October 3, 2024

Via Electronic Mail: rule-comments@sec.gov

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

Re: Notice of Proposed Rulemaking on Position Reporting of Large Security-Based Swap Positions; File No. S7-32-10

Dear Ms. Countryman:

MFA[1] is writing to apprise the Securities and Exchange Commission ("**SEC**" or the "**Commission**") of several recent legal developments that are pertinent to its proposed "Position Reporting of Large Security-Based Swap Positions" rules ("**Proposal**").[2] This letter further addresses the SEC's proposed Rule 10B-1 ("**Rule 10B-1**") under the Securities Exchange Act of 1934 (the "**Exchange Act**") which proposes to establish reporting and disclosure requirements for certain security-based swap ("**SBS**") positions. Specifically, we write to bring to your attention to these several important judicial opinions relevant to the Commission's statutory authority to promulgate proposed Rule 10B-1 that have been published recently.

As we expressed in our previous comment letters to the Commission on the Proposal,[3] we remain concerned that proposed Rule 10B-1 exceeds the Commission's statutory authority under Section 10B(d) of

[1] Managed Funds Association (MFA), based in Washington, DC, New York, Brussels, and London, represents the global alternative asset management industry. MFA's mission is to advance the ability of alternative asset managers to raise capital, invest, and generate returns for their beneficiaries. MFA advocates on behalf of its membership and convenes stakeholders to address global regulatory, operational, and business issues. MFA has more than 180 member fund managers, including traditional hedge funds, credit funds, and crossover funds, that collectively manage over $3.2 trillion across a diverse group of investment strategies. Member firms help pension plans, university endowments, charitable foundations, and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time.

[2] Exchange Act Release No. 34-93784 (Dec. 15, 2021), 87 Fed. Reg. 6,652 (Feb. 4, 2022).

[3] *See* MFA, *Comment Letter re Notice of Proposed Rulemaking on Position Reporting of Large Security-Based Swap Positions; File No. S7-32-10* (Mar. 21, 2022), https://www.sec.gov/comments/s7-32-10/s73210-20120700-272867.pdf; MFA, *Comment Letter re Notice of Proposed Rulemaking on Position Reporting of Large Security-Based Swap Positions; File No. S7-32-10* (May 16, 2023), https://www.sec.gov/comments/s7-32-10/s73210-190219-374542.pdf; MFA, *Comment Letter re Reopening of Comment Period for Position Reporting of Large Security-Based Swap Positions; Release No. 34-97762; File No. S7-32-10* (Aug. 21, 2023), https://www.sec.gov/comments/s7-32-10/s73210-248539-566744.pdf.

the Exchange Act.[4] *First*, we believe that Section 10B(d) cannot be viewed as a general grant of authority with respect to the reporting of SBSs generally but rather as a narrower authorization to impose reporting requirements that pertain and are necessary to the enforcement of position limits. *Second*, we believe that Section 10B(d) cannot be interpreted as allowing for public dissemination of SBS positions when such an interpretation would be inconsistent with other provisions of the Exchange Act. We write to highlight several recent opinions published by the U.S. Supreme Court and the U.S. Court of Appeals for the Fifth Circuit that bolster these concerns.

I. Section 10B(d) Is Not a General Grant of Authority with Respect to the Reporting of SBSs.

As we discussed in our previous comment letters, when read in the overall context of Section 10B, Section 10B(d) is best interpreted not as a general grant of authority to require SBS position reporting but as a means of allowing the Commission to require reporting of SBS positions needed to enforce position limits promulgated under Section 10B(a). Recent cases from the Fifth Circuit and the Supreme Court underscore the problems with the Commission's alternate reading of Section 10B(d) as creating a free-floating power to require position reporting.

In *National Association of Private Fund Managers v. SEC* (*NAPFM*), the Fifth Circuit considered whether Section 211(h) of the Investment Advisers Act of 1940 (the "**Advisers Act**") authorizes the SEC to promulgate regulations imposing various restrictions and disclosure requirements on private fund advisers.[5] Section 211(h) grants the Commission the authority to "facilitate the provision of simple and clear disclosures to investors" and to "promulgate rules prohibiting or restricting certain sales practices, conflicts of interest, and compensation schemes for brokers, dealers, and investment advisers that the Commission deems contrary to the public interest and the protection of investors."[6] As the Fifth Circuit recognized, read in isolation, the text of Section 211(h) would appear to grant the Commission the authority to require disclosures for the benefit of *all* investors, including private fund investors, and to promulgate rules "prohibiting or restricting certain sales practices, conflicts of interest, and compensation schemes" for *any* investment advisers.[7] But the Fifth Circuit rejected that blinkered reading of the statute, explaining that the words of a statute "cannot be construed in a vacuum."[8] Rather, they "must be read in their context and with a view to their place in the overall statutory scheme."[9] The Fifth Circuit went on to read Section 211(h) in the context of the broader regulatory scheme for private funds established under both the Advisers Act and its

[4] 15 U.S.C. § 78j-2(d).

[5] 103 F.4th 1097, 1103, 1106–08 (5th Cir. 2024).

[6] 15 U.S.C. § 80b-11(h).

[7] *NAPFM*, 103 F.4th at 1110–11.

[8] *Id.* at 1111.

[9] *Id.* at 1111 (internal quotation marks omitted).

sister statute, the Investment Company Act of 1940.[10] And, based on a variety of aspects of that broader regulatory scheme—including its overall structure and inferences about Congress's meaning drawn from statutory headings—the Fifth Circuit held that Section 211(h) could not be read to authorize the regulation of private funds, notwithstanding what the provision's terms might mean in isolation.[11]

The Fifth Circuit's reasoning in *NAPFM* underscores the Commission's misreading of Section 10B(d). In construing Section 10B(d) as a general grant of authority to require position reporting, the Commission reads the provision "in a vacuum" rather than in "context and with a view to [its] place" in the Exchange Act.[12] Here, similar contextual clues to those present in *NAPFM* point decisively towards a narrower interpretation of Section 10B(d). Section 10B(d) is part of a section of the Exchange Act titled "Position limits and position accountability for security-based swaps and large trader reporting."[13] The first two subsections of Section 10B authorize the Commission to establish limits on the size of positions in SBSs and related instruments, to require aggregation of positions, and to adopt exemptions from position limits.[14] And the text of Section 10B(d) itself refers back to subsection (a). Subsection (d) of Section 10B thus must be construed as one aspect of the Commission's statutory authority to promulgate and enforce position limits on SBSs, in accordance with the preceding subsections and the purpose of Section 10B.

Texas Medical Association v. U.S. Department of Health and Human Services,[15] also decided earlier this year by the Fifth Circuit, likewise highlights the error of overreading a narrow delegation of authority by ignoring statutory context. There, the Fifth Circuit considered whether a provision of the No Surprises Act requiring federal agencies to "establish by regulation one independent dispute resolution process"[16] authorizes those agencies to promulgate substantive standards for independent arbitrators, including regulations mandating how arbitrators weigh certain factors.[17] In rejecting that reading, the Fifth Circuit again refused to read that statutory language in isolation, faulting the government for "exploiting the term 'one independent dispute resolution process' as the basis for the challenged portions of the Final Rule."[18] Instead, looking to the broader context and structure of the No Suprises Act, the court held that this provision creates a "purely administrative authority" and does not authorize the agencies to supplement the

[10] *Id.* at 1111–12.

[11] *Id.* at 1112.

[12] *Id.* at 1111.

[13] 15 U.S.C. § 78j-2.

[14] *Id.* § 78j-2(a)–(b).

[15] 110 F.4th 762 (5th Cir. 2024).

[16] 42 U.S.C. § 300gg-111(c)(2)(A).

[17] *Texas Medical*, 110 F.4th at 768–69.

[18] *Id.* at 774.

comprehensive list of criteria for arbitrators to consider provided elsewhere in the statute.[19] Like *NAPFM*, *Texas Medical* highlights the danger of overreading a narrow delegation as a broad grant of authority by construing statutory text in isolation rather than in light of its place in the overall statutory scheme.

Finally, the Supreme Court's landmark decision in *Loper Bright Enterprises v. Raimondo*[20] similarly underscores the importance of interpreting delegations of authority reasonably and in a manner consistent with the statute's purpose. *Loper Bright*, of course, overruled the *Chevron* doctrine, ending the requirement that courts defer to agencies' interpretation of ambiguous statutory language. To be sure, *Loper Bright* recognized that where, as with Section 10B(d), "the best reading of a statute is that it delegates discretionary authority to an agency," courts must "effectuate" that meaning "subject to constitutional limits."[21] Following *Loper Bright*, however, the question of the *scope* of an express delegation to an agency—the very question raised by the Commission's misreading of Section 10B(d)—will be construed *de novo* by courts employing all the traditional tools of statutory interpretation.

Here, Section 10B(d) authorizes the Commission to require the disclosure of SBS positions needed to enforce the position limits promulgated under Section 10B(a). The Commission may not "leapfrog" from this narrow authorization to a broader power to require the reporting of SBS positions generally.[22]

II. Section 10B(d) Does Not Allow for Public Dissemination of SBS Positions.

The Fifth Circuit's decision in *NAPFM* also reinforces MFA's concern that the Commission has failed to interpret Section 10B(d) *in pari materia* with other provisions of the Exchange Act that address position and transaction reporting. Proposed Rule 10B-1's requirement of public disclosure of SBS positions is inconsistent with other provisions in the Exchange Act.

In *NAPFM*, after concluding that Section 211(h) of the Advisers Act does not authorize the Commission to promulgate regulations imposing certain restrictions and reporting requirements on private fund advisers, the Fifth Circuit also considered whether Section 206(4) provides the authority to do so.[23] Section 206(4) authorizes the Commission to "define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative" with respect to "any investment adviser."[24] Explaining that "in cases where statutes are *in pari materia* ('in a like

[19] *Id.* at 775 (internal quotation marks omitted).

[20] 144 S. Ct. 2244 (2024).

[21] *Id.* at 2263.

[22] *Texas Medical*, 110 F.4th at 775.

[23] *NAPFM*, 103 F.4th at 1112.

[24] 15 U.S.C. § 80b-6(4).

matter'), they should be interpreted harmoniously,"[25] the Fifth Circuit compared Section 206(4), which was silent as to disclosures and reporting, to other provisions of the Advisers Act that expressly provided for the disclosure and reporting of certain information.[26] According to the court, this contrasting language "shows that where Congress wanted to provide for reporting and disclosure of certain information, it did so explicitly."[27] And because Section 206(4) does not explicitly discuss disclosure and reporting, the Fifth Circuit held that it does not authorize the Commission to promulgate a rule with those requirements.[28]

NAPFM makes clear that Section 10B(d) must be construed *in pari materia* with other provisions of the Exchange Act addressing similar subjects so as to create a harmonious reporting scheme.[29] Two other provisions, in particular, are relevant here. First, in Section 13(m)(1)(D) of the Exchange Act, Congress authorized the Commission to "require registered entities to *publicly* disseminate . . . [SBS] transaction and pricing data."[30] This provision demonstrates that when Congress wants to provide the Commission with the authority to require the public disclosure of certain information, it knows how to do so, and it will do so "explicitly"[31]—something it did not do in Section 10B(d). Second, in Section 13(m)(1)(C)(iii), Congress provided that "the Commission shall require real-time public reporting for [SBS] transactions in a manner that does *not* disclose the business transactions and market positions of any person."[32] Pursuant to this provision, the Commission's Regulation SBSR specifically prohibits the disclosure of information regarding the identity of any counterparty to an SBS.[33] The Commission's reading of Section 10B(d) would put that provision at war with Section 13(m)(1)(C)(iii), requiring public disclosure of the very information that Section 13(m)(1)(C)(iii) expressly requires the Commission to keep anonymous. The Commission should not adopt a reading of Section 10B(d) that leaves another provision of the Exchange Act a dead letter and overrides the careful balance Congress struck in the Exchange Act.

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[25] *NAPFM*, 103 F.4th at 1111.

[26] *NAPFM*, 103 F.4th at 1113 (citing 15 U.S.C. §§ 80b-3(c)(1), 80b-4(b)(3), 80b-11(h)(1)).

[27] *Id.* at 1113 (internal quotation marks omitted).

[28] *Id.* at 1114.

[29] *See also Texas v. Nuclear Regulatory Comm'n*, 78 F.4th 827, 831 (5th Cir. 2023) (explaining that the Atomic Energy Act and the Nuclear Waste Disposal Act were "unambiguous" "[w]hen read alongside each other").

[30] 15 U.S.C. § 78m(m)(1)(D) (emphasis added).

[31] *NAPFM*, 103 F.4th at 1113.

[32] 15 U.S.C. § 78m(m)(1)(C)(iii) (emphasis added).

[33] 17 C.F.R. § 242.902(c)(1).

We appreciate the opportunity to provide supplemental comments to the Commission regard Rule 10B-1, and we would be pleased to meet with the Commission or its staff to discuss our comments. If the staff has questions or comments, please do not hesitate to call Joseph Schwartz, Vice President and Senior Counsel, or the undersigned at (202) 730-2600.

Very truly yours,

/s/ Jennifer W. Han

Jennifer W. Han
Executive Vice President
Chief Counsel & Head of Global Regulatory Affairs
Managed Funds Association