

# Working From 10 to 5, What a Way to Make a Livin': The SEC's Most Recent Amendments to Promote Corporate Governance and Curb Exploitative Hedge Fund Activism

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*This Note investigates the evolving regulatory landscape following the 2023 SEC amendments regarding beneficial ownership reporting. It begins by analyzing the rise of hedge fund activism and its influence on corporate governance strategies, addressing benefits, controversies, and criticisms associated with this form of shareholder activism. This Note then traces the historical development of the regulatory requirements for beneficial ownership reporting such the Williams Act and now nearly forty years later, the 2023 SEC amendments to Schedule 13(d) and Schedule 13(g). Lastly, this Note analyzes the ongoing limitations and challenges in balancing market transparency with market competition, gleaning into the future trajectory of the SEC regulatory landscape for beneficial ownership reporting. Despite the SEC's efforts to mandate market transparency, shine the spotlight on short-term investment horizons, and slow activist campaigns, this Note questions whether the 2023 SEC amendments sufficiently advance corporate governance initiatives or merely create slight barriers to activist hedge fund campaigns.*

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## TABLE OF CONTENTS

INTRODUCTION .....	277
I. CONTROVERSIES SURROUNDING HEDGE FUND ACTIVISM AND ITS IMPACT ON CORPORATE GOVERNANCE .....	279
A. THE RISE OF HEDGE FUND ACTIVISM .....	280
B. OPPONENTS OF HEDGE FUND ACTIVISM .....	282
C. PUSHING BACK AGAINST SUPPORTERS OF HEDGE FUND ACTIVISM .....	285
II. THE HISTORY OF THE REGULATORY FRAMEWORK FOR CORPORATE CONTROL TRANSACTIONS .....	289
A. SATURDAY NIGHT SPECIALS AND INFORMATION ASYMMETRY .....	289
B. THE WILLIAMS ACT AMENDMENTS .....	291
C. THE DEFICIENCIES OF THE PRIOR RULES .....	292
III. SEC AMENDMENTS TO SCHEDULE 13(D) AND SCHEDULE 13(G) REPORTING .....	295
A. SHORTER REPORTING DEADLINES .....	295
B. ADDRESSING PRIOR DEFICIENCIES .....	297
C. LIMITATIONS AND FUTURE QUESTIONS .....	300
CONCLUSION .....	303

## INTRODUCTION

In 2010, hedge fund titans Steven Roth and Bill Ackman purchased 26.7 percent of J.C. Penney's stock.<sup>1</sup> With this newfound control, the duo sought to overhaul the entire business, revamp J.C. Penney stores, and change the company's customer base.<sup>2</sup> In less than two years, store sales dropped by 25 percent,<sup>3</sup> thousands of employees lost their jobs, and J.C. Penney's stock plummeted nearly 50 percent.<sup>4</sup>

Shareholder activism and takeover attempts are nothing new in the realm of corporate law.<sup>5</sup> Neither is the fact that Mike Ullman, the CEO of J.C. Penney at the time, had no idea that Roth and Ackman purchased a position valued over \$900 billion in the company.<sup>6</sup> More specifically, Roth and Ackman were able to (1) cross 5 percent beneficial ownership and (2) acquire this significant stake in J.C. Penney within the ten-day filing window permitted under federal securities law—all before having to disclose their position.<sup>7</sup> Eventually, Ullman did learn about this sudden and significant change in J.C. Penney's shareholder base, but it was not because of any mandated reporting requirements.<sup>8</sup> Instead, it was because Ackman gave Ullman a courtesy phone call about his new stake in J.C. Penney.<sup>9</sup> Given that a courtesy call did a better job than the mandated reporting requirements under federal securities law, questions arise regarding whether federal securities law can regulate activist hedge funds, which are arguably more

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1. See John C. Coffee, Jr. & Darius Palia, *The Impact of Hedge Fund Activism: Evidence and Implications* 31 (EGCI, Working Paper No. 489, 2014); accord Guhan Subramanian, *Corporate Governance 2.0*, HARV. BUS. REV., Mar. 2015, at 96, 98.

2. See Bob Phibbs, *The Last Thing a Retailer Needs Is an Activist Investor*, RETAIL DIVE (Nov. 29, 2018), <https://www.retaildive.com/news/the-last-thing-a-retailer-needs-is-an-activist-investor/543157>.

3. *Id.*

4. *Id.*

5. Courtney Goldsmith, *Rise of Activist Investors*, WORLD FIN. (July 25, 2023), <https://www.worldfinance.com/special-reports/the-rise-of-activist-investors> ("In 2022, activists were buoyed by tumbling markets that gave them clear sights on how companies could be pushed to improve their margins. According to the Shareholder Activism Annual Review by Insightia, 929 companies were publicly targeted by new campaigns in 2022, up six percent from 2021 and mostly driven by the US, Korea and Japan. 'The outlook for activism in the US is perhaps the best in years, despite an extended run of defeats in 2022's marquee campaigns' . . .").

6. Subramanian, *supra* note 1 ("In 2010 the hedge fund titans Steve Roth and Bill Ackman bought 27% of J.C. Penney before having to disclose their position; Penney's CEO, Mike Ullman, discovered the raid only when Roth telephoned him about it."); Joseph Guinto, *Who Wrecked J.C. Penny?*, DMAG. (Oct. 16, 2013, 10:00 PM), <https://www.dmagazine.com/publications/d-ceo/2013/november/who-wrecked-jc-penney> ("Ackman, a 47-year-old New Yorker, had acquired a \$900 million stake in Plano-based J.C. Penney Co. Inc. in 2010 and gained a seat on the company's board.").

7. Subramanian, *supra* note 1, at 105.

8. Coffee, Jr. & Palia, *supra* note 1, at 53; accord Subramanian, *supra* note 1.

9. Subramanian, *supra* note 1.

focused on generating short-term profit margins than promoting long-term corporate governance.<sup>10</sup>

The Securities and Exchange Commission (SEC) requires investors who take on beneficial ownership in a company to report the details of their ownership through either a Schedule 13(d) filing or a Schedule 13(g) filing.<sup>11</sup> Schedule 13(d) applies to investors who possess a control intent, such as when they seek to incentivize change in a company by gaining a seat on the company's board of directors or push for a different form of capital allocation.<sup>12</sup> Because a control intent refers to investors who seek to incentivize change in the company, the SEC mandates a more detailed filing.<sup>13</sup> Schedule 13(g) pertains to passive investors who lack a control intent, permitting a less detailed filing.<sup>14</sup> Under this filing regime, federal law supposedly regulates activist hedge funds through the same regulatory mechanisms that govern transactions for corporate control.<sup>15</sup> In theory, by imposing a reporting deadline, shareholders, management, and people like Ullman can learn about an activist hedge fund's intention to target their company when they have enough time to evaluate and react.<sup>16</sup>

Prior to the recent 2023 SEC amendments, the regulations for beneficial ownership reporting were not properly modernized.<sup>17</sup> The Schedule 13(d) ten-day deadline was enacted in 1968 and there was no meaningful change until 2023,<sup>18</sup> when the SEC finally proposed and finalized amendments to beneficial

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10. See, e.g., Coffee, Jr. & Palia, *supra* note 1 (discussing how studies have found that hedge fund activist campaigns generally result in short-term gains, but studies assessing long-term gains have been less conclusive); see also Marcel Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. PA. L. REV. 1021, 1083 (2007) (discussing the short-termism associated with hedge funds).

11. See *infra* Subpart II.B (outlining the regulatory framework for beneficial ownership reporting).

12. 15 U.S.C. § 78m(d) (2018).

13. *Id.*; see also CFI Team, *Activist Investor*, CORP. FIN. INST., <https://corporatefinanceinstitute.com/resources/equities/activist-investor/> (last visited Dec. 15, 2024) (defining activist investors and the common intent to enact changes in the target company).

14. 15 U.S.C. § 78m(g).

15. *SEC Adopts Amendments to Beneficial Ownership Reporting Rules: What Investors Need to Know*, COOLEY (Oct. 30, 2023), <https://www.cooley.com/news/insight/2023/2023-10-30-sec-adopts-amendments-to-beneficial-ownership-reporting-rules-what-investors-need-to-know> ("The amendments and guidance demonstrate the importance that the SEC is placing on Section 13 beneficial ownership filing requirements. These requirements can be quite complex – including determination of whether a fund is required to file a Schedule 13D or is permitted to file a Schedule 13G. Moreover, depending on the circumstances, investors filing a Schedule 13G may be subject to differing amendment requirements. Finally, in certain circumstances, funds may have the ability to switch between Schedule 13D and Schedule 13G.").

16. See *id.*

17. Press Release, U.S. Sec. & Exch. Comm'n, SEC Adopts Amendments to Rules Governing Beneficial Ownership Reporting (Oct. 10, 2023), <https://www.sec.gov/news/press-release/2023-219> [hereinafter SEC Press Release]; Igor Kirman, Victor Goldfeld, Elina Tetelbaum & Wachtell Lipton Rosen & Katz, *M&A Developments: Hedge Fund Activism*, HARV. L. SCH. F. ON CORP. GOV. (May 6, 2024), <https://corp.gov.law.harvard.edu/2024/05/06/ma-developments-hedge-fund-activism>.

18. Kirman et al., *supra* note 17.

ownership reporting.<sup>19</sup> The intention of these updates was to promote stronger market transparency and curtail information asymmetry by shortening the reporting deadlines and addressing deficiencies that existed in the prior regulations.<sup>20</sup>

This Note will delve into these 2023 SEC amendments to beneficial ownership reporting and explore their impact on hedge fund activism and corporate governance. More specifically, this Note argues that these amendments fall short of meaningfully promoting corporate governance initiatives. Although the amendments mandate market transparency, slow activist hedge fund campaigns, and bring firm attention to investors prioritizing short-term investment horizons over long-term corporate governance, the amendments erect only a slight obstacle to the sweeping consequences of hedge fund activism.

Part I of this Note illustrates the relationship between activist hedge funds and corporate governance, reviewing the foundational premises of shareholder activism and institutional shareholders. Part I also considers both the advantages and disadvantages regarding hedge fund activism and its impact on corporate governance. Part II details the previous regulatory framework, highlighting the deficiencies in prior regulations that have allowed institutional shareholders to circumvent regulatory mechanisms. Part III outlines the finalized SEC amendments to beneficial ownership reporting and analyzes whether the amendments resolve the deficiencies mentioned in Part II. Lastly, Part III investigates the amendments' impact on corporate governance efforts, surveying the possible benefits for corporate governance and revealing potential open questions.

## I. CONTROVERSIES SURROUNDING HEDGE FUND ACTIVISM AND ITS IMPACT ON CORPORATE GOVERNANCE

Under the amended rules, activist hedge funds may find difficulty continuing to discreetly accumulate a meaningful stake in a target firm with expedited reporting deadlines and clarifications to the prior rules.<sup>21</sup> Numerous law firms expressed concerns regarding the impacts that the SEC amendments to beneficial ownership reporting will have on their client's business operations, namely activist hedge fund operations.<sup>22</sup> Subpart I.A discusses the rise of activist

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19. See SEC Press Release, *supra* note 17.

20. *Id.*

21. *SEC Adopts Rule Amendments to Modernize Beneficial Ownership Reporting*, WHITE & CASE (Oct. 27, 2023), <https://www.whitecase.com/insight-alert/sec-adopts-rule-amendments-modernize-beneficial-ownership-reporting> (“The changes could also increase the costs of acquiring shares, by condensing the demand for shares into a shorter purchasing period in order to make significant purchases before the required Schedule 13D filing . . .”).

22. *Id.*

hedge funds, detailing the concepts of shareholder activism, institutional share ownership, and hedge funds. Subpart I.B and I.C respectively consider the arguments against and in favor of activist hedge funds and their impact on corporate governance at target firms.

#### A. THE RISE OF HEDGE FUND ACTIVISM

Now a well-known tactic, shareholder activism came into prominence in the 1980s.<sup>23</sup> The concept is simple: an activist obtains a meaningful stake in a (typically) underperforming company and aggressively attempts to save the company, intending either to gain a substantial profit or create a positive social or environmental change.<sup>24</sup> Consider the early example of Carl Icahn and Trans World Airlines (“TWA”).<sup>25</sup> Icahn acquired a 20 percent stake in TWA when it was struggling to be profitable.<sup>26</sup> He helped grow the company as it merged with Ozark Airlines in 1986.<sup>27</sup> But when he took the company private and cashed out on \$469 million, TWA employees felt that Icahn was motivated not by a desire to grow the company, but to grow his own wealth.<sup>28</sup> This investment strategy of taking on failing corporations for monetary gain has come to be known as shareholder activism.<sup>29</sup>

These shareholder activism tactics have not been traditionally employed by institutional investors, who usually invest through institutional share ownership.<sup>30</sup> Instead hedge funds, as institutional investors, typically operate as limited partnerships comprised of private investors and professional fund managers oversee the fund’s investment strategies.<sup>31</sup> These funds are composed of passive investors that buy company stock and wait for returns over a longer

23. Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1276 (2008).

24. See, e.g., Bryan Rich, *Watsa’s Blackberry Bid May Not Be the Last One*, FORBES (Sept. 24, 2013, 10:16 AM EDT), <http://www.forbes.com/sites/greatspeculations/2013/09/24/billionaire-watsas-blackberry-bid-may-not-be-the-last-one>.

25. Meghna Maharishi, *Carl Icahn Bet on a Struggling TWA in the 1980s. Now He’s Trying Again with JetBlue.*, SKIFT (Feb. 13, 2024, 12:15 PM EST), <https://skift.com/2024/02/13/carl-icahn-bet-on-a-struggling-twa-in-the-1980s-now-hes-trying-again-with-jetblue/#:~:text=Initially%2C%20he%20helped%20the%20airline,a%20%24540%20million%20in%20debt>.

26. *Id.*

27. *Id.*

28. *Id.* (“‘It became more and more apparent that Carl was not interested in growing the airline but in using TWA as a financial vehicle to acquire wealth for himself,’ a TWA pilot told St. Louis Magazine in 2006.”).

29. *See id.*

30. Randall Smith, *Some Big Public Pension Funds Are Behaving Like Activist Investors*, N.Y. TIMES (Nov. 28, 2013, 8:48 PM), <https://archive.nytimes.com/dealbook.nytimes.com/2013/11/28/some-big-public-pension-funds-are-behaving-like-activist-investors>.

31. The Investopedia Team, *Hedge Fund: Definition, Examples, Types, and Strategies*, INVESTOPEDIA (Apr. 12, 2024), <https://www.investopedia.com/terms/h/hedgefund.asp#:~:text=A%20hedge%20fund%20is%20a,earn%20above%20average%20investment%20returns>.

period.<sup>32</sup> If the fund is dissatisfied with the target firm's performance, the fund typically sells their stock rather than taking a proactive role and attempting to instigate change for better company performance.<sup>33</sup>

However, as shareholder activism continued to grow as a popular and accepted investment strategy, institutional funds sought to employ similar activist tactics to influence companies.<sup>34</sup> Despite being only a small subset of hedge funds, activist hedge funds ("activist funds") constitute an impactful segment in the shareholder activist space, managing over \$150 billion in assets each year.<sup>35</sup> These activist funds also operate as privately owned investment vehicles with a similar goal of generating profits for their fund investors.<sup>36</sup> A major difference between activists funds and institutional funds, as their name suggests, is their method.<sup>37</sup> Activist funds acquire a meaningful stake within a target firm and use that stake to leverage change and maximize shareholder valuation.<sup>38</sup> Equipped with vast amounts of financial resources, activist funds are extremely powerful vehicles that can leverage change within a target firm, either by successfully negotiating with the target firm's board or implementing aggressive tactics to force the board to submit to activist demands.<sup>39</sup>

One indicator of the harms caused by activist funds is actually decreased stock value.<sup>40</sup> For example, in 2016, Nelson Peltz, the CEO of an activist hedge fund, Trian Fund Management ("Trian"), targeted one of the largest American

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32. *Id.*; see *Holding Periods for Institutional Asset Owners*, INSTITUTIONAL INV. (May 11, 2022), <https://iinetworks.com/content/holding-periods-institutional-asset-owners#:~:text=Long%20Holding%20Periods%20Holding%20periods%20for%20investment,equity%2C%20fixed%20income%20and%20hedge%20funds%2C%20respectively> ("Holding periods for investment managers are surprisingly long: 68%, 65%, and 42% of respondents report average holding periods of longer than 5 years for public equity, fixed income and hedge funds, respectively.").

33. See James Mackintosh, *Jitters Bring Polygon Founder to a Halt*, FIN. TIMES (June 4, 2008), <https://www.ft.com/content/b7abf744-31c3-11dd-b77c-0000779fd2ac>.

34. Smith, *supra* note 30.

35. Christine Williamson, *Activist Investment Firms Thriving, but Take Different Tacks on Engagement*, PENSIONS & INVS. (June 28, 2023, 8:00 AM), <https://www.pionline.com/hedge-funds/activist-investment-firms-thriving-take-different-tacks-engagement#:~:text=Assets%20under%20management%20in%20event,fund%20tracking%20firm%20HFR%20Inc>.

36. *Hedge Fund Activism*, ECGI, <https://www.ecgi.global/publications/collections/hedge-fund-activism> (last visited Dec. 15, 2024).

37. *Id.*

38. Bill George & Jay W. Lorsch, *How to Outsmart Activist Investors*, HARV. BUS. REV., May 2014, at 88, 90.

39. See Michelle Fox, *Hedge Funds Expect to Top \$3 Trillion in 2015: Deutsche Bank*, CNBC (Mar. 2, 2015, 3:51 PM EST), <http://www.cnbc.com/id/102469737> ("[T]he hedge fund industry is on track to surpass \$3 trillion in assets this year, according to a new survey by Deutsche Bank.").

40. See *infra* Subpart I.B for discussion on changes in stock value caused by activist funds.

multinational companies in the United States, Procter & Gamble (“P&G”).<sup>41</sup> Trian engaged in one of the most expensive proxy battles in U.S. history, with the goal of having Peltz serve on P&G’s board of directors.<sup>42</sup> Peltz expressed his desire to help the underperforming company.<sup>43</sup> Meanwhile, Daniel Taylor, the then CEO of P&G, warned about the dangers associated with activist funds, citing to the potential impact it may have on both the short-term and long-term future of P&G.<sup>44</sup> Taylor expressed concerns with Peltz’s plan to reorganize the company and eliminate corporate research and development, believing it would deprive P&G of future “lucrative opportunities.”<sup>45</sup> After Trian’s victory in the proxy battle, P&G shares increased by only 4 percent in twelve months, falling 18 percent behind its projected growth.<sup>46</sup> And this is just one example of the harm that activist funds can have on the companies they invest in.

Although there are harms associated with these practices, activist funds argue that they promote better governance at target firms they invest in by taking actions that maximize profits in the target firm and thereby generate profits for fund investors.<sup>47</sup> Thus, the conflict between hedge fund activism and corporate governance emerges, opening up debate over whether the methods activist funds employ to maximize profits within the target firm come at the expense of long-term corporate governance efforts.<sup>48</sup>

#### B. OPPONENTS OF HEDGE FUND ACTIVISM

Opponents of hedge fund activism assert that although activist fund interests can align with a firm’s short-term goals to generate profit, the fund’s interests problematically diverge from the firm’s long-term corporate governance efforts.<sup>49</sup> Some activist funds operate on the belief that companies that spend on environmental, social, and governance (“ESG”) efforts invest into

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41. Chris Isidore & David Goldman, *Procter & Gamble Declares Victory in Expensive Proxy Fight*, CNN BUS. (Oct. 10, 2017, 11:49 AM ET), <https://money.cnn.com/2017/10/10/news/companies/procter-gamble-proxy-fight/index.html>.

42. *Id.*

43. Lizzy Gurdus, *P&G CEO Calls Nelson Peltz’s Proposals ‘Very Dangerous’ in Short and Long Term*, CNBC (Sept. 11, 2017, 8:25 PM EDT), <https://www.cnbc.com/2017/09/11/pg-ceo-calls-nelson-peltzs-proposals-very-dangerous.html>.

44. *Id.*

45. *Id.*

46. Isidore & Goldman, *supra* note 41.

47. Joel Slowatsky, *Hedge Fund Activism in an Age of Global Collaboration and Financial Innovation: The Need for a Regulatory Update of United States Disclosure Rules*, 35 REV. BANKING & FIN. L. 272, 291, 302 (2015).

48. *Id.* at 301–02 (“There is a vigorous split of opinion in the corporate governance context as to whether activist investors are beneficial or detrimental to shareholders and companies. Some believe activism concentrates too much on short-term results to the detriment of long-term profitability.”).

49. Lynne L. Dallas, *Short-Termism, the Financial Crisis, and Corporate Governance*, 37 J. CORP. L. 265, 267 (2011).



unreliable returns.<sup>50</sup> This leads those activist funds to seek a significant stake in those companies, often to redirect any spending on ESG activities into possibilities that maximize shareholder returns.<sup>51</sup> As a result, opponents view hedge fund activism to be purely motivated by self-serving interests, especially given funds' incentive-based structure.<sup>52</sup>

In a study conducted between 2000 and 2016, the Higher Education Commission, Paris ("HEC Paris") found that activist funds are twice as likely to target firms with higher corporate social responsibility (CSR).<sup>53</sup> Because companies with higher CSR ratings tend to engage in more corporate governance and social responsibility activities, activist funds find it easier to redirect those funds towards efforts that maximize shareholder returns.<sup>54</sup> HEC Paris conducted a study of over 1,300 European companies, comparing firms targeted by activist funds against firms that were not targeted by activist funds.<sup>55</sup> HEC also interviewed CEOs and executives at targeted firms<sup>56</sup> as well as hedge fund managers and founders on their motives when targeting a firm.<sup>57</sup> This study had three key findings.

First, after being targeted by an activist fund, company valuation first rises then falls.<sup>58</sup> When an activist fund targets a firm, the firm experiences

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50. See Martin Lipton & William Savitt, *The Many Myths of Lucian Bebchuk*, 93 VA. L. REV. 733, 746 (2007) (finding that hedge fund investors have "no interest at all in the long-term economic success of the enterprise") (citation omitted).

51. See Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561, 582–83 (2006).

52. See Steve Denning, *The Seven Deadly Sins of Activist Hedge Funds*, FORBES (Feb. 15, 2015, 5:09 PM EST), <http://www.forbes.com/sites/stevedenning/2015/02/15/the-seven-deadly-sins-of-activist-hedge-funds>.

53. Mark DesJardine & Rodolphe Durand, *Why Activist Hedge Funds Target Socially Responsible Firms, and How Executives and Investors Can Counteract Them*, HEC PARIS (Mar. 25, 2021), <https://www.hec.edu/en/why-activist-hedge-funds-target-socially-responsible-firms-and-how-executives-and-investors-can-counteract-them>.

54. Mark DesJardine, Emilio Marti & Rodolphe Durand, *Why Activist Hedge Funds Target Socially Responsible Firms: The Reaction Costs of Signaling Corporate Social Responsibility*, 64 ACAD. MGMT. J. 851, 852 (2020).

55. DesJardine & Durand, *supra* note 53 ("[W]e studied more than 500 companies between 2000 and 2016, a period of intense hedge fund activity, and found that companies who spend more on CSR than their peers are more likely to be targeted. To be precise, a company's probability of being targeted by an activist hedge fund nearly doubles – from 3.04% to 5.11% – when its CSR score increases by two standard deviations above the average.").

56. *Id.* ("Secondly, we examined the signals that companies send out both through their words and their actions.").

57. Mark DesJardine & Rodolphe Durand, *Activist Hedge Funds: Good for Some, Bad for Others?*, HEC PARIS (Mar. 26, 2021), <https://www.hec.edu/en/activist-hedge-funds-good-some-bad-others#:~:text=While%20we%20typically%20think%20of,with%20an%20aim%20to%20make> ("We interviewed CEOs and other executives of companies that had come under the sights of activist hedge funds, as well as numerous managers and founders of hedge funds.").

58. *Id.* ("In both our sample and in prior research, after being targeted by an activist hedge fund, companies experience an immediate rise in their value . . . . However, this rise is short lived as it turns negative. In the years that follow, the value of the companies targeted by activist hedge funds steadily drops.").

approximately a 7.7 percent uptick in its valuation in the following year.<sup>59</sup> However, this valuation falls 4.9 percent four years after the targeting and continues to fall over the next five years.<sup>60</sup> Although short-term shareholders may reap the benefits, the long-term shareholders suffer the consequences from the targeting.<sup>61</sup>

Second, the firm starts to abandon its corporate governance plans.<sup>62</sup> Specifically, the study found that a firm's social performance falls by 18 percent within two years, causing corporate governance plans, such as environmental sustainability and social responsibility plans to be abandoned.<sup>63</sup> In five years, corporate social performance drops by about 25 percent.<sup>64</sup> The study further suggests that activist funds compel target firms to set aside corporate governance objectives and focus purely on increasing a company's valuation through pressuring the company to cut costs on measures that would originally go towards promoting corporate governance objectives.<sup>65</sup> Meanwhile, firms that have not been targeted by activist funds do not feel the same pressures that target firms do—as a result, these firms experienced a steady increase in CSR ratings.<sup>66</sup>

Third, after an activist fund targets a company, the company tends to undergo cutbacks in various departments due to activist fund pressure.<sup>67</sup> The study found that a company will experience “immediate and steady job losses.”<sup>68</sup> In the first year following the investment by the activist fund, the company may cut its workforce by about 4.5 percent. By the fifth year, a company may cut its workforce by 7 percent.<sup>69</sup> Based on the average company size in the study, approximately 383 to 642 employees can lose their jobs.<sup>70</sup>

The company also tends to scale back its operation costs, falling by about 4.7 percent in year two and 6.6 percent in year five, which can further contribute

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59. *Id.* (“Our research finds a 7.7% uptick in company value in the year following targeting.”).

60. *Id.* (“In the years that follow, the value of the companies targeted by activist hedge funds steadily drops, falling 4.9% four years after targeting and continuing downwards five years after targeting.”).

61. *Id.* (“Overall, when comparing the total value generated over five years, shareholders of targeted companies benefit from hedge fund activism in the short term but seem at a disadvantage in the later years.”).

62. *Id.*

63. *Id.* (“Two years after being targeted by an activist hedge fund, companies see their corporate social performance fall by 18% on average.”).

64. *Id.* (“By year five, this number becomes 25%.”).

65. *Id.* (“[A]s soon as an activist hedge fund takes ownership of a company's shares, the company is likely to firmly place on hold their efforts to be more environmentally sustainable and socially responsible while the non-targeted firms keep improving—which explains the striking difference.”).

66. *See id.* Figure 1 and Figure 2 within the study track the impacts that hedge fund activism has on firm value and CSR ratings over the span of five years. *Id.*

67. *Id.*

68. *Id.* (“There are immediate and steady job losses after an activist hedge fund targets a company.”).

69. *Id.* (“[T]he number of job losses amount on average to 4.5%, which continues to grow to 7% by year five.”).

70. *Id.* (“For an average company in our sample, this equates to a loss of 383 to 642 employees.”).

to workforce reduction.<sup>71</sup> This equates to about \$22 million to \$31 million in average cutbacks based on the average size company in the study.<sup>72</sup> Lastly, a company's research and development spending will also decrease by about 6 percent in year one and 9 percent by year five—estimating to a \$6 million to \$10 million decrease in research and development strategies at an average sized company in the study.<sup>73</sup> While the HEC Paris pertains to European corporate governance, the J.C. Penney example indicates that the study's findings impact U.S. companies in nearly identical ways.<sup>74</sup>

The interviews with activist fund managers provide further insight into their motivations.<sup>75</sup> Unnamed managers stated that their role in activist fund campaigns focuses on reorienting a company's activities so that market valuations increase sooner rather than later.<sup>76</sup> One manager even explained that the fund takes on a risk by targeting and investing into a company.<sup>77</sup> Because of these associated risks, most activist funds hold onto shares for about one or two years—in very rare cases, a fund will hold shares for three years.<sup>78</sup> The goal is short-term profits, so activist funds scout for unnecessary spending that will not generate profit in the short-term, pressuring the board to cease those expenditures.<sup>79</sup> Given the typical holding period, activist funds eagerly scrap these long-term initiatives in exchange for shorter-term rewards.<sup>80</sup>

### C. PUSHING BACK AGAINST SUPPORTERS OF HEDGE FUND ACTIVISM

Supporters of hedge fund activism advocate for a significantly different view: that activist funds hold corporate management accountable, remove inefficient managers, and bridge the monitoring gap left by passive and apathetic

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71. *Id.* (“Two years following targeting, operating expenses fall by 4.7% and continue falling, by 6.6% in year five.”).

72. *Id.*

73. *Id.* (“Research and development spending also decreases, by 6% in the first year after a company is targeted and by 9% five years later, equating to cutbacks of between \$6 and \$10 million for an average-sized company.”).

74. *See* Phibbs, *supra* note 2.

75. *See* DesJardine & Durand, *supra* note 57 (finding that activist hedge funds “take risks when investing in companies and aim to sell their shares in companies shortly after their initial purchase date”).

76. *Id.* (“One activist hedge fund manager warned, ‘Of course I would be glad to be ESG [environmental-social-governance] conscious and responsible, but if that means I’m going to underperform, I’m not going to do it.’”).

77. *See id.*

78. *Id.*

79. *Id.* (“Because managers at activist hedge funds are evaluated on a monthly basis and rewarded for short-term performance, they are driven to reorient companies’ activities in a way that generates market value sooner rather than later.”).

80. *Id.* (“The data we collected further suggests that when an activist hedge fund takes ownership of a company’s shares they can rapidly reconfigure the company, maximizing its profitability and market performance. However, we found that compared with similar non-targeted companies, the costs of these financial gains are later incurred down the line by other stakeholders, including employees and long-term shareholders.”).

shareholders.<sup>81</sup> In turn, hedge fund activism promotes better corporate governance.<sup>82</sup> Supporters also challenge the so-called “myths” that most critics have regarding activist funds: (1) that they are only motivated by short-term gains; (2) that they engage in problematically aggressive methods; and (3) that they seek full control in target firms.<sup>83</sup>

A Virginia Law study collected data from nearly 500 activist fund campaigns in the United States based on SEC EDGAR filings and challenged the so-called “myth” that hedge fund activism is only focused on short-term profits<sup>84</sup> through the deployment of overly aggressive strategies.<sup>85</sup> This empirical study contended that hedge fund activism should not be curtailed, does not warrant a legislative response, and found that activist funds tend to hold their shares longer than critics pose.<sup>86</sup> Breaking conventional wisdom, the study revealed that 73.6 percent of the activist funds held the target firm’s shares for over a year, with 131 activist funds holding shares for between one to three years and 148 activist funds holding them for more than three years.<sup>87</sup> While three years is generally not considered as a long-term holding period,<sup>88</sup> these medium-term investments are longer-term for activist funds and generate profits at the target firm through initiatives such as governance, capital structure decisions, and improved operating performance.<sup>89</sup>

The study then grouped activist fund tactics into three categories: (1) gentle activism; (2) soft activism; and (3) aggressive activism.<sup>90</sup> Gentle activism pertains to actions that do not attract media or public attention such as communication directly with target firms and informal proposals.<sup>91</sup> Soft

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81. Kahan & Rock, *supra* note 10, at 1047; Alon Brav, Wei Jiang, Frank Partnoy & Randall Thomas, *Hedge Fund Activism, Corporate Governance, and Firm Performance*, 53 J. FIN. 1729, 1774 (2008) (finding activist hedge funds “can be viewed as a new middle ground between internal monitoring by large shareholders and external monitoring by corporate raiders”); JONATHAN R. MACEY, CORPORATE GOVERNANCE: PROMISES KEPT, PROMISES BROKEN 272 (2008).

82. See MACEY, *supra* note 81, at 246.

83. Dionysia Katelouzou, *Myths and Realities of Hedge Fund Activism: Some Empirical Evidence*, 7 VA. L. & BUS. REV. 459, 476–77 (2013).

84. See *id.* at 460; THE ASPEN INSTITUTE, OVERCOMING SHORT-TERMISM: A CALL FOR A MORE RESPONSIBLE APPROACH TO INVESTMENT AND BUSINESS MANAGEMENT 2 (2009), [https://www.aspeninstitute.org/wp-content/uploads/files/content/docs/pubs/overcome\\_short\\_state0909\\_0.pdf](https://www.aspeninstitute.org/wp-content/uploads/files/content/docs/pubs/overcome_short_state0909_0.pdf).

85. Anabtawi & Stout, *supra* note 23, at 1279.

86. Katelouzou, *supra* note 83, at 478–84.

87. *Id.* at 479 (“[T]he vast majority of hedge funds (73.6%) remain in their target for more than one year. Of the 379 investments for which a holding period could be determined, 100 (26.4%) were for less than one year (short-term), 131 (34.6%) were for between one and three years (medium term), and 148 (39.1%) were for more than three years (long term).”).

88. *Id.*

89. MIKE WRIGHT, ANDREW BURROWS, ROD BALL, LOUISE SCHOLLES, MIGUEL MEULEMAN & KEVIN AMESS, OECD, THE IMPLICATIONS OF ALTERNATIVE INVESTMENT VEHICLES FOR CORPORATE GOVERNANCE: A SURVEY OF EMPIRICAL RESEARCH 6 (2007).

90. Katelouzou, *supra* note 83, at 484–85.

91. *Id.* at 484.

activism refers to communications that publicly criticize a firm, such as asking for board representation and advocating for change.<sup>92</sup> Aggressive activism refers to adversarial actions such as proxy fights, including seeking board representation against the management's will, campaigns to replace executives or directors, and takeover attempts—generally the sort of tactics that Trian employed in the earlier example.<sup>93</sup> Placing each tactic identified in the 833 data points into one of these three categories,<sup>94</sup> the study suggested that activist funds tend to use gentle activism 29.8 percent of the time, soft activism 39.5 percent of the time, and aggressive activism 30.7 percent of the time.<sup>95</sup> Supporters assert that, despite the evidence and the media's emphasis of highly aggressive tactics being used by activist funds, the statistics show that activist funds tend to use non-confrontational methods to seek change in target firms more often than not.<sup>96</sup>

Regarding control intent, the study highlighted that activist hedge funds are also unlikely to influence decision making processes for corporate governance efforts because activist funds do not acquire full control of a target company.<sup>97</sup> The study provided that the maximum stake held by an activist fund is around 11.54 percent of a firm's total shares.<sup>98</sup> For wolf packs, groups of separate investors acting together to target the same company, the average ownership held by "wolves" was collectively 17.02 percent.<sup>99</sup> Supporters argue that despite the media's efforts to portray activist funds as the next corporate raiders, statistics indicate that these funds hold relatively small amounts of shares and are unlikely to power over management.<sup>100</sup>

However, the problem is not that activist funds want to seek full control of a target firm, but that these funds gain enough control to leverage some type of change in the target firm, which may be enough for an activist fund to make

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92. *Id.* at 485.

93. *Id.*; *see also* Isidore & Goldman, *supra* note 41 (detailing Procter & Gamble's proxy fight against an aggressive activist hedge fund).

94. Katelouzou, *supra* note 83, at 485.

95. *See id.* at 48586 (percentages were calculated based on entries in Table 2, Summary of Activist Hedge Fund Tactics).

96. *Id.* at 489 ("Overall, the evidence presented seems to counter allegations of ultra-aggressive activist strategies. Hedge funds prefer to fly below the radar and adopt more soft tactics to help management to unlock dormant value. Recourse to quiet activism is, if anything, more common than these data show, for two reasons. First, quiet activism is probably underrepresented in my sample because of the lack of any proprietary information. Second, because the description of an activist event is dependent on the way they are presented in the press, my sample might result in a skewed presentation of confrontational activist events, as media tend to over emphasize adversary engagements.").

97. Brian R. Cheffins & John Armour, *The Past, Present, and Future of Shareholder Activism by Hedge Funds*, 37 J. CORP. L. 51, 55 (2011).

98. Katelouzou, *supra* note 83, at 490.

99. *Id.* at 491.

100. *Id.* at 496–97.

short-term profit without dealing with the long-term consequences that may follow. For example, the study highlights that while activist funds do not seek to gain full control, activist funds can seek enough control to block or support a merger, oust management, and even sell the target firm.<sup>101</sup> This is further amplified by the recent rise of activist funds' power and influence, namely in their capability to invest into 17 percent of S&P 500 companies.<sup>102</sup> Furthermore, in recent years, activist fund assets have grown substantially where the top 50 activists collectively managed around \$156 billion in equity assets at the end of 2023.<sup>103</sup>

Regarding the empirical evidence that holding periods are longer, the feud between corporate governance and hedge fund activism pertains to not only the short-term but also the long-term.<sup>104</sup> A commitment to a three-year holding period may seem to challenge the idea that funds are only interested in short-term profiting—as well as the findings from the HEC Paris study.<sup>105</sup> However, three years is still not a long enough period to realize long-term corporate governance goals.<sup>106</sup> Additionally, a three-year holding period also does not immediately signal an activist fund's dedication to long-term growth of a target firm through corporate governance initiatives.<sup>107</sup> Instead, activist funds who retain shares after three-years might simply indicate that the activist fund did not generate enough profit for the activist fund to divest its target firm shares.<sup>108</sup>

Moreover, adopting less aggressive tactics does not eliminate the potential for these activist funds to derail corporate governance plans.<sup>109</sup> Other studies have indicated that no matter which tactics are used, activist funds typically demand that the companies scale back, restructure assets, and adjust how dividends are distributed.<sup>110</sup> In certain instances, an activist fund may employ too aggressive of tactics that can destabilize management and negatively impact minority shareholders.<sup>111</sup> Exemplifying the potential negative impact of activist

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101. *Id.* at 495–96.

102. Kirman et al., *supra* note 17 (“There has been a resurgence of activism activity after the temporary drop during the Covid-19 pandemic; 2023 saw a 9% increase in global activism campaigns compared to 2022, which itself saw a 38% year-on-year increase in the number of campaigns launched in 2021. Approximately 17% of S&P 500 companies have a known activist holding more than 1% of their outstanding shares.”).

103. *Id.*

104. See Lipton & Savitt, *supra* note 50, at 746.

105. See Katelouzou, *supra* note 83, at 478–84; DesJardine & Durand, *supra* note 57.

106. See DesJardine et al., *supra* note 54, at 854–55 (“This short-term focus led one board member of a targeted firm to tell us: ‘I think it’s quite difficult to explain to a hedge fund that you’ll create value over seven years.’”).

107. See Anabtawi, *supra* note 51, at 564.

108. *Id.*

109. DesJardine & Durand, *supra* note 57.

110. *Id.*; see John C. Coffee, Jr. & Darius Palia, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance*, 41 J. CORP. L. 545, 556 (2016).

111. DesJardine & Durand, *supra* note 57; see Katelouzou, *supra* note 83, at 490–91, 495–97.

funds seeking out underperforming targets, the J.C. Penney and Ackman transaction demonstrates a detrimental overhaul of the target's business model against the company's wishes.<sup>112</sup>

The rise of fund activism has led many supporters to believe activist hedge funds push for strategic changes that benefit the long-term health of companies, increase shareholder value, and improve corporate governance strategies.<sup>113</sup> However, many more opponents argue that these practices harm corporate stability and long-term investments strategies.<sup>114</sup> These critics call on the SEC for change to regulate the practices of activist hedge fund more closely and ensure that their activities align with market stability and fair governance practices.<sup>115</sup>

## II. THE HISTORY OF THE REGULATORY FRAMEWORK FOR CORPORATE CONTROL TRANSACTIONS

Part II addresses the regulatory framework that oversees transactions for corporate control, which functionally allows for the moderation of problematic hedge fund activism. Subpart II.A introduces the history leading to the Williams Act, providing the relevant background regarding Saturday Night Specials and information asymmetry. Subpart II.B outlines the previous provisions of the Williams Act. And subpart II.C highlights the deficiencies in the prior regulations and illustrates how the problem of information asymmetry remained even after the Williams Act.

### A. SATURDAY NIGHT SPECIALS AND INFORMATION ASYMMETRY

An activist shareholder typically gains control through a transaction for corporate control, either by (1) acquiring shares from a controlling shareholder; or (2) aggregating shares from many smaller shareholders.<sup>116</sup> Given that most public companies are widely held, they almost never have a singular controlling shareholder.<sup>117</sup> Instead, control lies in the market, relegating a buyer seeking control to the latter option.<sup>118</sup>

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112. Phibbs, *supra* note 2.

113. *See supra* Subpart I.C (discussing and refuting arguments made by supporters of activist funds).

114. *See supra* Subpart I.B (detailing the arguments made by opponents of activist funds).

115. Lucian A. Bebchuk, Alon Brav & Wei Jiang, *The Long-Term Effects of Hedge Fund Activism*, 114 COLUM. L. REV. 1085, 1152 (2015).

116. WILLIAM T. ALLEN, REINIER KRAAKMAN & VIKRAMADITYA S. KHANNA, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 464–65 (6th ed. 2021).

117. *Id.* at 489.

118. *Id.*

Whenever a transaction for corporate control occurs, the firm takes on a risk.<sup>119</sup> The new controlling shareholder may have a better vision for the firm, wielding a plan to use corporate resources more efficiently, push out unproductive or self-serving management, and ultimately increase dividends for all shareholders.<sup>120</sup> On the other hand, the new controlling shareholder may have a self-serving agenda, scheming to withdraw a disproportionate amount of corporate wealth through non-pro rata distribution, award themselves an egregious executive compensation package, or loot company resources—all at the expense of minority shareholders.<sup>121</sup>

Regardless of the buyer's intent, numerous transactions for corporate control have historically operated in the dark.<sup>122</sup> Like most transactions in the realm of business, they were often done quickly.<sup>123</sup> With that haste, shareholders and management were left with little time and minimal information regarding the transaction.<sup>124</sup> In the 1970s, shareholders would commonly receive Saturday night calls from buyers willing to purchase their shares at a particular price.<sup>125</sup> However, no additional information accompanied the offer—only that the decision must be made by Monday.<sup>126</sup> Known as the Saturday Night Special, this technique was employed by buyers to pressure shareholders into making quick decisions, leaving management with little to no time to evaluate the sale and mount a proper defense.<sup>127</sup> The term originated from a 1975 public relations campaign against Colt Industries' hostile tender offer for Garlock Inc.<sup>128</sup> Colt Industries offered to purchase all of Garlock Inc.'s outstanding stock for \$76.8 million, all of which was a complete surprise to Garlock having learned about

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119. Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698, 712 (1982).

120. *Id.* at 715–16.

121. *See id.* at 716; *see also* Jerry Markon & Robert Frank, *Adelphia Officials Are Arrested, Charged with 'Massive' Fraud*, WALL ST. J. (July 25, 2002, 12:01 AM ET), <https://www.wsj.com/articles/SB1027516262583067680>.

122. *See* Daniel Liberto, *Saturday Night Special: What It Is, How It Works*, INVESTOPEDIA (Aug. 8, 2021), <https://www.investopedia.com/terms/s/saturdaynightspecial.asp>.

123. *See* Ali Lokhandwala & Katy Quintanilla, *Demystifying the Role of an Effective Transaction Management Office*, FTI CONSULTING 3 (July 29, 2023), <https://www.fticonsulting.com/insights/articles/demystifying-role-effective-transaction-management-office> (“Speed is critical to any transaction, and time lost bringing others up to speed is not time that will be picked up later in the process.”).

124. Liberto, *supra* note 122.

125. *Id.*

126. *Id.*

127. *Id.*

128. *See* PATRICK A. GAUGHAN, *MERGERS, ACQUISITIONS, AND CORPORATE RESTRUCTURINGS* 51 (4th ed. 2007).



the offer the previous night.<sup>129</sup> Absent the necessary time and information, harmful opportunism by controlling shareholders became more prevalent, inviting the possibility of an actor jeopardizing company and shareholder valuation.<sup>130</sup> Over time, this practice led to harms such as increasing the volatility of shares, destabilizing management, reducing employee morale, and diminishing investor confidence.<sup>131</sup>

## B. THE WILLIAMS ACT AMENDMENTS

To address the harms as illustrated above, Congress passed the Williams Act in 1968, a set of amendments to the 1934 Securities Exchange Act, to promote market transparency and allow for better regulation of corporate control transactions.<sup>132</sup> Legislators intended for the Williams Act to alert the market about public offerings and provide shareholders with ample time and sufficient information to make an informed decision before tendering their shares.<sup>133</sup>

The Williams Act contained four principal elements to facilitate those goals.<sup>134</sup> The first element provides an “early warning system” under section 13(d).<sup>135</sup> The second element mandates disclosure of potential tender offers.<sup>136</sup> To address other additional concerns surrounding tender offers, the third and fourth elements respectively seek to prevent fraud and further regulate how public tender offers are substantively made.<sup>137</sup>

Of relevance here is the first element of the Williams Act: the early warning system. Under the first element, section 13(d) requires any person who acquires beneficial ownership greater than 5 percent to file an ownership report with the SEC.<sup>138</sup> This ownership report informs the SEC, the public, and the company about a buyer who purchases more than 5 percent of the company’s voting shares, as the SEC assumes the buyer harbors a control intent.<sup>139</sup> The report requires the person to disclose their background, their identity, their purpose for the share ownership, and the number of shares that are owned.<sup>140</sup> Furthermore,

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129. See *Garlock Is Sought by Colt Industries*, N.Y. TIMES, Nov. 18, 1975, at 49, <https://www.nytimes.com/1975/11/18/archives/garlock-is-sought-by-colt-industries-colt-industries-bids-for.html>.

130. See *id.*; see also Markon & Frank, *supra* note 121.

131. Bebchuk et al., *supra* note 115, at 1148–50.

132. Kristin Giglia, Note, *A Little Letter, A Big Difference: An Empirical Inquiry Into Possible Misuse of Schedule 13G/13D Filings*, 116 COLUM. L. REV. 105, 108–09 (2016).

133. ALLEN ET AL., *supra* note 116, at 489; see Liberto, *supra* note 122.

134. ALLEN ET AL., *supra* note 116, at 489.

135. *Id.* at 489–90.

136. *Id.* at 490.

137. *Id.*

138. 15 U.S.C. § 78m(d).

139. *Id.*

140. *Id.* § 78m(d)(1)(A).

the SEC reserves a right to request “additional information” that may be needed for the public’s interest or the protection of investors.<sup>141</sup> Under the Williams Act, section 13(d) required that the person file this ownership report within ten days of acquiring 5 percent or more of a company’s voting shares.<sup>142</sup>

Congress further enacted a series of amendments, which then formed the basis for a Schedule 13(g) short form filing.<sup>143</sup> First, in 1970, Congress passed an amendment for section 13(d)(5), which allowed for a short form filing option—only requiring the name of the person, the number of shares, the date of acquisition, and other information as requested by the SEC.<sup>144</sup> This short form addressed the burdens faced by passive institutional investors who had to continually and excessively file section 13(d) reports.<sup>145</sup> In 1977, Congress passed another amendment to include section 13(g), allowing for an even shorter statement of one’s stock ownership.<sup>146</sup> Under section 13(g), the report only required the party’s identifying information, the number of shares, and the purpose for owning them.<sup>147</sup> Together, sections 13(d)(5) and 13(g) later formed the basis for a short form filing, which is known today as a Schedule 13(g).<sup>148</sup>

### C. THE DEFICIENCIES OF THE PRIOR RULES

Despite the Williams Act’s goals and efforts, buyers could still circumvent the act’s regulatory hurdles.<sup>149</sup> Specifically, due to the length of the reporting window, buyers could continue to trade millions of shares before the information was ever revealed to the public.<sup>150</sup> Today’s technology allows buyers to purchase a significant number of public securities in matters of seconds, and the previous rules allowed parties to have ten calendar days to report their beneficial

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141. *Id.* § 78m(d)(1).

142. Filing of Schedules 13D and 13G, 75 Fed. Reg. 56780 (Sept. 16, 2010) (codified at 17 C.F.R. § 240.13d-1).

143. Giglia, *supra* note 132, at 109–10; 15 U.S.C. § 78m(g).

144. Act of Dec. 22, 1970, Pub. L. No. 91-567, § 1, 84 Stat. 1497, 1497 (codified at 15 U.S.C. § 78m(d)(5)).

145. *See* 15 U.S.C. § 78m(d)(5).

146. *See* Domestic and Foreign Investment Improved Disclosure Act of 1977, Pub. L. No. 95-213, § 203, 91 Stat. 1494, 1499 (codified at 15 U.S.C. § 78m(g)).

147. 15 U.S.C. § 78m(g)(1)(A)–(B).

148. *See* Giglia, *supra* note 132, at 110; HAROLD M. WILLIAMS, U.S. SEC. & EXCH. COMM’N, 44TH ANNUAL REPORT OF THE SEC 19–20 (1979), [https://www.sec.gov/about/annual\\_report/1978.pdf](https://www.sec.gov/about/annual_report/1978.pdf).

149. *See GAF Corp. v. Milstein*, 453 F.2d 709, 717 (2d Cir. 1971) (“[T]he purpose of section 13(d) is to alert the marketplace to every large, rapid aggregation or accumulation of securities, regardless of technique employed, which might represent a potential shift in corporate control.”); Giglia, *supra* note 132, at 124.

150. Theodore N. Mirvis, Adam O. Emmerich, David A. Katz & Wachtell, Lipton, Rosen & Katz, *Comment Letter on Modernizing Section 13(d) and (g) Beneficial Ownership Reporting*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 14, 2022), <https://corpgov.law.harvard.edu/2022/04/14/comment-letter-on-modernizing-section-13d-and-g-beneficial-ownership-reporting/#2>.

ownership.<sup>151</sup> Opportunist investors could and would purchase 5 percent of a company's registered voting stock and then purchase as many shares as possible within the next nine calendar days to accumulate a controlling block of shares sufficient to influence the target firm without ever alerting the market.<sup>152</sup>

The previous rules required amendments to the Schedule 13(d) and 13(g) filings be made "promptly."<sup>153</sup> Yet, no guidelines were ever given on what constituted a "prompt" filing.<sup>154</sup> As a result, many investors loosely followed this requirement to file an amendment.<sup>155</sup> Furthermore, the ambiguity of the term "calendar day" was also abused.<sup>156</sup> Some investors interpreted ten calendar days to mean ten business days, providing themselves with a longer window to continue accumulating stocks into a control block.<sup>157</sup>

Moreover, investors have also taken advantage of Schedule 13(g) short form filings by presenting themselves as passive investors during their stock acquisition even though they truly harbor control intent.<sup>158</sup> Before launching a surprise attack, these activists can accumulate as much as 20 percent ownership

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151. *Id.* ("In today's world, where significant purchases of public securities can be executed in a matter of seconds and where voting and economic interests can be further amplified through the use of derivative securities, five days can be an eternity.")

152. *Id.*

153. Filing of Schedule 13D and 13G, 75 Fed. Reg. 56780 (Sept. 16, 2010) (codified at 17 C.F.R. § 240.13d-1).

154. *See id.*; *see also* Gerard S. DiFiore, Michael S. Lee, Tommi Li, Sarah Lee & Lauren Short, *Sections 13(d) and 13(g) of the Securities Exchange Act*, REEDSMITH (Nov. 10, 2023), <https://www.reedsmith.com/en/perspectives/2023/11/sections-13-d-and-13-g-of-the-securities-exchange-act> ("To better reflect the fast-paced nature of modern markets, the amended rule shortened the filing timelines for Schedule 13D and Schedule 13G. For Schedule 13D filers, the filing deadlines will be five business days instead of ten calendar days. Further, any amendments must be filed within two business days of a "material change" as opposed to the vague "prompt filing" requirements under existing rules.")

155. Mirvis et al., *supra* note 150; *see SEC Announces Enforcement Results for Fiscal Year 2023*, SEC (Nov. 14, 2023), <https://www.sec.gov/newsroom/press-releases/2023-234> ("The SEC filed eleven actions as part of an initiative focused on ownership reports that company insiders are required to file regarding their holdings of company stock. The SEC charged six officers, directors, and major shareholders of public companies for failing to file timely reports."); *see also* Ian A. Hartman, Martin Nussbaum & Michael S. Darby, *SEC and Activist Investors Reach Settlement Over Disclosure Violations*, DECHERT LLP (Feb. 24, 2017), <https://www.dechert.com/knowledge/onpoint/2017/2/sec-and-activist-investors-reach-settlement-over-disclosure-viol.html> ("The U.S. Securities and Exchange Commission and a group of activist investors settled claims that the group failed to adequately disclose information during campaigns to exert influence over public companies.")

156. *See* Anne L. Bruno, Daniel T. Kajunski & Raven Sun, *SEC Adopts Amendments to Section 13 Reporting Requirements*, MINTZ (Oct. 25, 2023), <https://www.mintz.com/insights-center/viewpoints/2901/2023-10-24-sec-adopts-amendments-section-13-reporting-requirements>; *see* SEC Announces Enforcement, *supra* note 155.

157. *See id.*

158. Thomas W. Briggs, *Corporate Governance and the New Hedge Fund Activism: An Empirical Analysis*, 32 J. CORP. L. 681, 691 (2007); Letter from Wachtell, Lipton, Rosen & Katz, Petition for Rulemaking Under Section 13 of the Securities Exchange Act of 1934, at 2 (Mar. 7, 2011), [https://www.wlrk.com/docs/Letter\\_to\\_the\\_SEC\\_re\\_%2013\(d\)\(final%20version\).pdf](https://www.wlrk.com/docs/Letter_to_the_SEC_re_%2013(d)(final%20version).pdf).

in a firm while declaring their ownership intent as passive.<sup>159</sup> Such misuse invites consequences, which render the Williams Act ineffective.<sup>160</sup> First, because investors may mistakenly rely on Schedule 13(d) filings, not 13(g) filings, to assess possible changes in corporate control and how it may impact the company value, the market may fail to account for control intent and misuse hidden within Schedule 13(g) filings.<sup>161</sup> Second, the market may realize that Schedule 13(g) filings are a pointless procedural hurdle—that every single filing, whether it be Schedule 13(d) or 13(g), illustrates a possible change in corporate control.<sup>162</sup> If the market assumes every filer harbors a control intent, it would only add additional variables to further complicate information asymmetry within the market.<sup>163</sup>

Lastly, activist funds also employ a tactic known as “wolf pack activism.”<sup>164</sup> This tactic involves hedge funds and other activist investors acting in concert to target a particular firm.<sup>165</sup> Typically, one activist shareholder takes the lead while others follow as “peripheral activists.”<sup>166</sup> The formation of the wolf pack allows activist funds to gain a significant and surprising amount of influence within target firms.<sup>167</sup> Target firms find the wolf pack unassuming because the median stake taken as a wolf in a wolf pack is 6.3 percent.<sup>168</sup> The wolf pack also appears uncoordinated as most “wolves” hold less than 5 percent ownership, which is an attempt by these activist funds to circumvent the filing requirements under Schedule 13(d).<sup>169</sup> However, the wolf pack forms very dynamically, such as by beginning with a public announcement regarding a

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159. Giglia, *supra* note 132, at 119.

160. *Id.* at 116.

161. *Id.*

162. *Id.* at 117.

163. *Id.*

164. R. Christopher Small, *Wolf Pack Activism*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 9, 2015), <https://corpgov.law.harvard.edu/2015/02/09/wolf-pack-activism>.

165. *See id.* (“The tactic involves multiple hedge funds or other activist investors congregating around a target, with one acting as a “lead” activist and others as peripheral activists.”).

166. *Id.*

167. *Id.* (“The formation of a wolf pack may enable activist hedge funds to gain the significant influence that they appear to wield in target firms with relatively small holdings . . .”).

168. Wei Jiang, Hyunseob Kim & Alon Brav, *Hedge Fund Activism: A Review*, 4 FOUND. & TRENDS FIN. 185, 202 (2010) (“The median initial (maximum) percentage stake that a hedge fund takes in the target is 6.3 (9.5)%, and the median dollar stake, at cost, is 15.0 (24.8) million in 2007-constant dollars.”).

169. Small, *supra* note 164; Carmen X.W. Lu, *Unpacking Wolf Packs*, 125 YALE L.J. 773, 777–78 (2016) (“Wolf packs, however, are able to evade section 13(d) in three ways. First, wolf packs can simply avoid detection if each of the activist investors acquires less than a five percent stake in the target. In 2011, the Second Circuit reaffirmed the narrow scope of “group” under section 13(d) in *CSX Corp. v. Children’s Investment Fund Management (UK) LLP*. The court held that specific evidence of coordination among the shareholders is required in order for them to be deemed a group.” (footnote omitted)).

destabilization campaign by the lead wolf pack member, and a rapid change in the composition of the target firm's shareholder base could follow overnight.<sup>170</sup>

Ultimately, the previous regulatory framework under the Williams Act allowed activist hedge funds to circumvent its legislative goals.<sup>171</sup> Through concealment, activist funds have prevailed against the Williams Act's early warning system by discovering methods to delay their reporting and to shroud their control intent through passivity and concerted action.<sup>172</sup>

### III. SEC AMENDMENTS TO SCHEDULE 13(D) AND SCHEDULE 13(G) REPORTING

In 2023, nearly forty years after the SEC's last amendments to these sections, the SEC proposed solutions aimed at addressing these existing loopholes and increasing market transparency. While these amendments are a starting point, concerns still exist regarding the resources and reach of activist funds.

Part III details the most recent SEC amendments to Schedule 13(d) and 13(g) reporting. Subpart III.A lays out the changes to the reporting deadlines. Subpart III.B analyzes whether the amendments resolve the deficiencies of the prior rules that were previously outlined in subpart II.C. Subpart III.C reviews whether the SEC amendments will truly benefit corporate governance at target firms.

#### A. SHORTER REPORTING DEADLINES

On October 10, 2023, the SEC proposed amended rules for Schedule 13(d) and 13(g) to modernize beneficial ownership reporting, enhance market transparency, and ensure more timely reporting.<sup>173</sup> The amendments impose shorter reporting deadlines to meet the needs of investors for more timely information in today's financial markets.<sup>174</sup> As Gary Gensler, the SEC Commissioner states, the "adoption updates the rules that first went into effect

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170. Small, *supra* note 164 ("[T]he process of wolf pack formation [is] as follows: 'The market's knowledge of the formation of a wolf pack (either through word of mouth or public announcement of a destabilization campaign by the lead wolf pack member) often leads to additional activist funds entering the fray against the target corporation, resulting in a rapid (and often outcome determinative) change in composition of the target's shareholder base seemingly overnight.'").

171. See Giglia, *supra* note 132, at 117.

172. *Id.* at 119–27.

173. See Modernization of Beneficial Ownership Reporting, Exchange Act Release Nos. 33-11253; 34-98704, 88 Fed. Reg. 76896 (final rule issued Oct. 10, 2023).

174. Peter Rudegeair, *SEC Increases Oversight for Hedge Funds, High-Speed Traders*, WALL ST. J. (Feb. 6, 2024, 3:44 PM ET), <https://www.wsj.com/finance/regulation/sec-increases-oversight-for-hedge-funds-high-speed-traders-84a43749>.

more than 50 years ago” along with “deadlines from half a century ago [that] feel antiquated.”<sup>175</sup> The proposed rules went into effect on February 5, 2024.<sup>176</sup>

Under the amendments, investors with control intent must now file a Schedule 13(d) report five business days after acquiring more than 5 percent of beneficial ownership.<sup>177</sup> If a material change occurs, investors must file an amendment two business days after the date of the material change.<sup>178</sup>

A qualified institutional investor (“QII”) must file a Schedule 13(g) report forty-five calendar days after the end of the calendar quarter when beneficial ownership exceeds 5 percent.<sup>179</sup> If the beneficial ownership exceeds 10 percent, the QII must file five business days after the end of that month.<sup>180</sup> If a material change occurs, the QII must file an amendment within forty-five days after the end of the calendar quarter.<sup>181</sup> The new deadlines also require the QII to file amendments within five business days if beneficial ownership increases or decreases by 5 percent.<sup>182</sup>

Passive investors must file a Schedule 13(g) report five business days after acquiring more than 5 percent beneficial ownership.<sup>183</sup> If a material change occurs, the amendments require passive investors to file an amendment forty-five days after the end of the calendar quarter.<sup>184</sup> The new deadlines require an amendment be filed two business days after beneficial ownership exceeds 10 percent or if beneficial ownership increases or decreases by more than 5 percent.<sup>185</sup>

Thus, the new reporting deadlines impact investors with control intent, QII’s, passive investors, and exempt investors all differently.<sup>186</sup> These amendments update Schedule 13(d) and 13(g) reporting to ensure that reporting deadlines apply to all relevant parties and that material information reaches the investors in a timely manner.<sup>187</sup>

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175. SEC Press Release, *supra* note 17.

176. Modernization of Beneficial Ownership Reporting, 88 Fed. Reg. 76896, 76896 (Nov. 7, 2023) (codified at 17 C.F.R. pts. 232, 240).

177. *Id.* at 76897.

178. *Id.* at 76898.

179. *Id.* at 76897.

180. *Id.* at 76898.

181. *Id.*

182. *Id.*

183. *Id.* at 76897.

184. *Id.*

185. *Id.* at 76898.

186. *See id.*

187. SEC Press Release, *supra* note 17.

## B. ADDRESSING PRIOR DEFICIENCIES

The amended rules appear capable of addressing the previous loopholes that activist funds have exploited to discreetly gain a meaningful stake sufficient to leverage control in a target firm.<sup>188</sup> Given that activist funds will primarily file a Schedule 13(d) report, these new reporting deadlines preclude activist funds from delaying their filing up to nine calendar days.<sup>189</sup> The deadlines require activist funds to file within five business days, as opposed to calendar days, of acquiring more than 5 percent beneficial ownership.<sup>190</sup>

By shortening the reporting deadlines, activist funds may face greater difficulties in obtaining a large enough position to leverage influence before their share accumulation is made public to the market.<sup>191</sup> By condensing the window into a shorter period (in theory from nine calendar days to four business days), the cost of acquiring shares should rise—either because the information becomes public to the market sooner, or the window to negotiate for share purchases is smaller.<sup>192</sup> If the price of share acquisition increases, activist fund operations may be forced to scale back—either choosing between investing into a smaller stake in a target firm or targeting smaller companies for less profits.<sup>193</sup> If the activist fund chooses to invest into a smaller stake, that may directly affect the fund’s ability to leverage enough change to generate profitable margins based on the incentive-based structure within hedge funds.<sup>194</sup> Moreover, a general increase in costs associated with share acquisition will decrease the

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188. *SEC Adopts Rule Amendments to Modernize Beneficial Ownership Reporting*, *supra* note 21.

189. *See id.* (“The changes could also increase the costs of acquiring shares, by condensing the demand for shares into a shorter purchasing period in order to make significant purchases before the required Schedule 13D filing.”).

190. Modernization of Beneficial Ownership Reporting, 88 Fed. Reg. at 76896.

191. *SEC Adopts Rule Amendments to Modernize Beneficial Ownership Reporting*, *supra* note 21 (“[T]he shortened filing deadlines could make it more difficult for an activist investor to obtain a large enough position to provide it leverage before their accumulations would be made public. The changes could also increase the costs of acquiring shares, by condensing the demand for shares into a shorter purchasing period in order to make significant purchases before the required Schedule 13D filing, or by increasing the cost to acquire sufficient shares after the filing is made.”).

192. *Id.* (“The five-business day initial reporting deadline may be difficult to meet in certain instances, particularly with respect to Schedule 13D filings. It will be imperative that systems be in place to prevent exceeding reporting thresholds unless the responsible persons are alerted and the disclosures are ready to be prepared.”).

193. *See id.*

194. *See* FRANCIS J. AQUILA & LAUREN S. BOEHMKE, *THE SHAREHOLDER RIGHTS AND ACTIVISM REVIEW* 185 (8th ed. 2023) (“Hedge fund activist are investors whose investment strategy is to identify what they consider to be vulnerabilities at certain companies and purchase a sizeable minority stake in those target companies with the view that changes they recommend and agitate for, if successful, will increase shareholder value and result in financial gain for their investment portfolio.”); *see also* Denning, *supra* note 52.

amount of profit that funds generate for their investors, which may also pull back activist fund campaigns.<sup>195</sup>

The amendments also provide the definition of a business day for Schedule 13(d) and 13(g) filings, further precluding investors from arbitrarily interpreting the term “calendar day.”<sup>196</sup> The SEC found that 29 percent of Schedule 13(d) filings were late because the deadline fell on a weekend and that investors filed their reports after the ten days.<sup>197</sup> The new definition of business day prevents that, clarifying that a calendar day is any day other than Saturday, Sunday, or a federal holiday from 12:00 a.m. to 11:59 p.m. Eastern Time.<sup>198</sup> With increased clarity, the reporting deadlines must be followed more closely.<sup>199</sup>

The amendments also impose a new materiality standard for amendments.<sup>200</sup> According to the rules, a material change is any acquisition or disposition of beneficial ownership by 1 percent or more of shares.<sup>201</sup> In certain circumstances, an acquisition or disposition of less than 1 percent of shares may also be considered material.<sup>202</sup>

Activist funds are no longer able to hide behind the vague requirement regarding “prompt” filing of amendments. The materiality standard may now compel activist funds to implement new monitoring systems to closely observe beneficial ownership to meet reporting deadlines in a timely manner.<sup>203</sup> For Schedule 13(d) filers, monitoring systems may become vital to ensure timely reporting, especially if investors use outside counsel to prepare drafts of their filings and the investors would need to review and internally approve those

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195. See Denning, *supra* note 52 (“[D]ividing the spoils is precisely what activist hedge funds turn capitalism into: extracting value from companies and dividing it among short-term investors and the C-suite.”).

196. *SEC Adopts Rule Amendments to Beneficial Ownership Reporting*, SULLIVAN & CROMWELL LLP (Oct. 16, 2023), [https://www.sullcrom.com/SullivanCromwell/\\_Assets/PDFs/Memos/SEC-Adopts-Rule-Amendments-Beneficial-Ownership-Reporting.pdf](https://www.sullcrom.com/SullivanCromwell/_Assets/PDFs/Memos/SEC-Adopts-Rule-Amendments-Beneficial-Ownership-Reporting.pdf); see Bruno et al., *supra* note 156.

197. Modernization of Beneficial Ownership Reporting, 88 Fed. Reg. 76896, 76947 n.605 (Nov. 7, 2023) (codified at 17 C.F.R. pts. 232, 240).

198. *Id.* at 76906 n.134.

199. Bruno et al., *supra* note 156.

200. See Modernization of Beneficial Ownership Reporting, 88 Fed. Reg. at 76898.

201. Carol W. Sherman & Jamie K. Sarmiento, *SEC Adopts Amendments to Rules Governing Beneficial Ownership Reporting*, KELLEY DRYE (Oct. 25, 2023), <https://www.kelleydrye.com/viewpoints/client-advisories/sec-adopts-amendments-to-rules-governing-beneficial-ownership-reporting#:~:text=Updated%20Schedule%2013D%20and%2013G%20Filing%20Deadlines&text=A%20%E2%80%8B%20material%20change%20is,material%20still%20be%20considered%20material>.

202. *Id.*

203. *SEC Adopts Amendments to Beneficial Ownership Reporting Rules: What Investors Need to Know*, *supra* note 15 (“Investors must be mindful of whether a transaction will trigger an amended filing. Historically, Schedule 13D filers have often taken liberties in interpreting the meaning of the term “promptly” when filing amendments, generally without significant consequence. Under amended Rule 13d-2(a), the precision of the two-business day requirement will make adherence to the timeliness of Schedule 13D amendments a priority.”).



filings before sending them to the SEC.<sup>204</sup> For Schedule 13(g) filers, passive investors can no longer shroud their control intent behind the veil of passivity, given that the acquisition or disposition of 1 percent or more of shares can constitute as material and thus, prompt a filing.<sup>205</sup> Therefore, the possibility of an investor amassing 20 percent of a firm's stock to launch a surprise attack becomes more difficult to execute.<sup>206</sup>

Lastly, the SEC amendment provides guidance on regulating wolf pack activism more thoroughly through stricter oversight of group formation.<sup>207</sup> Under amended sections 13(d)(3) and 13(g)(3), a group forms when two or more people act as a group for the purposes of acquiring, holding, or disposing of company securities.<sup>208</sup> Intending to treat investors who act together as a single person, the amendments require these groups to file Schedule 13(d) or 13(g) reports.<sup>209</sup> In its guidance, the SEC clarifies that the coordinated behavior of investors constitutes a group even in the absence of a formal agreement.<sup>210</sup>

Some commentators have expressed concerns about the amendments impeding the ability of investors to engage in ordinary business discussions with management and boards.<sup>211</sup> However, the SEC responded to these comments to shed further light on what does and does not amount to group formation.<sup>212</sup> The SEC clarified that the guidance does not interfere with daily firm conversations.<sup>213</sup> Also based on the SEC's responses, the following generally do not constitute group formation: (1) a private discussion between two shareholders regarding their views on shares; (2) a discussion between two or more shareholders and management; or (3) a recommendation made by shareholders regarding board structure and composition.<sup>214</sup> In practice, the SEC guidance targets wolf pack activism, such as any informal agreements or concerted action for the purpose of acquiring company shares.<sup>215</sup> Under this new guidance, wolf pack groups will be more strictly subject to beneficial ownership

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204. *See id.* ("The amended rules will require investors to implement and/or redesign systems that permit them to closely monitor their beneficial ownership and initiate drafts and supporting documentation of initial and amended filings more promptly.")

205. *See* Sherman & Sarmiento, *supra* note 201.

206. *See* Giglia, *supra* note 132, at 119.

207. *SEC Adopts Amendments to Beneficial Ownership Reporting Rules: What Investors Need to Know*, *supra* note 15.

208. *Id.*

209. *Id.*

210. SEC Press Release, *supra* note 17.

211. Modernization of Beneficial Ownership Reporting, 88 Fed. Reg. 76896, 76931 (Nov. 7, 2023) (codified at 17 C.F.R. pts. 232, 240).

212. *Id.* at 76933.

213. *Id.* at 76930–35.

214. *See id.*

215. Small, *supra* note 164.

reporting, requiring wolves to tread carefully—possibly hampering their capabilities to launch surprise attacks.<sup>216</sup>

### C. LIMITATIONS AND FUTURE QUESTIONS

Given that the SEC amendments to beneficial ownership reporting have only been in effect for a few months,<sup>217</sup> it is difficult to determine whether shorter reporting deadlines will be a benefit or detriment to corporate governance efforts in the long run. At the very least, the amendments create some type of obstacle that obstructs activist fund operations by imposing a shorter reporting deadline, mandating material amendments, and closely moderating group formation.<sup>218</sup> However, these amendments are not enough to slow down hedge fund activism.<sup>219</sup> These amendments only provide a temporary hurdle against activist funds equipped with a vast amount of financial resources to continue pursuing target companies.<sup>220</sup> The next set of SEC amendments should further consider harmful activist fund practices into account when drafting amendments and closing existing loopholes. For example, the SEC could explore tiered reporting deadlines based how many shares an investor acquires within a certain period to further protect shareholders against the harms of hedge fund activism.

Regardless of the amendments' shortcomings, one potential and immediate benefit that arises from the amendments is a re-invitation for firms to start signaling about their CSR efforts again by providing firms with the necessary information early on—creating the possibility of more corporate governance activities.<sup>221</sup> One study revealed that the threat of hedge fund activism chilled CSR signals,<sup>222</sup> which “are observable actions that firms take to provide additional information to shareholders and stakeholders about the firm’s unobservable intentions.”<sup>223</sup> For example, a firm that implements diversity and equity programs (an observable action) signals to the public that it is dedicated to a culturally diverse workspace in the long-term (an unobservable intention).<sup>224</sup>

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216. *See id.*

217. Modernization of Beneficial Ownership Reporting, 88 Fed. Reg. at 76896 (“Effective dates: The amendments are effective on February 5, 2024.”).

218. *See supra* Part III.B.

219. Modernization of Beneficial Ownership Reporting, 88 Fed. Reg. at 76912.

220. Kirman et al., *supra* note 17.

221. *See* DesJardine et al., *supra* note 54, at 854–58.

222. *Id.* at 867 (“[W]e expect firms will restrict their signaling activities. Firms will not only avoid false signals, but also send fewer true signals.”).

223. *Id.* at 851.

224. *See* Toyah Miller & Maria Del Carmen Triana, *Demographic Diversity in the Boardroom: Mediators of the Board Diversity–Firm Performance Relationship*, 46 J. MGMT. STUD. 755, 756 (2009) (indicating that a

Previously, CSR signaling was a lose-lose situation for target firms.<sup>225</sup> As an unintended audience member, activist funds targeted firms that signaled its CSR because CSR signals reveal that the firm is engaging in what they believe to be wasteful activities that fail to maximize shareholder value.<sup>226</sup> Activist funds targeted these firms and suppressed nearly 25 percent of a target firm's CSR activities.<sup>227</sup>

As a result, other firms engaged in strategic silence by minimizing CSR signals to avoid being targeted, which also generally limited corporate governance efforts.<sup>228</sup> This is harmful because, overall, signaling is generally a good sign of corporate governance because it focuses on transparent information disclosure, which can reduce governance conflicts.<sup>229</sup> For example, boards that have been involved in financial fraud may dismiss a director (an observable action) to signal that they are willing and able to remedy the exposed governance problems (an unobservable intention).<sup>230</sup>

Signaling can also serve as a valuable tool for firms to communicate to the public that they are informed about a variety of socially and environmentally important topics.<sup>231</sup> These signals may invite more job applicants, promote business, and build better community relations.<sup>232</sup> As the Business Roundtable has suggested, firms need to “stay committed to their customers, workers, suppliers and communities—and, in so doing, promote the long-term interests of their shareholders’ in order to succeed.”<sup>233</sup> Therefore, the public’s recognition of a firm’s commitment to its community is vital, and CSR signaling seems to promote that.<sup>234</sup>

Signals also enable a firm to reduce information asymmetry within the market by providing the community with information regarding a firm’s

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firm’s decision to hire a female board member constitutes an observable action, which would send a signal to job seekers that the firm is willing and able to support women in their careers—the firm’s unobservable intentions and capabilities).

225. DesJardine et al., *supra* note 54, at 867 (finding that CSR signaling risks both intended audiences perceiving the information negatively and unintended audiences targeting the firm for engaging in wasteful activities).

226. *Id.* at 852.

227. *Id.* at 868.

228. See W. Chad Carlos & Ben W. Lewis, *Strategic Silence: Withholding Certification Status as a Hypocrisy Avoidance Tactic*, 63 ADMIN. SCI. Q. 130, 132–33 (2018).

229. See Ruth V. Aguilera, Kurt Desender, Michael K. Bednar & Jun Ho Lee, *Connecting the Dots: Bringing External Corporate Governance into The Corporate Governance Puzzle*, 9 ACAD. MGMT. ANN. 483, 486 (2015).

230. DesJardine et al., *supra* note 54, at 867.

231. See *id.* at 851.

232. See *id.* at 853.

233. *For Long-Term Success, Companies Must Deliver for All Stakeholders*, BUS. ROUNDTABLE (Aug. 19, 2022), <https://www.businessroundtable.org/for-long-term-success-companies-must-deliver-for-all-stakeholders>.

234. See *id.*

capabilities and long-term visions, which are not easily visible.<sup>235</sup> Absent signaling, shareholders would have to witness the firm's capabilities and intentions "emerge over time" as the firm continues to "act in line with [its] intentions."<sup>236</sup> The study suggests that protecting firms by providing them with the information to defend themselves could relieve the pressures that activist funds exert to undermine a firm's CSR activities.<sup>237</sup> The amendments seek to inform shareholders and management sooner rather than later, which appears to be in line with the study's suggestion.<sup>238</sup>

Ultimately, the SEC attempted to strike a balance between allowing activist investors to engage in shareholder activism and promoting more timely information and market transparency.<sup>239</sup> These amendments constitute "the most significant reforms" since the rules for beneficial ownership reporting were adopted in 1968.<sup>240</sup>

However, before the public even learns of the information, the threshold question is whether four business days is enough time for an activist fund to accumulate a meaningful stake and to leverage influence in a target firm.<sup>241</sup> Such a question becomes especially concerning given that some commentators opposed to the SEC amendments suggested that it was not enough to reduce the filing window to only five business days—instead, advocating for more accelerated windows, tiered approaches, and even injunctions within reporting deadlines.<sup>242</sup>

Second, even if the amendments require activist funds to implement additional monitoring systems, the compliance costs are unlikely to be burdensome.<sup>243</sup> The burden may only slow smaller investors or entrepreneurs. Yet, the concern is more about large activist funds targeting smaller firms.<sup>244</sup> Thus, when these compliance costs are directed towards activist funds with over hundreds of millions of dollars in liquidities,<sup>245</sup> requiring additional filings and an extra monitoring system seems unlikely to deter hedge fund activism.

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235. DesJardine et al., *supra* note 54, at 853.

236. *Id.*

237. *Id.* at 868.

238. See Kirman et al., *supra* note 17.

239. Modernization of Beneficial Ownership Reporting, 88 Fed. Reg. 76896, 76901 (Nov. 7, 2023) (codified at 17 C.F.R. pts. 232, 240).

240. Kirman et al., *supra* note 17.

241. *Id.* ("These amendments (while still well short of the updating reforms for which many, including our firm, have been advocating) represent the most significant reforms to beneficial ownership reporting requirements since the rules were adopted in 1968 and will increase the timeliness and quality of information that all market participants will have.")

242. Modernization of Beneficial Ownership Reporting, 88 Fed. Reg. at 76906.

243. *Id.* at 76970.

244. *Id.* at 76904, 76905 ("[S]ome commenters expressed concern that the proposed five-day deadline would be unduly burdensome for smaller and non-institutional beneficial owners.")

245. See Fox, *supra* note 39.

After examining the rise of hedge fund activism, its various controversies, and the history of beneficial ownership reporting, it becomes clear that the 2023 SEC amendments provided a needed change to the regulatory landscape for control transactions. While the amendments reflect the SEC's attempt to balance market transparency with market competition, challenges remain, indicating that the regulatory landscape is likely to continue evolving.

#### CONCLUSION

Less than one year has passed since the amendments went into effect in February of 2024. This is simply not enough time to truly assess the benefits or detriments the amendments will have on long-term corporate governance. One thing remains clear: the SEC should not wait another fifty years to amend beneficial ownership reporting. Much like how success in the stock market derives from moderation and reactionism, the SEC should strive to be the same: carefully moderating how activist hedge funds respond to the new reporting deadline and adapting as further amendments are needed.

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