July 7, 2023

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

VIA ELECTRONIC MAIL
rule-comments@sec.gov

Subject: Reopening of Comment Period for Modernization of Beneficial Ownership Reporting, File No. S7-06-22

Dear Ms. Countryman:

The Society for Corporate Governance ("Society")[1] and the National Investor Relations Institute ("NIRI")[2] appreciate the opportunity to comment on the recently released Staff Memorandum prepared by the Division of Economic and Risk Analysis, in connection with the Commission's Proposed Rule to modernize beneficial ownership reporting.[3] This Staff Memorandum provides additional statistical data and analysis regarding the economic effects of this Proposed Rule.

The Society and NIRI together represent the interests of more than 1,600 public companies.

The SEC's rulemaking on this topic was initiated in March 2022 and seeks to: (1) modernize the reporting requirements regarding large equity investment positions; and (2)

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[1] Founded in 1946, the Society for Corporate Governance ("Society") is a professional membership association of approximately 3,700 corporate and assistant secretaries, in-house counsel, outside counsel, and other governance professionals who serve approximately 1,700 entities, including approximately 1,000 public companies of almost every size and industry. Society members are responsible for supporting the work of corporate boards of directors and the executive managements of their companies on corporate governance and disclosure matters.

[2] Founded in 1969, the National Investor Relations Institute ("NIRI") is the professional association of corporate officers and investor relations consultants responsible for communication among corporate management, shareholders, securities analysts, and other financial community constituents. NIRI is the largest professional investor relations association in the world with members representing over 1,500 publicly held companies and $12 trillion in stock market capitalization.

[3] Reopening of Comment Period for Modernization of Beneficial Ownership Reporting, 88 Fed. Reg. 28,440 (May 4, 2023).

improve market transparency and efficiency.[4] Both the Society and NIRI submitted comment letters to the SEC in support of this Proposed Rule.[5]

Background

Under current SEC rules, institutional investors purchasing shares through brokers and banks (called "beneficial owners") are required to disclose any ownership interest they may have in a public company once such ownership interest exceeds 5% of outstanding shares.[6] This disclosure is accomplished by filing a beneficial ownership interest report with the SEC on Schedule 13D. This report is required to be filed within 10 calendar days after a beneficial owner crosses the 5% threshold. This 10-day deadline has been in effect and unchanged since 1968.[7]

The SEC now proposes to shorten the reporting window from 10 calendar days to 5 calendar days. This advance would help reduce information asymmetry in the price discovery process and provide the marketplace with more timely notice of the acquisition of a 5% share ownership position. This would also help public companies from being ambushed and be better prepared to constructively respond to an activist investor that has accumulated a significant position over a relatively short period of time.

The SEC Staff Memorandum on Beneficial Ownership Reporting

On April 28, 2023, the SEC released a staff memorandum providing statistical data and analysis regarding the economic effects of its 2022 proposals to modernize the reporting regime for institutional investors that accumulate more than 5% of the outstanding shares of a public company.[8]

The SEC analyzed Schedule 13D filings from 2011-2021 and reached the following conclusions:

1. The SEC staff found that "there is a significant abnormal return after day five following the [5%] trigger date, indicating that there remains information that has not been fully

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[4] *See* Modernization of Beneficial Ownership Reporting, 87 Fed. Reg. 13,846 (Mar. 10, 2022) (hereinafter "Proposed Rule").
[5] *See* Letter from Ted Allen, Vice President, Policy & Advocacy, and Darla Stuckey, President and CEO, Society for Corporate Governance, to Vanessa A. Countryman, Secretary, Securities and Exchange Commission (Apr. 13, 2022), *available at* https://www.sec.gov/comments/s7-06-22/s70622-20123623-279866.pdf; and Letter from Matthew D. Brusch, Interim President and CEO, National Investor Relations Institute, to Vanessa A. Countryman, Secretary, Securities and Exchange Commission (Apr. 15, 2022), *available at* https://www.sec.gov/comments/s7-06-22/s70622-20123760-279972.pdf.
[6] *See* 17 C.F.R. § 240.13d-1(a).
[7] *See Proposed Rule* at 13,849.
[8] SEC Division of Economic and Risk Analysis, Staff Memorandum: Supplemental data and analysis on certain economic effects of proposed amendments regarding the reporting of beneficial ownership, April 28, 2023*, available at* https://www.sec.gov/comments/s7-06-22/s70622-20165251-334474.pdf.

incorporated into market prices as of that point."[9] The staff concluded that "[t]his pattern of returns suggests that there is greater potential for improvement in allocative efficiency and a reduction in information asymmetry under a shortened deadline …."[10]

2. During the time period studied, the SEC staff found that approximately 1/3 of Schedule 13D filers continued to accumulate shares for more than 5 days after reaching the 5% threshold and before the current 10-day filing deadline.[11]

3. Based on the data studied, the SEC staff estimates that there is a significant wealth transfer between selling investors unaware of a pending Schedule 13D filing and other market participants possessing superior market information during the lengthy 10-day filing window.[12]

The data and analysis in this SEC Staff Memorandum demonstrate quantitatively that reducing the filing window from 10 calendar days to 5 calendar days would meaningfully reduce information asymmetry and the unfair insider advantages that activist investors have during the current prolonged Schedule 13D reporting deadline. As stated by the SEC staff in this Memorandum:

> The harms to selling shareholders from trading opposite potentially informed, opportunistic traders, and the associated information asymmetry, may have broader implications for trust in markets and liquidity. In particular, lessening an informational advantage that some market participants may perceive to be unfair could enhance trust in the securities markets, thereby promoting capital formation. In addition, under current rules, the risk of facing these opportunistic traders and bearing these harms may lead market makers to charge wider bid-ask spreads and thus reduce liquidity.[13]

Conclusion

As a result of substantial technological and communications advances in the financial markets over the past 50 years, the 10-day window has been the subject of mounting criticism for allowing too much time for activist investors to accumulate large stock positions before being required to disclose anything publicly. Acquiring large blocks of shares secretly for such a long period of time allows these investors to trade on asymmetric price information and continue accumulating shares from unwitting investors for almost two weeks after the 5% threshold is reached.

[9] *Id.* at 7.
[10] *Id.* at 7-8.
[11] *Id*. at 15.
[12] *Id*. at 26.
[13] *Id*. at 27.

This prolonged reporting window disadvantages selling shareholders after the 5% threshold is reached and permits activist investors to ambush public companies, often by disclosing an ownership interest that far exceeds 5% of shares outstanding. These investors typically pressure executives and directors to agree to their short-term demands, which can include board membership, plant closings, workforce reductions, wage and benefit cuts, reduced R&D investment, increased share buybacks, special dividends, and other concessions that may or may not be in the long-term interest of shareholders, employees, and other stakeholders.

The SEC's proposal to shorten the reporting window would be a significant improvement for the securities markets. However, the Staff Memorandum also finds that "about two-thirds of the filers completed acquiring their reported stake [within 5 days after the 5% threshold was crossed]."[14] This finding demonstrates that even more market efficiency—and a further reduction in information asymmetry—can be accomplished if the Commission would support a two (2) business day reporting deadline.

A two (2) business day threshold would mirror the SEC's Form 4 disclosure requirements for executive stock transactions. These reported executive transactions, including those under Rule 10b5-1 plans, are far less material to investors than disclosures about an activist investor having accumulated a 5% position in an issuer. Disclosure of such a large stake often moves a company's stock price and is a far more important disclosure to other investors than many of the Form 4 disclosures, which are often for small share amounts. It makes more sense for the SEC to require that both these disclosures follow the same 2-day reporting window.

The Society and NIRI are very appreciative of the SEC's efforts to modernize its Section 13 beneficial ownership rules. Thank you for the opportunity to provide additional comments on this rulemaking and the Staff Memorandum analyzing beneficial ownership disclosures. Please feel free to contact either organization if further discussion of these points would be helpful.

Sincerely,

Christina A Maguire

Christina Maguire
President and Chief Executive Officer
Society for Corporate Governance

Matt Brusch

Matthew D. Brusch
President and CEO
National Investor Relations Institute

[14] *Id*. at 15.

cc: The Honorable Gary Gensler
The Honorable Hester M. Peirce
The Honorable Caroline A. Crenshaw
The Honorable Mark T. Uyeda
The Honorable Jaime Lizarraga
Erik Gerding, Director, Division of Corporation Finance