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June 2, 2015

United States Securities and Exchange Commission  
100 F Street, Northeast  
Washington, D.C. 20549-1090  
**Attention: Mr. Brent J. Fields, Secretary**  
**Re: Rulemaking Petition No. 4-624**

Dear Mr. Fields:

We write to comment on a petition for rulemaking requesting that the Commission tighten the disclosure rules that apply under the Williams Act to holders of large blocks of public-company stock.<sup>1</sup> Among other things, the Petition asks that the Commission reduce the number of days within which these shareholders must disclose their position from ten days to one. The Petition has been before the Commission for over four years, and the Commission has not taken any action on the proposal. Nevertheless, in light of recent calls for tightening the disclosure obligations governing the purchase of blocks of public-company stock,<sup>2</sup> and the pending status of the Petition, we write to submit the attached research so that it might inform the Commission should the SEC decide to consider the tightening proposed in the Petition.<sup>3</sup>

In our attached Article *Pre-Disclosure Accumulations by Activist Investors: Evidence and Policy*,<sup>4</sup> which we are today submitting for the Commission's consideration, we provide the first systematic empirical evidence on disclosures of significant blocks of public-company stock under Section 13(d) of the Williams Act. The evidence we provide should inform any consideration of this subject by the Commission.

The analysis in our Article is based on about 2,000 filings by activist hedge funds between 1994 and 2007. We show that the data are inconsistent with the Petition's key claim that changes in market practices and technologies have operated over time to increase the size of pre-disclosure accumulations, making existing rules "obsolete" and thus requiring the Petition's proposed "modernization." The median stake that these investors disclose has remained stable throughout the 14-year period we study, and regression analysis does not identify a trend over time of changes in the stake disclosed by investors.

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<sup>1</sup> See Letter from Wachtell, Lipton, Rosen & Katz to Elizabeth M. Murphy, Secretary, U.S. Sec. & Exch. Comm'n (Mar. 7, 2011), *available at* [www.sec.gov/rules/petitions/2011/petn4-624.pdf](http://www.sec.gov/rules/petitions/2011/petn4-624.pdf) [hereinafter Petition].

<sup>2</sup> See Letter from Citizens for Responsibility and Ethics in Washington et al. to Hon. Richard Shelby, Chairman, U.S. Sen. Comm. on Banking, Housing, and Urban Affairs et al. (April 15, 2015) (in light of the SEC's inaction on the Petition, "urg[ing] Congress to step in with a legislative solution").

<sup>3</sup> We write solely in our individual capacities; the institutional affiliations listed here are provided for identification purposes only.

<sup>4</sup> 39 J. CORP. L. 1 (2013).

In addition to providing evidence inconsistent with the Petition’s factual claims regarding changes over time in the size of pre-disclosure accumulations, the Article also shows that:

- A substantial majority of 13(d) filings are actually made by investors other than activist hedge funds, and these investors often use a substantial amount of the ten-day window before disclosing their stake;
- A significant proportion of poison pills have low thresholds of 15% or less, so that management can use 13(d) disclosures to adopt low-trigger pills to prevent any further stock accumulations by activists—a fact that any tightening of the SEC’s rules in this area should take into account;
- Even when activists wait the full ten days to disclose their stakes, their purchases seem to be disproportionately concentrated on the day they cross the threshold and the following day; thus, the practical difference in pre-disclosure accumulations between the existing regime and the rules in jurisdictions with shorter disclosure windows is likely much smaller than the Petition assumes; and
- About 10% of 13(d) filings seem to be made after the ten-day window has expired; thus, the SEC may therefore want to consider tightening the enforcement of existing rules before examining the Petition’s proposed acceleration of the deadline.<sup>5</sup>

The evidence in the Article provides a foundation on which future empirical analysis can build. Such analysis, we argue, should inform any consideration that the Commission gives to the tightening of the rules governing disclosure of the acquisition of blocks of public-company stock proposed by the Petition.

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The Article proceeds in seven Parts. Part I provides a brief introduction. Part II describes the universe of pre-disclosure accumulations that we study and provides evidence of the frequency and magnitude of such accumulations. We examine the universe of all Section 13(d) filings by activist hedge funds from 1994 through 2007. We find that hedge fund activists do indeed use the opportunity not to disclose immediately after they cross the 5% threshold, with over 40% taking advantage of a large part of the ten-day window. Indeed, we find that about 10% of all filings are made after the specified ten-day window, which suggests, as noted above, that the Commission should consider more effective enforcement of the existing deadline before examining whether, as the Petition proposes, the deadline should be shortened.

Moreover, our examination of the ownership stakes revealed in Section 13(d) filings indicates that the five anecdotes relied upon by the Petition are not representative of the magnitude of stakes accumulated by hedge fund activists prior to disclosure. The evidence shows that hedge fund activists typically disclose substantially less than 10% ownership in the company, with a median stake of 6.3%.

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<sup>5</sup> After we published the Article, the Commission announced enforcement proceedings against those who failed timely to file, among other reports, Schedule 13D. *See, e.g., SEC Announces Charges Against Corporate Insiders for Violating Laws Requiring Prompt Reporting of Transactions and Holdings* (Sept. 10, 2014), available at <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542904678>.

Part III investigates a key claim of the Petition: that changes in market practices have, over time, made it possible for activist investors to increase the magnitude of the stakes they accumulate before they disclose—making existing rules “obsolete” and requiring the Petition’s proposed “modernization.” We show that the evidence does not support this claim. In contrast to the concerns expressed in the Petition and subsequent work by the Petition’s authors,<sup>6</sup> the size of pre-disclosure accumulations of stock have not increased over time. Indeed, the median stake at the time of disclosure has remained relatively stable throughout the 14-year period we study, and more extensive regression analysis does not identify a time trend. Thus, changes in existing rules can at most be justified as necessary to address longstanding policy questions—not as a “modernization” required by changes in the marketplace.

Part IV examines the costs of tightening the rules under Section 13(d). Requiring activist investors to disclose their stakes in public companies more quickly will reduce these investors’ returns by giving them less time to acquire shares before disclosing their presence—and will therefore reduce the incidence and magnitude of outside blockholdings in public companies. This reduction will in turn impose two costs for other investors in public companies. First, *ex post*, investors in general will benefit less frequently from the superior returns that have long been associated with the arrival of an activist blockholder. Second, investors can be expected to lose the gains associated with the mere possibility that a blockholder will emerge and reduce agency costs and managerial slack—because, *ex ante*, the probability that such an investor will emerge is reduced by the tightening of the Commission’s rules under Section 13(d).

Part V provides evidence regarding an aspect of this subject that seems to have escaped the attention of the Petition’s authors, but that the SEC should take into account when considering the Petition’s proposed changes to the rules under Section 13(d). While the Petition and its authors have focused on activist investors, we show that Section 13(d) filings by activist hedge funds represent only a small minority of all such filings.

We document the large number of filings under Section 13(d) by investors other than activist hedge funds—and show that it is common for these investors, too, to make full use of the ten-day period prior to disclosure to accumulate more than 5% ownership in the firm by the time they disclose their stakes. Thus, in examining the consequences and costs of the proposed tightening of the Commission’s rules under Section 13(d), it is important to take into account that most of the investors to whom the tightened rules would apply would not be the activist hedge funds on which the Petition has focused.

In Part VI, we investigate how activists’ purchases beyond 5% ownership are likely distributed in the ten-day window after the investors cross the 5% threshold. We examine this subject by identifying abnormal trading turnover during the ten-day period. We find that, even when activists choose to wait the full ten days after crossing the 5% threshold to disclose their stakes, their purchases are likely concentrated on the day they cross the threshold as well as the following day. Thus, whatever the benefits of the existing ten-day period for activist investors, the practical difference in pre-disclosure accumulations between the existing regime and the rules in jurisdictions with shorter disclosure windows—jurisdictions the Petition holds out as a model for modern reform—is likely much smaller than the Petition assumes.

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<sup>6</sup> See Adam O. Emmerich, Theodore N. Mirvis, Eric S. Robinson & William Savitt, *Fair Markets and Fair Disclosure: Some Thoughts on The Law and Economics of Blockholder Disclosure* (Columbia Law and Economics Working Paper No. 428) (Aug. 27, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2138945](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2138945).

Finally, in Part VII we consider the relationship between the Petition's proposed tightening of the disclosure rules under Section 13(d) and the recent proliferation of low-threshold poison pills in the United States. We present evidence that shows that a significant proportion of poison pills at public companies have thresholds that fall substantially short of a controlling block. We argue that any consideration by the Commission of changing the rules under Section 13(d) should take into account the interaction of such reform with the use of these low-threshold poison pills.

In particular, we suggest that the SEC should avoid adopting any reforms that would facilitate the use of these pills to cap the stakes that outside investors can acquire in public companies. To the extent that the SEC does choose to consider tightening the rules under Section 13(d), any such tightening should apply only to companies that adopt corporate-law arrangements that preclude the adoption of low-trigger poison pills.

We wish to note that we are open to serious reconsideration of the Section 13(d) rules that govern blockholder disclosure. It may be that changes are needed to the structure that Congress originally selected. The choices that Congress made when it enacted the Williams Act may reflect ad-hoc policy decisions that may not be the product of optimal analysis of all of the implications of these rules. In our view, however, any reconsideration of these rules—and the rules governing the relationship between incumbents and outside blockholders more generally—should be based upon a full analysis of all of the empirical evidence. In the attached Article, we offer a first step toward the systematic empirical analysis that should be the basis for any changes to the Commission's existing rules governing blockholder disclosure.

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We appreciate the opportunity to provide comments in connection with the Commission's consideration of the Petition. If further discussion of these comments would be helpful to the Commission or the Staff, we would of course be pleased to be of assistance.

Please do not hesitate to contact us. Professor Bebchuk can be reached at [REDACTED] or via electronic mail at [REDACTED]; Professor Brav can be reached at [REDACTED] or via electronic mail at [REDACTED]; Professor Jackson can be reached at [REDACTED] or via electronic mail at [REDACTED]; and Professor Jiang can be reached at [REDACTED] or via electronic mail at [REDACTED].

Very truly yours,

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Bebchuk, Lucian A. and Brav, Alon and Jackson, Robert J. and Jiang, Wei, Pre-Disclosure Accumulations by Activist Investors: Evidence and Policy (April 2013). *Journal of Corporation Law*, Vol. 39, No. 1, pp. 1-34, Fall 2013; Columbia Business School Research Paper No. 13-33. Available at SSRN: <http://ssrn.com/abstract=2258083>