Simpson Thacher & Bartlett LLP

425 LEXINGTON AVENUE
NEW YORK, NY 10017-3954

TELEPHONE: +1-212-455-2000
FACSIMILE: +1-212-455-2502

Direct Dial Number
+1-212-455-2814

E-mail Address
jnadborny@stblaw.com

VIA ELECTRONIC SUBMISSION

April 11, 2022

Re: Request for Comment on Modernization of Beneficial Ownership Reporting, Release No. 33-11030, 34-94211 (File No. S7-06-22).

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

Dear Ms. Countryman:

We appreciate the opportunity to submit this comment letter in response to the request by the Securities and Exchange Commission (the "Commission") for comments on its release entitled "Modernization of Beneficial Ownership Reporting," as published on February 10, 2022 (the "Release").

While we do not seek to comment on every item contained in the Release, we do have concerns and suggestions on specific items, as set forth below.

The stated purpose of the Release is to "modernize the beneficial ownership reporting requirements and improve their operation and efficacy, and to provide investors and market participants with more timely disclosure of information related to corporate control." For the reasons explained in this letter, we believe that the proposals in the Release (the "Proposed Rules") are overly broad and not appropriately tailored to accomplish the stated objectives of the Release. More specifically, our view is that the Proposed Rules will (i) impose excessive costs and burdens on a large range of investors and investing activity generally unrelated to corporate control matters and therefore without any commensurate benefit, (ii) disincentivize certain investing activity unrelated to control positions and often inuring to the benefit of issuers and investors, (iii) result in a flood of information into the market that is not materially useful to investors, obfuscating the very information that the Williams Act was originally intended to identify and (iv) have unintended consequences on a wide range of other matters, where other regulations and contractual provisions have sought to capture control activities by incorporating definitions found in the Section 13 rules.

We also seek to identify areas in which the Commission should further evaluate improvements in the Regulation 13D and 13G reporting framework. As stated in the title of the Release, one goal of the Release is to "modernize" the beneficial ownership reporting framework. While the Release addresses certain aspects of modernization, we encourage the Commission to undertake a further review of (i) whether the current rules governing how to calculate beneficial ownership percentage unintentionally subject small investors to the Schedule 13D/G reporting regime where the issuer has more than one class of voting security, (ii) whether such calculations are understood by investors reading the disclosures and (iii) whether duplicative and unnecessary information required to be presented in the forms themselves can be eliminated, as more fully described below.

The beneficial ownership reporting framework is a delicate balance between the protection of issuers, their existing shareholders and potential new significant shareholders. The Proposed Rules represent substantial modifications to a reporting regime that has been in effect for decades and has been subject to substantial interpretation by the courts, resulting in framework based upon established case law and related interpretations. There can be disagreement amongst investors and practitioners as to whether such rules should be drafted to weigh more heavily in favor of one or another of these various constituents, but it inures to everyone's benefit to have rules that are clearly drafted and clearly and definitively applied to the fullest extent possible. The Proposed Rules, as drafted, particularly with respect to the treatment of cash derivatives and "group" attribution, are not clear enough to result in consistent application and may cast uncertainty on decades of case law. Given the complexity and historical background of this reporting regime and the broad consequences of material revisions, we urge the Commission to approach the modification of this reporting regime as an iterative process, with an opportunity for engagement with the investing community and those practitioners who advise clients on a daily basis, so that the objectives of the Proposed Rules can be implemented appropriately and with minimal chance for confusion and unintended consequences.

The Proposed Rules are Overly Broad and Not Well Tailored to Address the Concerns Underlying the Williams Act.

As stated in the Release, the Williams Act was initially enacted "with the intent to alert the marketplace to rapid accumulations of equity securities which might represent a shift in corporate control." There have been changes in investing activity and technological advances since the adoption of the Williams Act, and the Proposed Rules are intended to address those changes, but also appear to be in response for calls for greater transparency in investing activity more generally. Any revision to the rules under the Williams Act should seek to maintain the original objectives – providing the marketplace with timely disclosures regarding matters of corporate control. As stated in the Release, "The beneficial ownership reporting system is not intended to impede communications among shareholders or between proponents and issuers that are not undertaken with the purpose or effect of changing or influencing control of an issuer." Any intention to address disparities in information related to market positions or trading activity more generally are not appropriately addressed as part of these amended rules, but rather should be addressed through other, more appropriate channels.

Excessive Costs without Commensurate Benefit

In 1998, the Commission acknowledged that not all investing above 5% ownership levels presented the same level of concern relating to corporate control and adopted additional rules to carve out certain types of filers and positions from the application of the existing Regulation 13D, stating "The existing reporting scheme imposed unnecessary disclosure obligations on persons whose acquisitions do not affect the control of issuers…..The amendments …will improve the effectiveness of the beneficial ownership reporting scheme. The reduced number of Schedule 13D filings will allow the marketplace, as well as the staff of the Commission, to focus more quickly on acquisitions involving the potential to change or influence control."[1]

<u>*Acceleration of 13G Initial Filings and Increased Frequency of 13G Amendments for Material Updates*</u>

Lack of Nexus of Accelerated Filings to Concerns About Corporate Control

The Proposed Rules seek to roll-back the substantial majority of the benefits of the rule amendments in 1998 and to impose accelerated filing obligations on Rule 13d-1(b) filers, who currently are not required to file an initial Schedule 13G until the end of the calendar year in which they exceed 5% ownership as of the end of such year assuming they do not exceed 10% beneficial ownership, and on Rule 13d-1(d) filers who would not be required to file an earlier Schedule 13 filing in the absence of material acquisitions.

In proposing these amendments, the Commission has not articulated how these additional filing obligations, whether for passive investors beneficially owning less than 10% of the registered class of equity security or for predominantly pre-IPO investors beneficially owning more than five percent of the registered class of equity security already required to be fully described in existing disclosure (i.e., the IPO prospectus) will promote transparency into matters of corporate control.

Investors filing under 13d-1(b) and 13d-1(c) who beneficially own more than 10% of the registered class at the end of any calendar month (in the case of 13d-1(b)), or at any time (in the case of 13d-1(c)) are already required to make a Schedule 13G filing in connection with crossing that threshold, and prompt amendments if their beneficial ownership position changes by 5% or more. The Commission has not articulated a rationale related to transparency in corporate control for accelerating the disclosure for passive investors beneficially owning between 5% and 10% or for requiring such investors to file amendments for less than 5% changes to their ownership positions. Should these investors cease to be passive and have any intent to exercise any influence over the issuer, under current rules, the investor would be required to file a

[1] Amendments to Beneficial Ownership Reporting, Release No. 34-39538 (January 12, 1998) [63 FR 2854 (January 16, 1998)].

Schedule 13D, which would subject it to the existing more rigorous filing deadlines and amendment requirements.

Investors filing under 13d-1(d) are largely investors who have held the shares since prior to the IPO of the Company. As such, their original ownership is already materially disclosed in the IPO prospectus and the investing community is already aware of their ownership level and identity. Further, given that a substantial number of such investors also beneficially own more than 10% of the registered class and are subject to Section 16 reporting requirements, such investors largely are already required to report acquisitions and dispositions within two business days on Section 16 filings. Any material acquisitions above their pre-IPO ownership would cause them to become subject to the Schedule 13D filing requirements and the attendant more frequent amendments required under such existing rules.

Further the Commission has not defined what a "material" change would be. If such level of materiality were to be similar to the definition of materiality cited in the Schedule 13D rules, at the 1% change in ownership level, it is very likely that these investors would be required to amend their Schedule 13G filings on a frequent basis, without any incremental disclosure to investors that bears upon corporate control. If adopting the Proposed Rules, we urge the Commission to adopt a definition of "materiality" that truly bears on matters of corporate control, and believe that a threshold similar to the current 5% threshold applicable to investors filing under Rule 13d-1(b) and (c) would be a more appropriate indication of material changes to an investor's ownership in circumstances where such investors are passive (13d-1(b) and (c) filers) or such ownership is already fully disclosed pursuant to existing disclosures (13d-1(d) filers). Further, the Commission should clarify whether such amendment obligation would be triggered based on actual trading activity of an investor (actual acquisitions or dispositions) or whether such obligation would be triggered in whole or in part based on changes in the number of outstanding shares, and whether an investor would be permitted to "net" purchases and sales for purposes of the analysis.

Practical Limitations

The Proposed Rules would require substantial analysis and filings, if required, within several days of each month-end, which would impose burdens and difficulties in collecting and analyzing information and producing required disclosures within an extremely compressed timeframe. While there have been advances in technology since the rules were first adopted, the Proposed Rules ignore the practical limitations on preparing the required disclosures, as the calculation of beneficial ownership remains an extremely manual process, can involve significant judgment and relies on third party information. We are not aware of any current technology that would perform this analysis and prepare such reports in any reliable manner.

Specifically because analysis of Rule 13d-3 beneficial ownership depends on the most recently published outstanding share number from an issuer, an investor cannot reliably determine whether it is a 5% beneficial owner of any particular stock as of a month-end reference date until the last day of such month. An issuer can publish a new outstanding share number at any time, and there is currently no one specific form on which the issuer makes that disclosure. While the most recent outstanding share number is a required disclosure in the issuer's Form 10-Q and Form 10-K, it can also be published in any subsequent filing and an investor must carefully review all filings made by the issuer since the date of the most recent Form 10-Q and Form 10-K to confirm that there is no more recently published number to use as the basis for its calculation.

In addition, in many cases, specialist expertise is required regarding the method of calculation under Rule 13d-3 (which is not intuitive and may require the application of significant judgment and attendant education of clients as to proper calculation depending on the circumstances), particularly where there are dual-class structures, ownership of derivative securities, or complicated investor relationships, structures or contracts. Particularly time-consuming is the analysis of which persons or entities control the voting and/or disposition of the securities within a particular structure or an ability to obtain such power, by structure or contract, within less than 60 days, and can involve complicated "group" analysis (and attendant coordination with third parties). This review can require analysis of complicated shareholder arrangements, derivative instruments, structure charts, organizational documents and investment management contracts.

Further, given that these deadlines would be at every month-end, all investors holding material amounts of securities would be performing such analysis during the same five-day period following the end of each month. Unlike current initial Schedule 13G filings for 13d-1(c) passive investors and Schedule 13D filings, which are triggered off of actual investing activity and occur relatively regularly throughout the year, and other initial Schedule 13G filings and amendments where investors currently have 45 days after the end of the calendar year to analyze and prepare such filings, all investors would be attempting to analyze their significant positions on a monthly basis within the same five-day period as all other investors, putting incredible strain on the resources which are available to perform these functions.

Given the complexities in determinations of beneficial ownership described above, outside law firms regularly handle, or materially assist in, a tremendous number of these filings. In general, we believe that these firms are not currently set up to do this analysis for every one of their affected clients within the same five-day period on a monthly basis, given the level of expertise involved. Moreover, five days within the end of the month is simply not enough time to gather the requisite information from clients, analyze the information given the complexity of the holdings and structures and agreements, prepare filings, coordinate review with clients, EDGARize filings (including in many cases, through outside filing agents, as even law firms with internal filing capabilities are not structured to handle the volume involved in this process), gather signatures, finalize and file.

Further, based on our experience, outside filing agents are not currently capable of processing the overwhelming number of filings that would be made in a short window every month as a result of these accelerated reporting requirements (as evidenced by current difficulties in connection with the year-end Schedule 13G process, which is currently spread over a 45-day period). We also have concerns as to whether the EDGAR system is currently equipped to handle the volume of filings that we would expect. For example, prior to the most recent February 14th filing deadline for the annual amendments to Schedule 13G, EDGAR experienced significant delays in accepting filings and in at least one other year in the recent past, the system has temporarily shut down on the filing deadline, with investor filings not accepted in a timely manner.

Further, the Commission's current system for assigning EDGAR codes to new filing entities does not provide code authorizations to filers in a manner that would permit new filers to meet such deadlines. Historically, an investor was able to obtain new or replacement EDGAR codes typically within a period of approximately two business days, provided that the application was not rejected, which rejection can happen for a myriad of reasons that are not publicly detailed or available. Such code applications must be re-submitted and receive no priority in review. However, in recent experience, the Commission is taking upwards of three to five business days, and during busy periods, often longer, to issue EDGAR codes to new filers. The Commission will not expedite such code applications even when told that the repercussion will be a late filing. Further, the EDGAR manual explains that application to manually update certain codes must include a package of detailed information, including official corporate documents confirming identity of officers signing the application, documents evidencing legal transition of changes in control of the reporting person, and other information and that the reporting person must allow at least five business days for the Commission to review such request. Given the above limitations, we believe that it will be challenging for some new filers to receive EDGAR codes in time to file an initial Schedule 13G within five business days of month-end.

Further Study and Consideration of Alternatives Needed

We urge the Commission to take a more targeted approach to defining the problem that it is trying to solve, and to increase the speed and frequency of disclosures only for those investors who it determines are specifically implicated in matters of corporate control.

If the Commission seeks to apply the accelerated initial filing requirements or more onerous amendment requirements to a broad set of investors whose activities are largely unrelated to matters of corporate control, or where such matters may be implicated but are already subject to disclosure requirements under the existing disclosure regime, we would recommend further study and analysis to better understand what percentage of such investors ever are implicated in actual change in control scenarios—to determine the percentage of activist matters where earlier and more frequent disclosure of such investors' holding would have been materially beneficial to investors.

If the Commission's goal is instead market transparency more generally, and not a targeted concern related to matters of corporate control, the Commission should consider whether there are more appropriate tools to disclose 5% beneficial ownership positions or material changes to such positions in a more concise and efficient manner. Just as the Form 13F presents ownership information across all investments in a spreadsheet format, the Commission should consider whether any more frequent disclosures of 5% or greater positions and material changes thereto can be communicated through a spreadsheet-based format, which would be substantially easier for an investor to prepare, could be filed in one document for holdings at multiple issuers (similar to the Form 13F), or could be signed by "lead" or "designated" filers when the investment is held by affiliated funds. While collecting and analyzing data in a short timeframe would still present substantial challenges, the preparation and filing of the data in the more abbreviated format would facilitate compliance with accelerated and more frequent reporting deadlines. Noting that Schedule 13G filings by investors with multiple substantial positions are often filed by different entities within the investment firm structure, such an alternative form should be capable of being filed by multiple “lead-filer” affiliates jointly, using the CIK numbers of each, and should not be required to be filed on any particular issuer’s EDGAR page, as the form could contain a field for the relevant security’s CUSIP (similar to a Form 13F), and could be found by issuers and investors by searching such filings for the CUSIP for the class of registered security for that particular issuer.

Schedule 13D Initial Filings and Prompt Amendments

Shortening of Deadline for Initial Schedule 13D Filing

In the Proposed Rules, the Commission proposes to reduce the existing 10-calendar-day filing deadline for initial Schedule 13D filings to five days, based on “the ability to submit filings electronically and the use of modern information technology in today’s financial markets.” It is not clear that technological delays and complications were at the heart of the original 10-calendar-day deadline, but rather the consideration of a shareholder’s ability to accumulate stock as balanced with the issuer and other shareholders notification of such accumulation. In re-evaluating the balance between interests of accumulating investors versus those of the issuer and existing investors, the Commission should recognize that the investors who file on Schedule 13D are by no means all activist investors engaging in the types of activities the Williams Act seeks to regulate. In many cases, these are investors who already have control over the company based on pre-IPO positions and who acquired more than 2% of the outstanding stock in a 12-month period (which can often be triggered not by an actual accumulation of a material amount of stock, but rather technical acquisitions in connection with restructuring transactions in the IPO). In many other cases, these are investors who seek a minority position and potentially a board seat (given their desire to more actively monitor their sizeable investment), but seek to work cooperatively with the issuer, with the goal of building shareholder value for all investors, and possess no intent to replace a majority of the board of directors, launch a tender offer or make an offer to take the company private.

Given the foregoing, we support the Commission’s suggestion of offering a tiered approach to the initial Schedule 13D deadlines, tailoring the rules to require those who cross certain thresholds (for example, 10%) or accumulate certain amounts after crossing 5% (for example, an additional 3%) to file on the more accelerated timeline, but allowing investors who trigger Schedule 13D filings for more technical reasons and who are not accumulating stock in connection with a potential activist engagement (e.g., proxy contests or intended take-private activity) to continue filing under the current regime. We question whether accumulations between 5% and 10% necessarily indicate a control position, and for positions that exceed 10%, we note that such filers would become subject to Section 16 reporting upon crossing 10%, triggering a Section 16 filing within two business days for any additional accumulations above that threshold. Further, we support continuing to permit an investor who crosses the 5% threshold but acquires no additional stock after the initial crossing transaction to remain on the current 10 day timeframe, given that there is no informational disadvantage for existing investors in such circumstances. Further, it is often the case that such investors cross the 5% threshold in financing transactions directly with the issuer, in which case there is often earlier disclosure by the issuer relating to the transaction, and little purpose served by accelerating the timeline for the investor to prepare its disclosure.

Even assuming that shortening the 10-calendar-day period is merited for all Schedule 13D filers, the revised deadline should be five business days, not five calendar days. The most analogous securities laws governing reporting of material changes require filings within time periods designated in business days rather than calendar days. For example, the Current Report on Form 8-K requires an issuer to file material developments within 4 business days and Section 16(a) requires directors, officers and 10% beneficial owners to report transactions in the issuer's securities within two business days. Acknowledging that professionals in the legal and financial industries often regularly work hours that exceed the typical Monday–Friday business week, they do not necessarily keep regular business hours on weekends or holidays, nor should the rules of the Commission expect them to do so. Further, such professionals are supported by additional staff and in many cases, filings require the use of an outside filing agent, which also does not run regular business hours on weekends and federal holidays. With a longer deadline of 10 days, perhaps calendar day designation is appropriate, but if the Commission seeks to shorten the filing deadline, it should do so in a manner consistent with the other securities laws for reporting of material developments and adopt a five-business-day requirement.

Codification of Definition of "Promptly" for Schedule 13D Amendment Filings and Practical Limitations

Existing rules under Schedule 13D require an amendment to be filed "promptly" for material changes in existing disclosure or material developments. The promptness of the amendment filing obligation currently is determined by considering the facts and circumstances related to such filing and we urge the Commission to continue to consider the variation in circumstances that can lead to an amendment obligation rather than applying the same standard in all circumstances. The Commission states in the Proposed Rules that it believes that "[i]n light of technological advances…" it does not believe that requiring Schedule 13D amendments to be filed within one business day after the date on which a material change occurs will place filers at a disadvantage.

We strongly disagree with this statement and encourage the Commission to perform further evaluation to better understand the practical limitations on preparing such disclosures within such an expedited timeframe. We agree that in certain cases that truly bear on matters of corporate control, the one business day timeframe may be appropriate, however, it is unnecessary to subject all Schedule 13D filers to the same interpretation of this definition of "prompt", effectively accelerating the amendment filing obligations of all Schedule 13D filings, regardless of whether the activity leading to the amendment has any nexus to a change or influence in corporate control.

For activities relating to corporate control, it is widely understood and accepted that the requirement to disclose developments "promptly" means as soon as practically possible, and such investors are regularly advised that such requirement may mean that such disclosure must be made within the one-business-day timeframe. If the Commission believes that this interpretation of “promptly” is not being materially/universally observed in matters truly related to corporate control, it should instead clarify that in situations involving acquisition of corporate control (including reference to certain of the items outlined in Item 4 of the Schedule 13D), “promptly” means one business day—similarly to how Rule 13d-2 sets out a general “materiality” standard and then clarifies that as it relates to acquisitions or dispositions of securities, “materiality” means 1% or more of the outstanding class.

In contrast, however, the Proposed Rules are overly broad and require amendments for all Schedule 13D filings to be filed within one business day. In proposing this requirement on all Schedule 13D filers, the Commission ignores that there are many different reasons an investor may file a Schedule 13D. These include non-corporate control situations, such as a pre-IPO owner who already has a control position but purchases shares in the market (or is a member of a group where another investor in the group does so), an investor purchasing securities directly from an issuer in a financing transaction who obtains a board seat (who notably, is in many cases subject to contractual standstill provisions), or merely an investor who beneficially owns more than 5% and wants flexibility in the future to engage with the issuer on operational or financial objectives but has no intentions of acquiring any controlling stake in the company.

Filing an amendment to Schedule 13D within a one-business-day time frame is impractical in a substantial number of cases, and in our experience, it generally takes two to three business days, and in some cases longer, to compile and file such amendments even when all parties involved are working diligently to file as promptly as practicable. While an investor engaged in a change of control objective will have been taking preparatory steps toward such goal, would have an internal deal team and external advisors actively engaged in the project and would have built the Schedule 13D amendment obligation into its workstream, there are many situations requiring a Schedule 13D amendment in which such advance notice and planning is not possible or practical. For example, we commonly see an investor make a very quick decision to buy shares in the market when they see the market price drop and believe the shares are undervalued. Such purchases may commence the same day that such decision is made and may exceed 1% of the securities when taken together with other activity since the previous Schedule 13D amendment. In these cases, requiring an amendment to be filed the next business day would require that within a period of less than 24 hours, such investor and its counsel undergo a significant amount of work and coordination amongst a large number of different professionals. Such work can include: obtaining all the trading information from the investor’s broker (which cannot be done until following the close of market and relies on the broker’s responsiveness and accuracy of information); coordinating with outside counsel to analyze data and prepare a Schedule 13D amendment (which assumes immediate availability of outside counsel); coordination with in-house legal and finance teams to review the disclosures for accuracy; once finalized, coordination with an outside filing agent for EDGARization, which will regularly take several hours; and finally, distribution for signatures and receipt of signatures (which also assumes practical immediate availability of signatories). The foregoing is further complicated by any time zone differences between outside legal professionals, in-house legal counsel for the client and the relevant signatories. In sum, such accelerated timeline is likely to present substantial (potentially insurmountable) challenges to investors. Further, in many cases, the investor will also want to coordinate disclosure with the issuer. For example, in a private placement, there will typically be coordination on disclosure related to the investment agreement, terms of securities or incorporation by reference of documents being filed by the issuer on Form 8-K. The investor may wish to alert the issuer to the fact of the Schedule 13D amendment, so that the issuer can prepare its investor relations team for in-bound inquiries. Such coordination would be effectively eliminated in cases where the investor would be required to file its amendment within one business day.

Further, in order to file a Schedule 13D amendment, despite the Commission's statement in the Proposed Rules that such an amendment only requires that the material change be reported and not a complete set of new narrative responses to each of the disclosure form's individual line items, the Schedule 13D, as amended, must be updated for any change since the last amendment, even if not material. Given the large amount of additional information required in a Schedule 13D, this requires that the entire existing Schedule 13D disclosure be reviewed for accuracy at the time of filing any Schedule 13D amendment. These additional disclosures can result in the need to update, for example, the list of officers and directors of the reporting persons, any other beneficial ownership in other divisions of the investment firm, and the inclusion of 60-day trading history for the investor. To require that all filing investors undergo this analysis and preparation within this compressed timeframe, where there is, in most cases, limited benefit to the investing community in requiring such disclosure to be made in one business day, puts unjustified cost and risk of non-compliance on the investor.

We think that in matters outside of those truly related to changes or influence in corporate control, requiring such amendments to be filed within one business day is impractical and believe the investing community does not benefit in any material fashion from having disclosure within that accelerated timeframe. In fact, given that the amendment requirement is triggered off of "material" changes, outside the change of control context, we question whether having a definitive one-day amendment requirement will in fact discourage Schedule 13D filers from filing amendments for changes in their disclosure, preferring to take more risk that their determination on materiality is later questioned than risk having a "late" filing with the Commission.

We additionally note that in a large number of cases the Schedule 13D amendment is filed solely to report an aggregate acquisition or disposition of 1% of the securities of the registered class. In the case of sales by substantial shareholders, such shareholders are in many cases selling in registered underwritten offerings, in which case the issuer has already filed a prospectus or prospectus supplement identifying to the market that a large sale is occurring, or if selling into the market as an affiliate, such sales are moderate in nature, given the requirement that they be in compliance with Rule 144 and subject to the volume limitations set forth in such rule. In such cases, it may be the case that an investor has disposed of more than 1% of its stock since its last filing, but such information is not necessarily so material to the market that it must be identified in one business day.

We note that existing filing regimes related to matters material to investors, namely the requirement for an issuer to make material disclosures on Form 8-K, which is due within four business days of a triggering event, and Section 16 filings for acquisitions or dispositions by directors, officers and 10% beneficial owners, which are due within two business days, acknowledge the balance between the importance of getting disclosures to investors in a timely manner, with the complexity and labor required in order to create such filings in a complete and thoughtful manner. Even with respect to such existing filing deadlines, we note that, unlike the narrative format of a Schedule 13D, Section 16 forms, due within two business days, are primarily data driven and often do not require extensive new narrative disclosures, which can be particularly nuanced and time-consuming to draft properly. We question why an analogous balancing inquiry would not be applicable here.

Further Study Needed

Before adopting the requirement that all Schedule 13D amendments are required to be filed within the one-business-day timeframe, we encourage the Commission to engage in further study to determine what percentage of Schedule 13D filers ultimately engage in activities which impact corporate control under the purview of the Williams Act and in what number of such cases are those investors not currently filing within the one-business-day timeframe under existing guidance in order to determine whether such requirement will materially improve the timeliness of disclosures the Williams Act is intended to address. We also urge the Commission to engage in further study regarding the different circumstances under which Schedule 13D amendments are filed and consider whether requiring such amendments to be filed within the one business day timeframe would materially improve the information provided to investors relating to such issuer control matters.

Disincentivizing Beneficial Investing Activity

Chilling of Beneficial Investing Activities

As acknowledged in the Release, investors expend substantial amounts of time and resources evaluating the issuer, the issuer's industry, peers, competitors and other factors before investing in the issuer. Such time and cost only pays off for such investor if it can accumulate a sizeable stake in the issuer in a cost-effective manner. Requiring earlier disclosure will lead such investors to alter certain investment assumptions, including an increase in the expected cost of their initial investment and a related reduction in the returns that they can expect to realize, thereby disincentivizing them from allocating resources to the evaluation of undervalued investment opportunities. Further, when faced with the prospect of an earlier disclosure, we question whether such investors will choose to build their position within the shorter timeframe at a more aggressive pace, which may contribute to price volatility, speculation and disorder in the market. The Commission acknowledges that shortening the filing deadline may chill investing activity by investors who may bring about change that benefits all shareholders and, as detailed above, rather than broadly impacting all filers we encourage the Commission to target the accelerated filing deadlines to more carefully identify the investing behaviors that the Commission believes to be detrimental to investors more generally.

Attribution of Beneficial Ownership of Shares Underlying Cash-Settled Derivatives

The Proposed Rules seek to classify ownership of cash-settled derivatives (other than security-based swaps) as conferring beneficial ownership on the holder, if the holder holds the security with the purpose or effect of changing or influencing control of the issuer or in connection with or as a participant in any transaction having such purpose or effect. The Commission has proposed such rules based on unsupported assumptions that the holder of the derivative may be able to influence a counterparty to vote or transact in a manner favorable to the holder. As described elsewhere herein, the Proposed Rules are overbroad, and will potentially apply in circumstances where such activity is not implicated. For example, in certain cases, investors hold cash-settled securities issued by the issuer, where the Commission's concern about unduly influencing a counterparty to vote or dispose in a particular manner is unfounded and it is unclear how a holder of such security would be able to engage in the type of corporate control investing activity the Williams Act was designed to prevent.

Further, given the decision in *CSX Corp. v. Children's Inv. Fund Mgmt.* ("CSX"), the type of concerted activity or inappropriate influence that the Commission seeks to regulate is already subject to the risk of beneficial ownership attribution, as the Court conferred beneficial ownership to the holder of the cash-settled derivative in that case as a result of a scheme to evade the reporting rules of the Williams Act. Any such similar parking arrangement would already result in beneficial ownership under the existing rules. In our experience, banks and other financial counterparties are very cognizant of this risk and CSX and as a matter of policy and contractual limitations, will customarily refrain from such activities. Before the Commission proceeds with adopting an overly-broad application of the beneficial ownership definition to all cash-settled instruments (other than security-based swaps), it should engage in further analysis regarding the current prevalence of the use of cash-settled swaps in takeover scenarios, and determine how frequently in connection with the entry into or holding of cash-settled swaps the counterparty did in fact take any concerted action with the activist investor and whether any actual advantage was gained through influence of the counterparty. Also notable is that the Commission's concern that the financial counterparties will build large positions is mitigated by the fact that such counterparties would be subject to the Schedule 13D and 13G requirements if their positions exceeded 5% or 10%. Underlying much of the Commission's rationale in the Proposed Rules are assumptions on potential future behavior rather than analysis on what activities are actually occurring in practice. While it may be that there are some activities by isolated financial counterparties which contribute to an activist investor's ability to influence the issuer, such potential for abuse must be weighed against the over-regulation of ordinary course investing activities where such instruments may be used solely to increase the investor's economic exposure to the underlying security and the investor has no intention of influencing the financial counterparty's voting or investment activities.

As a result, further analysis is merited as to the current investing activities of the banks and other financial counterparties to determine whether they are in fact building these large positions for investors who have not represented or otherwise communicated to them that they are passive and have no control intent. The Commission should consider proposing rules that more specifically target the types of behaviors it is seeking to regulate. For example, if the Commission is concerned that an investment in a cash-settled derivative instrument could be converted into direct holdings of the reference security via an amendment to the instrument or otherwise, consider requiring disclosure of such transactions once they occur (including the identity of the participating financial counterparty), or requiring some cooling off period before such securities can be voted once acquired by such investor, which would deter financial counterparties from engaging in these transactions in the ordinary course and limit the utility of such activity for the purpose of building a control position without attendant disclosure.

The Proposed Rules also indicate a method for calculating the number of securities outstanding for calculation of beneficial ownership percentage, stating that "any securities that are not outstanding but are referenced by the relevant cash-settled derivative security will be deemed to be outstanding for the purpose of calculating the percentage of relevant covered class beneficially owned by the holder of the derivative security." It is unclear how the holder of a cash-settled derivative issued by a counterparty would be able to determine whether the securities referenced are outstanding when it has no information about the ownership of the counterparty or its hedging activities, if any. We would request the Commission to provide further clarity on how the holder would be expected to have the information as to whether the referenced security is outstanding.

With respect to the proposal to only count long positions for purposes of Rule 13d-3(e)(2), we note that, to the extent there are offsetting positions with the same counterparty, that counterparty's long hedge position would be reduced to reflect such offset. To the extent the Commission's concerns relate to the suggested ability of the holder of the security to influence the counterparty's long hedge position, it would follow that only the net long portion of the combined position be counted for this purpose, and we request that the Commission take this into consideration.

Regarding the proposal to tie reporting of affected cash-settled derivatives to the "delta" of the derivative, we note that the delta (sometimes referred to as the hedge ratio) of an option is typically calculated using a Black-Scholes options pricing model. One input of this model is the volatility of the underlying shares, for which we understand there is no universally agreed methodology for determining, and involves a certain degree of subjectivity based on market conditions and views on the underlying issuer. As a result, different market participants may calculate different deltas for a given option. Given that, and the complexity of option pricing generally, it is often not feasible for end-users of these options to be able to calculate the delta of the option on a regular basis.

The Commission has asked for feedback on whether Item 7 of Schedule 13D should be amended to explicitly require the filing of cash-settled derivative instruments as an exhibit to the Schedule 13D. We think the filing of the cash-settled derivative instruments is unnecessary, as the material terms of such arrangements (such as number of underlying shares) can be described in Item 6, and such documents are often very technical in nature and difficult to understand for many readers. Further, the time required to EDGARize such documents will present additional logistical difficulty, particularly given the compressed timeframes for Schedule 13D amendments proposed by the Commission.

In requesting comments on the Proposed Rules, the Commission specifically asks whether the circumstances in which a holder acquires or holds a cash-settled derivative security with the purpose or effect of changing or influencing the control of the issuer be reasonably determinable and whether the Commission should provide further guidance on this point. Currently, there is a broad variety of circumstances in which someone could be deemed to be influencing or controlling the issuer, many of which do not implicate the types of control activities the Williams Act was designed to address. Specifically, the Commission should consider whether the presence of one board seat on the issuer's board (as compared to seeking multiple seats, or a majority of the board), or a mere desire to interact with management on operational or financial measures, would result in an automatic classification of an investor as intending to influence the issuer in the way intended to be covered by the Williams Act. Notably, it is very common for significant minority holders to ask for a board seat in connection with an investment in the issuer (in many cases, an investment negotiated directly with the issuer in order to provide the issuer with financing). The staff of the Commission currently has an interpretation (C&DI 103.04) that indicates the presence of a board seat most likely renders a holder unable to certify that it does not have any intent to influence the issuer. Consider whether a negotiation of a board seat directly with the issuer (as compared to an actual or threatened proxy fight) in connection with the arms-length negotiation of financing, or the potential that an investor may want to more actively engage with management or the board of directors of the issuer on operational matters, should be treated in the same manner as the takeover and change in control activities the Williams Act was intended to address.

Given the potential for far-reaching application of the attribution of beneficial ownership by actively engaged investors and the vagueness of the concept of holding a security "with the purpose or effect of changing or influencing the control of the issuer," and the fact that the holding of a cash-settled instrument, on its own, gives the holder no voting power over such securities, we encourage the Commission to specifically carve such beneficial ownership attribution out of the calculation of beneficial ownership for determining 10% beneficial ownership status for purposes of being subject to Section 16 of the Exchange Act. Holding such securities gives the holder no access to inside information, which is the underlying basis for subjecting a significant stockholder to Section 16 reporting and liability. Further, if the goal of such regulation is providing information to the market more generally, under a theory that investors are disadvantaged by not having such information, it is not clear how subjecting such investors to profit disgorgement provisions and Section 16 plaintiff's demand letters seeking profit disgorgement and attendant cost will benefit the investing community, and in fact, such repercussions pose a very real potential to chill investment activity by such investors, as they would become limited in their ability to monetize the investment to realize the gains that they helped to bring about with their investment.

Expansion of Group Definition

Section 13(d)(3) of the Exchange Act currently does not define the term "group" and when a group is formed is a question of fact. As stated in the Release, Rule 13d-5(b) was adopted to provide some clarity as to when a group might be formed. Legislative history and case law currently provide additional clarity for investors and practitioners advising such investors as to when an investor may be subject to Section 13(d) or Section 13(g) filing requirements. The proposed amendments to Rule 13d-5 are overly broad, and will result in attribution of "group" designation to investors who are not combining their holdings in pursuit of any common objective, and therefore do not present the risk that the Williams Act was designed to regulate. Further, such amendments do not appear to fully reflect Congressional intent and will cast doubt upon existing case law surrounding application of Rule 13d-5 resulting in uncertainty in the rule's application which may have a chilling effect on typical market activity.

The Release states that the intended purpose of the amendments to Rule 13d-5 is to "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 and that, depending on the particular facts and circumstance, 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." The Commission has not articulated why current case law does not sufficiently provide such clarification, given that courts do not rely solely on the "presence of an express agreement" as the Commission alleges is the case, but instead are already evaluating the underlying facts and circumstances in the absence of such an express agreement. Current application of the guidance and court decisions relating to "group" attribution already acknowledge that a "group" can be found if the facts and circumstances evidence an implied agreement. There is no current requirement that an express agreement between the investors exist for there to be a finding that they are a "group". For example, in *Hallwood Realty Partners, L.P. v Gotham Partners, L.P.*, the court stated that "[t]he agreement among these entities may be formal or informal, and need not be expressed in writing"[2] and goes on to explain that in evaluating whether or not a "group" existed, the District Court properly noted that "prior relationships and trading patterns were relevant to a decision regarding the existence of a §13(d) group."[3] The Second Circuit provided additional clarity in *Morales v. Quintel Entertainment, Inc.*, stating that "alleged group members need not be committed to "acquiring, holding, voting, or disposing of equity securities" on certain specified terms, but rather they need only have combined to further a common objective regarding one of [such] activities."[4] Finally, the reference to the term "agreement" appears to be consistent with legislative history and, in fact, the Release itself includes a citation indicating that members of Congress contemplated some form of "agreement" when evaluating whether a group is formed.[5]

It is unclear whether the Commission is seeking to change the current meaning of Section 13(d)(3) of the Exchange Act or rather to clarify that an express agreement is not a requisite factor in order to be able to find that a "group" exists. We urge the Commission to consider the effect that the Proposed Rules may have on current case law interpreting the statute and the rules in existence today. Are those current court interpretations still a valid interpretation of these rules, or should investors and practitioners understand that there is now a blank slate and the past 50 years of case law is no longer applicable? The Commission should consider whether the current rules are sufficient to prove the existence of a group when there is concerted activity that implies the existence of an agreement to act together even in the absence of an express agreement.

---

2 *Hallwood Realty Partners, L.P. v Gotham Partners, L.P.*, 286 F.3d 613, 617 (2d Cir. 2002).

3 *Id.* At 618.

4 *Morales v. Quintel Entertainment, Inc.*, 249 F. 3d 115, 124 (2d Cir. 2001).

5 The Release cites House and Senate Reports accompanying the bill which state that "[t]he group would be deemed to have become the beneficial owner, directly or indirectly, of more than 10 percent of a class of securities at the time [t]hey agreed to act in concert."

The Proposed Rules may have far-ranging, unintended consequences on a variety of typical market transactions, which may result in a chilling effect on raising capital. As an example of potential unintended consequences, consider how the Proposed Rules would affect communications between shareholders who may want to provide financing to an issuer. When existing shareholders participate in an issuer's equity financing, such shareholders are often required to engage in some communication, including with respect to the terms of the proposed securities, governance rights, lockups and other material terms of the transaction. The Proposed Rules would potentially characterize such investors as part of a "group", where their only interaction is at the request of the issuer and to facilitate the issuer's capital raise, but are otherwise acting entirely independently of each other. Given the size and speed of some liquidity needs of issuers, particularly in times of market volatility, an issuer often needs to approach more than one investor in order to raise the requisite amount of capital, and absent the request by the issuer for coordination, such investors would not have had any interaction with each other in respect of the issuer. Such investors, given their knowledge about the issuer's financing plans, would be in possession of material non-public information and would only purchase shares directly from the issuer. The Commission may wish to consider what additional benefit would be provided to other shareholders by characterizing these investors as a "group". Further given that any "group" that beneficially owns more than 10% of the registered class would subject all "group" members to Section 16, consider the chilling effect this could have on an issuer's ability to access capital from investors who do not wish to be subject to Section 16 when they have neither any agreement to act together with other shareholders, no ongoing access to inside information and beneficial ownership below 10%. The Commission notes in the Release that it understands that there would be an increased cost for any investor subject to Section 16 as a result of the amendment of Rule 13d-5, as such investor "may incur additional compliance costs for their filing obligations under Section 16." The Commission is not acknowledging, however, the vastly more material consequence and potential cost, which is the risk of being subject to Section 16(b) profit disgorgement provisions, whereby such investors risk losing their entire profits on their investment should they seek to sell their positions. While it is noted that proposed Rule 13d-6(c) would contain an exemption for certain investors taking concerted actions with respect to an issuer's securities provided that such communication is not undertaken with the purpose or effect of changing or influencing control of the issuer, it is not clear that such exemption will be particularly useful in a substantial percentage of these scenarios, as it is not uncommon for one or more investors to negotiate for or have a board seat in connection with their sizeable investments in the issuer. If the presence of a negotiation for a board seat, or increasing the duration of an existing board seat, in connection with such purchase would make an investor ineligible for such exemption, the adoption of the Proposed Rules would effectively eliminate the ability of investors to coordinate or communicate with each other in any manner in connection with such transactions. The Commission states in the Release that "the beneficial ownership reporting system is not intended to impede communications among shareholders or between proponents and issuers that are not undertaken with the purpose or effect of changing or influencing control of an issuer" but the Proposed Rules will do exactly that in a substantial number of circumstances.

Proposed Rule 13d-5(b)(1)(ii) would require "group" attribution when an investor receives information from another investor, in advance of a Schedule 13D filing by the communicating investor, that is "communicated with the purpose of causing others to make purchases" and the recipient investor "makes a purchase based on such information". We believe that the language of this proposed Rule 13d-5(b)(1)(ii) is overly broad and could cause investor confusion as to when a "group" may have formed and further, if such a "group" has been formed by virtue of that communication, when such group is dissolved. The definition under the Proposed Rules would appear to imply that the mere receipt of information about another investor's intent to purchase would freeze the recipient investor out of the market from further purchases unless such investor was prepared to be considered a member of a "group" with the communicating investor. If such an interpretation is correct, then it is unclear for how long such investor would be frozen from further purchasing due to being in possession of that information. Would such "group" attribution only be possible prior to the time that the communicating investor makes its Schedule 13D filing? What about additional purchasing activity that could cause such investor to file a Schedule 13D amendment, or communications by an existing Schedule 13D filer? What if the communicating investor is an existing Schedule 13G filer or is eligible to file on Schedule 13G rather than Schedule 13D? It is unclear whether even after the communicating investor makes its Schedule 13D filing the recipient investor still risks "group" attribution if it were to purchase in the market (due to the risk that further purchases would trigger a further Schedule 13D amendment filing). It is also unclear what would happen if the communicating investor did not cross the 5% threshold for some time and therefore does not trigger a 13D filing obligation in the short term, and particularly, when such information would be deemed to have been made "public" in the absence of a Schedule 13D filing such that the recipient of such information is free to trade without being considered part of a group.

The Commission should also consider whether the public dissemination of information, for example, postings by investors on publicly available message boards or media interviews regarding their intention to buy stock and/or advocating that a stock is undervalued might make any reader or viewer, as applicable, a potential member of a group with such investor under the Proposed Rules. Noting that there would not be any agreement (whether express or implied) between these investors, consider how the original investor would even be notified of the other investor's purchases in order to be able to know that a "group" has been formed, the number of shares being purchased and whether a Schedule 13D filing has been triggered. Without any agreement or coordination, it is not clear how the other investors would know whether the original investor intends to be passive (and file a Schedule 13G) or active (and file a Schedule 13D) or indeed, whether other investors who consumed such publicly available information may be considered part of the same "group".

Further, the Proposed Rules do not appear to address when (and how) a group deemed to be formed in connection with such purchases would be considered to have dissolved. Under existing rules, if the agreement to act together is the factual underpinning of the formation of the group, then it is the termination of the agreement to act together which would support that the group has dissolved. Under the Proposed Rules, if a group is found to exist in the absence of any agreement to act together, consider how an investor would be able to determine that such group has been dissolved.

Finally, we believe that proposed Rule 13d-6(d)would significantly impair ordinary-course derivatives transactions by dealers and financial institutions, even with counterparties who do not have any control intent. We also believe that it was fairly settled that a bilateral transaction, negotiated at arm's length, would not by itself be sufficient to create group status absent other indicia of group status such as agreements to vote and other factors. As a result, the uncertainty caused by proposed Rule 13d-6(d) may increase risks for market participants in otherwise established financial transactions which may inhibit such activity.

Flood of Information

If adopted in their currently proposed form, the Proposed Rules would result in a substantial increase in the number of Schedule 13G filings and amendments and rapid filing of Schedule 13D amendments. The Commission should question how investors are going to be able to digest and analyze this information, and whether requiring practically constant updates to such information, or on extremely compressed timeframes, will inure to the benefit of such investors where such filings largely do not implicate matters of corporate control. If the Commission is seeking instead to provide greater transparency to the market about trading in general, such solution should be data driven and the Schedule 13G and 13D filings are not the appropriate vehicle for this disclosure. The Commission has proposed requiring such reports to be filed using a structured, machine-readable data language. Instead of retro-fitting the Schedule 13G and 13D filings into a format that can be mined for data, consider whether the problem the Commission is trying to address should have a more data-driven format and solution, and whether existing disclosures, for example, the Form 13F are more appropriate locations for such data-heavy disclosures, rather than the narrative format of a Schedule 13D.

Unintended Consequences

Quality of Information

Consider whether the speed of required filings and the requirement for more frequent disclosures will degrade the quality of the information contained in such filings. As discussed elsewhere in this letter, the Proposed Rules would impose significant additional reporting burdens on all investors holding significant ownership in an issuer. We believe that the compressed filing timeframes outlined in the Proposed Rules will negatively impact the ability of investors and their advisors to draft meaningful disclosures and engage in thoughtful analysis, and in order to avoid making a "late" filing with the Commission, a risk that such disclosures will degrade and shift to boilerplate disclosures, which can more quickly be included in filings but are less useful to investors and regulators. Further, when evaluating whether a material change has occurred to existing Schedule 13D disclosure, consider whether an investor would lean towards a determination that a change is not material rather than risk having a "late" filing if it cannot file within the required one-business-day timeframe.

Encouragement of Short-Term Trading

Given the amount of information that is likely to be generated on a fairly constant basis, we urge the Commission to consider as well whether imposing such filing obligations would tip the balance further in the benefit of day-trading, machine-driven investors to the detriment of individual retail investors who cannot be expected to have the resources to digest and analyze the information being produced.

Further, individual retail investors, presuming that they will "miss out" on a market run-up or stock price drop based on the constant disclosures of large investors, may be encouraged to make trading decisions based on their speculation about the activities of large investors, rather than on their evaluation of the financial and operational fundamentals of the individual issuers and the industries in which they operate. The individual retail investor is not privy to information regarding the institutional investor's motivations for investing activities, including the institutional investor's investment thesis, investment guidelines or other matters unrelated to the specific issuer, leaving the individual retail investor to speculate as to whether the change in position reflects any fundamentals about the issuer.

Incorporation of Rule 13D Definitions in other Control Definitions

As acknowledged in the Release, the market for corporate control has changed since the Williams Act was first enacted. Hostile tender offers, the original subject the Williams Act sought to regulate, have been largely replaced by minority positions taken by activist investors. The Schedule 13D and 13G landscape, however, is not a regulatory framework limited to disclosure by activist investors or those seeking corporate control. Instead, the Schedule 13D and 13G rules have come to have broad-reaching implications beyond that application, as they are also the basis for the rules governing a set of investors subject to Section 16 (as 10% beneficial owners), and have largely been imported wholesale into various other aspects of the corporate landscape, from disclosures of beneficial ownership in an issuer's proxy statement, to widespread use in change-in-control definitions in corporate contracts, including M&A transactions, credit agreements, equity compensation arrangements, and derivative securities, to the Rule 506 "bad actor" disqualification regime. Given the broad reach of the rules, it is imperative that if the Commission is going to expand the definition of "beneficial ownership" and "group" in order to address matters of general market transparency rather than actual corporate control, that it be cognizant of potential collateral effects on other aspects of corporate matters that have imported such definitions in matters intended to bear upon control of the issuer.

Further Considerations for Modernization

The Commission has positioned the Proposed Rules as "modernizing" the Schedule 13D and 13G landscape, but has largely failed to propose changes to the actual forms and disclosures, beyond suggesting that there be digital tagging of certain information and reduction in Item 4 disclosure to a "check box" approach indicating that the investor has a plan or proposal falling within one of the designated categories of Item 4. We encourage the Commission to undertake a comprehensive review of the current forms and propose rules to simplify and remove disclosure that is either readily available elsewhere or duplicative, in the same way that other rule making[6] has sought to eliminate disclosures that are duplicative or readily available elsewhere. As an example, in the context of Schedule 13D and 13G, we would recommend eliminating the

[6] *See e.g., "Disclosure Update and Simplification"*, Release Nos. 34-76474, 33-10110 (August 17, 2018).

requirement to include the issuer's address, which is readily available from the issuer's other disclosures. Similarly, for purposes of streamlining disclosures, the Commission should consider eliminating the current "cover page" approach to Schedule 13D and 13G and instead replace it with one table of reporting persons. Other required cover page disclosures may also be worthy of elimination, such as the code specifying what type of entity is filing (i.e., partnership, corporation, individual) when in most cases that information is clear from the name of the reporting entity.

We further urge the Commission to consider codifying or clarifying what is currently a broadly adopted practice of reporting only the direct holder or parent entity and allow affiliated funds and their controlling entities or persons to report solely by one or a few "lead-filers" or "investor representatives", which would reduce the volume of disclosure that is not relevant to investors, including, in many cases, a large number of cover pages, and a detailed recitation of all the interim corporate or other entities between the direct holders and the ultimate controlling persons. Such a change could also eliminate the need to obtain signatures from officers of each entity in the control chain, which can result in multiple signatories for each filing. Such changes and other streamlining actions might reduce the time required to draft and EDGARize Schedule 13D and 13G filings and the logistical challenges of collecting multiple signatures in order to make filings in compressed time frames.

As described elsewhere in this letter, to the extent the Commission will adopt more frequent amendment requirements for Schedule 13G filers, consider whether such amendments can be done in a format which does not require a separate filing at each issuer where such investor and its affiliated funds beneficially own more than 5% of the outstanding class of a security, and permit the EDGAR system to accept a joint filing by multiple lead-filers for different investments within the investment firm. To that end, it is noted that the EDGAR system currently has a limit of 10 reporting persons for a single Section 16 filing. This limitation results in multiple Section 16 filings to the extent there are more than 10 affiliated beneficial owners reporting the transaction, resulting in duplicative forms filed solely as a result of the limitation of the EDGAR system. Consider whether the EDGAR system can be modernized to accept beneficial ownership filings from more than 10 reporting persons, thus reducing the number of filings and the attendant time required to draft and EDGARize such filings, and the potential for investor confusion caused by multiple duplicative filings reporting the same transactions. The EDGAR system appears able to accept more than 10 filers in the case of registration statements filed by more than 10 subsidiaries of a registrant—it is unclear why the system is not designed to do the same for beneficial ownership reporting.

Further, the Commission should consider whether certain common capital structures result in reporting outcomes that do not properly reflect the original intentions of the Williams Act. For example, in issuers with dual class structures, where there is a second class of equity securities that votes on a combined basis with the registered class, a beneficial owner is currently only permitted to include in the denominator the currently outstanding number of the registered class of equity security plus the number of convertible securities it holds, and is not permitted to take into account the additional voting securities held by investors holding other classes of equity securities. In these circumstances, the application of the current Rule 13d-3 calculation very commonly results in investors who own a small amount of a company's overall equity being required to report on Schedule 13D or Schedule 13G, and being subject to Section 16 as a 10% beneficial owner. It is not uncommon for an issuer undergoing an initial public offering to reclassify all pre-IPO owners into separate unregistered classes of securities that are convertible into the registered class and vote alongside the registered class, which leads to Rule 13d-3 calculations whereby beneficial owners of the registered class are reported as having a higher percentage of beneficial ownership than matches either the percentage of economics or voting power than they hold in reality. This is an unfair application to such holders, including subjecting them to Section 16 when they often have no access to inside information due to their minimal actual holdings in the issuer. Additionally, this is confusing for public investors, as it is not apparent from the percentages reported on Schedule 13D or 13G filings or Section 16 filings that such investors in fact have minimal ownership, and can be misunderstood by the market as such investors taking a large position in the issuer where they have not actually done so. We would recommend that the Rule 13d-3 rules be revised to permit a holder to include in its Rule 13d-3 denominator any shares that are not of the registered class but which vote alongside the registered class in the election of directors.

Conclusion

As described herein, the Proposed Rules will impose significant reporting burdens on all investors holding significant ownership in an issuer, regardless of control intent, and there are real costs associated with this increased reporting burden that should not be underestimated or discounted. The Commission should consider that (i) the filing of an earlier Schedule 13G is not merely an acceleration of the cost of that particular filing, from what may currently be a cost in February of each year to an earlier month-end, and (ii) that filing one or more amendments during the course of the year may be one or more multiples of the cost of a yearly amendment. The Commission should consider also (i) whether investors holding a large number of these positions have systems and personnel currently in place that are capable of collecting and analyzing the data in these accelerated and more frequent timeframes, and (ii) whether the increased reporting burdens will significantly affect the cost of compliance for these investors. Such increased cost may include the need to build additional technologies and systems to handle the increased analysis and reporting burden and the need to increase staffing to handle what would essentially become a constant monitoring, analysis and drafting process. The Commission should consider who is bearing the cost of these efforts. A substantial portion of the implicated investors are investing money on behalf of third-party limited partners or clients, which include pension funds and retail investors, and the costs of these increased reporting burdens will in large part be passed through to these underlying partners and clients.

Finally, the Commission should be cognizant that imposing overly aggressive filing deadlines sets ordinary investors up for failure, despite the seriousness with which such investors may take compliance with the federal securities laws. While the Commission is correct that there have been advances in technology since the original adoption of these rules, there are no currently available technologies that are capable of performing the legal analysis, drafting and review that is required for compliance with nuanced and technical beneficial ownership analysis. Schedule 13D and Schedule 13G filings are not solely data-driven printouts of position information, but, particularly with respect to Schedule 13D, are narrative-based disclosures, requiring detailed analysis of investment fund structures, relationships and agreements with other shareholders, terms of derivative instruments, and nuanced determinations of the purposes of investment and intentions of the investors. If the Commission seeks to encourage market transparency more generally, or faster disclosures by investors engaged in particular change in corporate control activities, we urge the Commission to perform further study and analysis as to more targeted means to accomplish its objectives and in doing so, provide the investing community and their advisors an opportunity for meaningful engagement to achieve what are, in large part, common objectives for clear and appropriately targeted reporting standards.

We appreciate the opportunity to submit for the Commission's consideration our comments on the modernization of beneficial ownership reporting and the other related matters set forth herein. We would be pleased to discuss our comments with you or provide any additional information you would find useful. If you have any questions regarding this letter, please do not hesitate to contact Jennifer Nadborny at (212) 455-2814.

Very truly yours,

/s/ Jennifer Nadborny

Jennifer Nadborny