this period. The cost-benefit justification for the Proposed Beneficial Ownership Rules would be considerably different if, for example, retail investors have been net buyers during this period, whereas sophisticated institutions have been net sellers. Likewise, the Commission could examine the composition of the investor base of targeted companies after the filing of Schedule 13Ds, to determine the existence and impact of purchases by investors other than Schedule 13D filers, including investors who might be deemed to have been part of a “group” under the Proposed Beneficial Ownership Rules. To the extent the Commission would benefit from additional data, it could postpone adoption of final rules until it obtains and studies such data.

- Nicole Boyson, *Professor of Finance, Northeastern University*
- William W. Bratton*, Nicholas F. Gallicchio Professor Law Emeritus, University of Pennsylvania Carey Law School*
- Brian Broughman, *Professor of Law, Robert S. and Theresa L. Reder Faculty Fellow, Vanderbilt Law School*
- Matt Cain*, Senior Fellow at Berkeley Law School, University of California*
- Charles W. Calomiris, *Henry Kaufman Professor of Financial Institutions, Columbia University*
- Yongqiang Chu*, Professor of Finance, University of North Carolina Charlotte*
- Pierre Collin-Dufresne, *Professor of Finance, Swiss Finance Institute of the École Polytechnique Fédérale de Lausanne*
- Lawrence A. Cunningham*, Founding Director, Quality Shareholders Initiative and Henry St. George Tucker III Research Professor, The George Washington University Law School*
- Darrell Duffie*, Adams Distinguished Professor of Management and Professor of Finance at the Graduate School of Business, and Professor, by courtesy, Department of Economics, Stanford University*
- Alexander Dyck, *Manulife Financial Chair in Financial Services, Rotman School of Management, University of Toronto*
- Alex Edmans*, Professor of Finance, London Business School*
- Franklin R. Edwards*, Professor Emeritus, Economics and Finance, Graduate School of Business, Columbia University*
- Joseph Engelberg, *Professor of Finance, Atkinson/Epstein Chair in Management Leadership, Rady School of Management, University of California, San Diego*
- Elisabeth de Fontenay, *Professor of Law, Duke University*
- Vyacheslav (Slava) Fos*, Associate Professor of Finance Carroll School of Management, Boston College*
- Merritt B. Fox, *Arthur Levitt Professor of Law Co-Director, Center for Law and Economic Studies Co-Director, The Program in the Law and Economics of Capital Markets, Columbia Law School*
- Jesse M. Fried, *Dane Professor of Law, Harvard Law School*
- Nickolay Gantchev*, Professor of Finance, Warwick Business School, University of Warwick*
- George S. Georgiev*, Associate Professor of Law, Emory University*
- Oleg Gredil*, Assistant Professor of Finance, Tulane University Freeman School of Business*
- Bruce Greenwald, *Heilbrunn Professor of Finance and Economics (Emeritus) Columbia University Graduate School of Business*
- Kathleen Hanley, *Bolton-Perella Chair, Director of the Center for Financial Services Perella, Lehigh University College of Business*
- Grant M. Hayden*, Professor of Law, SMU-Dedman School of Law*
- Peter H. Huang, *Professor and DeMuth Chair of Business Law, University of Colorado Law School*
- Matthew Jennejohn, *Professor of Law, BYU Law School*
- Chotibhak Jotikasthira, *Associate Professor of Finance, Corrigan Research Professor, Southern Methodist University*

- Marcel Kahan, *George T. Lowy Professor of Law, New York University School of Law*
- Sehoon Kim, *Assistant Professor, University of Florida Warrington College of Business*
- Michael Klausner, *Nancy and Charles Munger Professor of Business and Professor of Law, Stanford Law School*
- Jan-Pieter Krahen, *Professor for Corporate Finance, Goethe-University Frankfurt*
- Praveen Kumar, *Cullen Distinguished Chair and Professor of Finance, University of Houston*
- Choonsik Lee, *Assistant Professor of Finance, University of Rhode Island College of Business*
- Yoon-Ho Alex Lee, *Professor of Law, Northwestern University Pritzker School of Law*
- Robert Litan, *former Director of Economic Studies, Brookings Institution*
- Alexander Ljungqvist, *Stefan Persson Family Professor of Entrepreneurial Finance, Stockholm School of Economics*
- Dennis Logue, *Professor Emeritus at Dartmouth College*
- Dorothy Lund, *Associate Professor of Law, USC Gould School of Law*
- Minor Myers, *Professor of Law, University of Connecticut School of Law*
- Yaron Nili, *Associate Professor of Law, Smith-Rowe Faculty Fellow in Business Law, University of Wisconsin Law School*
- Terrance Odean, *Rudd Family Foundation Professor of Finance, Haas School of Business, UC Berkeley*
- Charles R. T. O'Kelley, *Professor and Director, Berle Center on Corporations, Law and Society, Seattle University School of Law*
- James Park, *Professor of Law, UCLA School of Law*
- Menesh Patel, *Acting Professor of Law, UC Davis School of Law*
- Adam C. Pritchard, *Frances and George Skestos Professor of Law, University of Michigan Law School*
- Adam V. Reed, *Julian Price Professor of Finance, Kenan-Flagler Business School, University of North Carolina at Chapel Hill*
- Professor Ringgenberg, *Associate Professor of Finance, David Eccles School of Business, University of Utah*
- Jay Ritter, *Cordell Eminent Scholar, University of Florida Warrington College of Business*
- Amanda Rose, *FedEx Research Professor & Professor of Law, Vanderbilt University Law School, Professor of Management, Vanderbilt University Owen Graduate School of Management*
- Paul Rose, *Robert J. Watkins/Procter & Gamble Professor of Law, Ohio State University Moritz College of Law*
- Simone M. Sepe, *Professor of Law and Finance, University of Arizona; TSE; ECGI*
- Omari Scott Simmons, *Howard L. Oleck Professor of Business Law, Director of Business Law Program, Wake Forest University School of Law*
- Chester S. Spatt, *Pamela R. and Kenneth B. Dunn Professor of Finance, Tepper School of Business, Carnegie Mellon University*
- Eric Talley, *Isidor & Seville Sulzbacher Professor of Law, Columbia Law School*
- Randall S. Thomas, *John S. Beasley II Professor of Law and Business, Vanderbilt Law School*
- Rory Van Loo, *Professor of Law, Boston University School of Law*

- William K.S. Wang, *Emeritus Professor, University of California Hastings College of Law*
- Glen Young*, Assistant Professor, McCoy College of Business, Texas State University*
- Christopher Yust*, Associate Professor Deloitte Foundation Leadership Professorship, Mays Business School Texas A&M*

Exhibit A

March 21, 2022

Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0609

Re: File No. S7-32-10; Proposed Prohibition Against Fraud, Manipulation, or Deception in Connection with Security-Based Swaps; Prohibition against Undue Influence over Chief Compliance Officers; Position Reporting of Large Security-Based Swap Positions; Release No. 34-93784

Dear Ms. Countryman,

We are law and finance professors who study and teach topics related to Release No. 34-93784 (the "Proposed Swaps Rules" or the "Release"), the proposed rules on the prohibition against fraud, manipulation, or deception in connection with security-based swaps; prohibition against undue influence over chief compliance officers; and position reporting of large security-based swap positions.[1] We appreciate the opportunity to comment on the Proposed Swaps Rules.

Our comments also relate to the intertwined Release No 34-94211 (the "Proposed Section 13-D/G Rules") (together with the Proposed Swaps Rules, the "Proposed Rules"), the proposed rules on the modernization of beneficial ownership. Several of us intend to comment on the Proposed 13-D/G Rules as well. We believe the Securities and Exchange Commission ("Commission") should consider and analyze the comment letters for the Proposed Rules together.

Our comments focus on the effect of the Proposed Swaps Rules on shareholder activism. We believe these rules could reduce the benefits of activism. Below we describe (1) the Proposed Swaps Rules, (2) the benefits of shareholder activism, and (3) the potential effects of the Proposed Swaps Rules on shareholder activism. Our comments are straightforward: we urge the Commission to consider the literature on shareholder activism as part of its economic analysis of the Proposed Swaps Rules.

The Proposed Swaps Rules

The Proposed Swaps Rules address several categories of swaps, including "credit default swaps" ("CDS") and "security-based swaps," two categories of swaps that have posed recent policy questions. First, with respect to CDS, as the introduction to the Release emphasizes, the Proposed Swaps Rules address manufactured credit events and other opportunistic strategies in

[1] This comment letter was drafted by staff of the International Institute of Law and Finance, a non-profit, non-partisan corporation, with assistance from many of the professors who have signed this letter. No signatories to this letter received compensation for the letter.

the CDS market, and concerns among industry participants about how these practices could harm the efficiency, reliability, and fairness of the debt markets.[2]

Second, with respect to "security-based swaps," although the Proposed Swaps Rules do not specifically reference the collapse of Archegos Capital Management, L.P. ("Archegos"), the Release states that the "the intent of proposed Rule 10B-1 is to alert regulators and the market, including counterparties to security-based swap trades and the companies whose securities underlie security-based swaps, that one or more market participants are amassing a large position in security-based swaps."[3] The Release apparently was written at least in part with Archegos in mind.[4]

We write, not about these two issues involving CDS or Archegos, but about the potential impact of the Proposed Swaps Rules on shareholder activism. Unfortunately, as we describe below, the relatively low, and complex, threshold for triggering Proposed Swaps Rule 10B-1(b)(1)(iii) would impose a disclosure requirement that could significantly deter shareholder activism, particularly at the largest companies, where shareholder activists have generated the greatest gains for investors.[5] Shareholder activists would be required to disclose their swaps positions after just one business day after they exceeded the threshold set forth in the Proposed Swaps Rules.[6]

Specifically, Proposed Swaps Rule 10B-1(b)(1)(iii) would require that any investor make such a disclosure "once a Security-Based Swaps Position based on equity meets or exceeds $300 million, calculated on a gross basis."[7] Proposed Swaps Rule 10B-1(b)(1)(iii)(A) would further provide that "once a Security-Based Swap Position exceeds a gross notional amount of $150 million, the calculation of the Security-Based Swap Position shall also include the value of all of the underlying equity securities owned by the holder of the Security-Based Swap Position (based on the most recent closing price of shares), as well as the delta-adjusted notional amount of any

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[2] *See* Gina-Gail S. Fletcher, *Engineered Credit Default Swaps: Innovative or Manipulative?*, 94 N.Y.U. L. REV. 1073 (2019).

[3] Proposed Swaps Rules, at 77.

[4] *See, e.g.*, Akayla Gardner, *Gensler Says SEC Plans More Swaps Disclosures Post-Archegos*, BLOOMBERG (Sept. 15, 2021) (quoting Chairman Gensler explaining, "I've asked staff for recommendations on how we can put out—with the thought of Archegos in mind—how we can put out aggregate information about the aggregate positions in securities underlying the total return swaps.").

[5] We describe various aspects of the relevant literature below. For recent information on shareholder activism, see THE DIRECTORS GUIDE TO SHAREHOLDER ACTIVISM (2021), https://corpgov.law.harvard.edu/2021/06/11/the-directors-guide-to-shareholder-activism.

[6] Proposed Swaps Rules, at 86.

[7] *Id.* at 77. The Release focuses on "gross" notional amount calculations, and references "net" disclosures in certain contexts related to CDS, but not equities. *See id.* at 149-50, 174-76. The Release does not address the literature on "encumbered shares" or "empty voting," or analyze the costs and benefits of equity security-based-swap disclosure requirements even for low or zero net positions. *See* Shaun Martin & Frank Partnoy, *Encumbered Shares*, 2005 UNIVERSITY OF ILLINOIS LAW REVIEW 775 (2005) ("encumbered shares"); Henry T. C. Hu & Bernard Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership*, 79 S. CAL. L. REV. 811 (2006) ("empty voting"). These issues are relevant to both of the Proposed Rules.

options, security futures, or any other derivative instruments based on the same class of equity securities."[8] Proposed Rule 10B-1(a)(2) would require that a Schedule 10B be filed promptly, no later than the end of the first business day after execution of a trade.[9]

The one-day disclosure requirement is significantly shorter than the Proposed Section 13-D/G Rules, which would require that a shareholder activist disclose positions within "five days after the date on which a person acquires more than 5% of a covered class of equity."[10] The existing disclosure regime requires a Schedule 13-D filing "within ten days after [an] acquisition [of more than 5% of a covered class of equity.]"[11] Yet the Proposed Swaps Rules do not discuss either the existing ten-day requirement or the proposed five-day requirement.

The Proposed Swaps Rules, perhaps inadvertently, would mandate disclosure of a position in the equity securities of an issuer after one business day so long as that position included a security-based swap position of more than $150 million in gross notional amount (potentially a small percentage stake for a large firm). This requirement would render the ten- or five-day provisions and their corresponding ownership thresholds in the Section 13-D/G Rules irrelevant in many instances. The Commission provides the public with no discussion of the implications of this new requirement for equity securities disclosure, no economic analysis of the requirement, and no statutory authority for it.[12]

Benefits of Shareholder Activism

The academic literature details many benefits of activism.[13] Peer-reviewed research shows that shareholders benefit from statistically significant and meaningful average stock price appreciation following announcements of shareholder activism.[14] An examination of stock price performance during the five years after a shareholder activist intervention finds no evidence that

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[8] *Id.* at 78. As noted above, the Release also would increase the disclosure requirements for equities as well as swaps under these circumstances.
[9] *Id.* at 67.
[10] Proposed Section 13-D/G Rules, at 6.
[11] 15 U.S.C. 78m(d)(1).
[12] For example, the Commission could provide empirical evidence of the costs and benefits associated with shortening the time period from ten days to either five days or one day.
[13] For a review of the literature on shareholder activism, see Alon Brav, Wei Jiang & Rongchen Li, *Governance by Persuasion: Hedge Fund Activism and Market-Based Shareholder Influence*, European Corporate Governance Institute Finance Working Paper No. 797/2021, forthcoming *Oxford Research Encyclopedia of Economics and Finance* (2022); Matthew R. Denes, Jonathan M. Karpoff & Victoria B. McWilliams, *Thirty Years of Shareholder Activism: A Survey of Empirical Research,* 44 J. CORP. FIN. 405 (2017); Alon Brav, Wei Jiang & Hyunseob Kim, *Hedge Fund Activism: A Review*, 4 FOUND. TREND FIN. 185 (2010).
[14] *See* Alon Brav, Wei Jiang, Frank Partnoy & Randall Thomas, *Hedge Fund Activism, Corporate Governance, and Firm Performance*, 63 J. FIN. 1729 (2008). *See also* April Klein & Emanuel Zur, *Entrepreneurial Shareholder Activism: Hedge Funds and Other Private Investors*, 64 J. FIN. 187 (2009); Marcel Kahan & Edward Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. PA. L. REV. 1021 (2007); William Bratton, *Hedge Funds and Governance Targets*, 95 GEO. L.J. 1375 (2007).

those gains dissipate; to the contrary, several studies document long-term financial benefits that arise after activists intervene.[15] These findings have been widely replicated and are supported by reliable science.[16] A few studies point to potential problems associated with shareholder

[15] *See* Edward P. Swanson, Glen M. Young & Christopher G. Yust, *Are All Activists Created Equal? The Effect of Interventions by Hedge Funds and Other Private Activists on Long-Term Shareholder Value*, 72 J. CORP. FIN. 1 (2022) (showing that benefits are not limited to sale of targeted firms, and that long-term shareholders increase ownership after activist interventions); Lucian A. Bebchuk, Alon Brav, & Wei Jiang, *The Long-Term Effects of Hedge Fund Activism,* 115 COLUM. L. REV. 1085, (2015) (documenting significant long-term effects). Other academic work verifies the short- and long-term stock price gains associated with hedge fund activism. *See, e.g.*, Alon Brav, Wei Jiang, & Hyunseob Kim, *Recent Advances in Research on Hedge Fund Activism: Value Creation and Identification*, 7 ANN. REV. FIN. ECON. 579 (2015) (studying the short- and long-term performance gains in activist-targeted companies); Alon Brav, Wei Jiang, Frank Partnoy, & Randall Thomas, *Returns to Hedge Fund Activism*, 64 FIN. ANALYSTS J. 45 (2008) (studying the return profile of hedge fund activism as an investing strategy).

[16] For an exploration of why some activists succeed while others fail, see C.N.V. Krishnan, Frank Partnoy & Randall Thomas, *The Second Wave of Hedge Fund Activism: The Importance of Reputation, Clout and Expertise*, 40 J. CORP. FIN. 296 (2016). *See also* Nicole M. Boyson, Linlin Ma, & Robert M. Mooradian, *How Does Past Experience Impact Hedge Fund Activism?*, J. FIN. QUANTITATIVE ANAL. (forthcoming 2021); Yaron Nili, *Missing the Forest for the Trees: A New Approach to Shareholder Activism*, 4 HARV. Bus. L. REV. 157 (2014). *See also* David H. Webber, THE RISE OF THE WORKING-CLASS SHAREHOLDER: LABOR'S LAST BEST WEAPON (2018) (discussing successful partnership between labor and shareholder activists).

activism,[17] though even critics of early shareholder activism research recognize that shareholder activism is associated with increased returns[18] for investors, including retail investors.[19]

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[17] Some have argued that activists encourage a short-term approach to market performance. *See* Martin Lipton, Wachtell, Lipton, Rosen & Katz, *Important Questions About Activist Hedge Funds*, HARV. L. SCH. F. CORP. GOV. (2013); John C. Coffee, Jr. & Darius Palia, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance*, 41 J. CORP. L. 545 (2016); Leo E. Strine, Jr., *Who Bleeds When the Wolves Bite?: A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System*, 126 YALE L.J. 1870 (2017). But other papers contest this argument. Mark J. Roe, *Stock Market Short-Termism's Impact*, 167 U. PA. L. REV. 71 (2019); Jesse M. Fried & Charles C.Y. Wang, *Short-Termism and Capital Flows*, 8 REV. CORP. FIN. STUDS. 207 (2019); Hadiye Aslan & Hilda Maraachlian, *Wealth Effects of Hedge Fund Activism*, Working Paper (2018). In addition, Coffee & Palia (2016) have suggested that hedge funds "may prefer to share the gains among themselves by using an organizational structure that unites a number of funds into a loosely knit organization (i.e., the 'wolf pack') that may acquire 25% or more of the target." *Id.* at 595. However, the authors further note that "[t]his is an unexplored area, and we express no firm conclusion." *Id.* at 596. There is no evidence cited in the Release of shareholder activists, or anyone, using swaps to engage in the kind of "reciprocity" suggested in Coffee & Palia (2016).

[18] Taken as a whole, the academic literature finds the phenomenon of shareholder activism to be overall positive for investors, though there is granularity regarding whether individual funds or campaigns subtract, rather than add, value, and also regarding the extent to which the benefits from activism are primarily due to stock picking as opposed to long-term value creation. For example, Martijn Cremers, Erasmo Giambona, Simone M. Sepe & Ye Wang, *Hedge Fund Activists: Value Creators or Good Stock Pickers?* Working paper (2021) employ various methodologies and novel data to conclude that the positive abnormal returns to shareholder activism are due more to stock picking than value creation; they nevertheless document, consistent with prior literature, that shareholder activism "is associated with positive abnormal stock returns in both the short term and the long term." *Id.* at 24. In addition, Hadiye Aslan & Praveen Kumar, *The Product Market Effects of Hedge Fund Activism*, 119 J. FIN. ECON. 226 (2016) focus on the impact of activism on rival firms, finding that the welfare consequences of shareholder activism are complex in that activism generally increases the efficiency of target firms, with negative consequences on relatively inefficient rival firms, suggesting overall improvements in welfare from the viewpoint of economic efficiency.

[19] Activists provide other benefits to investors as well. *See, e.g.*, Alon Brav, Michael Bradley, Itay Goldstein & Wei Jiang, *Activist Arbitrage: A Study of Open-Ending Attempts of Closed-End Funds*, 95 J. FIN. ECON. 1 (2010) (documenting activists' effect on reducing discounts in closed-end funds); Agnes Cheng, Henry He Huang & Yinghua Li, *Hedge Fund Intervention and Accounting Conservatism*, 32 CONTEMP. ACCT. RES. 392 (2015) (showing that firms have superior accounting/financial reporting following activist intervention); Sehoon Kim, *Disappearing Discounts: Hedge Fund Activism in Conglomerates*, Working paper (2022) (showing that activists reduce the diversification discount in conglomerates); Virginia Harper Ho, *Risk Related Activism: The Business Case For Monitoring Nonfinancial Risk*, 41 J. CORP. L. 647, 678 (2016) (arguing that activists can improve firm disclosure of risk); Kobi Kastiel, *Against All Odds; Hedge Fund Activism in Controlled Companies*, 2016 COLUM. BUS. L. REV. 60 (2016) (showing that activists can discipline management even at controlled companies); Nickolay Gantchev, Oleg R. Gredil & Chotibhak Jotikasthira, *Governance Under the Gun: Spillover Effects of Hedge Fund Activism*, 23 REV. FIN. 1 (2019) (demonstrating improved performance at nontargeted peers of activist-targeted firms).

In addition to financial gains to investors from increases in the stock prices of targeted firms, the academic literature demonstrates numerous real and operational effects of activism, including:

- Reduced management entrenchment, as measured by CEO turnover[20]
- Reduced emissions, as measured using plant-chemical level data[21]
- Reduced value-destroying mergers and acquisitions activity[22]
- Improved firm performance, as measured by return on assets[23]
- Improved firm productivity, as measured by plant-level performance[24]
- Increased board diversity[25]
- Improved environmental and social performance[26]
- Improved corporate innovation, as measured by patent counts and citations[27]

Finally, the academic literature has demonstrated numerous mechanisms that activists use to achieve benefits. Shareholder activists often gain board representation,[28] reduce management

[20] *See* Brav, Jiang, Partnoy & Thomas (2008).

[21] *See* Pat Akey & Ian Appel, *Environmental Externalities of Activism*, Working paper (2020); S. Lakshmi Naaraayanan, Kunal Sachdeva & Varun Sharma, *The Real Effects of Environmental Activist Investing*, Working paper (2020); Yongqiang Chu & Daxuan Zhao, *Green Hedge Fund Activists*, Working Paper (2019).

[22] *See* Wei Jiang, Tao Li & Danqing Mei, *Activist Arbitrage in M&A Acquirers*, 29 FIN. RES. LETTERS 156 (2019); Nikolay Gantchev, Merih Sevilir & Anil Shivdasani, *Activism and Empire Building*, 138 J. FIN. ECON. 526 (2020); Nicole M. Boyson, Nickolay Gantchev & Anil Shivdasani, *Activism Mergers*, 126 J. FIN. ECON. 54 (2017).

[23] *See* Brav, Jiang, Partnoy & Thomas (2008); Nicole M. Boyson & Robert Mooradian, *Corporate Governance and Hedge Fund Activism*, 14 REV. DERIVATIVES RES. (2011); Christopher P. Clifford, *Value Creation or Destruction? Hedge Funds as Shareholder Activists*, 14 J. CORP. FIN. 323 (2008).

[24] *See* Alon Brav, Wei Jiang, & Hyunseob Kim, *The Real Effects of Hedge Fund Activism: Productivity, Asset Allocation, and Labor Outcomes*, 28 REV. FIN. S. 2723 (2015).

[25] *See* Wei Jiang, *Diversity Through Turnover: How to Overcome the Glacial Pace Toward Board Diversity?*, COLUMBIA BUSINESS SCHOOL RESEARCH PAPER (Feb. 26, 2021).

[26] *See* Alexander Dyck, Karl V. Lins, Lukas Roth & Hannes F. Wagner, *Do Institutional Investors Drive Corporate Social Responsibility? International Evidence*, 131 J. FIN. ECON. 693 (2019); Youngqiang Chu, Bo Huang & Chengsi Zhang, *The Color of Hedge Fund Activism*, Working paper (2019). *See also* Cathy Hwang & Yaron Nili, *Shareholder-Driven Stakeholderism*, U. CHI. L. REV. ONLINE (2020) ("arguing that shareholders have long been advocates of the kind of progressive values that the public desires").

[27] *See* Alon Brav, Wei Jiang, Song Ma & Xuan Tian, *How Does Hedge Fund Activism Reshape Corporate Innovation?* 130 J. FIN. ECON. 237 (2018).

[28] *See* Lucian A. Bebchuk, Alon Brav, Wei Jiang & Thomas Keusch, *Dancing with Activists*, 137 J. FIN. ECON. 1 (2020). *See also* Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 Yale L.J. 262 (2016) (discussing negotiations between activists and issuers that conclude with a withdrawn shareholder proposal and some sort of corporate reform).

entrenchment,[29] and improve both stock price and operating performance.[30] Shareholder activist stock ownership is directly correlated with the probability of success in obtaining one or more board seats through settlement with targeted companies.[31]

Potential Effects of the Proposed Rules on Shareholder Activism

The disclosure obligations in the Proposed Swaps Rules could reduce the incidence and effectiveness of activism by reducing the incentives to engage in activism. These incentives arise from the expected gains in positions that shareholder activists can accumulate before engaging in actions to mitigate agency costs, reduce corporate malfeasance, and hold managers and directors accountable to shareholders. To the extent those expected gains are reduced, shareholder activism will become less attractive.[32] Reduced monitoring would adversely affect shareholders

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[29] *See* Lucian A. Bebchuk, *The Myth That Insulating Boards Serves Long-Term Value*, 113 COLUM. L. REV. 1637 (2013); Paul Rose & Bernard S. Sharfman, *Shareholder Activism as a Corrective Mechanism in Corporate Governance*, 2014 BYU L. REV. 1014 (2014).

[30] The academic literature also examines the tactics activists may use to improve their odds of success. *See, e.g.*, Alon Brav, Wei Jiang, Tao Li & James Pinnington, *Picking Friends Before Picking (Proxy) Fights: How Mutual Fund Voting Shapes Proxy Contests*, Working paper (2021) (examining mutual fund voting behavior in proxy contests); Alon Brav, Amil Dasgupta & Richmond Mathews, *Wolf Pack Activism*, forthcoming MGMT. SCI. (2021) (studying how multiple blockholders might engage management in parallel); Adam L. Aiken & Choonsik Lee, *Let's Talk Sooner Rather Than Later: The Strategic Communication Decisions of Activist Blockholders*, 62 J. CORP. FIN. 1 (2020) ("document(ing) how the choice to start communication early with management, before the 13D disclosure, fits within the" activist strategy); Matthew D. Cain, Jill E. Fisch, Sean J. Griffith & Steven Davidoff Solomon, *How Corporate Governance is Made: The Case of the Golden Leash*, 164 U. PA. L. REV. 649 (2016) (examining the use of so-called "golden leashes" to incentive activist-nominated director candidates).

[31] It is important to note that activists only hold minority stakes in firms, so they must rely on convincing other shareholders to support their views. *See* Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 899 (2013); Ronald J. Gilson & Jeffrey N. Gordon, *Agency Capitalism: Further Implications of Equity Intermediation*, in RESEARCH HANDBOOK ON SHAREHOLDER POWER (Jennifer G. Hill & Randall S. Thomas, eds.) (2015); Assaf Hamdani & Sharon Hannes, *The Future of Shareholder Activism*, 99 B.U. L. REV. 971 (2019); John D. Morley, *Too Big to Be Activist*, 92 S. CAL. L. REV.1407 (2019). Those other shareholders often—and increasingly—include index funds and other large institutional investors. Ian Appel, Todd Gormley & Donald Keim, *Standing on the Shoulders of Giants: The Effects of Passive Investors on Activism*, 32 REV. FIN. STUD. 2720 (2019); Lucian Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. REV. 721, 724 (2019); Clifford G. Holderness, *The Myth of Diffuse Ownership in the United States*, 22 REV. FIN. STUD. 1377 (2009). The literature has long established the important role played by such large investors. Andrei Shleifer & Robert W. Vishny, *Large Shareholders and Corporate Control*, 94 J. POL. ECON. 461 (1986); Alex Edmans, *Blockholder Trading, Market Efficiency, and Managerial Myopia*, 64 J. FIN. 2481 (2009).

[32] The literature establishes that the size of the stake acquired by an activist motivates effort, and that shareholder activism is expensive; to the extent disclosure requirements increase the costs of activism and limit the benefits, they could deter the activity. *See* Rui Albuquerque, Vyacheslav Fos & Enrique Schroth, *Value Creation in Shareholder Activism*, J. FIN. ECON (forthcoming 2021); Nickolay Gantchev, *The Costs of Shareholder Activism: Evidence from a Sequential Decision Model*, 107 J. FIN. ECON. 610 (2013). For a discussion on how activists trade, see Pierre Collin-Dufresne & Vyacheslav Fos, *Do Prices Reveal the Presence of Informed Trading?* 70 J. FIN. 1555 (2015); *see also* Kerry Back, Pierre Collin-Dufresne

of all types, including those with the longest time horizons and greatest degree of concentration.[33]

Despite the availability of relevant data,[34] the Release does not include any estimate of the effects of the Proposed Swaps Rules on shareholder activism. There are no data or cost-benefit analyses cited related to shareholder activism. Nor is there a counterfactual analysis to assess lost societal benefits from decreased levels of shareholder activism. There is no indication in the Release that shareholder activists have used swaps in similar ways to the use of swaps in the CDS market or by Archegos. Indeed, the economic analysis in the Release does not reference shareholder activism at all.

The Release states that the Commission constructed the thresholds used in the Proposed Swaps Rules based on an analysis of data in the debt market.[35] The Release further notes that the Commission intends to consider some "newly available data in determining thresholds to use in connection with Security-Based Swap Positions based on equity securities when adopting a final rule."[36] Accordingly, it appears that the $300 million rule is not based on data from the equity swaps market or data related to shareholder activism. The economic analysis also did not address how the disclosure thresholds relate to the risks posed by Archegos. Unfortunately, the Release also does not describe any additional data the Commission might use in the future to support position thresholds that might appear in any final rules, and such data were not made available or even referenced during the comment period.

The Release also notes that "transparency about security-based swap positions could play an important role in protecting market integrity, including by providing the Commission and other regulators with access to information that may indicate that a person (or a group of

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Vyacheslav Fos, Tao Li & Alexander Ljungquist, *Activism, Strategic Trading, and Liquidity*, 86 ECONOMETRICA 1431 (2018) (studying theoretical implications of liquidity on activist engagements); Nickolay Gantchev & Chotibhak Jotikasthira, *Institutional Trading and Hedge Fund Activism*, 64 MGMT. SCI. 2930 (2018).

[33] Although much academic research focuses on "hedge fund" activism, other research examines a range of shareholders' time horizon and concentration. *See, e.g.*, Brian Bushee, *Identifying and Attracting the "Right" Investors: Evidence on the Behavior of Institutional Investors*, 16 J. APPLIED CORP. FIN. 28 (2004); Martijin Cremers & Ankur Pareek, *Patient Capital Outperformance: The Investment Skill of High Active Share Managers Who Trade Infrequently*, 122 J. FIN. ECON. 288 (2016); Lawrence A. Cunningham, *Lessons from Quality Shareholders on Corporate Governance Practice, Research and Scholarship*, 5 GEO. WASH. BUS. FIN. L. REV. 1 (2021). Research led by the Quality Shareholders Initiative of George Washington University concludes that engaged shareholders with longer time horizons and higher concentration tend to be particularly valuable, whether they are hedge funds, pension funds, or another type of investor. *See* LAWRENCE A. CUNNINGHAM, QUALITY SHAREHOLDERS: HOW THE BEST MANAGERS ATTRACT AND KEEP THEM (2020); see also Lawrence A. Cunningham, *The Case for Empowering Quality Shareholders*, 46 BYU L. REV. 1 (2021).

[34] *See, e.g.*, Lucian Bebchuk, Alon Brav, Robert J. Jackson, Jr. & Wei Jiang, *Pre-Disclosure Accumulations by Activist Investors: Evidence and Policy*, 39 J. CORP. L. 1 (2013). *See also* Lucian A. Bebchuk & Robert J. Jackson, Jr., *The Law and Economics of Blockholder Disclosure*, 2 HARV. BUS. L. REV. 40 (2012).

[35] Proposed Swaps Rules, at 152, 161.

[36] *Id.* at 76.

persons) is building up a large security-based swap position, which may be relevant for a number of reasons, as discussed in greater detail in section III."[37] We believe this objective could be accomplished by requiring disclosures only to the Commission, not publicly. To the extent there are additional concerns about the public's understanding, those concerns could be addressed through different mechanisms, including alternatives related to the Proposed Section 13-D/G Rules.

Some of the statements in the economic analysis section of the Release regarding the equity security-based swaps thresholds appear to have been focused on Archegos.[38] Specifically, the Release notes the possibility of an economic externality where a market participant who decides to take on a large leveraged position in the underlying entity through a security-based swap will not internalize the total societal cost of a negative outcome.[39] In that event, the Release states that disclosure "could alleviate the externality by making information public that could be incorporated into TRS prices, thus requiring the party with the equity exposure to fully pay for the additional risks that it is incurring. Counterparties that have amassed large economic exposures in a specific security or TRS [total return swap] on that security (or both) and are therefore at greater risk of default could then be more easily identified."[40] The Release does not address the extent to which swaps clearing rules failed to reduce counterparty risks posed by the Archegos swap transactions.[41]

There is no analysis in the Proposed Swaps Rules of the above concerns in the context of shareholder activism. There is no evidence of any such externality related to shareholder activism, or any large leveraged undisclosed equity positions by a shareholder activist that have led to such a negative outcome. Importantly, the Archegos situation did not involve shareholder activism or any possible intention to influence or control the company whose securities were the subject of the derivatives. A number of financial institutions suffered losses as a result of the Archegos situation, but those losses were absorbed by the financial system without the need for government intervention or the liquidation of any of the affected institutions.

More broadly, the Release is titled "Proposed Prohibition Against Fraud, Manipulation, or Deception in Connection with Security-Based Swaps." Yet the Release presents no evidence that equity-based swaps held by shareholder activists have been associated with, or even have the potential for, fraud, market abuse, or market manipulation.[42] The Release does not include any

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[37] *Id.* at 22.
[38] *See id.* at 118-19.
[39] *See id.*
[40] *Id.* at 119.
[41] *See* 15 U.S.C. 78c-3(a)(1) (as added by Section 763(a) of the Dodd-Frank Act of 2010); *see also* Process for Submissions for Review of Security-Based Swaps for Mandatory Clearing and Notice Filing Requirements for Clearing Agencies; Technical Amendments to Rule 19b-4 and Form 19b-4 Applicable to All Self-Regulatory Organizations, Release No. 34-69286, Jun. 28, 2012 (describing security-based swaps submissions and clearing requirements).
[42] The Commission does not address whether the fraud risk associated with equity security-based swaps is sufficient to warrant an exception to the general statutory requirement of identity protection with respect to rulemaking related to public availability of security-based swap information and the Commission's statutory duty ''to ensure such information does not identify the participants." 15 U.S.C. 78m-1(1)(E)(i).

empirical analysis of fraud, market abuse, or market manipulation based on a meaningful sample size, or describe such problems in the context of shareholder activism, where disclosure of positions is widespread, public, and closely studied, as in the academic literature cited here. The Release does not analyze or compare the potential benefits of the Proposed Swaps Rules based on one unmentioned (non-activist) market participant that the Commission is investigating[43] to the potential costs borne by a categorically different (activist) group of market participants. There is no analysis of potential costs and benefits of requiring disclosure of certain positions acquired through equity purchases within five days under the Proposed Section 13-D/G Rules, but requiring disclose of certain positions acquired through swaps within one day under the Proposed Swaps Rules.

Even those of us who are critics of various aspects of shareholder activism recognize that there is evidence in the literature that activism can be a means to address corporate underperformance and malfeasance, and hold management and boards of directors accountable to the ultimate owners of targeted companies. The research cited above demonstrates real benefits from shareholder activism, including benefits to retail investors from the financial gains associated with activism. Yet the Proposed Swaps Rules do not address shareholder activism, the extent to which shareholder activism might be impacted by the new one-day disclosure requirement, or the potential costs of imposing disclosure thresholds significantly below those in the Proposed Section 13-D/G Rules. A piecemeal approach to the Proposed Rules could have a chilling effect on shareholder activism, limiting a key protective tool for shareholders, large and small, and further insulating management and boards from accountability, to the detriment of investors. We urge the Commission to consider the research cited here, and the potential impact on shareholder activism, before adopting the Proposed Swaps Rules.

We appreciate the Commission's consideration of our comments.

Respectfully,

- Emilie Aguirre, *Associate Professor of Law, Duke Law School*
- Olufunmilayo Arewa, *Shusterman Professor of Business & Transactional Law Temple University, Beasley School of Law*
- Hadiye Aslan, *Associate Professor of Finance, Georgia State, J. Mack Robinson College of Business*
- Jordan Barry, *Professor of Law, USC Gould School of Law*
- James Benjamin, *Department of Accounting, Mays Business School Texas A&M University*
- Bernard Black, *Nicholas J. Chabraja Professor, Northwestern University Pritzker School of Law and Kellogg School of Management*

[43] *See* Heather Perlberg, Matt Robinson & Sridhar Natarajan, BLOOMBERG, *SEC Investigating Archegos for Potential Market Manipulation*, Oct. 8, 2021; Matthew Goldstein, *The S.E.C. Has Issued a Subpoena to Archegos, the $10 Billion Firm that Collapsed Spectacularly*, N.Y. TIMES, Oct. 8, 2021; Dave Michaels, *SEC Probes Trading by Archegos That Rattled Market*, WALL ST. J., Mar. 31, 2021.

- Barbara Bliss*, Associate Professor of Finance, Knauss School of Business, University of San Diego*
- Nicole Boyson, *Professor of Finance, Northeastern University*
- Brian Broughman, *Professor of Law, Robert S. and Theresa L. Reder Faculty Fellow, Vanderbilt Law School*
- Ryan Bubb, *Professor of Law, New York University School of Law*
- Matt Cain, *Senior Fellow at Berkeley Law School, University of California*
- Chris Clifford, *Chair Department of Finance and Quantitative Methods, University of Kentucky, Gatton College of Business and Economics*
- James D. Cox, *Brainerd Currie Professor of Law, Duke University*
- Lawrence A. Cunningham *Founder, Quality Shareholders Initiative, Professor, George Washington University School of Law*
- Robert M. Daines, *Pritzker Professor of Law, Business, Associate Dean, Rock Center on Corporate Governance, Stanford Law School*
- Darrell Duffie, *Adams Distinguished Professor of Management and Professor of Finance at the Graduate School of Business, and Professor, by courtesy, Department of Economics, Stanford University*
- Asaf Eckstein, *Hebrew University of Jerusalem School of Law*
- Alex Edmans, *Professor of Finance, London Business School*
- Franklin R. Edwards*, Professor Emeritus, Economics and Finance, Graduate School of Business, Columbia University*
- Cristie Ford*, Professor Allard School of Law, The University of British Columbia*
- Vyacheslav (Slava) Fos, Associate *Professor of Finance Carroll School of Management, Boston College*
- Merritt B. Fox, *Arthur Levitt Professor of Law Co-Director, Center for Law and Economic Studies Co-Director, The Program in the Law and Economics of Capital Markets, Columbia Law School*
- Jesse M. Fried, *Dane Professor of Law, Harvard Law School*
- Nickolay Gantchev, *Professor of Finance, Warwick Business School, University of Warwick*
- George S. Georgiev, *Associate Professor of Law, Emory University*
- Lawrence R. Glosten, *S. Sloan Colt Professor of Banking and International Finance, Columbia University*
- Bruce Greenwald*, Heilbrunn Professor of Finance and Economics (Emeritus) Columbia University Graduate School of Business*
- Jillian Grennan, *Visiting Assistant Professor of Law, Business, and Public Policy, UC Berkeley*
- Sarah C. Haan, *Professor of Law, Washington and Lee University School of Law*
- Kathleen Hanley, *Bolton-Perella Chair, Director of the Center for Financial Services Perella, Lehigh University College of Business*
- Grant M. Hayden, *Professor of Law, SMU-Dedman School of Law*

- Edith S. Hotchkiss, *Professor of Finance, Carroll School of Management, Boston College*
- Peter H. Huang, *Professor and DeMuth Chair of Business Law, University of Colorado Law School*
- Wei Jiang, *Arthur F. Burns Professor of Free and Competitive Enterprise, Columbia Business School*
- Chotibhak Jotikasthira, *Associate Professor of Finance, Corrigan Research Professor, Southern Methodist University*
- Jonathan M. Karpoff, *Professor of Finance and Washington Mutual Endowed Chair in Innovation, Foster School of Business, University of Washington*
- Kobi Kastiel, *Associate Professor, Tel Aviv University Faculty of Law and Senior Fellow at the Program on Corporate Governance, Harvard Law School*
- Sehoon Kim, *Assistant Professor, University of Florida Warrington College of Business*
- Michael Klausner, *Nancy and Charles Munger Professor of Business and Professor of Law, Stanford Law School*
- S.P. Kothari, *Gordon Y. Billard Professor of Accounting and Finance, MIT Sloan School of Management*
- C.N.V Krishnan, *Professor of Banking and Finance, Case Western University Weatherhead School of Management*
- Praveen Kumar, *Cullen Distinguished Chair and Professor of Finance, University of Houston Bauer College of Business*
- Choonsik Lee, *Assistant Professor of Finance, University of Rhode Island College of Business*
- Yoon-Ho Alex Lee, *Professor of Law, Northwestern University Pritzker School of Law*
- Adi Libson, *Bar-Ilan University School of Law*
- Da Lin, *Assistant Professor of Law, University of Richmond School of Law*
- Robert Litan, *former Director of Economic Studies, Brookings Institution*
- Alexander Ljungqvist, *Stefan Persson Family Professor of Entrepreneurial Finance, Stockholm School of Economics*
- Dorothy Lund, *Associate Professor of Law, USC Gould School of Law*
- Joshua C. Macey, *Assistant Professor, The University of Chicago Law School*
- Jonathan R. Macey*, Sam Harris Professor of Corporate Law, Securities Law and Corporate Finance, Yale Law School*
- Paul G. Mahoney, *David and Mary Harrison Distinguished Professor of Law, University of Virginia School of Law*
- Amelia Miazad, *Associate Professor of Law, UC Davis School of Law (effective July 2022), Founding Director, Business in Society Institute, UC Berkeley School of Law*
- Curtis J. Milhaupt, *William F. Baxter-Visa International Professor of Law, Stanford Law School*
- Peter Molk, *Professor of Law, University of Florida, Levin College of Law*
- Yaron Nili, *Associate Professor of Law, Smith-Rowe Faculty Fellow in Business Law, University of Wisconsin Law School*

- Terrance Odean, *Rudd Family Foundation Professor of Finance, Haas School of Business, UC Berkeley*
- Charles R. T. O'Kelley, *Professor and Director, Berle Center on Corporations, Law and Society, Seattle University School of Law*
- James Park, *Professor of Law, UCLA School of Law*
- Menesh Patel, *Acting Professor of Law, UC Davis School of Law*
- Jay Ritter, *Cordell Eminent Scholar, University of Florida*
- Usha R. Rodrigues*, University of Georgia School of Law*
- Amanda Rose, *FedEx Research Professor & Professor of Law, Vanderbilt University Law School, Professor of Management, Vanderbilt University Owen Graduate School of Management*
- Paul Rose, *Robert J. Watkins/Procter & Gamble Professor of Law, Ohio State University Moritz College of Law*
- Tano Santos, *David L. and Elsie M. Dodd Professor of Finance, Director of the Heilbrunn Center for Graham and Dodd Investing, Columbia Business School*
- Christina M. Sautter*, Cynthia Felder Fayard Professor of Law Byron R. Kantrow Professor of Law Vinson & Elkins Professor of Law, Louisiana State University Paul M. Hebert Law Center*
- Alan Schwartz, *Sterling Professor, Yale Law School*
- Lemma W. Senbet, *The William E. Mayer Chair Professor of Finance, University of Maryland, Smith School of Business*
- Simone M. Sepe, *Professor of Law and Finance, University of Arizona; TSE; ECGI*
- Bernard S. Sharfman, *Senior Corporate Governance Fellow, RealClearFoundation,* Research Fellow, *Law & Economics Center at George Mason University's Antonin Scalia Law School*
- Omari Scott Simmons, *Howard L. Oleck Professor of Business Law, Director of Business Law Program, Wake Forest University School of Law*
- Chester S. Spatt, *Pamela R. and Kenneth B. Dunn Professor of Finance, Tepper School of Business, Carnegie Mellon University*
- James C. Spindler, *Mark L. Hart, Jr. Endowed Chair in Corporate and Securities Law, University of Texas Law School; Professor, University of Texas McCombs School of Business*
- Marc Steinberg, *Rupert and Lillian Radford Chair in Law and Professor of Law, Southern Methodist University (SMU) Dedman School of Law*
- Edward P. Swanson, *Professor Emeritus, Mays Business School, Texas A&M University*
- Jennifer Taub, *Professor of Law, Western New England University School of Law*
- Randall S. Thomas, *John S. Beasley II Professor of Law and Business, Vanderbilt Law School*
- Andrew Tuch, *Professor of Law, Washington University in St. Louis*
- Anne M. Tucker, *Professor of Law Georgia State University, College of Law*
- J.W. Verret, *Associate Professor of Law, George Mason University's Antonin Scalia Law School*

- William K.S. Wang, *Emeritus Professor, University of California Hastings College of Law*
- David H. Webber, *Professor of Law and Paul M. Siskind Scholar, Boston University School of Law*
- Roman L. Weil, *V. Duane Rath Professor Emeritus of Accounting, Chicago Booth School of Business*
- Glen Young, *Assistant Professor, McCoy College of Business, Texas State University*
- Christopher Yust, *Associate Professor Deloitte Foundation Leadership Professorship, Mays Business School Texas A&M*