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November 18, 2022

Via Electronic Mail

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

Re: **File No. S7-06-22; Modernization of Beneficial Ownership Reporting; Release Nos. 33-11030; 34-94211**

Dear Secretary Countryman:

We write to supplement our prior comment letters[1] regarding the Commission's pending Section 13(d) rulemaking proposal[2] to respond to the comment letter thereon submitted by Wachtell, Lipton, Rosen and Katz on October 4, 2022 (the "Supplemental Wachtell Letter").[3] While we believe our Comment Letters clearly and accurately demonstrate significant shortcomings of the Section 13D Rulemaking Proposal, including the threat the Proposal, if adopted, would pose to activism and thus to the vibrancy and efficiency of the U.S. financial markets, we feel it is important to address certain inaccurate statements and analyses contained in the Supplemental Wachtell Letter.[4]

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[1] *See* Letter from Richard B. Zabel, General Counsel & Chief Legal Officer, Elliott Investment Management L.P., to Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission, re: Release Nos. 33-11030, 34-94211 (Apr. 11, 2022) (our "Original Comment Letter"); Letter from Richard B. Zabel, General Counsel & Chief Legal Officer, Elliott Investment Management L.P., to Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission, re: Effect of *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) on Pending Release Nos. 34-93784, 33-11030, and 34-94211 (August 18, 2022) (our "Supplemental Comment Letter" and, collectively, our "Comment Letters").

[2] *See* File No. S7-06-22; Modernization of Beneficial Ownership Reporting, Release Nos. 33-11030, 34-94211 (Feb. 10, 2022) (the "Section 13(d) Rulemaking Proposal").

[3] *See* Letter from Wachtell, Lipton, Rosen & Katz to Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission, re: Comments on Release Nos. 33-11030; 34-94211; File No. S7-06-22 (Oct. 4, 2022).

[4] As noted in our Original Comment Letter, we believe that many of the issues with the Section 13D Rulemaking Proposal also apply to the Commission's proposal to adopt new Rule 10B-1 under the Securities Exchange Act of 1934, 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

Elliott Investment Management L.P. ("Elliott") is a leading multi-strategy investment advisor and one of the oldest firms of its kind under continuous management. Elliott invests in a wide range of areas in order to protect and grow the assets of our investors, which include 101 educational endowments, more than 180 foundations, and more than 100 private and public pension plans, among others, which are often advised by their own dedicated advisors. Elliott's active investments in public equities have become one of our most significant and impactful efforts, resulting over the past decade in more than 140 disclosed engagements with public companies, and more in which our dialogue with the company remained private. The views expressed herein are those of Elliott, and are not expressed as views of any other firm or person.

We agree with Wachtell that the "U.S. market for corporate control is the strongest in the world, and has durably demonstrated that."[5] We therefore struggle to see the relevance of governance and disclosure standards in other markets, which are referred to extensively in the Supplemental Wachtell Letter. Emulating markets demonstrably weaker in terms of governance, efficiency, and shareholder protection as part of an evaluation of the ongoing efficacy of one of the key regulatory components of the U.S. market strikes us as contradictory and misguided.

The extended and detailed comparison to these other markets is also beside the point. Although shareholder activism is practiced in other markets, it is far more developed in the United States. The reality is that activism is simply less common outside the United States and has not yet reached a level in Europe or other major markets that U.S. investors would deem acceptable.

As one of the leading activist firms, for many years Elliott has regularly engaged in activism outside the United States – in the U.K., Europe, Japan, as well as other international markets. Our consistent experience has been that regulatory structures, as well as cultural norms in local business communities and shareholder bases, mean that activism in non-U.S. markets is less prevalent than in the United States. That dynamic is to the detriment of investors in those non-U.S. markets where, in many cases, there remains a lack of independent voices in the market able to hold boards and management accountable. Some level of increased activist engagement in a handful of non-U.S. markets, coming from a very low baseline level, certainly does not mean that the Commission should seek to emulate regulatory structures in those other jurisdictions.[6]

As made clear in our Original Comment Letter, Elliott has chosen not to oppose the shortening of the reporting deadline under Section 13(d). We recognize that other commenters oppose this change; we note our position to make clear that our concerns about the impact of the Section 13D Rulemaking Proposal are based on *other* aspects of the proposal. We are

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(Dec. 15, 2021). For further background on our concerns with the Rule 10B-1 Rulemaking Proposal, *see* Letter from Richard B. Zabel, General Counsel & Chief Legal Officer, Elliott Investment Management L.P., to Vanessa A. Countryman, Secretary, U.S. Securities and Exchange Commission, re: Release No. 34-93784 (March 21, 2022) (our "Rule 10B-1 Comment Letter"). As we have previously elaborated, we believe the potential combination of the Commission's Section 13D and Rule 10B-1 proposals, if adopted, would compound the problems created by each proposal individually.

5 *See* Supplemental Wachtell Letter, 2.

6 We note, in particular, the focus in the Supplemental Wachtell Letter on increases in activism in the Japanese market. While these increases are salutary, Japan is a market that has long been recognized as among the least responsive to shareholder concerns of the markets of developed economies.

concerned that Wachtell's inordinate focus on justifying the Commission's proposal to shorten the Section 13(d) reporting deadline risks deflecting attention from other more troubling market-altering aspects of the Section 13D Rulemaking Proposal.

In particular, Wachtell errs in its discussion of the Commission's proposal to change the interpretation of the concept of a "group" for purposes of Section 13(d). Wachtell continues to assert that the Commission's proposal to do away with the requirement of an agreement (express or implied) in order to trigger group status under Section 13(d) will be neither overbroad nor difficult to apply.[7] Our Original Comment Letter demonstrates why that will not be the case,[8] as do the comment letters of a number of respected legal scholars submitted in response to the Section 13(d) Rulemaking Proposal.[9] In an attempt to sideline these concerns, Wachtell suggests that the Commission could (in the final rule and in the adopting release) adopt a new safe harbor for investors that (1) are eligible to disclose their positions on Schedule 13G rather than Schedule 13D,[10] and (2) have filed on such Schedule in respect of the target previously. Wachtell's suggestion vastly understates the scope of the problem with the Commission's group proposal.

First, the group concept under Section 13(d) is by definition an aggregator – the behavior of various investors will result in their positions being combined for Section 13(d) reporting purposes. If the aggregated position of the group is greater than five percent, group members will be required to report that position under Section 13(d), having not been required to do so previously. Wachtell's proposed safe harbor is flawed because it applies too narrowly: if the safe harbor is only available to investors that previously reported on Schedule 13G, it would be of no benefit to an investor with less than five percent ownership that previously had no obligation to report its positions, but now found itself a member of a group.

The Commission cannot solve that problem by adopting a safe harbor that would be available to any investor who would be permitted to report on Schedule 13G, whether or not the

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7 In a truly remarkable statement (and one not supported by any citation to authority and in fact belied by the case law), Wachtell asserts that the proposed amendments to the definition of group "appear in large part designed simply to adhere . . . to the underlying statutory language in Section 13(d)(3) of the Act." In making this claim, Wachtell ignores the extensive analysis contained in a broad array of comment letters demonstrating how significantly this proposed amendment would change the meaning of the term "group" (including our Original Comment Letter, which describes how this proposal contravenes the Williams Act's text, structure and purposes -- *see* pp. 5-8).

8 *See* Section 2 of our Original Comment Letter, pp. 3-22.

9 *See* Letter from Jeffrey N. Gordon, Richard Paul Richman Professor of Law, Columbia University, (June 20, 2022) at pp. 5-6 ("[a]ny "group" concept that goes beyond "agreement," explicit or implicit, sets up a trap for the unwary and could chill legitimate activity"); Letter from 65 Law and Finance Professors (April 11, 2022) at fns. 13-17 and accompanying text (noting the "dearth of data and academic research presented . . . supporting the proposed amendments to [the "group" provisions of Regulation 13D-G] and noting that the data cited by the Commission in the Section 13(d) Rulemaking Proposal does not justify the costs inherent in this proposal); Letter from Robert E. Bishop, Fellow, and Frank Partnoy, Adrian A. Kragen Professor of Law, UC Berkeley School of Law (April 11, 2022) at fn. 35 and accompanying text (noting that the Commission's proposed interpretation of "group" in the Section 13(d) Rulemaking Proposal is at variance with positions the Commission has taken in various amicus briefs submitted by the Commission to courts and constitutes a "flip-flop" by the Commission that "would generate uncertainty and chill investor communications and action").

10 The proposal also refers to filings on Schedule 13F. For ease of comprehension, we do not refer to that Schedule in subsequent references in this letter, as it does not affect any of the analysis contained herein.

investor previously reported on that Schedule. Even under that broadened safe harbor provision, the core problem noted in our Original Comment Letter – the impracticability of treating investors as a group even in the absence of an express or implied agreement – would remain. In essence, the current (and longstanding) requirement that a group can exist only in the presence of an agreement is *itself* a safe harbor. A market participant can know with whom it does, and does not, have an agreement (whether written or oral), and can order its affairs accordingly. The difficulties caused by the Commission's proposed replacement of this objective standard with a shapeless, subjective "totality of the circumstances" group definition are demonstrated by the flaws in Wachtell's attempt to afford market participants similar safe harbor comfort. For example, a given investor will have no way of ascertaining whether each other member of the purported group will qualify for Wachtell's passive investor status such that Schedule 13G would be available, particularly given the fluidity of outreach efforts as part of an activist effort. This uncertainty would provide a significant disincentive to many investors from participating in discussions regarding the activist effort, including in circumstances where no group would be formed under current law. It is very common and constructive for market participants to share views about a particular company. That is also precisely the sort of discussion that the Commission should not, and historically has not, sought to discourage. The chilling effects the expanded group definition would have on such conversations are clear. These concerns are not acknowledged, much less evaluated, in the Section 13(d) Rulemaking Proposal, and cannot be rectified by a subjective safe harbor targeted at "mainstream" institutional investors (whatever that term may mean) as proposed by the Supplemental Wachtell Letter.

We also note that Wachtell's proposed rewriting of the Commission's proposed group definition is sufficiently novel, and important, that if the Commission were inclined to adopt it, the Administrative Procedure Act would require the Commission to formally re-propose at least that aspect of the Section 13(d) Rulemaking Proposal for notice and comment. In other words, Wachtell's proposal is not a logical outgrowth of the Section 13(d) Rulemaking Proposal.

Finally, it is of course not the case that the only investors an activist will reach out to are "mainstream institutional investors"[11], which we think means passive investors that would qualify to report on Schedule 13G rather than Schedule 13D. The universe of investors is far larger, and activists can, and do, interact across the active/passive spectrum. Proposing a safe harbor that only protects communications with passive investors is yet another example of Wachtell's desire to have the Commission take sides and modify Section 13(d) in an outcome-determinative manner. Wachtell essentially assumes it is acceptable and uncontroversial to effectively prohibit all active investors from communicating with each other – a prohibition that would enable incumbent management to thwart the ability of an activist investor to challenge management's stewardship of the shareholders' company.[12] As we pointed out in our Original

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[11] A term used repeatedly in the Supplemental Wachtell Letter (with several variations) without definition, but apparently intended to mean mutual funds, ETFs and other institutional investors (*see* reference at page 16 of the Supplemental Wachtell Letter). As we and many other commentators have noted, the vast majority of these investors are indexed to specified holdings and thus do not typically engage in governance challenges. *See, e.g.,* our Rule 10B-1 Comment Letter at pp. 7-8. We can only interpret this and other references to mean "shareholders that will not challenge management."

[12] In seeking to prohibit communication among investors who may actively challenge management, Wachtell hyperventilates about "follow-on activists" and so-called "wolfpacks"(a term that they and others have popularized, suggesting, contrary to reality, that companies and incumbent management are merely defenseless lambs). However, there is no evidence or case law demonstrating that there is such a

Comment Letter, Congress, in adopting the Williams Act, assiduously sought to not favor either side in the contest for influence or control. Yet the Supplemental Wachtell Letter invites the Commission to take that unprecedented step. The Commission should reject that proposal and adhere to its longstanding balanced approach.[13]

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Ultimately, a primary point of the Supplemental Wachtell Letter is that aspects of the U.S. system that are not present in other jurisdictions "make the U.S. system easily usable by activist investors"[14] such that the damage that the Section 13(d) Rulemaking Proposal will cause is insignificant. This counterfactual statement, which is unsupported by citation to any form of authority (and which we have demonstrated in our Original Comment Letter is not correct), is simply an assertion that the current state of the U.S. market for corporate control is better than weaker systems elsewhere in the world, and that is good enough. Activist investing faces significant hurdles in the U.S. market – some of which are the product of current regulations, others of which result from macro-level shifts in the ownership of equity securities, such as the increasing dominance of large passive institutional investors who are often at best conflicted in dealing with company management. Adding to these hurdles by imposing further impediments on activism, without providing empirical cost/benefit support for so doing, cannot be justified on this conclusory and inaccurate basis.[15] The Commission's statutory obligation is to protect investors in the U.S. market, not to reduce protections so long as our markets remain ever so slightly better than weaker markets in other countries. If, as Wachtell claims, its Supplemental

"wolfpack" problem. In fact, the law is bereft of any Section 13D cases justifying this sea change in the Section 13(d) Rulemaking Proposal. There is, however, ample evidence of companies consistently seeking to adopt anti-shareholder democracy and anti-activist measures. Current examples abound. One need look no further than the recent bylaw amendment adopted by Masimo Corporation to require disclosure of the identities of the limited partners of hedge fund Politian Capital Management. The bylaw was clearly engineered by the defense advisors and the company to deter Politan from exercising its rights as a shareholder and Politan has brought litigation in the Delaware Chancery Court to invalidate it. *Politan Capital Management LP v. Kiani*, 2022-0948-NAC, Delaware Chancery Court (2022).

13 As noted in our Original Comment Letter, the Commission's revised interpretation of Section 13(d)'s group provision is unlawful because it departs without adequate explanation from past Commission practice. *See* our Original Comment Letter at fns. 70-78 (and cases cited therein) and accompanying text. Wachtell's proposed changes to that proposal do not address any of the shortcomings identified in our Original Comment Letter.

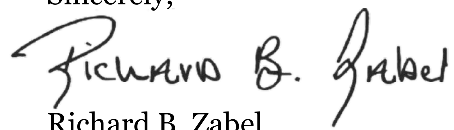
14 Supplemental Wachtell Letter at p. 2.

15 Wachtell pronounces without support and without relevant experience (since it does not run or represent clients that run activist campaigns) that "[i]t has never been more feasible to run cost-effective activism campaigns, given the current market environment in which little more than 10 to 15 institutions are the target audience." Supplemental Wachtell Letter at p. 11. In fact, Wachtell is inadvertently acknowledging how difficult it can be to succeed as an activist when the shareholding is so dominated by large institutions that have conflicting business interests that may prevent them from criticizing management even when they agree with the activist. That has, in fact, been our experience. And further, the cost of mounting an activist effort is immense: often tens of millions of dollars to buy a position, engage experts, engage counsel, and engage the many other third parties that are necessary to ensure that the activist is substantively correct in its views of the company and negotiate or even litigate to a resolution.

Letter represents a balanced presentation, it would have addressed these facts. Instead, Wachtell ignores them.

The strength of the market for corporate control in the United States is due in no small part to the nuanced and balanced regulatory structure created by the Williams Act and implemented by the Commission's regulations and other actions in the 54 years since that Act's enactment. As discussed in our Original Comment Letter, the Section 13(d) Rulemaking proposal threatens to compromise fundamental attributes of the U.S. system. The proposal contained in the Supplemental Wachtell Letter threatens to further compromise our markets by choosing to ensconce management and board members over protecting investors.

Sincerely,



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