FOLEY

FOLEY & LARDNER LLP

April 11, 2022

VIA ELECTRONIC MAIL (rule-comments@sec.gov)

U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Attn: Vanessa A. Countryman, Secretary

Re: Modernization of Beneficial Ownership Reporting, Release Nos. 33-11030, 34-94211; File No. S-7-06-22 (the "Release")

Dear Ms. Countryman:

On behalf of our client Hoak & Co ("Hoak"), a family office based in Dallas, Texas, we have reviewed the Release and the proposed amendments to Section 13(d) and 13(g) reporting requirements. If implemented, the amendments will no doubt provide more timely and complete information to the marketplace, particularly around position reporting. We appreciate the opportunity to provide comments on behalf of Hoak.

13D amendment filing deadline

A key concern of our client with the Release is that the proposed requirement to file Schedule 13D amendments within one business day is not practical and may have negative, unintended consequences on accurate reporting. This is the case in its view even though the cutoff for same day filing would be extended to 10pm eastern (a change which is applauded). Accordingly, retaining the "prompt" standard, or, at a minimum, having a deadline that is no less than two business days, would address this concern and better ensure concise, clear and accurate disclosure.

Schedule 13D amendments for our filers like Hoak are often quite sophisticated (frequently involving much more than simply changes in position size) and, even under the current "prompt" amendment regime, many such amendments produce a proverbial "scramble" given the need to, among other things, obtain and confirm all required information, draft qualitative disclosure, seek and obtain necessary approvals, ensure accurate analysis and review, and involve third party service providers for edgarization and filing. In addition, the determination as to whether a non-routine amendment is required, or how qualitative information in the amendment should be conveyed, generally requires substantive legal analysis and judgment for which some period of reflection and research is necessary. Lastly, situations regularly arise where there may be an unavoidable delay in the material information being reported to the disclosure and reporting decision makers at the client, in order for a determination to be made on the need for filing an amendment.

13D filers such as Hoak believe the *flexibility* to make 13D amendments within 24 hours will continue to be important (from both the perspective of the investor and the marketplace), but they also recognize from experience that a rush to make disclosure under such a short timeframe in all circumstances can result in disclosure that is not as clear and concise as it could be, which would be more beneficial for transparency in the marketplace. Overall, the proposed accelerated turnaround risks promoting mistakes and, given securities law liability considerations, inadvertent exposure for filers. In addition, at times filers and issuers have adversarial postures on 13D filings and inadvertent mistakes could be "weaponized" by issuers, which would be an unintended and, in our view, unfortunate consequence.

To promote accuracy and quality above all, as noted, retaining the existing "prompt" standard - which in our experience is often understood to be two business days but builds in necessary flexibility to account for disparate circumstances for each filing situation – makes sense. If the SEC felt it was important to codify a hard deadline, two business days (a 100% increase in time relative to the proposal) would better serve to balance providing timely and complete information without frustrating the purpose of the proposed changes.

Amendments for involuntary changes

One related change not addressed in the Release, which would help promote overall compliance, are amendment obligations for involuntary changes in circumstances caused by the issuer. On behalf of our client Hoak, we recommend providing that amendments for such involuntary changes not trigger amendments, as they do not relate to the 13D filer's action or intent and are fully disclosed to the marketplace by the issuer.

Under current guidance from the SEC (July 14, 2016 C&DI, Question 103.08), a Schedule 13D filer is responsible for filing an amendment if a change in outstanding shares occurs (e.g., buyback, tender etc.) that results in a material change in the filer's position size (i.e., 1%). As a practical matter, filers (who have not yet engaged in one or more transactions that cause them to focus on their ownership percentage) may fail to see or convey right away that such a change in outstanding shares occurred. In addition, while counsel may be aware of the filing obligation, it is unusual for counsel to be closely monitoring issuer press releases or filings to be able to immediately obtain this information independently. As a result, the need for the triggered amendment can go unnoticed in the very short time frame which the *current rule* technically requires.

In order to put increased "teeth" in filers' Section 13D/G responsibilities (under the theory that noncompliance erodes the regime overall), the modernization effort by the SEC presents a good opportunity to eliminate the requirement to file amendments if a 1% or more change in ownership between key filing thresholds (e.g., between 5% and 10% or between 10% and 20%) occurs solely by virtue of an involuntary change in outstanding shares as a result of actions by the issuer. Consistent with marketplace experience, it would be sensible and balanced if *any subsequent* purchase or sale (not simply transactions causing a 1% change in ownership based on the pro forma outstanding shares number) would then trigger a filing obligation after the involuntary change occurred if the resulting position (pro forma for the change in outstanding shares) is a material change.

We emphasize that the marketplace broadly – and certainly the issuer - is aware of disclosed changes in an issuer's outstanding shares, so an amendment requirement (in absence of a new transaction by the filing party/parties or other qualitative material change) really conveys no new information and accordingly simply puts the filing party at risk of a "foot fault". Finally, the challenges around involuntary changes dovetail with the challenges posed by the proposed one business day amendment requirement, since – while the marketplace broadly will immediately understand that a change in the issuer's outstanding shares has occurred when that disclosure is made – a single individual investor client may well not be immediately aware of the issuer's actions. A 13D filing is designed to provide transparency to the public on why the 13D filer has taken a significant stake, and the effect the 13D filer's action might have on the control of the issuer, not to report on actions taken by the issuer.

Proposed Rule 13d-5(b)(1)(ii)

On behalf of our client Hoak, we applaud – as a means to "level the playing field" - the basic intentions of the proposed new rule regarding group formation in a circumstance where one party discloses an impending filing and another party acquires shares of the same issuer. Coupled with the SEC's expressed position that the rule in no way prohibits the disclosure of filing obligations and/or purchases in reliance thereon, the language of the proposed rule is vague however and may result in confusion. Given vagueness in the proposed rule, as discussed below, the SEC should describe "safe harbor" circumstances where investors sharing new or increased positions would not be in violation of the new rule.

The proposed rule states that the group filing is triggered only where "the non public information that [a] filing will be made" is communicated "*with the purpose* of causing such other person or persons to acquire equity securities of the same class…" As a threshold matter, in our experience, between sophisticated investors, it is conventional for disclosure to be made that one has initiated a large new position. It is also quite conceivable for this communication to be made by an investor that routinely makes Schedule 13D filings. In this circumstance, assuming the existence of a material new position was disclosed, the "tipee" in this circumstance might easily infer or conclude a Schedule 13D filing will be made, but that does not mean that the tipper actually disclosed that a "[Schedule 13D] filing will be made" (indeed the "tipper" investor could, depending on the circumstances, in fact choose to file a Schedule 13G instead of a Schedule 13D)?

In addition, with regard to the critical "purpose" requirement, we observe that the circumstances where disclosure of material new positions (or the filing of a Schedule 13D for that matter) is made are unlikely to be for the actual "purpose" of causing others to acquire securities. The "purpose" of the disclosure, as suggested above, is typically simply ordinary course information sharing and relationship building between sophisticated investors. It may well advantage the tipper prospectively if friendly hands acquired shares, but it is not essential. In fact, to the contrary, purchases by others are often detrimental to the tipper, as they can drive up the price of the shares at a time when the tipper is trying to buy more shares.

Absent some "smoking gun" ("let's tell Investor B we are making a 13D filing, so they will buy") email, how will the SEC support this quite subjective "purpose" standard? Will enforcement require other communications - beyond simply disclosing a large position or an impending filing - that demonstrate a clear purpose to cause the tipee to purchase shares? Overall, the uncertainty inherent in the proposed rule may frustrate communications between large investors in circumstances where no duties are owed to issuers and the investor parties are truly not coordinating and have no plans to do so in the future. Assuming the SEC desired to move forward with the proposed well intentioned rule, we believe it would be constructive for the SEC to describe "safe harbor" circumstances where investors sharing new positions are not in violation of the new rule, recognizing the facilitation of information sharing between investors may in fact be helpful and important to the marketplace.

Lastly, we add that the proposed rule and the vagueness inherent therein does not simply affect outside investors in issuers. In fact, corporate insiders may be the most at risk. Many times corporate insiders (e.g., all or a portion of a board of directors) may socialize amongst themselves and with management the desire to coordinate purchases of an issuer's shares in an open trading window where they believe the shares are undervalued and the issuer has strong prospects and they want to send a strong signal to the marketplace as to this belief. If one of these insiders is a Schedule 13D filer (not uncommon), such coordination and the disclosure of actual or expected individual purchases by the filer to other insiders in this circumstance may well be interpreted as having formed a group regarding purchases of shares. But it seems a stretch to see this situation as consistent with the spirit of the rule, i.e., that the latter insiders are somehow taking advantage of knowledge of an impending filing to buy shares.

Thank you for your consideration.

Sincerely,

Evan Stone

Peter Fetzer

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