

April 11, 2022

Via email to rule-comments@sec.gov

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

Via email to rule-comments@sec.gov

Re: Modernization of Beneficial Ownership Reporting, Release Nos. 33-11030; 34-94211; File No. S7-06-22 (the “Proposal”)

Dear Ms. Countryman:

Perkins Coie LLP (“Perkins Coie” or “we”) appreciates the opportunity on behalf of one of our institutional investor clients to offer views on the above-referenced proposal to modernize beneficial ownership reporting on Schedules 13D and 13G.¹ We are a leading national law firm that services clients with existing or potential beneficial ownership reporting obligations on Schedules 13D and 13G. We submit this letter on behalf of a client but are aware that the positions set forth in this letter represent views widely held by many institutional investors. We believe that institutional investors generally support the SEC’s goals of updating beneficial ownership reporting to enhance the disclosures and publication of information that is critical to the capital markets integrity and confidence in the United States. In addition, investors appreciate the proposed additional guidance by the U.S. Securities and Exchange Commission (“SEC” or “Commission”) in the Proposal on what constitutes a “group” for purposes of Schedules 13D and 13G. However, certain elements of the Proposal, such as certain of the proposed changes to the filing deadlines, raise material concerns. We discuss the Proposal in more detail below.

I. Executive Summary of Comments

This Comment Letter sets forth the following comments in Sections III, IV, and V, respectively:

- If the Commission wishes to reduce the filing deadlines, a deadline of two business days would achieve the SEC’s desire for more timely disclosure by beneficial owners while allowing for a compliance and reporting timeframe that is less burdensome and more reasonable for institutional investors.

¹ Modernization of Beneficial Ownership Reporting, 87 Fed. Reg. 13,846 (March 10, 2022).

- If the definition of a “beneficial owner” will include cash-settled derivatives positions, such beneficial ownership should either be determined based solely upon holdings that exceed a minimum reporting trigger amount (e.g., if derivatives positions were to be converted into the reference security, the person would hold 5% or more of the reference security), or the definition should include a de minimis safe harbor amount (e.g., if derivatives positions were to be converted into the reference security, the person would hold less than 5% of the reference security) below which reporting under Rule 13d-3(e) will not be required.
- We support additional clarity regarding what constitutes a “group”, including both of the SEC’s proposals. However, the SEC should further clarify what constitutes a “group” in the absence of an express agreement between parties.

II. The Key Components of the Proposal for Institutional Investors

In addition to certain related technical amendments, the Proposal contains three key proposed amendments to the current beneficial ownership reporting requirements: (1) accelerated filing deadlines for Schedules 13D and 13G; (2) a newly proposed Rule 13d-3(e) for disclosure of certain derivatives holdings; and (3) clarifications to the meaning of “group” for purposes of Schedules 13D and 13G.²

Filing Deadlines for Schedule 13D and 13G— As summarized below, the Proposal would amend the current deadlines for Schedule 13D and Schedule 13G filings, respectively (the “Deadlines Proposal”).

- **Schedule 13D:** The Deadlines Proposal would shorten the initial filing deadline for Schedule 13D filings from 10 days to 5 days. It would then also require that amendments to the Schedule 13D be filed within one business day (currently required to be filed promptly).
- **Schedule 13G:** (1) For qualified institutional investors and exempt investors, the Deadlines Proposal would change the initial filing deadline for a Schedule 13G from 45 days after year-end to 5 business days after the end of the month in which the investor beneficially owns more than 5 percent of the covered class; (2) for passive investors, the Deadlines Proposal would shorten the initial filing for a Schedule 13G from 10 days to 5 days; (3) for qualified institutional investors and passive investors, the Deadlines Proposal would accelerate the amendment obligations upon exceeding 10% beneficial ownership or a 5% increase/decrease in beneficial ownership of a covered class, requiring the filing of an amendment within 5 days and 1 business day, respectively; and (4) for all Schedule 13G filers, the Deadlines Proposal would require that an amendment be filed within 5 business days after the end of the month in which a material change occurred (currently 45 days after the year in which any change occurred).

² See *id.* at 13,847.

New Rule 13d-3(e)— The Proposal would amend Rule 13d-3 under the Securities Exchange Act of 1934 (the “Exchange Act”)³ by creating a new Rule 13d-3(e) that would treat the holder of a cash-settled derivative security, other than a security-based swap, as the beneficial owner of the reference equity securities if the derivative is held with the purpose or effect of changing or influencing the control of the issuer of the reference securities, or in connection with or as a participant in any transaction having such purposes or effect (the “Rule 13d-3(e) Proposal”). The Rule 13d-3(e) Proposal would also update Item 6 of Schedule 13D to clarify that a person is required to disclose interests in all derivative securities (including cash-settled derivative securities) that use the issuer’s equity security as a reference security.

Clarification of “Group”— The Proposal includes two suggested changes with regards to the meaning of “group” for purposes of Schedules 13D and 13G (the “Group Proposals”):

- The Group Proposals would align the text of Rule 13d-5 under the Exchange Act,⁴ as applicable to two or more persons who act as a group, with the statutory language in Sections 13(d)(3) and (g)(3) of the Exchange Act;⁵ and
- The Group Proposals also set forth circumstances under which two or more persons would be able to communicate and consult with one another and engage with an issuer without concern that they will be subject to regulation as a group with respect to the issuer’s equity securities.

III. The Deadlines Proposal would impose significant reporting and monitoring burdens on institutional investors

The reduction of reporting timelines under the Deadlines Proposal would create significant reporting and monitoring burdens for both Schedule 13D and Schedule 13G filers, and these burdens are particularly acute for institutional investors and other unregistered entities that may lack the infrastructure and personnel to comply with the revised filing deadlines. This is particularly true for qualified institutional investors and exempt investors that file on Schedule 13G. Under the Deadlines Proposal, they will now be required to monitor for initial Schedule 13G filing throughout the year, and file when triggered, rather than checking for filing requirements and filing at the beginning of a new year. This would cause such investors to allocate a significant amount of financial and human resources to administrative compliance. In addition, the Deadlines Proposal requires overly prompt disclosure on several items. Specifically, we request additional time beyond one business day for reporting a 5% increase/decrease in beneficial ownership of a covered class and additional time beyond one business day for amendments to Schedule 13D. One business day provides an insufficient period of time between the date of investment (and/or discovery by compliance) until the filing is due

³ 17 C.F.R. § 240.13d-3.

⁴ *Id.* § 240.13d-5.

⁵ 15 U.S.C. § 78m(d)(3) (“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.”); *id.* § 78m(g)(3).

and would invoke unnecessary regulatory risk for institutional investors. If the Commission determines to proceed with reducing the filing deadlines, two business days provides an alternative timeline that would still achieve the SEC's desire for more timely disclosure by beneficial owners, consistent with the current interpretation of the "prompt" amendment requirement for Schedule 13D.

IV. The Rule 13d-3(e) Proposal presents certain difficulties for filers and could benefit from additional clarity

As summarized above, the Rule 13d-3(e) Proposal would treat the holder of a cash-settled derivative security, other than a security-based swap, as the beneficial owner of the reference equity securities if the derivative is held with the purpose or effect of changing or influencing the control of the issuer of the reference securities, or in connection with or as a participant in any transaction having such purposes or effect. As such, the applicable holder would be required to disclose its interests in all derivatives that use the respective issuer's equity security as a reference security. This proposed change represents an unprecedented expansion of concept of beneficial ownership to include a purely economic interest uncoupled from any voting or investment power with respect to the reference equity securities.

The SEC has explained that it constructed this newly proposed Rule 13d-3(e) to require the additional derivatives disclosure only in limited circumstances. As stated in Footnote 97 of the Proposal, "[P]roposed Rule 13d-3(e) would . . . focus[] *predominantly* on whether the derivative security is held with the purpose or effect of changing or influencing the control of the issuer of the reference securities."⁶ The term "predominantly" lacks clear definition in this context and creates a dilemma for how an institutional investor will develop and implement compliance controls to demonstrate to the Commission or its Staff that the derivatives are *not* held for purposes of changing or influencing the issuer. Without an articulated, actionable triggering mechanism for reporting, or a safe harbor below which reporting would not be required, it would be necessary for institutional investors to prove a negative to demonstrate that they appropriately did not file the additional derivatives disclosure under Rule 13d-3(e). Because of this lack of clarity, some institutional investors may opt to submit the disclosure set forth in Rule 13d-3(e) as a precautionary measure, even if they are not acquiring the derivative positions for the reasons described in proposed Rule 13d-3(e).

In light of the foregoing, the reporting requirement under Rule 13d-3(e) arguably generates additional regulatory risk for institutional investors that lack any intention to control an issuer, with little or no added benefit to the Staff, the Commission or the public. The proposed Rule 13d-3(e) could impose significant compliance burdens on institutional investors that hold cash-settled derivatives and, as noted, may cause them to opt to make filings on a prophylactic basis, even when not required. These "false positives" would result in data that is less useful to the Staff by distorting the derivative positions that are maintained for the purposes of predominately influencing or changing control of the issuer of the reference securities, thereby diluting the intended value both to the Commission, the issuer of the reference security, and the

⁶ See 87 Fed. Reg. at 13,861-62 n.97 (emphasis added).

public. The Commission should consider defining “beneficial owner” with regards to derivatives positions based upon a minimum reporting trigger amount, rather than subjective intent, so that an institutional investor *and the SEC* would have clarity as to when a filing under Rule 13d-3(e) is required. For instance, the SEC could construct Rule 13d-3(e) to designate as a “beneficial owner” any institutional investor that would own 5% or more of the reference security if the derivatives positions were to be converted into the reference security. Alternately, the SEC could establish a de minimis safe harbor amount (calculated similarly) below which there will be a presumption that reporting under Rule 13d-3(e) would not be required.


V. We support additional clarity regarding what constitutes a “group”

The Group Proposals from the SEC provide needed clarity on the issue of what constitutes a “group” for purposes of Schedule 13D and Schedule 13G filings. Institutional investors have long struggled with what constitutes a “group” under the current rules and instructions for Schedule 13D and 13G. Concerns regarding unintentionally creating a group make institutional investors reluctant to engage in otherwise productive communication and consultation with one another or with issuers. In addition, the SEC staff has generally refrained from providing additional guidance on group status issues in recent years, even as the facts and circumstances of how institutional investors invest has continued to evolve. Therefore, any additional clarity regarding what constitutes a “group” is supported, including both of the SEC’s Group Proposals: (a) the alignment of the text of Rule 13d-5; and (b) the additional clarity regarding circumstances under which two or more persons would be able to communicate and consult with one another and engage with an issuer. However, the SEC should further clarify what constitutes a “group” in the absence of an express agreement between parties so that institutional investors do not invite unwanted risk when merely discussing a public company.

VI. Conclusion

Thank you for the opportunity to offer these comments to this Proposal on behalf of our client. Please feel free to contact Valerie Dahiya [REDACTED]

Sincerely,


Valerie Dahiya

Partner

cc: Danielle Benderly, Esq.
Andrew Cross, Esq.
Thomas Ahmadifar, Esq.