sifma

asset management group

March 21, 2022

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

Re: ***Notice of Proposed Rulemaking on the 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 (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") 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, as well as re-proposed Rule 9j-1 under the Exchange Act, each as reflected in the Proposed Rule.

SIFMA AMG members have had the opportunity to review (i) the joint letter[3] that the Securities Industry and Financial Markets Association ("SIFMA"), the International Swaps and Derivatives Association, Inc. ("ISDA") and the Institute of International Bankers ("IIB") (the "Joint Association 10B-1 Letter") have filed with the Commission with respect to the SBS position reporting requirements set forth in proposed Rule 10B-1 under the Exchange Act and proposed Schedule 10B and (ii) the joint letter that SIFMA, ISDA and IIB (the "Joint Association 9j-1 Letter," and together with the Joint Association 10B-1 Letter, the "Joint Association Letters") have filed with the Commission with respect to re-proposed Rule 9j-1 under the Exchange Act. We generally support the views expressed in the Joint Association Letters. In addition to providing additional perspective on certain points made in the Joint Association Letters, we focus in this letter on some issues of particular importance to SIFMA AMG members and our clients.

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

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 Letter from Kenneth E. Benson, Jr., President and Chief Executive Officer, SIFMA, Scott O'Malia, Chief Executive Officer, ISDA and Briget Polichene, Chief Executive Officer, IIB to Vanessa Countryman, Secretary of the Commission, dated March 21, 2022.

Introduction

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 and in the Joint Association Letters, 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. While 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, it is important that the reporting regime introduced to achieve this does not have an unnecessary chilling effect on legitimate market activity. We respectfully ask the SEC to take account of the concerns and suggestions outlined below and in the Joint Association Letters, and solicit further public comment on these issues as necessary, before finalizing and adopting the Proposed Rule.

As discussed in more detail below and assuming the Commission decides to proceed with finalizing the Proposed Rule, SIFMA AMG recommends that the Commission 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 as a way to achieve the objectives of the Proposed Rule.

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 in order 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. Rule 9j-1 should be revised to include an affirmative defense from liability similar to the affirmative defense under Rule 10b-5 provided by Rule 10b5-1(c)(2).

SIFMA AMG agrees with the general point made in the Joint Association 10B-1 Letter that, should the Commission decide to proceed with finalizing the Proposed Rule, the new requirements should only be adopted following a full evaluation of the impact of existing rules, such as Regulation SBSR[4] and the various regulatory margin requirements applicable to SBS. These existing rules are already intended to achieve some of the same objectives as those set out in the Proposed Rule, through reporting and public dissemination of SBS transactions and the posting of margin to mitigate the credit risk arising from concentrated exposures. By allowing time for a full evaluation and consideration of the impact that Regulation SBSR and other SBS reforms will have on the market, the Commission will be able to make a better informed decision as to the additional rule making that is required to address the objectives set out in the Proposed Rule. It may be that many of the objectives in the Proposed Rule are adequately addressed by the existing rules, thus obviating the need for some of the newly proposed requirements.

We also note that the Proposed Rule has been published at a time when a number of other reporting and disclosure reforms have been proposed by the Commission, including significant revisions to the Commission's Section 13 reporting rules and their application to derivatives, new proposals to enhance short sale disclosures and new requirements with respect to reporting of securities lending transactions. The operational burden and the commercial impact of all these new and additional requirements on market participants will in the aggregate be quite significant. Given the large number of over-lapping proposals, we think the impact of the Proposed Rule cannot be judged in isolation. Instead, any cost/benefit analysis must take account of the impact of all of these requirements together. We are concerned that, absent meaningful changes to the current proposals, their cumulative effect will have a negative impact on pricing, liquidity and the ability to hedge, be very burdensome and that it will be very difficult, costly and time-consuming for market participants to implement and absorb all the new requirements.

[4] 17 C.F.R. § 242 *et seq*.

In addition, the Commission asked many dozens of questions concerning the operation of the Proposed Rule and the SBS market generally, and SIFMA AMG feels strongly that a 45-day comment period is simply an insufficient amount of time to allow for meaningful consideration of, and comment on, the Proposed Rule, which would impose significant changes to current SBS market practices. In this regard, SIFMA AMG reconfirms our request that the comment period should have been extended to 90 days. In particular, we note that the range of activities and operational ramifications implicated by the Proposed Rule would usually warrant a 90-day comment period, or even the usual default period of 60 days. The SBS market is complicated with many different participants and a variety of transaction terms reflecting a diversity of nuanced factors and considerations. We are concerned that a 45-day comment period means that commenters were unable to deliberate on the issues carefully and provide the quality of responses and alternatives that would be valuable for the Commission's consideration as part of thoughtful rulemaking.

Discussion

1. **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.

The Commission itself has recognized the potential costs of public disclosure in similar contexts, including as recently as 2020 in its proposal to raise the reporting threshold for Form 13F reports from $100 million to $3.5 billion.[5] In the Release for that proposal, the Commission referred[6] to academic literature containing partial evidence of potential harms caused by disclosure

[5] *Reporting Threshold For Institutional Investment Managers*, SEC Release No. 34-89290 (July 10, 2020). 85 Fed. Reg. 46016 (July 31, 2020).

[6] *Ibid*, 46022.

to third parties in the context of 13F reporting (including evidence that managers make confidential treatment requests to protect confidential trading information from front running, evidence of profiting from copycatting strategies and evidence of decreased hedge fund performance following Form 13F disclosure). While such research was not conclusive, we submit that similar concerns to those addressed in that research are raised by public disclosure under the Proposed Rule and that a full cost/benefit analysis which considers all the available evidence is warranted before the Proposed Rule is finalized.

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. 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]

We also question whether public reporting of SBS positions is required at all in order to assist with improving risk management and better informing SBS pricing. We 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

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

which resulted in the collapse of Archegos Capital Management in 2020. 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 as recently as this month,[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 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 strengthening the 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]

In adding Section 10B(d) to the Exchange Act and authorizing the Commission to require large trade reporting of SBSs, Congress did not mandate that such information be publicly reported. In light of this, we believe a clear, demonstrable case needs to be made before a new public reporting requirement is introduced pursuant to Section 10B(d). Given the magnitude of the issues and concerns raised in this letter and in the Joint Association 10B-1 Letter, 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.

2. **Reporting of SBS Positions of Advised Clients**

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 purposes of reporting. In the case of equity securities, Section 13(d) of the Exchange Act requires persons who are the beneficial owners of more than 5% of a class of voting equity securities regulated under Section 12 of the Exchange Act to file a disclosure statement. Beneficial ownership for this purpose includes a person who has or shares investment power over the securities (including the power to dispose of such securities or direct their disposition). As a result, for Section 13(d) purposes, the investment adviser of a

[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.

Managed Fund which has investment authority over its assets is treated as the beneficial owner of such securities with an obligation to disclose them.

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. The omission from the Proposed Rule of a beneficial ownership test similar to the one under Section 13 suggests that the standards applied there to determine disclosure obligations are not applicable under the Proposed Rule. We note, however, that the instructions to Item 1 of proposed Schedule 10B—which are taken directly from the instructions to Schedule 13D—include investment adviser as a category of reporting person. This suggests the Commission does contemplate that investment advisers will be reporting persons in some circumstances. If that is the case, 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. This would defeat one of the chief objectives of the new reporting requirement, which is to allow market participants to identify the accumulation of significant exposures by individual counterparties. Also, reporting SBS positions at the investment adviser level would magnify some of the negative consequences arising from the lack of calibration of the reporting thresholds as discussed in the Joint Association 10B-1 Letter. 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. This would create a large reporting burden for investment advisers and would not further the objectives of the Proposed Rule as effectively as only having reporting of SBS positions calculated at the Managed Fund level. Requiring aggregate reporting would undermine the objective of the Proposed Rule by generating large volumes of reports that do not reveal useful or meaningful information. We request that the Commission clarify the Proposed Rule to make it clear such aggregate reporting is not required.

3. **Reporting SBS Positions of SMA Clients**

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 ("SMAs"). In an SMA arrangement, a single legal entity (i.e., the sole beneficial owner) ("SMA Client") uses multiple, separate investment advisers. The SMA Client allocates to each distinct investment adviser a certain amount of funds for which each investment adviser executes its own investment strategy. Each investment adviser has full discretion as to its SMA of the SMA Client. The investment advisers do not know the identity of the other investment advisers that are also managing an SMA for the SMA Client, how much money is allocated to other investment advisers and what the other investment advisers are trading as part of their separate strategies. Therefore, there is no information sharing by and among the investment advisers nor coordination of their trading and investment activity.

An SMA approach diversifies the SMA Client by including the strategies of different investment advisers as to investment perspectives, expertise and asset allocations for the invested assets and mitigates concentration risk. Each investment adviser trades products (including in some cases SBSs) under agreements it negotiates on behalf of the SMA Client, maintains separate assets under management for its strategy, and has no ability to see or control the activities of other investment advisers (including their trading in SBSs) who are managing the same SMA Client or to see the aggregate holdings and investments of the SMA Client other than its own SMA.

SMAs present unique hurdles to implementation of the Proposed Rule. 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 so as 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. The Proposed Rule requires SBS positions to be reported no later than the first business day following the day of execution of the SBS that results in the position exceeding the applicable reporting threshold. In our experience, most SMA clients typically receive periodic reports of holdings from each of their investment advisers on a monthly basis. For this reason and others, we agree with the recommendation outlined in the Joint Association 10B-1 Letter that the reporting timelines under the Proposed Rule should be aligned with Section 13 reporting deadlines.

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] It will also better facilitate the monitoring of concentrated exposures to report SBS positions at the individual SMA level due to the fact it is relatively common for SMA structures to involve limited recourse arrangements where the recourse of creditors is limited to the assets allocated to the SMA. Where an SMA Client ring-fences each SMA in this fashion, it is much more informative for creditors to see SBS positions at the SMA level as that is the pool of assets to which those creditors have recourse.

4. **Transition Period**.

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. While a number of new regulatory reporting regimes covering derivatives have been introduced in the last decade (including, in the case of SBSs, Regulation SBSR), the applicable rules have generally allocated the responsibility for reporting to derivatives dealers. Market participants who are not dealers generally have not been given direct reporting obligations or, where they have been required to report, the applicable rules have permitted them to delegate their reporting obligations to their dealer counterparties. Therefore, while the Proposed Rule will be burdensome for dealers, it will be particularly burdensome for other market participants who have less recent experience implementing these types of derivatives reporting requirements. Given the complexity of the proposed reporting threshold tests and inclusion of both SBS and related securities in the reporting obligation, the technical and operational challenges will be significant and time-consuming. 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. The implementation effort will be significant and we believe the Commission's current cost/benefit analysis significantly underestimates the extent of the reporting burden and the costs associated therewith. We would direct the Commission to the discussion of this topic in Section I of the Joint Association 10B-1 Letter, with which we agree.

[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.

5. **Reporting Threshold Amounts**.

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

To achieve its stated goals, the Proposed Rule should only require reporting and disclosure of SBS positions that are likely to be material to the market. In our view, the reporting threshold amounts in the Proposed Rule would result in the reporting in significant amounts of immaterial information. As suggested in the Joint Association 10B-1 Letter, we believe the Commission should reassess and recalibrate the reporting threshold amounts to make sure they reflect the different trading and liquidity characteristics of the underlying instruments that SBSs reference. We also agree that 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. We also support the point made in the Joint Association 10B-1 Letter that, 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.

In terms of timing and process, we are of the view that the Commission should wait until it has analyzed the data available to it under Regulation SBSR before finalizing the reporting threshold amounts. We do not believe the data which the Commission relied upon in developing the reporting threshold amounts in the Proposed Rule accurately reflects the underlying SBS markets. Beginning in April 2022, the Commission will have available to it historical SBS information pursuant to Regulation SBSR. At that point we believe 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**

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

We agree with the commentary in the Joint Association 10B-1 Letter regarding when previously filed SBS position reports should be amended. 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. **Clarify the Range of "Related" Instruments Covered by Schedule 10B.**

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. We agree with the point made in the Joint Association 10B-1 Letter that market participants may not be able to determine what constitutes a related instrument and that such a vague standard would result in inconsistent decision-making as to what instruments to report. We agree with SIFMA, ISDA and the IIB that 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. **Cross-Border Scope.**

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

SIFMA AMG supports the proposals made in the Joint Association 10B-1 Letter regarding the need to scale back the territorial scope of the reporting obligation in the Proposed Rule. In particular, we agree with the observation that not all SBS transactions required to be reported pursuant to Rule 908(a) of Regulation SBSR should be reportable under the Proposed Rule. In particular, we think 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. We would ask the Commission to take this into consideration as it finalizes the cross-border provisions in the Proposed Rule.

9. **Informative Barrier Affirmative Defense for Rule 9j-1**

Rule 9j-1 should be revised to include an affirmative defense from liability similar to the affirmative defense under Rule 10b-5 provided by Rule 10b5-1(c)(2).

Many investment advisers have implemented policies and procedures to allow them to prevent insider trading violations and rely on the affirmative defense provided by Rule 10b5-(c)(2) from liability under Rule 10b-5. For the reasons outlined in the Joint Association 9j-1 Letter, SIFMA AMG members believe it is important that a similar affirmative defense is added to re-proposed Rule 9j-1 before it is finalized. Firms should be able to continue to operate independent business units in compliance with the new requirements and we believe the same rationale for the

affirmative defense provided by Rule 10b-5(c)(2) applies in the context of Rule 9j-1. As long as the individuals making the investment decisions are not aware of material non-public information and the firm has implemented reasonable policies and procedures to prevent violations of Rule 9j-1, we do not see why a firm should face claims of fraud or manipulation under the rule. The addition of such an affirmative defense is essential if firms are to be able to continue to operate independent business units, consistent with past practice under Rule 10b-5. We would ask the Commission to consider making this addition as part of finalizing the Proposed Rule.

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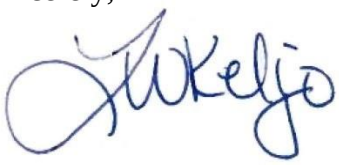
On behalf of SIFMA AMG, we appreciate the opportunity to respond to the Proposed Rule and your consideration of our comments and recommendations. If you have any questions or

require additional information, please do not hesitate to contact us by calling Lindsey Keljo at (202) 962-7312 or William Thum at (202) 962-7381.

Sincerely,



Lindsey Weber Keljo
Head- Asset Management Group

William C. Thum
Managing Director and Associate General Counsel

cc: The Honorable Gary Gensler, Chair
The Honorable Hester M. Pierce, Commissioner
The Honorable Allison Herren Lee, Commissioner
The Honorable Caroline A. Crenshaw, Commissioner