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April 7, 2022

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

Re: *Modernization of Beneficial Ownership Reporting (File No. S7-06-22)*

Dear Ms. Countryman:

The Investment Company Institute (ICI)<sup>1</sup> recommends that the Securities and Exchange Commission (SEC or “Commission”) substantially revise its proposal to aggressively accelerate the filing deadlines for Schedules 13D and 13G (“Proposal”).<sup>2</sup> While we appreciate the SEC’s interest in reporting of more timely information regarding beneficial ownership positions, we question the basis for, and utility of, significantly shortening the filing deadlines as the SEC proposes, especially with respect to institutional investors, such as regulated funds and investment advisers that file as Qualified Institutional Investors (QIIs) on Schedule 13G. Funds and advisers, especially when filing as QIIs, do not raise the same issues as 13D filers and should be treated differently, as contemplated by the legislative and administrative history of the beneficial ownership provisions.

#### I. Executive Summary

The SEC has not persuasively explained why it is appropriate to aggressively shorten the filing deadlines for Schedules 13D and 13G, particularly the Schedule 13G filing deadline for QIIs. Such a dramatically accelerated filing schedule raises significant concerns regarding harm to, and unnecessary costs to, advisers and their clients, including funds and their investors. ICI urges the Commission to revise its proposed filing deadlines to be consistent with the intent of Sections

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<sup>1</sup> The [Investment Company Institute](https://www.ici.org) (ICI) is the leading association representing regulated investment funds. ICI’s mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. Its members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in Europe, Asia, and other jurisdictions. Its members manage total assets of \$31.0 trillion in the United States, serving more than 100 million investors, and an additional \$10.0 trillion in assets outside the United States. ICI has offices in Washington, DC, Brussels, London, and Hong Kong and carries out its international work through [ICI Global](https://www.ici.org/global).

<sup>2</sup> See *Modernization of Beneficial Ownership Reporting*, Release Nos. 33-11030 and 34-94211 (Feb. 10, 2022); 87 Fed. Reg. 13846 (March 10, 2022), available at <https://www.govinfo.gov/content/pkg/FR-2022-03-10/pdf/2022-03222.pdf> (“Proposing Release”).

13(d) and 13(g) and the fundamental difference between investors that acquire beneficial ownership of more than five percent of a covered class of securities with the purpose or effect of changing or influencing control of the issuer and investors that beneficially own more than five percent with no such purpose or effect, as well as the further distinction between non-control investors and the subset of those investors that are QIIs—institutions that acquire beneficial ownership in the ordinary course of business. ICI’s basis and recommendations for revising the filing deadlines are discussed in Sections IV and V below, and may be summarized as follows:

<b>Issue</b>	<b>Current Requirement</b>	<b>SEC Proposal</b>	<b>ICI Recommendation</b>
<b>Initial Schedule 13D filing: Rule 13d-1(a)</b>	Within 10 days after the date on which a person acquires beneficial ownership of more than five percent of a covered class of equity securities	Within 5 days after the date on which a person acquires beneficial ownership of more than five percent of a covered class of equity securities	Within 5 <i>business</i> days after the date on which a person acquires beneficial ownership of more than five percent of a covered class of equity securities
<b>Amendments to Schedule 13D: Rule 13d-2(a)</b>	“Promptly” following a material change	Within one business day of a material change	Retain standard of “promptly” following a material change or revise to specify “promptly, but within no more than three business days, following a material change”
<b>Initial Schedule 13G filing by QIIs: Rule 13d-1(b)</b>	Within 45 days after the end of the calendar year as of which the QII beneficially owns more than 5% of a covered class of equity securities	Within 5 business days after the end of the month as of which the QII beneficially owns more than 5% of the covered class of equity securities	Within 45 days after the end of the calendar quarter as of which the QII beneficially owns more than 5% of a covered class of equity securities
<b>Amendments to Schedule 13G filings: Rule 13d-2(b)</b>	Within 45 days after the end of the calendar year as of which <i>any</i> change occurred	Within 5 business days after the end of the month as of which a <i>material</i> change occurred including, but not limited to, any material increase or decrease in the percentage of the class beneficially owned	Within 45 days after the end of the calendar quarter as of which a <i>material</i> change occurred; confirm that a change in beneficial ownership of <5% will not be deemed material for these purposes
<b>10% Amendments to Schedule 13G by QIIs:</b>	Within 10 days after the end of the first month as of which the QII’s beneficial ownership	Within 5 days after the QII’s beneficial ownership exceeds 10% and, thereafter, within 5 days	Retain current rule: Within 10 days after the end of the first month as of which the QII’s beneficial ownership exceeds

<b>Rule 13d-2(c)</b>	exceeds 10% of a covered class of equity securities and, thereafter, within 10 days after the end of the first month as of which the QII's beneficial ownership increases or decreases by 5%	after a 5% increase or decrease in beneficial ownership	10% of a covered class of equity securities and, thereafter, within 10 days after the end of the first month as of which the QII's beneficial ownership increases or decreases by 5%
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We make the following recommendations and points in the remainder of the letter:

- In Section VI, we discuss the implications of proposed new Rule 13d-3(e).<sup>3</sup> While we support the SEC's proposed exclusion from this rule of security-based swaps in recognition of its current proposal that would require reporting of large positions in these instruments, we are concerned that the rule would inadvertently apply to a broader range of situations than the SEC intended. We question whether such a specific provision is necessary and believe that the unintended negative consequences of the provision would outweigh the potential benefits of having an explicit anti-evasion provision.
- In Section VII, we discuss our views on the SEC's proposed changes to the concept of a "group" for purposes of Sections 13(d) and 13(g).<sup>4</sup> We are deeply concerned that this aspect of the Proposal would likely have a broader effect than the SEC anticipates and would have highly detrimental unintended consequences. We explain that the SEC's proposed expansion of the concept of a "group" is inconsistent with the legislative history and case law of Sections 13(d) and 13(g) and would completely undermine the SEC's proposed exemptions in proposed Rule 13d-6(c) and (d),<sup>5</sup> create significant uncertainty,

<sup>3</sup> Proposed Rule 13d-3(e) provides that a holder of a cash-settled derivative security, other than a security-based swap, will be deemed the beneficial owner of the reference security if the derivative security is held with the purpose or effect of changing or influencing the control of the issuer of the reference security or in connection with or as a participant in any transaction having that purpose or effect.

<sup>4</sup> The Proposal would amend Rule 13d-5(b)(1) by redesignating it as Rule 13d-5(b)(1)(i) and removing the word "agree" from the rule so that an agreement would not be a necessary prerequisite to finding the existence of a group for purposes of Sections 13(d) and 13(g). The Proposal also would add new Rule 13d-5(b)(1)(ii), which would provide that, if a person shares non-public information about the person's upcoming Schedule 13D filing with the purpose of causing others to make purchases of the same class of an issuer's covered securities, and another person subsequently purchases the issuer's securities based on this information, these persons will be deemed to have formed a group within the meaning of Section 13(d)(3).

<sup>5</sup> As discussed further below, proposed Rule 13d-6(c) provides that, subject to certain conditions, two or more persons will not be deemed to beneficially own an issuer's equity securities as a group, for purposes of Sections 13(d)(3) or 13(g)(3), solely because of their concerted actions with respect to the issuer's equity securities, including engagement with one another or the issuer, or acquiring, holding, voting, or disposing of the issuer's equity securities. Proposed Rule 13d-6(d) provides that, subject to certain conditions, two or more persons will not be deemed to have formed a group for purposes of Sections 13(d)(3) or 13(g)(3) solely because they enter into an agreement governing the terms of an equity-based derivative security.

and have a deeply chilling effect on legitimate actions by industry participants fearful of inadvertently forming a group. We recommend changes to broaden and clarify the scope of these proposed exemptions.

- In Section VIII, we express our support for the SEC’s proposed changes to the filing process for Schedules 13D and 13G, including extending the filing cut-off times in the SEC’s EDGAR system and requiring that Schedules 13D and 13G be filed using an XML-based structured data language. We also support the SEC extending the EDGAR filer support hours to reflect the extended filing cut-off times.
- In Section IX, we urge the SEC, in any final rules and amendments, to include compliance dates that will provide funds, advisers, and other market participants with adequate time to implement the changes that the SEC proposes, including sufficient time to incorporate the new XML taxonomy into their systems. We note that, in addition to the Proposal, *the Commission has issued over 20 other significant rule proposals within the last six months alone*, many of which would impose new or enhanced reporting obligations on market participants. We urge the Commission to propose a holistic, staged multi-year implementation schedule with respect to *all* of the reporting rules it adopts, taking into account the combined implementation and testing efforts that will be required across all of these rulemakings, how the rulemakings inter-relate, and the related impacts and burdens on funds, advisers, and other market participants. In the meantime, we encourage the SEC to take meaningful steps to mitigate the cumulative effects of its rulemakings by more closely analyzing its existing reporting obligations and determining whether some of its proposed reporting obligations may be duplicative or unnecessary.

## II. Background

### A. ICI Members are Schedule 13D/G Filers

ICI’s members include US registered investment companies (“registered funds”), such as mutual funds, exchange-traded funds (ETFs), unit investment trusts (UITs), and closed-end funds, that are regulated under the Investment Company Act of 1940 (“Investment Company Act”), and non-US regulated funds<sup>6</sup> (together with registered funds, “regulated funds”), along with the advisers to these regulated funds. A regulated fund or adviser may be deemed to be a “beneficial owner” of an equity security, for purposes of Sections 13(d) or 13(g) of the Securities Exchange Act of 1934 (“Exchange Act”), if the fund or adviser, directly or indirectly, has or shares: (i)

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<sup>6</sup> “Non-US regulated funds” refers to funds that are organized or formed outside the United States and are substantively regulated to make them eligible for sale to retail investors, such as funds domiciled in the European Union and qualified under the UCITS Directive (EU Directive 2009/65/EC, as amended), Canadian investment funds subject to National Instrument 81-102, and investment funds subject to the Hong Kong Code on Unit Trusts and Mutual Funds.

voting power, including the power to vote, or direct the voting of, such security; and/or (ii) investment power, including the power to dispose, or direct the disposition of, such security.<sup>7</sup>

When ICI members that are institutional investors acquire beneficial ownership of more than five percent of a covered class of equity securities, they typically do so in the ordinary course of business and with no intent of changing or influencing the control of the issuer. These regulated funds and advisers typically meet the definition of Qualified Institutional Investor<sup>8</sup> (QII) and are eligible to file on Schedule 13G. In limited circumstances, an adviser to a regulated fund that acquires beneficial ownership of more than five percent of a covered class of equity securities may file a Schedule 13D when the adviser beneficially owns more than five percent of an issuer's shares with the purpose or effect of changing or influencing control of the issuer (*e.g.*, having a seat on the issuer's board or participating in a take-private transaction as a sponsor or co-investor).

#### B. Closed-End Funds Use Schedule 13D Data

ICI members that are closed-end funds have an additional perspective as users of Schedule 13D data.<sup>9</sup> Shares of closed-end funds are reportable securities for purposes of Sections 13(d) and 13(g).<sup>10</sup> Closed-end funds and their boards look to reports filed on Schedule 13D to obtain needed transparency into control positions in their shares, including important information about activist investors.<sup>11</sup>

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<sup>7</sup> See Rule 13d-3 under the Exchange Act. Securities that are subject to reporting under Sections 13(d) and 13(g) (referred to collectively in this letter as a "covered class of equity securities") include any equity security of a class that is registered pursuant to Section 12 of the Exchange Act, or any equity security of any insurance company which would have been required to be so registered except for the exemption contained in Section 12(g)(2)(G) of the Exchange Act, or any equity security issued by a closed-end investment company registered under the Investment Company Act, or any equity security issued by a Native Corporation pursuant to Section 1629c(d)(6) of title 43, or otherwise becomes or is deemed to become a beneficial owner of any of the foregoing upon the purchase or sale of a security-based swap that the Commission may define by rule. Rule 13d-1 explicitly excludes non-voting securities from the scope of reporting under Section 13(d), other than reporting of certain derivative securities under certain circumstances, as specified in the rules under Section 13(d).

<sup>8</sup> Qualified Institutional Investors include, among others, registered investment companies, registered investment advisers, registered broker-dealers, banks, and non-US institutions that are the functional equivalent of the institutions listed in Rule 13d-1(b)(1)(ii)(A)-(I), as long as the non-US institution is subject to a regulatory scheme that is substantially comparable to the regulatory scheme applicable to the equivalent US institution. See Rule 13d-1(b) under the Exchange Act; Proposing Release at n.6.

<sup>9</sup> Closed-end funds also use Schedule 13G data to determine whether certain passive beneficial owners are known activist investors that may eventually become Schedule 13D filers. Learning the identities of these passive beneficial owners may help closed-end funds better prepare for and address future shareholder demands.

<sup>10</sup> Shares of ETFs also are reportable securities for purposes of Sections 13(d) and 13(g), but many beneficial owners of ETF shares rely on SEC staff no-action relief to avoid making Schedule 13D and 13G filings. See, *e.g.*, PDR Services Corporation, SEC No-Action Letter (pub. avail. Dec. 14, 1998).

<sup>11</sup> Most closed-end fund shareholders do not purchase or redeem their shares directly from the fund, but instead buy and sell closed-end fund shares through a broker or in a brokerage account. Traditional exchange-listed closed-end

### C. The SEC’s Proposal Would Significantly Shorten the 13D/G Filing Deadlines

The Commission proposes to amend Rule 13d-1(a) under the Exchange Act to shorten the initial filing deadline for Schedule 13D from 10 days to five days<sup>12</sup> after the date on which a person acquires beneficial ownership of more than five percent of a covered class of equity securities, and amend Rule 13d-1(e), (f) and (g) to shorten the filing deadline to five days for persons who lose their eligibility to file on Schedule 13G. The Commission also proposes to amend Rule 13d-2(a) to require that amendments to Schedule 13D be filed within one business day of a material change.

The Commission believes that shortening the filing deadlines is warranted based on technological developments since Section 13(d)(1) was enacted in 1968 as well as a need to address “information asymmetries” in the markets that could harm investors.<sup>13</sup> The Commission also expresses the concern that investors who file on Schedule 13G “may avoid beneficial ownership reporting by selling down their positions before the end of the calendar year, and, in the case of QIIs, selling down before the end of a month if ownership exceeds 10%.”<sup>14</sup> The Commission appears to believe there is a “gap in reporting” under the current filing timeframes and that changes are needed to improve transparency.<sup>15</sup>

The Commission proposes to amend Rule 13d-1(b) to shorten the Schedule 13G filing deadline for QIIs from 45 days after the end of the year in which beneficial ownership exceeds five percent, to five business days after the end of the month in which the investor beneficially owns more than five percent of the covered class of equity securities. The Commission proposes to amend Rule 13d-2(b) to shorten the deadline to file amendments to Schedule 13G from 45 days after the end of the year in which *any* change occurred to five business days after the end of the month in which a *material* change occurred including, but not limited to, any material increase or decrease in the percentage of the class beneficially owned.<sup>16</sup>

In addition, the Commission proposes to amend Rule 13d-2(c) to significantly accelerate the amendment filing deadlines for QIIs that acquire beneficial ownership in excess of 10% of a

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fund shares trade on the secondary market. Closed-end fund shares trade on the secondary market trade at a market-determined price that may be somewhat higher or lower than the fund’s net asset value (NAV). For more information about activist activity aimed at closed-end funds, please see Investment Company Institute, Recommendations Regarding the Availability of Closed-End Fund Takeover Defenses (March 2020), *available at* [https://www.ici.org/pdf/20\\_itr\\_cef.pdf](https://www.ici.org/pdf/20_itr_cef.pdf).

<sup>12</sup> As proposed, this would mean five calendar days, not business days.

<sup>13</sup> Proposing Release at 13849-50.

<sup>14</sup> *Id.* at 13855.

<sup>15</sup> *Id.* at 13855-56.

<sup>16</sup> An amendment would not need to be filed with respect to a change in the percentage of a class outstanding previously reported if the change results solely from a change in the aggregate number of securities outstanding.

covered class of securities. Currently, QIIs must file an amendment to Schedule 13G within 10 days after the end of the first month in which their direct or indirect beneficial ownership exceeds 10% of a covered class of equity securities and, thereafter, within 10 days after the end of the first month in which their beneficial ownership increases or decreases by five percent. The Commission proposes to shorten these filing deadlines for QIIs, from 10 days after month-end, to five days after exceeding 10% beneficial ownership or after a five percent increase or decrease in beneficial ownership, thereby imposing a mid-month reporting obligation on QIIs for the first time.

### III. Filing Timeframes for Schedules 13D/G Must Reflect the Purposes of These Provisions

#### A. SEC Has Not Justified the Need for Significantly Accelerated Filing Deadlines

The SEC has not persuasively explained why it is appropriate to aggressively shorten the filing deadlines for Schedules 13D and 13G. The SEC must consider what is a feasible timeframe to file Schedule 13D. Further, the SEC has not justified why it is appropriate to shorten the Schedule 13G filing deadline for QIIs from *45 days after the end of the year* in which beneficial ownership exceeds five percent, to *five business days after the end of the month* in which the investor beneficially owns more than five percent of the covered class of equity securities. Such a dramatically accelerated filing schedule raises significant concerns regarding harm to advisers and funds, and would impose substantial unnecessary costs on these investors, concerns the Commission has neglected to adequately consider.

The Commission asserts that shortening the filing deadlines is necessary to address “information asymmetries” and “reporting gaps” that could harm investors. The Commission has not provided evidence supporting these claims, however, particularly with respect to institutional investors that file as QIIs on Schedule 13G. Without evidence, the SEC suggests that QIIs may sell down positions before the end of a reporting period to avoid having to report. We do not believe these unsupported claims are an appropriate basis on which to dramatically shorten the reporting deadlines for QIIs filing on Schedule 13G.<sup>17</sup> As discussed below, the legislative and administrative history of Sections 13(d) and 13(g) does not support either the SEC’s stated concerns with respect to Schedule 13G filers, or the accelerated timeframes it proposes.

The Commission asserts that shortening the filing deadlines is warranted based on technological developments since Section 13(d)(1) was enacted in 1968. This rationale does not adequately explain why it is appropriate to significantly shorten the filing deadlines, particularly with respect to QIIs that file on Schedule 13G. The SEC has never suggested that technological ability

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<sup>17</sup> We also note that selling positions solely to avoid a filing obligation may be inconsistent with an investment adviser’s fiduciary duty, and may be inconsistent with a fund’s investment strategy. An index fund, for example, seeks to closely track the performance of a specified index. Selling positions in a particular issuer likely would be inconsistent with that strategy.

to file is or should be the primary basis to determine the appropriate filing deadlines for Schedules 13D and 13G.<sup>18</sup>

In addition, the Commission itself has not made significant technological advances over the years to its own systems that market participants rely on to prepare Schedules 13D and 13G, making it challenging and costly for investors to gather the information about beneficial ownership they need to file Schedules 13D and 13G. For example, information about issuers' outstanding shares is not available on the SEC's EDGAR system in a user-friendly format. There is no readily available way for investors to search issuer data to determine an issuer's shares outstanding without the use of third-party data vendors or through manual issuer-by-issuer research. Members also have observed issues with accuracy in the EDGAR system regarding such data points as an issuer's address and other identifying information. If the SEC expects market participants to file beneficial ownership reports faster, it first should modernize its own systems to facilitate market participants' ability to do that. Among other measures, the SEC should consider preparing and posting an official list of "13D/G Securities" as it currently does for Form 13F<sup>19</sup> including, for each security on the list, the same information as is included for 13F securities (*e.g.*, CUSIP, Issuer Name, Issuer Description, Status), as well as shares outstanding.

Further, the Commission's proposal to dramatically shorten filing deadlines based on technological developments does not reflect the increased operational steps that will be necessary for firms to report under the Proposal, including the additional work that will be required to prepare reports using XML. For example, many firms will need to work with vendors to prepare reports in XML, adding an additional step, and requiring more time, to complete the filing process.<sup>20</sup>

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<sup>18</sup>*See, e.g., Amendments to Beneficial Ownership Reporting Requirements*, Securities Exchange Act Rel. No. 34-39538 (Feb. 17, 1998) (the Commission concluded that QIIs should be permitted greater flexibility in filing amendments because they "routinely buy and sell securities in the ordinary course of business and are less likely to abuse the process.").

<sup>19</sup> *See* Official List of Section 13(f) Securities, available at <https://www.sec.gov/divisions/investment/13flists.htm>. As we have recommended in the past for the list of Section 13(f) Securities, the SEC should provide the list of 13D/G Securities in the form of a table or spreadsheet, so that filers can sort and search the data efficiently and compare it to data in their internal systems. *See* Letter to Ms. Vanessa A. Countryman, Secretary, Securities and Exchange Commission, from Susan Olson, General Counsel, and Sarah A. Bessin, Associate General Counsel, Investment Company Institute, dated Sept. 29, 2020, available at <https://www.sec.gov/comments/s7-08-20/s70820-7860142-223928.pdf>.

<sup>20</sup> In support of its proposal to shorten the reporting deadline for an initial Schedule 13D filing to five days, the Commission notes that this "shorter filing deadline . . . also would be consistent with the filing deadlines for similar beneficial ownership reports in foreign jurisdictions." Proposing Release at text accompanying n.43. While some ICI members file beneficial ownership reports in foreign jurisdictions, US registered funds overall have more significant positions in US issuers, resulting in a greater operational burden for funds in filing a larger volume of beneficial ownership reports (primarily Schedule 13G, as explained above) with respect to US issuers. This operational burden is compounded by the limitations of the SEC's EDGAR system, noted above.



B. SEC’s Proposed Filing Deadlines Are Inconsistent with the Legislative and Administrative History of Sections 13(d) and 13(g)

The SEC’s proposed filing deadlines fail to reflect the distinct purposes of Schedules 13D and 13G based on the fundamental difference between investors that acquire beneficial ownership of more than five percent of a covered class of securities with the purpose or effect of changing or influencing control of the issuer and investors that beneficially own more than five percent with no such purpose or effect (“non-control investors”), as well as the further distinction between non-control investors and the subset of those investors that are QIIs—institutions that acquire beneficial ownership in the ordinary course of business and satisfy the other conditions of Rule 13d-1(b)(1) under the Exchange Act.<sup>21</sup>

The legislative history of Section 13(d) reflects Congress’ intent to provide for disclosure of significant purchases that are made to “acquire control,” recognizing that “[t]he persons seeking control . . . have information about themselves and about their plans, which if known to investors, might substantially change the assumptions on which the market price is based.”<sup>22</sup> The Commission recognized, as early as the mid-1970s, the critical distinction between investors acquiring an interest for purposes of control, and institutional investors that “often acquire securities in the ordinary course of their business and not with a view toward changing or effecting a change in the control of an issuer”<sup>23</sup> and, on that basis, provided a short-form notice for the latter to satisfy their filing obligations. In 1978, following Congress’ enactment of Section 13(g), the Commission discussed the rationale for the current annual reporting timeframe under Schedule 13G for QIIs, explaining why more frequent reporting is not appropriate for these investors, a rationale that is equally true today:

Old Rule 13d-5 would have required a person to file former Form 13D-5 if at any time during the quarter such person acquired, in the ordinary course of business and not for the purpose of changing or influencing control, beneficial ownership of more than five percent of a class of equity security, regardless of whether his ownership as of the end of the quarter exceeded that amount. . . . *The Commission believes that the utility of*

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<sup>21</sup> Rule 13d-1(b)(1) provides that a person that otherwise would be required to file on Schedule 13D, may file a schedule 13G if: (i) the person acquired the securities in the ordinary course of business and not 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; (ii) such person is an investment company, investment adviser, broker-dealer, bank, or one of the other entities enumerated in the rule, including a non-US institution that is the functional equivalent of one of the enumerated entities as long as the non-US institution is subject to a substantially comparable regulatory scheme; and (iii) such person has promptly notified any other person on whose behalf it holds, on a discretionary basis, more than five percent of a covered class of securities, that the other person might have a reporting obligation under Section 13(d).

<sup>22</sup> H.R. Rep. No. 90-1711 (1968) at 3.

<sup>23</sup> *Adoption of Beneficial Ownership Disclosure Requirements*, Securities Exchange Act Rel. No. 34-13291 (Feb. 24, 1977).

*ownership disclosure where the acquisition is in the ordinary course of business and there is no purpose or effect of changing or influencing control does not warrant expenditures of the magnitude said to be necessary for the operation of a daily tracking system.*<sup>24</sup>

The Commission also has consistently made the distinction that Section 13(d) was designed to provide disclosure of “rapid accumulations of [ ] equity securities in the hands of persons who would then have the potential to change or influence control of the issuer,” while Section 13(g) is a disclosure provision of “more general application.”<sup>25</sup>

The Commission has further recognized the critical distinction between non-control investors that file on Schedule 13G, and the subset of those investors that are QIIs. In the 1998 release adopting amendments to the rules regarding reporting of beneficial ownership, the Commission stated that “Qualified Institutional Investors are permitted greater flexibility in filing amendments in recognition of the fact that Qualified Institutional Investors routinely buy and sell securities in the ordinary course of business and are less likely to abuse the process.”<sup>26</sup> The Commission observed that “Schedule 13G strikes an appropriate balance between furnishing disclosure to the market and the burdens placed on [institutions that purchase securities in the ordinary course of business].”<sup>27</sup>

#### IV. The SEC Should Revise the Proposed Filing Deadlines For Schedule 13D

For the initial filing on Schedule 13D, we recommend that the Commission provide five business days instead of five calendar days as proposed. We appreciate the Commission’s interest in more timely information by investors that acquire shares of an issuer with the purpose of effect of changing or influencing control of the issuer, but these investors nonetheless need sufficient time to prepare and file a Schedule 13D. Especially for larger investors, it would be difficult to obtain and verify the information necessary to complete the Schedule 13D filing in such a short timeframe. For example, for a Schedule 13D filing, firms are required to provide information regarding any transactions in the covered class of securities over the past 60 days or since the previous filing, whichever is less.<sup>28</sup> To ensure that information is reported accurately, an investor may wait until a trade is fully settled, processed in its systems, and reconciled with custodian records. It also may be necessary to obtain information from other corporate entities and

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<sup>24</sup> *Filing and Disclosure Requirements Relating to Beneficial Ownership*, Securities Exchange Act Rel. No. 34-14692 (Apr. 21, 1978) (emphasis added).

<sup>25</sup> *Filing and Disclosure Requirements Relating to Beneficial Ownership*, Securities Exchange Act Rel. No. 34-15348 (Nov. 22, 1978).

<sup>26</sup> *Amendments to Beneficial Ownership Reporting Requirements*, Securities Exchange Act Rel. No. 34-39538 (Feb. 17, 1998).

<sup>27</sup> *Id.*

<sup>28</sup> Item 5(c) of Schedule 13D.

coordinate with multiple personnel to complete the filing. This process often takes several days to complete. Under a five calendar day filing deadline, if an investor acquires more than five percent beneficial ownership of a class of covered securities on a Friday, the investor would be required to make its Section 13D filing on Wednesday of the following week. If the investor also executed a trade in that class of covered securities on Friday, that trade would not settle until Tuesday or even Wednesday, if there were a holiday between the trade date and settlement date. This would leave the investor with very little time to process the trade in its systems and verify the accuracy of the reported trade information.

For amendments to Schedule 13D, we appreciate the SEC's intent to provide more certainty regarding when amendments must be filed by requiring that they be filed within one business day, rather than "promptly," as Rule 13d-2 currently requires. One business day, however, may not be enough time to file an amendment in all circumstances. We therefore recommend that the Commission retain the current standard of "promptly" to provide reasonable flexibility for market participants to take the steps they need to prepare and file amendments without fear of being in violation of the rule's amendment filing deadline. If the Commission believes that it is critical to specify a maximum timeframe, we recommend "promptly, but within no more than three business days." One business day may not be enough time, for example, to: (i) prepare and obtain the review and approval of the customized responses that are included in an amendment; (ii) review prior information filed on Schedule 13D to ensure that there have been no other changes in the prior filings that must be updated; (iii) update positions, including those that may not have been subject to the transaction that triggered the amendment;<sup>29</sup> and (iv) obtain details regarding trading information which, as noted above, may be extensive and require significant resources to extract, review, and convert to a form that is reportable in Schedule 13D.

## V. The SEC Should Revise the Proposed Filing Deadlines for QIIs Filing on Schedule 13G

### A. Require QIIs to File Schedule 13G on a Quarterly Basis Within 45 Days

For the initial filing on Schedule 13G, we recommend that the Commission require a QII to file within 45 days after the end of a calendar quarter as of which the QII beneficially owns more than five percent of a covered class of equity securities. This timeframe would be consistent with the filing timeframe for institutional investment managers under Section 13(f) of the Exchange Act and better reflects the distinction the Commission historically has made between QIIs and other beneficial owners.<sup>30</sup>

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<sup>29</sup> This process may require coordination across various corporate entities and with multiple personnel to obtain the updated position information.

<sup>30</sup> We recognize that there is potential overlap between the filing requirements for institutional investment managers under Form 13F and for QIIs on Schedule 13G. As discussed below in Section IX, we urge the Commission to analyze its existing reporting obligations, including under Form 13F, and determine whether some of its existing or proposed reporting obligations may be duplicative or unnecessary.

Currently, QIIs are required to file an initial Schedule 13G within 45 days after the end of the calendar year as of which the QII's beneficial ownership exceeds five percent. Accelerating this filing obligation to monthly, within five business days, is unprecedented and inappropriate. Such an accelerated filing timeframe for QIIs is unnecessary to accomplish the Commission's regulatory objectives, and is inconsistent with the intent and administrative history of the rules under Sections 13(d) and 13(g), discussed above.

Many of our members that file as QIIs are concerned that monthly reporting on Schedule 13G would create a significant risk of prematurely disclosing sensitive portfolio holdings information to the market, which may result in front-running, copycatting, and other abusive trading practices that harm advisers and their clients, including funds and their investors. We disagree with the Commission's assertion that, because Schedule 13G filings "do not have a set frequency and do not require disclosure of a fund's entire portfolio" as is required by Form N-PORT and potentially by Form 13F, "[Schedule 13G] filings are unlikely to provide information with the level of precision and predictability needed for free riding or front running purposes."<sup>31</sup> Rather, these concerns are significant, and are magnified the shorter the filing deadline is from the end of the filing period. For example, particularly with respect to investments in small cap issuers, prematurely disclosing a position publicly risks increasing trading and portfolio management costs, to the detriment of investors.

Increasing the frequency of the Schedule 13G filing from annually to monthly would magnify the expense and burden of QIIs' filing obligations exponentially, without material benefit to investors. We disagree with the Commission's assumption that monthly reporting would impose minimal additional burdens on QIIs because these investors "should already have well-established compliance systems in place to monitor Schedule 13G ownership levels to determine whether filing obligations have been triggered."<sup>32</sup> To the contrary, this accelerated filing deadline would require significant changes to our members' operational systems and processes. Members would have to devote substantially more compliance resources to provide monthly reporting. Reporting within such a short time period after month-end would increase the risk that reported information would subsequently need to be revised through amendments to Schedule 13G, potentially confusing the market. Many of our members that are QIIs are large firms that file Schedule 13G with respect to dozens, if not hundreds, of issuers. Reducing the time available to make a Schedule 13G filing from 45 days after year-end to five business days after month-end would make it unnecessarily challenging for firms to: (i) obtain the information they need with respect to each class of covered security, including final trade information that typically is not available until several days after month-end;<sup>33</sup> (ii) potentially consolidate data across multiple

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<sup>31</sup> Proposing Release at 13886.

<sup>32</sup> *Id.* at 13856.

<sup>33</sup> As noted above, this challenge is exacerbated by the manual nature of the SEC's own systems on which filers rely to obtain needed information.

affiliated entities; (iii) reconcile the data and verify its accuracy; (iv) work with vendors;<sup>34</sup> and (v) submit the completed Schedule 13G in XML.

As discussed above, the Commission has recognized explicitly that it is not necessary or appropriate to require QIIs to report their beneficial ownership interest on as frequent a basis or as quickly as is appropriate for investors that have an intent to change or influence the control of an issuer.<sup>35</sup> In revising the reporting timeframes for beneficial owners, the Commission must respect the historical distinction between non-control investors that file a Schedule 13G as QIIs and control investors that file a Schedule 13D. We believe our recommendation of quarterly filing within 45 days after the end of a quarter as of which a QII beneficially owns more than five percent of a covered class of securities appropriately strikes this balance.

#### B. Require QIIs to File Amendments Within the Same Timeframe as Initial Filings

For similar reasons, the SEC should apply the same time frame to amendments by QIIs to a previously filed Schedule 13G (*i.e.*, require that amendments be filed within 45 days after the end of a quarter as of which a material change occurred). This approach would be consistent with the SEC's current approach to amendments by QIIs to a previously filed Schedule 13G, which must be filed within 45 days after the end of the year as of which any change occurred.

The Commission proposes to add a materiality qualifier to the Schedule 13G amendment requirement (*i.e.*, a 13G filer would only amend its previous filing on the basis of material changes). We do not object in principle to this aspect of the Proposal, which is intended to align with the more frequent filing schedule the Commission proposes.<sup>36</sup> Given the numerous potential definitions of materiality that have been articulated across Section 13(d) reporting,<sup>37</sup> we request that the Commission clarify what constitutes a material change for Schedule 13G filers to (i) provide clarity and ease of implementation in the light of potentially meaningfully increased reporting burdens and (ii) to ensure that QIIs are required to file amendments only with respect to those changes that are important to market participants and are not subject to unnecessary filing burdens. Specifically, we request that the SEC confirm that a change in beneficial ownership of less than five percent will not be deemed material for these purposes. This

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<sup>34</sup> As noted above, members may be more likely to use vendors to implement the Commission's proposed requirement of submitting Schedule 13D/G filings in an XML structured data language.

<sup>35</sup> *See supra* Section III.B.

<sup>36</sup> Proposing Release at 13858.

<sup>37</sup> We note in particular that Rule 13d-2(a) currently indicates that a change in position of one percent or more is material for Schedule 13D filers.

approach would be consistent with the Commission's differential treatment of QIIs, including in Rule 13d-2(c) and its predecessor rules.<sup>38</sup>

#### C. Amendments by QIIs that are 10% Beneficial Owners

Currently, under Rule 13d-2(c), QIIs have to file an amendment to Schedule 13G within 10 days after the end of the first month in which their direct or indirect beneficial ownership exceeds 10% of a covered class of equity securities and, thereafter, within 10 days after the end of the first month in which their beneficial ownership increases or decreases by five percent. The Commission proposes to amend Rule 13d-2(c) to accelerate these filing deadlines for QIIs, from 10 days after month-end, to five days after exceeding 10% beneficial ownership or after a 5% increase or decrease in beneficial ownership.

We recommend that the Commission not amend this requirement and retain the current approach under Rule 13d-2(c) of determining 10% beneficial ownership as of the end of a month, rather than requiring QIIs to file intra-month within five days of reaching an amendment threshold. Continuing to require filings by QIIs based on beneficial ownership as of the end of a month, within 10 days of month-end, is consistent with the Commission's historical recognition that beneficial ownership by QIIs does not raise the same concerns as beneficial ownership by investors that hold positions with the intent of changing or influencing control of the issuer, and that it is therefore appropriate to minimize the reporting burdens on QIIs. Requiring intra-month reporting by QIIs would impose significant and unnecessary additional reporting burdens on these investors. For example, members' compliance systems for preparing and filing Schedule 13G are not built to run intra-month. If the SEC were to require intra-month reporting by QIIs, members would need to significantly enhance, or add new functionality to, their compliance systems, at substantial cost.

#### VI. Proposed Derivatives Provision Would Have Unintended Consequences and Is Unnecessary

We appreciate that the SEC historically has taken a tailored approach to when an investor may be deemed to have a beneficial ownership interest in a derivative security.<sup>39</sup> We agree with the

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<sup>38</sup> Rule 13d-2(c) requires a QII to file an amendment to Schedule 13G within 10 days after the end of the first month as of which its direct or indirect beneficial ownership exceeds 10% of a covered class of equity securities and, thereafter, within 10 days after the end of the first month as of which its beneficial ownership increases or decreases by five percent.

<sup>39</sup> For these purposes, a "derivatives security" means as any option, warrant, convertible security, stock appreciation right, or similar right with an exercise or conversion privilege at a price related to an equity security, or similar securities with a value derived from the value of an equity security, but shall not include:

1. Rights of a pledgee of securities to sell the pledged securities;
2. Rights of all holders of a class of securities of an issuer to receive securities pro rata, or obligations to dispose of securities, as a result of a merger, exchange offer, or consolidation involving the issuer of the securities;

SEC's historical position that derivative securities that entitle the holder to nothing more than economic exposure to a security should rarely result in beneficial ownership for purposes of Sections 13(d) or 13(g).<sup>40</sup> We urge the Commission to maintain this position and avoid more broadly attributing beneficial ownership to derivatives holders. Attributing beneficial ownership to derivatives holders, other than under very limited circumstances, would be inconsistent with longstanding legal precedent and industry practice, and could have significant unintended consequences, reaching far beyond these rules.<sup>41</sup>

Currently, under Rule 13d-3(d), a person is deemed to be the beneficial owner of a security if the person has the right to acquire beneficial ownership of the security within 60 days through, among other methods, the exercise of any option, warrant or right, or the conversion of a security.<sup>42</sup> The SEC proposes to add a new rule, Rule 13d-3(e), providing that a holder of a cash-settled derivative security, other than a security-based swap, will be deemed the beneficial owner of the reference security if the derivative security is held with the purpose or effect of changing or influencing the control of the issuer of the reference security or in connection with or as a participant in any transaction having that purpose or effect.

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3. Rights or obligations to surrender a security, or have a security withheld, upon the receipt or exercise of a derivative security or the receipt or vesting of equity securities, in order to satisfy the exercise price or the tax withholding consequences of receipt, exercise or vesting;
  4. Interests in broad-based index options, broad-based index futures, and broad-based publicly traded market baskets of stocks approved for trading by the appropriate federal governmental authority;
  5. Interests or rights to participate in employee benefit plans of the issuer;
  6. Rights with an exercise or conversion privilege at a price that is not fixed; or
  7. Options granted to an underwriter in a registered public offering for the purpose of satisfying over-allotments in such offering.

*See* Rule 16a-1(c) under the Exchange Act.

<sup>40</sup> Proposing Release at 13860 and nn.87, 114, 198. The Dodd-Frank Act added new Section 13(o) to the Exchange Act, which provides that a person shall be deemed to acquire beneficial ownership of an equity security based on the purchase or sale of a security-based swap, only to the extent that the Commission adopts rules after making certain determinations with respect to the purchase or sale of security-based swaps. Following the 2011 effective date of Section 13(o), the SEC readopted, without change, the relevant portions of Rules 13d-3 and 16a-1 under the Exchange Act, and confirmed that it was not changing the definition of beneficial ownership with respect to those rules. See Beneficial Ownership Reporting Requirements and Security-Based Swaps, Securities Exchange Act Release No. 34-64628 (June 8, 2011), available at <https://www.sec.gov/rules/final/2011/34-64628.pdf>.

<sup>41</sup> The concept of beneficial ownership is used, for example, in many other federal and state laws and rules, as well as in contracts. Thus, expanding the definition of "beneficial ownership" for purposes of the rules under Sections 13(d) and 13(g) would have much broader implications.

<sup>42</sup> The rule provides that the option, warrant, right or convertible security also may result in an independent obligation to file with respect to the underlying security.

We support the SEC’s proposed exclusion of security-based swaps in recognition of its current proposal that would require reporting of large positions in these instruments.<sup>43</sup> We are concerned, however, that proposed new Rule 13d-3(e) would inadvertently apply to a broader range of situations than the SEC intended, as described below. We question whether such a specific provision is necessary and believe that the unintended negative consequences of the provision would outweigh the potential benefits of having an explicit anti-evasion provision.<sup>44</sup> In particular, the uncertainty regarding how this proposed provision would apply is likely to have a chilling effect on the ordinary course acquisition of cash-settled derivative securities.

## VII. Treatment as a “Group” for Purposes of Sections 13(d) and 13(g)

Rule 13d-5(b)(1) provides that, when two or more persons “agree to act together” to acquire, hold, vote, or dispose of a covered class of equity securities, the group is deemed to have acquired beneficial ownership, for purposes of Sections 13(d) and 13(g). Neither Section 13(d) nor Section 13(g) defines the term “group,” the existence of which is determined based on a facts and circumstances analysis.

The Proposal would make several changes to Rule 13d-5. First, the Proposal would amend Rule 13d-5(b)(1) by redesignating it as Rule 13d-5(b)(1)(i) and removing the word “agree” from the rule so that an agreement would not be a necessary prerequisite to finding the existence of a group for purposes of Sections 13(d) and 13(g). The Commission explains that “concerted actions” by two or more persons for the purpose of acquiring, holding, or disposing of a covered class of equity securities are sufficient to constitute formation of a group.<sup>45</sup>

Second, the Proposal would add new Rule 13d-5(b)(1)(ii), which would provide that, if a person shares non-public information about the person’s upcoming Schedule 13D filing with the purpose of causing others to make purchases of the same class of an issuer’s covered securities, and another person subsequently purchases the issuer’s securities based on this information, these persons will be deemed to have formed a group within the meaning of Section 13(d)(3).

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<sup>43</sup> See *Prohibition Against Fraud, Manipulation, or Deception in Connection with Security-Based Swaps; Prohibition Against Undue Influence Over Chief Compliance Officers; Position Reporting of Large Security-Based Swap Positions*, Exchange Act Release No. 34-93784 (Dec. 15, 2021), 87 Fed. Reg. 6652 (Feb. 4, 2022) (“SB Swap Reporting Proposal”). ICI opposes the SB Swap Reporting Proposal in its current form, as we believe it would create unintended consequences for funds and their shareholders, as well as have negative implications for market liquidity. See Letter to Ms. Vanessa Countryman, Secretary, US Securities and Exchange Commission, from Sarah A. Bessin, Associate General Counsel, and Nhan Nguyen, Assistant General Counsel, dated March 21, 2022, available at <https://www.sec.gov/comments/s7-32-10/s73210-20120723-272883.pdf>.

<sup>44</sup> We note that Rule 13d-3 already includes an anti-evasion provision, Rule 13d-3(b), and that Rule 10b-5 is also available to, and used by, the Commission to address fraud in the context of Schedule 13D and 13G filings. We also note that proposed Rule 13d-3(e) includes a complex formula for calculating the number of equity securities that a holder of a cash-settled derivative will be deemed to beneficially own, which would require daily calculations, increasing the compliance burdens of the rule.

<sup>45</sup> Proposing Release at 13868-69.



The SEC explains that this provision is intended to address a situation in which a large shareholder tips another person regarding the large holder's impending Schedule 13D filing obligation, and is intended to prevent circumvention of Section 13(d) through concerted activity even in the absence of an express or implied agreement.

A. The SEC Must Revise Its Proposed Approach to Determining When a Group Exists

While we appreciate the SEC's intent in these proposed provisions to better define the scope of a "group" for purposes of Sections 13(d) and 13(g), we believe these provisions would likely have a broader effect than the SEC anticipates and would have highly detrimental unintended consequences. We disagree with the Commission's assertion that an agreement is not necessary to form a group for purposes of Sections 13(d) and 13(g) and believe that the Commission's proposal to remove the word "agree" from the regulatory language in Rule 13d-5 may exceed its statutory authority. While we concede that an agreement need not be *explicit* to create a group for purposes of Sections 13(d) and 13(g), and that the existence of an agreement may be determined by the facts and circumstances, it is clear, based on the legislative and administrative history of the beneficial ownership provisions, as well as court cases, that there must be a meeting of the minds for a group to exist. The SEC's suggestion that any "relationship," "arrangement," or "concerted actions" between two or more persons may be sufficient to find the existence of a group<sup>46</sup> would completely undermine the SEC's proposed exemptions in proposed Rule 13d-6(c) and (d), create significant uncertainty, and have a deeply chilling effect on legitimate actions by industry participants fearful of inadvertently forming a group.<sup>47</sup> As the Commission acknowledges, the purpose of Section 13(g)(3) is to prevent two or more persons that are acting as a group to avoid disclosure requirements.<sup>48</sup> It is difficult to see how two persons *who have not agreed to act as a group* could be deemed to be collectively seeking to evade disclosure requirements.<sup>49</sup>

The SEC suggests that an agreement is not required by Section 13(d)(3) in order to form a group; however, this runs against an exhaustive case law history and the legislative history. For instance, in *Rubenstein v. International Value Advisers, LLC*, the court stated that, "Rubenstein's theory is incompatible with the text of the '34 Act and its implementing regulations. *Both*

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<sup>46</sup> *Id.* at 13868.

<sup>47</sup> For example, two persons that each, individually, beneficially own less than five percent but, together, beneficially own more than five percent. Under the Proposal, even in the absence of an agreement or understanding, and without knowledge of each other's level of ownership or intent, these persons together could inadvertently form a "group" for purposes of Section 13(d) and 13(g) and have a joint filing obligation without realizing it.

<sup>48</sup> Proposing Release at 13865.

<sup>49</sup> Further, the plain language of the statute contemplates treating the "group" as a single person. If no agreement is required, it is difficult to see how the purported group members could coordinate to address their reporting obligations under Section 13.

provide that a group is formed when multiple individuals *agree to act together* ‘for the purpose of acquiring, holding, or disposing of securities of an issuer.’” (emphasis added).<sup>50</sup>

The legislative history indicates that the purpose of the “group” provisions is to “...prevent a group of persons who seek to pool their voting or other interests in the securities of an issuer from evading the provisions of the statute because no one individual owns more than [the applicable beneficial ownership position].”<sup>51</sup> This type of concerted action by necessity requires some type of agreement. Indeed, while the Commission cites to certain legislative history indicating a concern with “informal associations” evading disclosure<sup>52</sup> as reasons for broadening the definition of “group,” this ignores extensive case law that has already captured such arrangements.<sup>53</sup> It is well established and understood in the current Section 13(d) regime that agreements need not be formal or written and can be inferred—it is unnecessary to introduce additional ambiguity by seeking to address this issue under Rule 13d-5.

Finally, the existing definition of group requiring some form of agreement is critical to providing certainty to investors. As articulated above, there are decades of jurisprudence, learning, and disclosure interpretations around the complex issue of when a group is formed. To simultaneously invalidate this robust body of guidance, while implementing an ambiguous

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<sup>50</sup> 363 F. Supp. 3d 379 (2019). The finding of a requirement for an agreement in both Section 13(d)(3) and Rule 13d-5 has been articulated by numerous other courts. *See e.g.*, *Morales v. Freund*, 163 F.3d 763, 766 n. 4 (2d Cir. 1999) (“Section 13(d) of the Act states, in pertinent part, ‘When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a ‘person’ for the purposes of this subsection. 15 U.S.C. § 78m(d)(3). The language of 17 CFR § 240.13d-5(b)(1), promulgated under 13(d), is very much the same.”); *Roth v. Jennings*, 489 F.3d 499, 507-08 (2d Cir. 2007) (“Accordingly, under §13(d)(3) and [Rule 13d-5], if two or more entities agree to act together for any of the listed purposes, a ‘group’ is ‘thereby’ formed.”); *Wellman v. Dickinson*, 682 F.2d 355, 363 (2d Cir. 1982) (“[T]he touchstone of a group within the meaning of Section 13(d) is that the members combined in furtherance of a common objective.”). Courts have also indicated that they view Section 13(d)(3) and Rule 13d-5 as analogous in nearly all respects. *See CSX Corp. v. Children’s Inv. Fund Management (UK) LLP*, 654 F.3d 276, 283 (2d Cir. 2011) (“SEC Rule 13d-5(b)(1) provides that the section 13(d) disclosure requirements apply to the aggregate holdings of any ‘group’ formed ‘for the purpose of acquiring, holding, voting or disposing’ of equity securities of an issuer. 17 C.F.R. § 240.13d-5(b)(1). *This Rule tracks Section 13(d)(3) in all respects except that the Rule adds voting as a group for the purpose of triggering the disclosure provisions.*”) (emphasis added).

<sup>51</sup> H.R. 14 Rep. No. 90-1711 (1968); *see also* H.R. Rep. 91-1655 (1970) (the 10% ownership position standard was amended in 1970 to a 5% ownership position standard under Section 13(d)(1) and (3)).

<sup>52</sup> Proposing Release at 13868, n.129.

<sup>53</sup> *See e.g.*, *Morales v. Quintel Entertainment, Inc.*, 249 F.3d 115, 124-26 (2d. Cir. 2001) (stating that sworn statements by defendants, alleged group members, that the members “never ‘agreed’ among themselves to acquire [the] stock” are insufficient to support the granting of summary judgment in favor of the defendants where there is circumstantial evidence from which “a reasonable trier of fact could discredit the . . . sworn statements and infer instead that [the defendants entered into an agreement with one another] with an agreed purpose to acquire [the] stock.”).

standard, will lead to confusion, chill legitimate activity, increase unnecessary litigation, and result in significant and costly operational challenges.

The SEC explains that proposed new Rule 13d-5(b)(1)(ii) is intended to prevent circumvention of Section 13(d) through concerted activity even in the absence of an express or implied agreement.<sup>54</sup> This proposed rule raises the same question as the proposed amendment above regarding whether intent is necessary to form a group for purposes of Sections 13(d) and 13(g). For similar reasons, we are concerned that this rule would have unintended consequences and create uncertainty, and recommend that the Commission eliminate it. The SEC asks whether the proposed rule would unduly chill communications between shareholders and market participants, such as investment advisers.<sup>55</sup> We strongly believe it would, and offer the example of an investment adviser that is a QII and files Schedule 13G communicating with a sub-adviser or other investors that are Schedule 13D filers. If the adviser is deemed to have formed a 13D group with the sub-adviser or the other investors, solely based on the intent and filing status of those parties, the inadvertent 13D status of that adviser would significantly limit its ability, as part of its fiduciary duty managing other funds and accounts, to purchase for those other clients shares of the covered class of security of which the group is deemed to beneficially own more than five percent. This result seems anomalous and unfair, especially in a situation where the adviser does not know of the other parties' control intent, yet the intent would be attributed to the adviser.

#### B. The SEC Should Revise Its Proposed Exemptions From Treatment as a "Group"

The Proposal would add two new exemptions to Rule 13d-6 so that certain actions taken by two or more persons will not cause them to be deemed to be acting as a group, for purposes of Sections 13(d) and 13(g), where those actions do not have the purpose or effect of changing or influencing the control of an issuer. We appreciate the SEC's intent in proposing these provisions and support the ability of market participants to engage in ordinary course activities without being deemed to form a group for 13D/G purposes. As drafted, however, these proposed exemptions are too narrow and, particularly in conjunction with the SEC's proposed amendments to the rules that define when a group is deemed to exist, discussed above, would likely fail to exempt the very activities the Commission intends to protect, as well as create significant additional uncertainty. We recommend, below, changes to broaden and clarify the scope of these proposed exemptions.

##### 1. Proposed Exemption for Engagement Activities

Proposed Rule 13d-6(c) provides that two or more persons will not be deemed to beneficially own an issuer's equity securities as a group, for purposes of Sections 13(d)(3) or 13(g)(3), solely because of their concerted actions with respect to the issuer's equity securities, including

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<sup>54</sup> Proposing Release at 13869.

<sup>55</sup> *Id.* at 13871.

engagement with one another or the issuer, or acquiring, holding, voting, or disposing of the issuer's equity securities. The proposed exemption would be available only: (i) to persons who are not directly or indirectly obligated to take such actions; and (ii) where the communications are not undertaken with the purpose or effect of changing or influencing control of the issuer, and are not made in connection with or as a participant in any transaction having such purpose or effect.

The Commission intends that this exemption would permit institutional investors or shareholder proponents to communicate with one another regarding an issuer's performance or corporate policy matters involving issuers without being deemed to form a group, for purposes of Sections 13(d) or 13(g). It also would allow them to take similar action with respect to the issuer or its securities, including engaging directly with the issuer's management or coordinating their voting of the issuer's shares with respect to management or shareholder proposals.<sup>56</sup>

We strongly support the intent of this proposed exemption, which is largely consistent with existing positions of the SEC staff.<sup>57</sup> We believe, however, that as drafted, and in conjunction with the SEC's proposed approach to the concept of "group" in Rule 13d-5, the proposed exemption would cover a narrower range of conduct than the SEC intends and would create uncertainty regarding the activities that may result in group status. For example, if an activist investor has initiated a proxy contest, an investment adviser that files on Schedule 13G may find it necessary to communicate with the activist investor to understand its rationale for the proxy contest so that the adviser may cast an informed vote that is in the best interests of its fund or other client. If the activist investor's communications to the adviser are made with the intent to change or influence control of the issuer, that intent should not be attributed to the investment adviser and destroy its ability to rely on the exemption. As a result of these concerns, members would be hesitant to rely on the exemption, unless it is revised. Advisers must have the opportunity to communicate with other investors in an issuer without fear of being deemed to have formed a group—if advisers are only able to hear management's perspective on an issue, this could lead to less informed voting that would not be in the best interest of advisers and their clients, including the funds they manage.

To address these concerns, the SEC should implement our recommendations, above, regarding Rule 13d-5. Clarifying the scope of "group" in Rule 13d-5 is critical to whether this proposed exemption would have utility, as the exemption focuses on whether engagement activities by two or more persons create a group "solely because of their concerted actions . . ." In addition, the Commission should eliminate the proposed condition that specifies that "[s]uch persons, when taking such concerted actions, are not directly or indirectly obligated to take such actions . . ."

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<sup>56</sup> *Id.* at 13872.

<sup>57</sup> See Division of Corporation Finance, Compliance and Disclosure Interpretations, Exchange Act Sections 13(d) and 13(g) and Regulation 13D-G Beneficial Ownership Reporting, Question 103.11 (last updated July 14, 2016) (available at <https://www.sec.gov/divisions/corpfin/guidance/reg13d-interp.htm>).

While we understand that the intent of this provision is to make the proposed exemption unavailable where persons are acting, for example, pursuant to the terms of a cooperation or joint voting agreement,<sup>58</sup> it is unclear what it means to be “indirectly obligated” to take actions, and this vague language would further engender uncertainty.

The SEC also asks whether the proposed exemption is broad enough to exempt activity by shareholders who coordinate to make non-binding proposals under Rule 14a-8 under the Exchange Act or otherwise, or whether an express exemption is needed for shareholders who act together in introducing such proposals.<sup>59</sup> We believe that an express exemption should be included to remove any uncertainty regarding this matter given the inherent facts and circumstances nature of assessing whether a given action has been taken to change or influence control of an issuer.

## 2. Proposed Exemption for Ordinary Course Derivatives Transactions

Proposed Rule 13d-6(d) provides that two or more persons will not be deemed to have formed a group for purposes of Sections 13(d)(3) or 13(g)(3) solely because they enter into an agreement governing the terms of an equity-based derivative security, provided that the agreement: (i) is a *bona fide* purchase and sale agreement entered into in the ordinary course of business; and (ii) is not entered into 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 SEC explains that this exemption is necessary to avoid a financial institution and its counterparty from being deemed to be acting as a group as a result of a financial institution’s foreseeable “covering” of its position for the duration of the derivative by acquiring and holding the reference security.<sup>60</sup>

We appreciate the SEC’s intent to exempt ordinary course derivatives transactions from creating a group for Section 13(d)/(g) purposes, but question whether this proposed provision is necessary or would instead create further uncertainty. Market participants have been entering into ordinary course derivatives transactions for years without treating these transactions as creating a group for purposes of Sections 13(d) and 13(g). In the absence of additional factors that would suggest the existence of a group, it is unclear why an explicit exemption is necessary.

The proposed exemption also would create uncertainty regarding the circumstances under which market participants could rely on it. For example, it is unclear what would constitute a “bona fide purchase and sale” of a derivative security for purposes of the rule. We also believe that this provision could have unintended implications for proposed Rule 10B-1, which would require

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<sup>58</sup> Proposing Release at 13873.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 13872.

reporting of large positions in security-based swaps.<sup>61</sup> Proposed Rule 10B-1 applies to “[a]ny person . . . or *group* of persons” that, after acquiring a security-based swap, is the owner or seller of a security-based swap position that exceeds the rule’s reporting thresholds. It is unclear whether the Commission intends that the term “group” in proposed Rule 10B-1 would have the same meaning as it does in the context Sections 13(d) and 13(g).<sup>62</sup> If that is the Commission’s intent, a market participant’s inadvertent failure to satisfy the conditions of the exemption would not only have implications for its reporting obligations under Sections 13(d) and 13(g), but could result in an unexpected reporting obligation under Rule 10B-1.<sup>63</sup> It seems unlikely the Commission intended such a result.

## VIII. ICI Supports Changes to the Filing Process

### A. ICI Supports Proposed Amendments Regarding Filing Process

In recognition of the additional administrative burdens placed on investors by shortening the reporting deadlines for Schedules 13D and 13G, the SEC proposes to amend Rule 13(a)(4) of Regulation S-T to extend the filing cut-off times in the SEC’s EDGAR system for filing Schedules 13D and 13G from 5:30 pm to 10:00 pm ET each business day. We support extension of the filing cut-off times, as additional time to file is critical under the SEC’s shortened filing deadlines, especially if the Commission does not accept our recommendations to revise its proposed deadlines.<sup>64</sup> The SEC asks whether it should, in light of its proposal to extend the filing cut-off times in the EDGAR system, also extend EDGAR filer support hours beyond 6 pm ET.<sup>65</sup> We strongly support this suggestion, as filers would need the ability to access technical support during the extended filing hours.

### B. ICI Supports Proposed Requirement to File Schedules 13D and 13G in XML

Currently, Schedules 13D and 13G are required to be filed electronically through the SEC’s EDGAR system in HTML or ASCII. The SEC proposes to require that Schedules 13D and 13G instead be filed using an XML-based structured data language specific to Schedules 13D and 13G. For both Schedule 13D and Schedule 13G, all disclosures, textual narratives, and

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<sup>61</sup> See SB Swap Reporting Proposal.

<sup>62</sup> The SB Swap Reporting Proposal does not address this issue.

<sup>63</sup> Conversely, a lack of a corresponding exemption under proposed Rule 10B-1 could cause an agreement governing the terms of a security-based swap to be deemed to create a group, for purposes of Rule 10B-1, triggering reporting obligations under that rule.

<sup>64</sup> We do not object to the SEC’s proposal to eliminate the ability for Schedule 13D and 13G filers to request a temporary hardship exemption, which applies to unanticipated technical difficulties preventing the timely preparation and submission of an electronic filing. We agree with the Commission that the continued availability of a filing date adjustment, under the same circumstances as a temporary hardship exemption currently is available, would generally accomplish the same purpose. See Proposing Release at 13859.

<sup>65</sup> *Id.* at 13860.

identification checkboxes would be required to be filed in XML, with the exception of the exhibits to the Schedules.

ICI supports filing Schedules 13D and 13G in an XML-based structured data language. We agree that tagging the data reported on Schedules 13D and 13G will make it easier for investors and other market participants to access, compile, and analyze this information.<sup>66</sup> We appreciate that, in connection with this proposed requirement, the Commission would develop electronic “style sheets” that, when applied to the reported XML data, would represent that data in “human readable” format.<sup>67</sup>

As discussed below in Section IX, however, it is critical that the SEC provide a sufficiently long compliance period for funds and advisers to incorporate XML reporting. Reporting persons and their vendors will need adequate time to incorporate the XML tags into their systems and conduct testing before the SEC requires filing of amended Schedules 13D and 13G in XML.

#### IX. The SEC Must Provide an Adequate Implementation Period

We urge the SEC, in any final rules and amendments, to include compliance dates that will provide funds, advisers, and other market participants with adequate time to implement the changes that the SEC proposes. The compliance dates must reflect the enhancements that funds and advisers would need to make to their systems to file on an accelerated timeframe, potentially increase compliance staff to handle additional filing obligations, as well as the need to coordinate with vendors and, potentially, sub-advisers, to implement any required changes. Further, reporting persons also will need additional time to incorporate the new XML taxonomy into their systems. We recommend that the SEC release the taxonomy at least six months in advance of the date by which funds and advisers must file any revised Schedules 13D or 13G so that reporting persons can incorporate the taxonomy into their filing systems. We also recommend that the SEC provide for a test period in which reporting persons can make test filings using the taxonomy in advance of the date by which funds and advisers must first file the revised schedules.

More broadly, the Commission’s compliance period must take into account the implications for market participants of the many other rulemakings it has recently issued. In addition to the Proposal, *the Commission has issued over 20 other significant rule proposals within the last six months alone*, many of which would impose new or enhanced reporting obligations on market participants. The vast majority of these proposals, if adopted, would affect funds and advisers.<sup>68</sup>

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<sup>66</sup> See *id.* at 13849.

<sup>67</sup> *Id.* at n.159.

<sup>68</sup> See, e.g., *Enhanced Reporting of Proxy Votes by Registered Management Investment Companies; Reporting of Executive Compensation Votes by Institutional Investment Managers*, Securities Exchange Act Rel. No. 34-93169 (Sept. 29, 2021), 86 Fed. Reg. 57478 (Oct. 15, 2021); *Electronic Submission of Applications for Orders under the Advisers Act and the Investment Company Act, Confidential Treatment Requests for Filings on Form 13F, and Form ADV-NR; Amendments to Form 13F*, Securities Exchange Act Rel. No. 34-93518 (Nov. 4, 2021), 86 Fed. Reg. 64839 (Nov. 19, 2021); *Proxy Voting Advice*, Securities Exchange Act Rel. No. 34-93595 (Nov. 17, 2021), 86 Fed. Reg. 67383 (Nov. 26, 2021); *Reporting of Securities Loans*, Securities Exchange Act Release No. 34-93613 (Nov.

Ms. Vanessa A. Countryman

April 7, 2022

Page 24 of 25

Implementation of these rules would require a tremendous amount of work and devotion of resources by funds, advisers, and other market participants, including the need to develop new systems, conduct in-depth planning and testing of changes to existing systems, operations, and documentation, as well as adopt and revise compliance policies and procedures. It is essential that the Commission provide a sufficiently long time period for funds, advisers, and other market participants to address the numerous considerations and implementation issues that these proposals raise both individually and on a collective basis.

The Commission must consider holistically the cumulative implementation implications of these proposals. Doing so is especially important as the Commission seeks to impose new reporting obligations and change reporting form amendments, many of which closely relate to one another. If adopted as proposed, these rules would require different reporting timeframes, which amplifies the already significant operational challenges. Funds, advisers, and other industry participants will need time to implement each of these requirements and cannot properly implement all of them at once, in light of operational and resource limitations.

Accordingly, we urge the Commission to propose a holistic, staged multi-year implementation schedule with respect to all of the reporting rules it adopts, taking into account the combined implementation and testing efforts that will be required across all of these rulemakings, how the rulemakings inter-relate, and the related impacts and burdens on funds, advisers, and other market participants. The SEC should provide public notice and an opportunity for comment on

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18, 2021), 86 Fed. Reg. 69802 (Dec. 8, 2021); *Reopening of Comment Period for Reporting of Securities Loans*, Securities Exchange Act Release No. 34-94315 (March 2, 2022), 87 Fed. Reg. 11659 (Mar. 2, 2022); *Share Repurchase Disclosure Modernization*, Securities Exchange Act Rel. No. 34-93783 (Dec. 15, 2021), 87 Fed. Reg. 8443 (Feb. 15, 2022) (applicable to closed-end investment companies); *Money Market Fund Reforms*, Investment Company Act Rel. No. IC-34441 (Dec. 15, 2021), 87 Fed. Reg. 7248 (Feb. 8, 2022); *Prohibition Against Fraud, Manipulation, or Deception in Connection with Security-Based Swaps*; *Prohibition against Undue Influence over Chief Compliance Officers*; *Position Reporting of Large Security-Based Swap Positions*, Securities Exchange Act Rel. No. 34-69491 (Dec. 15, 2021), 87 Fed. Reg. 6652 (Feb. 4, 2022); *Rule 10b5-1 and Insider Trading*, Securities Act Rel. No. 33-11013 (Jan. 13, 2022); 87 Fed. Reg. 8686 (Feb. 15, 2022) (applicable to closed-end investment companies); *Amendments to Exchange Act Rule 3b-16 Regarding the Definition of “Exchange”*; *Regulation ATS for ATSs That Trade U.S. Government Securities, NMS Stocks, and Other Securities*; *Regulation SCI for ATSs That Trade U.S. Treasury Securities and Agency Securities*, Securities Exchange Act Rel. No. 34-94062 (Jan. 26, 2022); 87 Fed. Reg. 15496 (March 18, 2022); *Cybersecurity Risk Management for Investment Advisers, Registered Investment Companies, and Business Development Companies*, Securities Act Release No. 33-11028 (Feb. 9, 2022), 87 Fed. Reg. 12524 (Mar. 9, 2022); *Shortening the Securities Transaction Settlement Cycle*, Securities Exchange Act Rel. No. 34-94196 (Feb. 9, 2022), 87 Fed. Reg. 10436 (Feb. 24, 2022); *Modernization of Beneficial Ownership Reporting*, Securities Act Release No. 33-11030 (Feb. 10, 2022), 87 Fed. Reg. 13625 (March 10, 2022); *Short Position and Short Activity Reporting by Institutional Investment Managers*; *Notice of Proposed Amendments to the National Market System Plan Governing the Consolidated Audit Trail for Purposes of Short Sale-related Data Collection*, Securities Exchange Act Rel. Nos. 34-94313 and 34-94314 (Feb. 25, 2022), 87 Fed. Reg. 14950 (Mar. 16, 2022); *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, Securities Act Release No. 33-11042 (Mar. 21, 2022); *Further Definition of “As a Part of a Regular Business” in the Definition of Dealer and Government Securities Dealer*, Securities Exchange Act Rel. No. 34-94524 (Mar. 28, 2022); *Special Purpose Acquisition Companies, Shell Companies, and Projections*, Securities Act Rel. No. 33-11048 (Mar. 30, 2022); *Rules Relating to Security-Based Swap Execution and Registration and Regulation of Security-Based Swap Execution Facilities*, Exchange Act Rel. No. 34-94615 (Apr. 6, 2022).



Ms. Vanessa A. Countryman  
April 7, 2022  
Page 25 of 25

its proposed staged implementation schedule. In the meantime, the SEC should take meaningful steps to mitigate the cumulative effects of its rulemakings by more closely analyzing its existing reporting obligations and determining whether some of its proposed reporting obligations may be duplicative or unnecessary.

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Thank you for the opportunity to provide comments on the Proposal. If you have any questions on our comment letter, please feel free to contact Susan Olson at (202) 326-5813 or Sarah Bessin at (202) 326-5835.

Sincerely,

/s/ Susan Olson

/s/ Sarah A. Bessin

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General Counsel

Sarah A. Bessin  
Associate General Counsel

cc: The Honorable Gary Gensler  
The Honorable Hester M. Peirce  
The Honorable Allison Herren Lee  
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