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Via Electronic Mail

August 18, 2022

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

Re: Effect of *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), on Pending Release Nos. 34-93784, 33-11030, and 34-94211

Dear Ms. Countryman:

Elliott Investment Management L.P. ("Elliott") submits this letter to address the effect of the Supreme Court's recent decision in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), on the Commission's pending Rule 10B-1 and Section 13(d) rulemaking proceedings.[1] This letter supplements the comment letters previously filed by Elliott regarding the Rule 10B-1 and Section 13(d) Proposals.[2] Although the comment periods for those Proposals have closed, the *West Virginia* decision postdates the comment periods in both instances and merits the Commission's careful attention given its effect on "all corners of the administrative state." 142 S. Ct. at 2608.

West Virginia reaffirms the principle that agencies may not take "unprecedented" action on "major policy decisions" unless a statute grants them "clear authorization" to do so. *Id.* at 2609–14 (citations omitted). Much of *West Virginia*'s reasoning applies to the Rule 10B-1 and Section 13(d) Proposals, both of which break with decades of precedent in ways that would radically reshape important elements of the Nation's capital markets. *West Virginia* thus amplifies the concerns expressed in our

[1] *See* File No. S7-32-10; Proposed 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, Release No. 34-93784 (Dec. 15, 2021) ("Rule 10B-1 Proposal"); File No. S7-06-22; Modernization of Beneficial Ownership Reporting, Release Nos. 33-11030, 34- 94211 (Feb. 10, 2022) ("Section 13(d) Proposal").

[2] *See* Letter from Richard B. Zabel, General Counsel & Chief Legal Officer, Elliott Investment Management L.P., to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, re: Release No. 34-93784 (Mar. 21, 2022) ("March 21 Letter"), available at https://www.sec.gov/comments/s7-32-10/s73210-20120750-272913.pdf; Letter from Richard B. Zabel, General Counsel & Chief Legal Officer, Elliott Investment Management L.P., to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, re: Release Nos. 33-11030, 34-94211 (Apr. 11, 2022) ("April 11 Letter"), available at https://www.sec.gov/comments/s7-06-22/s70622-279518.pdf. This letter supplements and does not replace the analysis in those prior letters, which demonstrated that the Rule 10B-1 and Section 13(d) Proposals exceed the Commission's authority for reasons independent of the major-questions doctrine. Thus, even if that doctrine were inapplicable, the analysis in our previous letters would be unaffected, and both Proposals would be arbitrary, capricious, and contrary to law for the reasons stated in the March 21 and April 11 Letters.

previously submitted comment letters and further underscores the need for the Commission to abandon these misguided Proposals.

1. Background on the *West Virginia* Decision. *West Virginia* applied the major-questions doctrine, which limits federal agencies' ability to adopt regulations with far-reaching economic and political consequences, to the Clean Power Plan—an Environmental Protection Agency (EPA) regulation designed to "substantially restructure the American energy market." *Id.* at 2610–12.

EPA based the Clean Power Plan on a broad and "unprecedented" interpretation of an "ancillary" Clean Air Act provision regarding emission-control systems for existing power plants. *Id.* at 2610. For decades, EPA had read that provision as authorizing measures that would reduce pollution by making individual plants "operate more cleanly." *Id.* But in 2015, EPA changed course, concluding that a "broader, forward-thinking approach" was necessary because the emissions reductions achievable under the longstanding framework were "too small." *Id.* at 2611 (citations omitted). Rather than focusing on technological controls at individual plants, EPA's new regulation sought to reduce emissions of "the overall power system" by "forcing a shift throughout the power grid from" generation by coal- and gas-fired plants to renewable sources such as wind and solar. *Id.* (emphasis and citation omitted). This generation-shifting scheme sought to achieve an "aggressive transformation" of the electricity sector that would drive "investments in renewables" while "requir[ing] the retirement of dozens of coal-fired plants" and imposing "billions of dollars in compliance costs." *Id.* at 2604, 2612 (citations omitted). In short, EPA chose sides in the market for energy generation based on its own views rather than clear legislative direction—adopting a rule that favored renewable sources over fossil fuels.

The Supreme Court rejected EPA's new interpretation, holding that EPA could not rely on "vague [statutory] language" to effect such a "transformative expansion in its regulatory authority." *Id.* at 2610 (citation and alteration omitted). Although EPA's broadened reading of the statute was plausible "[a]s a matter of definitional possibilities," that was not enough to justify a regulation "of such magnitude and consequence." *Id.* at 2614, 2616. Instead, the Clean Power Plan was permissible only if supported by "clear congressional authorization." *Id.* at 2609, 2614. Because the statutes cited by EPA failed to clear that high bar, the Court held that the agency exceeded its authority in adopting the Clean Power Plan. *Id.* at 2614–16.

2. Application of *West Virginia* to the Rule 10B-1 and Section 13(d) Proposals. Much of *West Virginia*'s reasoning—which governs "all corners of the administrative state," *id.* at 2608—applies here and reinforces the concerns we have expressed regarding the Commission's Rule 10B-1 and Section 13(d) Proposals.

First, the Rule 10B-1 and Section 13(d) Proposals would, much like the Clean Power Plan, make major transformative changes to the rules that govern important aspects of the Nation's capital markets. As explained in our prior comment letters, both Proposals seek to deploy novel and expansive public disclosures as a means of shielding public companies from engagement by activist investors. *See* April 11 Letter at 2. That step would in turn eliminate one of the last sources of independent criticism of public companies and further entrench corporate boards and managers, particularly for poorly performing

companies. *See* March 21 Letter at 1–2. In this way, the Commission, like EPA in *West Virginia*, has chosen sides in a market-transforming way—favoring corporations over engaged investors and radically re-ordering the dynamics of investing and communications among investors.

The Commission's Proposals are particularly troubling because activism has long "play[ed] a critical role in the health of the U.S. capital markets." *Id.* at 1. In particular, activism helps ensure alignment between shareholders and boards of directors, resulting in "changes that improve performance and benefit investors" in "all sectors of the market." *Id.* Activist engagement "has resulted in lasting change, creating shareholder value and enhancing governance at the board level by reducing board tenure, increasing diversity, advocating ESG principles, and eliminating outdated devices designed to entrench management." *Id.* at 8. Between 2017 and 2021 alone, activist engagement "generated $90 billion of value," a "very significant majority of" which was "realized by shareholders other than the activists themselves." Regulatory Analysis of Dr. Patrick Conroy et al., NERA Economic Consulting, at 17 (Mar. 21, 2022) (attached as Exhibit A to March 21 Letter) ("NERA Report").

Despite these benefits, the Rule 10B-1 and Section 13(d) Proposals would make it effectively impossible to pursue activist engagement in most circumstances, *see* March 21 Letter at 5–6, and "shut down the ability of engaged shareholders to communicate with each other except at unreasonable legal peril," April 11 Letter at 2. Together, the proposed regulations would "radical[ly] rewor[k]" the framework for activist engagement through "a wholesale and unlawful rewriting of the law." *Id.* at 4.

The sweeping changes proposed in the Commission's Rule 10B-1 and Section 13(d) releases thus implicate several of the concerns expressed by the Supreme Court in *West Virginia*. The capital markets, like the market for electricity generation by existing power plants, constitute "a significant portion of the American economy," 142 S. Ct. at 2608, and have "links to every other sector" as well, *id.* at 2621 (Gorsuch, J., concurring). The Commission's Proposals threaten hundreds of billions of dollars in shareholder value, *see* NERA Report at 17, putting their impact on par with (or perhaps even greater than) the "billions of dollars in compliance costs" imposed by the Clean Power Plan, 142 S. Ct. at 2604. And like the environmental concerns that animated the Clean Power Plan, the rules governing shareholder activism have long "been the subject of an earnest and profound debate." 142 S. Ct. 2614 (citation omitted); *see* March 21, 2022 Letter at 4–5 & nn.3–5, 7 n.12. The Commission's one-sided intervention in that debate constitutes the sort of "sweeping and consequential authority" that courts will closely scrutinize under *West Virginia*'s logic. 142 S. Ct. at 2608 (citation omitted).

The Commission's decision to favor the interests of corporate management over shareholders (including engaged investors) is particularly problematic in light of the Williams Act's legislative history. The Senate Report on the Williams Act emphasizes that Congress took "extreme care to avoid tipping the balance of regulation either in favor of management or in favor of the person" building an investment position, in part because shareholder engagement "serve[s] a useful purpose in providing a check on entrenched but inefficient management." *Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids*, S. Rept. No. 550, 90th Cong., 1st Sess., at 3 (1967) ("Senate Report"). Thus, while the Williams Act requires disclosure in defined circumstances, it is designed to allow "the offeror and

management equal opportunity to fairly present their case." *Id.* The Commission's misguided Proposals would upset that carefully calibrated balance.

Second, the Rule 10B-1 and Section 13(d) Proposals would both mark an unprecedented departure from longstanding governing principles.

The swaps covered by proposed Rule 10B-1 have existed for decades and have long been employed by a range of investors, including activist investors, for whom these products constitute a critical part of their investment model. *See* March 21 Letter at 2. Throughout that history, the governing statutes and regulations have permitted investors to build a position through these swaps without being deemed to have acquired beneficial ownership of the underlying securities, and thus not being required to publicly disclose their trades. *See id.* at 5–6, 24–25. This framework allowed activist investors to deploy a strategy, often supported by lengthy and expensive research, without immediately having to reveal their investment position to the world, a disclosure that would make the strategy futile or of greatly diminished value.

The Commission's proposed rule would upend that settled framework by imposing new, next-day public disclosure requirements "for the first time in the Commission's history." April 11 Letter at 2. The Commission's apparent claim is that it has always had this "unheralded power" to redefine beneficial ownership and force public disclosure of proprietary information based on a "long-extant statute" under which the power was never asserted—a claim that echoes the unjustified expansion of power that the Supreme Court rejected in *West Virginia*. 142 S. Ct. at 2610 (citation omitted). The Proposal's new regime would, in the vast majority of circumstances, make effective activist engagement impossible to carry out. As former SEC Chief Economist Craig Lewis confirmed in his March 21, 2022 expert report on the Rule 10B-1 Proposal, that scheme would be "unprecedented" and highly disruptive. *See* Professor Craig Lewis, Review of the Economic Analysis for Proposed Rule 10B-1 on the "Position Reporting of Large Security-Based Swap Positions," at 2–4 (Mar. 21, 2022) (attached as Exhibit B to March 21 Letter). A number of comment letters, in addition to ours, have made the same point.[3]

The Section 13(d) Proposal likewise breaks from decades of settled precedent. In particular, the Proposal would overturn more than 50 years of caselaw and Commission action regarding when two or more investors qualify as a "group" for purposes of trading disclosures. *See* April 11 Letter at 4–10; Senate Report, *supra*, at 8 (explaining that investors who collectively own "more than 10 percent of a class of securities" become part of a group "at the time they agre[e] to act in concert" through a "contract, understanding, relationship, agreement, or other arrangement"). Although "every court of appeals to consider the question has held that some form of agreement is necessary for formation of a 'group' under Section 13(d)," *id.* at 11, and the Commission's Division of Enforcement has "consistently applied" the

[3] *See, e.g.*, Letter from Managed Funds Association, to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, Re: Notice of Proposed Rulemaking on Position Reporting of Large Security-Based Swap Positions; File No. S7-32 (March 21, 2022), available at https://www.sec.gov/comments/s7-32-10/s73210-20120700-272867.pdf; Letter from Thornton, Hubbard & Scott, Committee on Capital Markets Regulation, Re: File Number S7–32–10: Notice of Proposed Rule Making on the Position Reporting of Large Security-Based Swap Positions (March 21, 2022), available at https://www.sec.gov/comments/s7-32-10/s73210-20120760-272940.pdf.

same rule, *id.* at 10, the Commission's Proposal would eliminate that requirement in favor of a shapeless and overbroad facts-and-circumstances test that would leave investors without any meaningful guidance. That approach, too, is "unprecedented," *id.* at 2, and involves "discover[ing] in a long-extant statute an unheralded power" on the Commission's part, *West Virginia*, 142 S. Ct. at 2610 (citation omitted). In Professor Lewis's assessment, the Proposal would "significantly and adversely affect activist investment strategies"—"decreas[ing] or eliminat[ing] the positive impact" they have "on market participants and the U.S. Economy." Professor Craig Lewis, *Review of the Economic Analysis for Proposed Rule Amendments to Modernize Beneficial Ownership Reporting*, at 3 (Apr. 11, 2022) (attached as Exhibit B to April 11 Letter). As with the Rule 10B-1 Proposal, a number of comment letters, in addition to ours, have made the same point.[4]

As a result, the Commission's proposed rules represent the sort of "transformative expansion in [the agency's] regulatory authority" that triggers heightened "skepticism" under *West Virginia*. 142 S. Ct. at 2610, 2614 (citation omitted). That added scrutiny was warranted with respect to the Clean Power Plan given "the unprecedented nature" of EPA's attempt to "substantially restructure the American energy market." *Id.* at 2608, 2610. Here, as in *West Virginia*, the Commission's Proposals conflict with longstanding agency practice and settled court precedent, and would convert the disclosure and group-affiliation rules "into an entirely different kind" of regulatory scheme. *Id.* at 2612. The Commission's Proposals—and the proposed revision of the test for "group" membership under Section 13(d) in particular—are thus permissible only if they are supported by "clear congressional authorization," *id.* at 2609, 2614, which, as our prior letters demonstrate, is absent here. That shortcoming is particularly important in light of the significant constitutional questions presented by the Proposals, which we addressed at length in our prior letters. *See* March 21 Letter at 12–14; April 11 Letter at 16–19.

Third, increased scrutiny is warranted because the Commission's Proposals are, like the Clean Power Plan, designed to "work around the legislative process." 142 S. Ct. at 2621 (brackets, citation, and quotation marks omitted) (Gorsuch, J, concurring); *see also id.* at 2614 (majority opinion). As explained in our prior comment letters, we are concerned that the Commission "is impermissibly seeking to use its statutory authority under Section 10B(d) to achieve the substantive equivalent of Section 13(d) beneficial ownership reporting with respect to cash-settled security-based swaps." April 11 Letter at 25–26. The Section 13(d) release excludes cash-settled security-based swaps from the scope of its expanded reporting mandate, noting that such swaps may be deemed to confer beneficial ownership of the underlying security only if the Commission first complies with the consultation and other requirements prescribed by Section 13(*o*). The Commission has not complied with those requirements, and yet is nevertheless seeking to compel public disclosure of the same information through proposed Rule 10B-1. This aspect of the Proposal gives rise to a concern that the Commission is seeking to circumvent the requirements of Section 13(*o*) in much the same way that EPA, in the Court's estimation, sought to bypass statutory

[4] *See, e.g.*, Letter from Jeffrey Gordon, Professor of Law, Columbia University School of Law, to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, re: Release No. 33-11020; 34-94211 (June 20, 2022), available at https://www.sec.gov/comments/s7-06-22/s70622-20132543-303070.pdf; Letter from Council for Investor Rights and Corporate Accountability (CIRCA), to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, re: Modernization of Beneficial Ownership Reporting - File No. S7-06-22 (April 11, 2022), available at https://www.sec.gov/comments/s7-06-22/s70622-20123223-279501.pdf.

limitations in *West Virginia*. *See* 142 S. Ct. at 2614; April 11 Letter at 26. That concern is yet another reason why the Commission's Proposals would—like the Clean Power Plan—be subject to heightened scrutiny if challenged in court.

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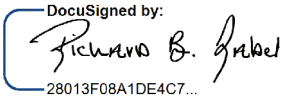
Our comment letters provided a detailed analysis of the legal flaws in the Rule 10B-1 and Section 13(d) Proposals, as well as sound reasons why the Commission should rethink its approach going forward. The Supreme Court's decision in *West Virginia* reinforces those points and serves as an important reminder that the Commission must adhere to statutory limitations in pursuing its regulatory agenda.

Sincerely,



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