

**Committee on Securities Law  
of the Business Law Section of the  
Maryland State Bar Association**

April 11, 2022

**VIA EMAIL AT RULE-COMMENTS@SEC.GOV**

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

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

Ladies and Gentlemen:

This letter expresses the views of the Committee on Securities Law (the "Committee") of the Business Law Section of the Maryland State Bar Association ("MSBA") with respect to the above-referenced proposing release, SEC Release Nos. 33-11030; 34-94211; File No. S7-06-22 (sometimes referred to herein as the "release") relating to the Securities and Exchange Commission's (the "Commission") proposed amendments regarding beneficial ownership reporting on Schedules 13D and 13G. The Business Law Section and the Board of Governors of the MSBA have not taken a position on the matters discussed herein, and individual members of the MSBA and the Committee, and their associated firms or companies, may not necessarily concur with the views expressed in this letter.

The membership of the Committee consists of securities practitioners who are members of the MSBA and includes lawyers in private practice, business, government, and academia. The members of the Committee who have participated in the preparation of this comment letter, however, do not have experience representing activist investors or significant experience assisting clients with Schedule 13D filings. We also do not have experience representing qualified institutional investors in this area. As a result, other than with respect to amendment filings, we have limited our comments to the impact of the proposed rule amendments on Schedule 13G filings that would be filed by Exempt Investors and Passive Investors, in each case as defined in the release.

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The proposed amendments would accelerate the filing deadlines for initial Schedule 13G filings by Passive Investors from 10 days after acquiring beneficial ownership of more than 5% of a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (the "Exchange Act") to five days after such acquisition, and for Exempt Investors from 45 days after the end of the calendar year in which their beneficial ownership exceeds 5% to five business days after the month-end in which their beneficial ownership exceeds 5% of the applicable class of securities. For all Schedule 13G filers, the filing deadline for amendments would change from 45 days after the calendar year-end in which any change occurred to five business days after the month-end in which a material change occurred. In addition, for Passive Investors, the filing deadline for Schedule 13G amendments would change from promptly to one business day after exceeding 10% beneficial ownership or, once such investors exceed the 10% threshold, a 5% increase or decrease in beneficial ownership. For the reasons discussed in this letter, we do not believe that the proposed amended deadlines for initial and amended Schedule 13G filings set forth above are reasonable or appropriate, and respectfully suggest that, for the reasons discussed in this letter, the Commission not adopt this part of the proposal.

With respect to initial Schedule 13G filings, the release provides that the Commission "believe[s] it is appropriate to amend the initial Schedule 13G filing deadline in Rule 13d-1(c) to match the proposed initial Schedule 13D filing deadline in Rule 13d-1(a) in order to maintain the historical regulatory consistency between the deadlines in Rules 13d-1(c) and (a) and to facilitate the overall goal of increasing transparency in beneficial ownership." Other than, possibly, the discussion of "technological developments," which we address below, the reasons provided in the release for shortening the initial Schedule 13D 10-day filing deadline to five days, however, would not apply with respect to Schedule 13G filings by Passive Investors and, in many cases, Exempt Investors.

First, with respect to supporting the change in the initial filing deadline for Schedule 13D filings, the release refers to "technological advances since 1968, such as the ability to submit filings electronically through the Commission's Electronic Data Gathering, Analysis and Retrieval ('EDGAR') system and the use of modern information technology in today's financial markets." The release also refers in a footnote to "electronic filing with a button push" that did not exist in 1968, when Section 13(d) of the Exchange Act, first requiring the filing of Schedule 13D ownership reports, was enacted. This description, however, paints a rather misleading picture of how Commission filings are made and how long it takes to prepare such a filing. A review of the comment letters received to date

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on the proposed amendments would also give the reader the misleading impression that the filing obligation in question consists of nothing more than providing very basic information about the number of shares beneficially owned and that can be submitted through a process no more complicated than sending an email.<sup>1</sup> This is simply not the reality of filing through EDGAR, even for a filing as relatively simple as a Schedule 13G, or the level of information that is required in these filings. As a practical matter, the five-day timeline would, in most cases, simply be impossible to comply with. The below discussion outlines why this is so.

First, in order to make any filing through EDGAR, a filer must obtain EDGAR codes by filing a Form ID with the Commission, which form must be notarized. In our experience, Schedule 13G filers are not equipped to make such a filing without the assistance of counsel. Even if such filers were equipped to make such a filing, it takes at least seven days for the Commission to process a Form ID filing which would cause the filer to miss the proposed filing deadline. Second, and as discussed in greater detail below, the notion, as set forth in the release, that “[m]andated electronic submissions relieve filers of the need to arrange for delivery in-person or through the U.S. mails” warrants cutting the initial filing deadline in half ignores the fact that, due to the need to obtain EDGAR filing codes and have a printer convert the filing into the appropriate filing format, it takes a good deal *longer* to make an initial Schedule 13G (or even 13D) filing than it did when such filings could be made through overnight delivery or hand delivery from counsel’s office located in or near Washington, D.C.

In our experience, it is not uncommon for Passive Investors and Exempt Investors to be unaware of their Schedule 13G filing obligations until they actually cross the 5% beneficial ownership reporting threshold; even if they are aware of such obligations, they are unlikely to take steps to prepare for complying with such obligations before they are actually subject to them, that is,

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<sup>1</sup> See, e.g., letter dated Mar. 14, 2022 from Chris McEntee (“They should have to report it the same day . . . If you can afford to buy millions of dollars [sic] worth of stock you can afford to report it right away.”); letter dated Mar. 14, 2022 from Taj Reilly (“I bet it could be faster. 3 days sounds like a reasonable amount of time to dot i’s and cross t’s. We have computers, it can be faster now.”); letter dated Feb. 19, 2022 from Jason Dunlop (“The requirements for beneficial ownership reporting is not stringent enough. Modern technology has been in place for decades that can make reporting this data almost instantly. There is no clear argument that these positions should not be reported in 1 day for every market participant.”); letter dated Feb. 19 from Corey (“Five days to report still allows bad actors to skew information on a timeline, as such I believe the time to report should be End-of-day to effectively reduce information asymmetry.”).

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until they actually cross the 5% reporting threshold. For purpose of this illustration, let us assume that the beneficial owner in question acquires beneficial ownership of a security registered under Section 12 of the Exchange Act that causes the beneficial owner to cross the 5% beneficial ownership threshold on a Monday, that the filer is informed about (or remembers something about) the beneficial ownership report filing obligations sometime Monday afternoon or Tuesday morning. On Tuesday, the beneficial owner asks some contacts for names of counsel that can assist them with the filing, and calls a couple of attorneys late Tuesday or early Wednesday, settling on counsel to assist them with their filing obligations by the end of the day on Wednesday. Assuming the chosen attorney can take a few hours to work on administrative matters right then and there, it can still take two to four days for the attorney to onboard the Schedule 13G filer as a client (conflict checks, due diligence, engagement letter and retainer, etc.). Best case scenario, the attorney retained to assist with the filing could not even start working on the matter until Friday. That leaves one business day, Monday, to prepare and complete the filing. Even if the attorney and the filer are willing to work through the weekend to prepare the filing, there is still insufficient time for the filing to be timely made under the deadline because of the Form ID issues as described below.

Under the above scenario, the earliest that the attorney would be able to file the Form ID on behalf of the Schedule 13G filer would be Friday, or more realistically, Monday. Currently, it takes at least seven days for the Commission to process a Form ID filing, meaning that the earliest that the filing codes necessary to file the Schedule 13G through EDGAR would be received would be several days, or more likely a week, after the Schedule 13G would be due, and this is assuming that there are no problems with the Form ID that would require it to be resubmitted (at which point, it would take another seven days to process).

Even putting aside the need to obtain EDGAR filing codes, the proposed filing deadline would, in most cases, provide insufficient time to file the required Schedule 13G by the date it would be due - on the following Monday. Assuming that there are only one or two people that need to be included as part of the Schedule 13G filing and that they are available and able to provide the necessary information Friday evening or over the weekend, and that the attorney is able to work on the Schedule 13G over the weekend, then perhaps the attorney could send a draft to the clients for approval Monday morning, get their approval, have the filers execute the Schedule 13G filing, forward the Schedule 13G to the printer for conversion into the necessary XBRL format, proof the filing, and get

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the filing made by the proposed 10:00 PM cutoff time. But in most cases it would be highly unlikely that all this could be done in one day. Further, if the acquisition that caused the beneficial owner to cross the 5% threshold took place on a Wednesday or Thursday, the intervening weekend would make meeting the five-day deadline impossible. In addition, this example assumes one or two filing persons. If there are multiple filing persons with respect to the Schedule 13G filing, the whole process, including onboarding each filing person and gathering the information required for the Form from each such person, would take additional time. One member of the Committee recently assisted a client with an initial Schedule 13G filing that involved over half-a-dozen filing persons, including a mix of entities and natural persons, with various interrelationships, and who were located in various foreign countries. It took several days just to get the information needed to understand the relationships between the parties so that counsel could determine which filing persons had control of which other filing persons and therefore beneficial ownership of the shares directly owned by the various parties. Then counsel first had to prepare a draft of the Schedule 13G, have all parties review and sign-off on the initial and revised drafts, send the filing to a printer for conversion into html format for filing, and collect signatures from multiple individuals. The time differences among the U.S. and the various other countries in which the filing persons resided lengthened the timetable even more. While we acknowledge that this is may be an extreme case, and that many Schedule 13G filings will not be so complicated, some will, and as noted above the five-day timeline would be all but impossible to meet even under the best of circumstances.

But most importantly, even under the best of circumstances, the five-day filing deadline would be impossible to comply with because it takes longer than that to receive the EDGAR filing codes needed to make the filing in the first place.

Based on the statements in the release in this regard, the proposed changes to the initial Schedule 13D and 13G filing deadlines seem to be based on the assumption that the information required to be included in the filing, and perhaps even the Schedule 13D or 13G filing itself, has been provided and prepared in advance, the necessary EDGAR filing codes are in hand, and the lawyers are at the ready at the time that the 5% beneficial ownership reporting threshold is crossed; in this regard, we note in particular the statement in the related Commission press release that “[i]nvestors currently can withhold market moving information from other shareholders for 10 days after crossing the 5 percent threshold before filing a Schedule 13D.” While this is probably a

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reasonable assumption with respect to activist investors, and perhaps with respect to other investors that are required to file a beneficial ownership report on a Schedule 13D, such state of affairs is highly unlikely with respect to Passive Investors and Exempt Investors. Based on our experience, Passive Investors and Exempt Investors are not “withhold[ing] market moving information from other shareholders,” during such 10-day period, those filing on Schedule 13G but rather are more likely to be scrambling to retain counsel, understand their filing obligations, gather the relevant information, and timely make the required filing, without nary a thought as to whether such information is potentially “market moving,” let alone intentionally depriving other shareholders of the information that will be reported on such Schedule 13G. Of course, as further discussed below, the information filed on a Schedule 13G is unlikely to be “market moving” anyway.

The reference in the release that “given the advances in the information technologies used by market professionals today, less time is needed to compile the necessary data and prepare and transmit the Schedule 13D to the Commission than was required in 1968” is similarly inapplicable to many, if not most, Schedule 13G filers. While activists and certain others persons filing a Schedule 13D may reasonably be described as “market professionals,” this is not an accurate description of the beneficial owners that typically file a Schedule 13G, who generally use technology no more sophisticated than email to compile the necessary data and prepare and transmit (to the printer) their Schedule 13G for filing.

Finally, “the use of modern information technology in today’s financial markets” has no impact on the ability of filing persons to make their Schedule 13G filings (or, for that matter, amendments), and therefore should not be a consideration in what the deadline for these filings should be.

The release focuses heavily on the idea that the proposed five-day filing deadline for initial Schedule 13D (and, by reference, apparently, 13G) filings is warranted based on the need for material information to be disseminated in the market. For example, the release states that “[t]he 10-day filing deadline raises concerns that material information about potential change of control transactions is not being disseminated to the public in a manner that would be considered timely in today’s financial markets. The delay in reporting this material information contributes to information asymmetries that could harm investors.”

We do not necessarily agree that information about a beneficial holder’s

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ownership of a class of securities registered under Section 12 of the Exchange Act constitutes “material information” that the holder has an obligation to report akin to an issuer’s disclosure obligation, but we assume for purposes of our comments that that is the case. Even given that, however, the filing of a Schedule 13G and the information that is reported therein is unlikely to be “material information” that would justify shortening the initial Schedule 13G filing deadline as proposed, even if this is justification for shortening the initial filing deadline for Schedule 13D filings (with respect to which we are not offering comment). Of course, by definition a Schedule 13G filed by a Passive Investor would not include information about a potential change of control transaction, as Passive Investors must certify that the securities reported therein “were not acquired and are not held for the purpose of or with the effect of changing or influencing the control of the issuer of the securities and were not acquired and are not held in connection with or as a participant in any transaction having that purpose or effect.” With respect to the statement in the release about “the delay in reporting this material information ...,” the release cites to a number of reports and statements in support, but they all relate to activist investors or the impact of a Schedule 13D filing, and therefore would not be applicable to Schedule 13G filings (and by definition could not be applicable to those Schedule 13Gs filed by Passive Investors). We do not believe that there is any genuine debate on this issue; the release all but explicitly states that the filing of a Schedule 13G and/or the information therein is not material. First, the release includes numerous discussions about how the filing of a Schedule 13D or the information therein may be material without saying the same about the information in or the filing of a Schedule 13G. Second, the Commission proposes to amend Rule 13d-5 to provide that a group can be formed when one party tips off another party about their upcoming Schedule 13D filing and the tippee purchases shares of the class covered by the Schedule 13D, but notably does not propose to amend Rule 13d-5 to provide the same with respect to Schedule 13G filings, even though the circumstances regarding group formation would otherwise be comparable for Schedule 13D and Schedule 13G filers under the amended rule.

Further, to the extent that the information reported in a Schedule 13D or even a Schedule 13G beneficial ownership report was material information that an investor was obligated to publicly disclose, then we believe that clarification that the beneficial owners/filing persons are prohibited from trading until the required filing is made and the information therein absorbed into the market – i.e. enforcement of insider trading prohibitions, is a more logical way to address this issue than accelerating the Schedule 13D and 13G filing deadlines. First, under corresponding circumstances – i.e. with respect to material nonpublic

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information known by an issuer and its insiders, the rule with respect to trading is to abstain from trading or disclose the information to the counterparty; that is how informational asymmetries between buyer and seller is otherwise addressed under the federal securities laws. In this regard, the release states that “[u]nder current Rule 13d-1(a), large shareholders may acquire more shares without contemporaneously disclosing their beneficial ownership during the 10-day period that follows the date that a Schedule 13D filing obligation arises.” If this is the concern, it is curious that the answer the Commission proposes is to give such persons only five days to trade on material nonpublic information instead of 10. It seems to us that if “information asymmetries” are the concern, the best response to address it is from an insider trading standpoint because that will actually address the harm the Commission is targeting better than accelerating the Schedule 13D and 13G filing deadlines, which still leaves activist investors five days to still trade while in possession of material nonpublic information, without placing unreasonable and unnecessary requirements on non-activist investors.

With respect to Exempt Investors and the proposed change in the deadline for their initial Schedule 13G filing from 45 days after the end of the calendar year in which their beneficial ownership exceeds 5% to five business days after the month-end in which they exceed the 5% threshold, the trajectory for these filings will be similar to that we outlined above. With respect to Exempt Investors, the release notes that “Exempt Investors ... may include persons such as founders of companies and early investors in an issuer’s class of equity securities who made their acquisition before the class was registered under Section 12 of the Exchange Act” and that “[t]hese beneficial owners may continue to influence or control the issuer.” While this may be true, Exempt Investors are just as likely to include beneficial holders that are unaffiliated with the issuer and do not exert such influence or control. Further, in our experience persons who invested before the class of equity securities they own became registered under Section 12 of the Exchange Act and are not affiliated with the issuer are unlikely to become aware of their potential beneficial ownership reporting obligations in a timely manner.

As a result, whether Exempt Investors can reasonably be expected to meet the proposed deadline will depend on at what point in the applicable month their beneficial holdings of a reportable security exceeds 5%. If they first exceed the 5% reporting threshold early in the month, then they are likely to have enough time to obtain the necessary EDGAR filing codes and have the Schedule 13G filing prepared and filed by the proposed deadline; on the other hand, if



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they first exceed the reporting threshold during the last couple of days of the month, then they are unlikely to be able to comply with the proposed deadline. As a result, we suggest that the initial filing deadline for Exempt Investors filing on Schedule 13G be the later of five business days after the month-end in which their beneficial ownership exceeds the 5% threshold or 10 business days after their beneficial ownership exceeds the threshold. We do not believe that the potential additional up to five business days would deprive investors of any needed information, particularly because, as discussed above, the information in a Schedule 13G will usually not be material.

Given that the reasons set forth in the release for accelerating the initial filing deadline for Schedule 13D filings are generally not applicable to Schedule 13G filings, we do not believe that shortening the Schedule 13G filing deadline to match the proposed Schedule 13D filing deadline, for the sake of historical convenience, is appropriate. Further, transparency for transparency's sake, without regard to materiality or the practical consequences of setting a deadline that in most cases cannot be complied with, also, we believe, provides insufficient justification for the proposed change to the initial Schedule 13G filing deadline.

Finally, we are extremely concerned about the proposed amendments that would institute a one-day filing deadline for amendments to Schedule 13D and for certain amendments to Schedule 13G filed by Passive Investors. We do not believe that any one-day reporting deadline for Commission filings is reasonable, but we believe that is particularly the case here where such a filing would need to involve counsel (for Passive Investors, often outside counsel) and could require review, approval, and execution by multiple parties.<sup>2</sup> We believe that a filing deadline that assumes and requires the availability of all required parties on extremely short notice and that no one is ever unavailable on a business day is simply unworkable in practice. Human beings may be unavailable for a day or two for all sorts of reasons – travel, medical procedures, illness, observance of religious holidays, attending a child's or grandchild's graduation, or even for a work matter that makes them unavailable to focus on an unrelated matter. While larger entities and outside counsel may have sufficient personnel to step in for an unavailable colleague on a moment's notice, there are plenty of smaller entities

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<sup>2</sup> Compare this, for example, to the process for filing a Statement of Changes in Beneficial Ownership on Form 4, which have a two business day-filing deadline. Forms 4 include very little information outside of the security that is the subject of the Form, are generally filed and executed by (as attorney-in-fact) the issuer's personnel, and usually are filed on behalf of only one person, eliminating the need to gather information from, and have the filing reviewed by, multiple people.

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and law firms that do not have the ability to cover for short absences on a moment's notice. And when a filing person is a natural person that needs to provide relevant information and review and execute a filing, the concept of such redundancies is moot. No technological advances since 1968 can guarantee that a natural person will always be able to be reached and available every single day with little or no notice (and we pray that the technology that does is not invented in our lifetime). It is a simple fact of life that cannot be ignored in the name of transparency and no matter how material one might imagine the information being considered may be. Setting a one-day filing deadline will not change this, and we believe that doing so knowing this is unacceptable.


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We appreciate the Commission's consideration of the foregoing comments.

Very truly yours,

*Committee on Securities Law* of the Business Law  
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Penny Somer-Greif, Chair

  
Gregory T. Lawrence, Vice-Chair