



ICGN

International Corporate Governance Network
Inspiring good governance & stewardship

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

Via email

27 June 2023

Dear Secretary Countryman,

Subject: Modernization of Beneficial Ownership Reporting (File No. S7-06-22)

The International Corporate Governance Network (ICGN) appreciates the opportunity to comment on the Securities and Exchange Commission's (SEC) proposed amendments to the rules governing beneficial ownership reporting (the "Proposing Release").

Led by investors responsible for assets under management of \$77 trillion, ICGN is an authority on global standards of corporate governance and investor stewardship. Headquartered in London, our membership is based in more than 40 countries and includes companies, advisors, and other stakeholders.

ICGN would like to share its perspective on Section C, specifically concerning the notion of "two or more persons acting as a group"¹ under the Securities Exchange Act of 1934 and the criteria when investors may confer with each other.

Within the Proposing Release, the SEC has provided exemptions to permit shareholders to communicate and consult with each other, jointly engage issuers, and execute certain transactions without being subject to regulation as a group. ICGN welcomes these proposed amendments.

The ICGN Global Stewardship Principles recommend that investors engage with investee companies with the aim of preserving or enhancing value on behalf of beneficiaries or clients. Investors should be prepared to collaborate with other investors to enhance engagement outcomes.²

Therefore, we appreciate the SEC's recognition that investors should be free to discuss important issues, as they fulfil their fiduciary and stewardship responsibilities, without fear that they will be subject to onerous reporting requirements that ultimately have a chilling effect on discussions.

With respect to the Proposing Release, ICGN offers these views:

- **Determination whether two or more persons are acting as a group**

As noted in the Proposing Release, the determination whether two or more persons are acting as a group under the relevant statutory and rule provisions depends upon the

¹SEC Release, [2022-03222.pdf](#)

² [ICGN Global Stewardship Principles | ICGN](#)

particular facts and circumstances of the situation and may vary on a case-by-case basis. The current lack of clarity may cause investors to be subject to the requirements of the Exchange Act and further regulations when they are simply attempting to engage in a dialogue with an issuer, as they fulfil their fiduciary and stewardship obligations. ICGN welcomes the proposed new Rule 13d–6(c), which helps clarify when two or more persons may communicate, 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.

- **Exemptions to regulation as a “group” under specific circumstances are designed to provide greater certainty while ensuring that the proposed amendments will not have a chilling effect on shareholder communications or engagement or impair certain financial institutions’ capacity to execute strictly commercial transactions in the ordinary course of their business.**

The amendments would revise Rule 13d–6 with a new paragraph, Rule 13d–6(d), and set forth additional exemptions from Sections 13(d) and (g). The new paragraph would explain the circumstances under which two or more persons may enter into an agreement governing a derivative security in the ordinary course of business without concern that they will become subject to regulation as a group. ICGN believes the new paragraph will help investors understand when they could become subject to regulation as a “group” under these circumstances and avoid costly regulatory filings for activity in the ordinary course of business.

There is a legitimate question raised under Section 13(g) whether investors, acting as a group, with combined ownership exceeding 5% of a covered class at the end of a calendar year, should be subject to Section 13(g). ICGN appreciates that the SEC has asked whether additional exemptions may be necessary to address situations in which beneficial ownership reporting under Section 13(d) or 13(g) by a group would be unnecessary from an investor protection standpoint or even contrary to the public interest: We believe that an express exemption is essential.

As part of their stewardship activities, investors may find it appropriate to communicate with one another. This helps inform their engagement strategies and proxy voting decisions. There is nothing inherently unsuitable in these discussions that should trigger additional filings. In turn, communications sent to issuers from a collection of investors can enlighten an issuer’s perspective. Today, with the ability to communicate through all sorts of communication vehicles, the beneficial reporting system should be used for its intended purpose, not to impede communication between shareholders, issuers or proponents of proposals that are not changing or influencing control of an issuer.

The proposed exemptions may indeed help support the SEC’s mission, of “protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation”.³

- **Proposal to add a new paragraph (c) to Rule 13d–6 to avoid chilling communications among shareholders or impeding shareholders’ engagement with issuers.**

ICGN believes that this new paragraph provides clarity for investors that is of utmost importance as they communicate with other investors with no intention to trigger the group reporting requirements. These communications generally are not undertaken with the purpose of influencing control of the issuer, rather they are used for engagement and

³ [SEC.gov | What We Do](https://www.sec.gov/what-we-do)

dialogue between investors and the issuer. They are not acting in concert to acquire, hold or dispose of securities of an issuer. They already have ownership, which may include passive investments. The ownership levels amongst the investors may be widely divergent, thereby confirming that their equity stakes in the company are not being used to change or influence control of the issuer. It is an unfortunate reality that there are some issuers that choose not to respond to an individual investor's request to engage on a topic related to corporate governance, material sustainability risks or capital allocation strategies. When a larger set of investors communicate to a board or senior management, there is more incentive for the issuer to respond.

ICGN recognizes that the SEC's view that proxy solicitations requesting support for a proposal calling for a change of control of an issuer, for example, in the case of a contested election of directors, would have the purpose and effect of changing or influencing control of an issuer.

- **Is the proposed Rule 13d-6(c) exemption broad enough to exempt activity by shareholders who coordinate to make non-binding proposals under 17 CFR 240.14a-8 or otherwise, or is an express exemption needed for shareholders who act together in introducing such proposals?**

ICGN does not consider that the proposed Rule 13d-6(c) is broad enough. We believe that an express exemption is necessary for shareholders who act together when filing non-binding proposals under 17 CFR 240.14a-8. A precatory (i.e., non-binding) shareholder proposal is already challenging enough to file for an investor, particularly when the issuer seeks to have the shareholder proposal removed from its ballot. When shareholders join together to meet the requisite ownership thresholds for filing, they are generally seeking support from other investors to request that a board issue a report on the topic of the proposal, at reasonable expense, and to exclude proprietary information.

These types of proposals are not part of an effort to challenge the election of directors or change control of the company. There are other mechanisms, including "Vote No" campaigns and the use of a Universal Ballot in contested director elections, which could trigger filing under separate regulations.

Thank you again for the opportunity to share our perspective on the proposed amendments. If you would like to follow up with questions or comments, please contact our Global Policy Director, Séverine Neervoort (severine.neervoort@icgn.org) or our Governance and Stewardship Policy Manager, Carol Nolan Drake (carol.nolandrake@icgn.org).

Yours faithfully,



Kerrie Waring

Chief Executive Officer, ICGN

Cc: Catherine McCall, Chair, ICGN Global Stewardship Committee