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March 7, 2011

Ms. Elizabeth M. Murphy  
Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549

Re: Petition for Rulemaking Under Section 13 of the  
Securities Exchange Act of 1934

Dear Ms. Murphy:

Wachtell, Lipton, Rosen & Katz<sup>1</sup> respectfully submits this petition<sup>2</sup> to the Securities and Exchange Commission (the "Commission") requesting that the Commission initiate a rulemaking project regarding the beneficial ownership reporting rules under Section 13 of the Securities Exchange Act of 1934 (the "Exchange Act")—specifically, to propose amendments to shorten the reporting deadline and expand the definition of beneficial ownership under the reporting rules. We believe that the current reporting regime fails to fulfill its stated purposes, and outline in this letter a number of recommended amendments that we believe would be beneficial to investors, issuers and the market as a whole.

<sup>1</sup> Wachtell, Lipton, Rosen & Katz is a New York based law firm that specializes in mergers and acquisitions, strategic investments, takeovers and takeover defense, corporate and securities law and corporate governance. We counsel both public and private acquirors and targets.

<sup>2</sup> Rule 192(a) of the Rules of Practice and Rules on Fair Fund and Disgorgement Plans of the Securities and Exchange Commission.

In particular, we believe that the current narrow definition of beneficial ownership and the ten-day reporting lag after the Section 13(d) ownership reporting threshold is crossed facilitate market manipulation and abusive tactics. It has become both simple and commonplace for aggressive investors to intentionally structure their acquisition strategies to exploit the gaps created by the current reporting regime, to their own short-term benefit and to the overall detriment of market transparency and investor confidence. Current tactics show that the very purposes for the Section 13(d) reporting requirement are being undermined.

There is no valid policy-based or pragmatic reason that purchasers of significant ownership stakes in public companies should be permitted to hide their actions from other shareholders, the investment community and the issuer; indeed, the need for transparency, fairness and equality of information in our financial markets has never been higher. Recent events have highlighted the potential extremes to which these acquisition tactics may be taken, and make clear the urgent need for meaningful, comprehensive reform, both to clearly prohibit these types of abuses and to conform with the current norm for developed markets throughout the world. The reporting regime in the United States must evolve if it is to continue to perform the vital function for which it was initially implemented.

Recent legislation has made clear that the Commission has the necessary authority to take these remedial steps, and that the time for decisive action has come.<sup>3</sup> Indeed, Section 766(e) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) highlights the need for prompt action by creating significant uncertainty as to the continued validity of long-standing interpretations of the reporting rules with respect to the treatment of derivatives. The Staff of the Commission has publicly indicated that it intends to act to resolve such uncertainties.<sup>4</sup> We applaud these statements, but urge the Commission to take this opportunity to undertake the comprehensive reform that is so sorely needed, rather than limiting its actions to a narrow rulemaking confined to the specific issues raised by Section 766(e) of the Dodd-Frank Act. Closing the ten-day window and requiring the proper reporting of derivative ownership are vital and pressing actions that should be a priority.

#### *Historical Purpose of the Section 13(d) Reporting Rules*

Since its adoption by Congress in 1968 as part of the Williams Act, the stated purpose of the beneficial ownership reporting regime has been to compel the release of information to the investing public with respect to the accumulation of substantial ownership of an issuer’s voting securities.<sup>5</sup> In particular, Congress noted a troubling absence of disclosure regulations for accumulations outside of the context of proxy contests, despite the fact that policy reasons

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<sup>3</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (hereafter “Dodd-Frank Act”); see in particular §§ 766(e) and 929R.

<sup>4</sup> See, e.g., Joshua Gallu, *Secret Corporate Raids to Get Harder Under SEC Rule Change*, Bloomberg, Feb. 22, 2011; Yin Wilczek, *Shortening of Disclosure Period for Beneficial Owners*, Corp. Coun. Wkly., Feb. 16, 2011.

<sup>5</sup> See, e.g., S. Rep. 90-550, at 1 (1967) (“There are, however, some areas still remaining where full disclosure is necessary for investor protection but not required by present law. One such area is the purchase of substantial or controlling blocks of the securities of publicly held companies”).

dictate similar disclosure obligations in all circumstances.<sup>6</sup> Simply put, the purpose of the Section 13(d) disclosure rules has always been to “alert investors in securities markets to potential changes in corporate control and to provide them with an opportunity to evaluate the effect of these potential changes.”<sup>7</sup>

This purpose is no longer being properly served. As the Commission has publicly observed for nearly three decades, the ten-day reporting lag leaves a substantial gap after the reporting threshold has been crossed during which the market is deprived of material information, and creates incentives for abusive tactics on the part of aggressive investors prior to making a filing.<sup>8</sup> Such investors may – and frequently do<sup>9</sup> – secretly continue to accumulate shares during this period, acquiring substantial influence and potential control over an issuer without other shareholders (or the issuer) having any information about the acquiror or its plans and purposes at the time stockholders sell their shares. This serves the interest of no one but the investor seeking to exploit this period of permissible silence to acquire shares at a discount to the market price that may result from its belated disclosures.

### *The Ten-Day Reporting Window*

The pragmatic reasons which may have motivated the inclusion of a ten-day reporting lag in the Williams Act are simply obsolete. Changes in technology, acquisition mechanics and trading practices have given investors the ability to make these types of reports with very little advance preparation time. The impact of these advances and corresponding need for change in the Section 13(d) reporting timetable was noted as early as 1983<sup>10</sup> in the report of an advisory commission established by the Commission, and has only become more compelling with the passage of time. The advent of computerized trading has upended traditional timelines for the acquisition of shares, allowing massive volumes of shares to trade in a matter of seconds. The increasing use of derivatives has accelerated the ability of investors to accumulate economic ownership of shares, usually with substantial leverage. Furthermore, the markets rely on the expectation that material information will be disseminated promptly and widely, in no small part

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<sup>6</sup> See, e.g., S. Rep. 90-550, at 2 (1967) (“The failure to provide adequate disclosure to investors in connection with a cash takeover bid or other acquisitions which may cause a shift in control is in sharp contrast to the regulatory requirements applicable where one company offers to exchange its shares for another, or where a contest for control takes the form of a proxy fight”).

<sup>7</sup> *Wellman v. Dickinson*, 682 F.2d 355, 365-66 (2d Cir. 1982), citing *GAF Corp. v. Milstein*, 453 F.2d 709, 717 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972).

<sup>8</sup> Advisory Committee on Tender Offers, SEC, Report of Recommendations (July 8, 1983), reprinted in Fed. Sec. L. Rep. (CCH) No. 1028 (Extra Edition) 22 (“The 10-day window between the acquisition of more than a 5% interest and the required filing of a Schedule 13D was found to present a substantial opportunity for abuse, as the acquiror ‘dashes’ to buy as many shares as possible between the time it crosses the 5% threshold and the required filing date.”) (hereafter, “Tender Offer Advisory Committee Report”); see also Letter from Harold M. Williams, Chairman, SEC, to the Senate Banking Committee (Feb. 15, 1980) (hereafter, “Williams Letter”); Hearings Before the Subcomm. on Telecomm. And Fin. of the House Comm. on Energy and Commerce Concerning Pending Legislation Regarding Contests for Corporate Control, 100<sup>th</sup> Cong. 2 (1987) (statement of David S. Ruder, Chairman, SEC).

<sup>9</sup> See, e.g., Andrew Ross Sorkin, Dealbook, *Big Investors Appear Out of Thin Air*, N.Y. Times (Nov. 1, 2010). For additional examples, see text accompanying footnotes 23-26.

<sup>10</sup> Tender Offer Advisory Committee Report at 1.

due to the impact of the internet and online information exchange. In today's world, ten days is an eternity.

These changes and trends have been explicitly recognized by the Commission in the context of other reporting rules, both through the implementation of additional disclosure requirements and the shortened timelines that have been adopted for other types of filings. In 2004, the deadline for filing Current Reports on Form 8-K, the primary mechanism by which issuers make ongoing disclosure to the Commission and the public, was shortened to four business days following the triggering event.<sup>11</sup> The Commission explicitly linked this change to the Sarbanes-Oxley mandate to provide investors with disclosure of material corporate events on a "rapid and current basis,"<sup>12</sup> in recognition of the fact that the previous fifteen-calendar-day deadline was too lengthy to accomplish this goal. This step followed an accelerated filing requirement imposed on officers, directors and 10% shareholders of corporate issuers with respect to reporting transactions in the issuer's securities, to the second business day following the triggering transaction.<sup>13</sup> In perhaps the most extreme example, following the enactment of Regulation FD in 2000, issuers are generally required to inform the market broadly of any material, non-public information *simultaneously* with its intentional disclosure to any outside party.<sup>14</sup> These examples illustrate a marked trend by the Commission toward more immediate disclosure of information material to investors, which should now be applied to the Section 13(d) reporting rules.

Lower reporting thresholds and shortened deadlines have been required for years in other developed financial markets, including the United Kingdom, Germany, Australia and Hong Kong. The U.S. should, at a minimum, offer investors an equivalent level of available information on as timely a basis as other markets, in order to maintain investor confidence in the integrity of the U.S. trading markets. For example, Australia requires disclosure of any position of 5% or more within two business days if any transaction affects or is likely to affect control or potential control of the issuer, or the acquisition or proposed acquisition of a substantial interest in the issuer.<sup>15</sup> The United Kingdom imposes a two-trading-day deadline for disclosure of acquisitions in excess of 3% of an issuer's securities.<sup>16</sup> Germany requires a report "immediately," but in no event later than four days after crossing the acquisition threshold.<sup>17</sup> Hong Kong securities laws require a report within three business days of the acquisition of a "notifiable interest" under the law.<sup>18</sup> No special policy or practicality concerns mandate that the

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<sup>11</sup> Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date, Release Nos. 33-8400, 34-49424; File No. S7-22-02 (Mar. 16, 2004).

<sup>12</sup> *Id.*

<sup>13</sup> Ownership Reports and Trading by Officers, Directors and Principal Security Holders, Release Nos. 34-46421, 35-27563, IC-25720; File No. S7-31-02 (Aug. 27, 2002).

<sup>14</sup> Selective Disclosure and Insider Trading, Release Nos. 33-7881, 34-43154, IC-24599; File No. S7-31-99 (August 15, 2000) (adopting Regulation FD).

<sup>15</sup> Australian Takeover Panels Guidance Note 20.

<sup>16</sup> Chapter 5 of the Financial Services Authority's Disclosure Rules and Transparency Rules.

<sup>17</sup> See Part 4 of the German Securities Trading Act.

<sup>18</sup> See Part XV of the Securities and Futures Ordinance.

U.S. retain its outdated, overly permissive reporting deadlines or definitions of beneficial ownership.

There are various options to be considered with respect to shortening the reporting deadline in order to re-align the Section 13(d) reporting rules with their intended purpose. We recommend that the Commission require that the initial Schedule 13D filing be made within one business day following the crossing of the five percent ownership threshold, using the same “prompt” disclosure standard that the Commission requires with respect to material amendments to existing Schedule 13D filings.<sup>19</sup> While some may argue that this deadline would impose an unreasonable deadline and reporting burden on investors, we disagree. The type of investor who acquires a 5% stake in a public company will almost always be a sophisticated, experienced investor, with the resources to submit the required filings promptly, particularly as these forms can be substantially prepared prior to crossing the 5% threshold.

Furthermore, to curtail the incentive towards abusive tactics currently inherent in the lag between crossing the ownership threshold and the reporting deadline, we recommend that acquirers be prohibited from acquiring beneficial ownership (under a broadened definition discussed below) of any additional equity securities of the issuer during the time between acquisition of a 5% ownership stake until two business days after the filing of the required Schedule 13D. This short “cooling-off period” would be similar to, but less restrictive than, the cooling-off period rules governing formerly passive investors switching from Schedule 13G filers to Schedule 13D filers, which prohibit such persons from voting, directing the voting of, or acquiring an additional beneficial ownership interest in, equity securities of the issuer from the time they develop a control intent until ten days after the filing of the required Schedule 13D.<sup>20</sup> As stated by the Commission in adopting the 1998 beneficial ownership reporting amendments, “[t]he cooling-off period will prevent further acquisitions or the voting of the subject securities until the market and investors have been given time to react to the information in the Schedule 13D filing.”<sup>21</sup> The same policy concerns are at work here, and the recommended rule would be less onerous. The two business day cooling-off period would provide time for the investment community to review and assess the potential market impact of the initial Schedule 13D disclosures.

In enacting the Dodd-Frank Act, Congress specifically authorized the Commission to shorten the filing window: Congress modified Section 13(d)(1) of the Exchange Act to read “within ten days after such acquisition, *or within such shorter time as the Commission may establish by rule.*”<sup>22</sup> This explicit grant of authority demonstrates Congress’ recognition of the need for prompt corrective action, as exemplified by recent dramatic abuses of the ten-day window period.

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<sup>19</sup> 17 C.F.R. §240-13d-2(a).

<sup>20</sup> 17 C.F.R. §240-13d-1(e)(2).

<sup>21</sup> Amendments to Beneficial Ownership Reporting Requirements, Release No. 34-39538; File No. S7-16-96 (Jan. 12, 1998) at p. 10.

<sup>22</sup> Dodd-Frank Act §929R (emphasis added).

The recent acquisitions of J.C. Penney stock by Pershing Square Capital Management and Vornado Realty Trust vividly illustrate the extent to which savvy investors are able to exploit the gaps in the current Section 13(d) reporting rules – in this case, acquiring beneficial ownership of more than 25% of J.C. Penney’s outstanding common stock before any public disclosure was made. Pershing Square first acquired 4.9% ownership through open market purchases, and then Pershing Square and Vornado rapidly acquired a total of approximately 27% ownership through open market purchases, forward purchases, call options and total return swaps during the ten-day window after crossing the 5% threshold in late September 2010 and prior to filing their initial Schedule 13D ten days later.<sup>23</sup> In the first full trading day after Pershing Square and Vornado filed their Schedule 13D reports, J.C. Penney’s stock closed at \$33.12, compared to the average closing price of \$28.31 over the prior ten days while Pershing Square and Vornado were engaging in their aggressive accumulation program after crossing 5%, resulting in a substantial transfer of value to these two investors from the public shareholders who sold their shares during the ten-day window without knowledge of the investors’ plans. In January 2011, representatives of each of Pershing Square and Vornado were appointed to J.C. Penney’s board of directors, demonstrating the influence and control that these investors were able to obtain as a direct result of their secret share acquisitions during the ten-day window period.<sup>24</sup>

Pershing Square employed similar tactics in its recent acquisition of the stock of Fortune Brands. Pershing Square first acquired slightly less than 5% of Fortune Brands’ common stock. During the ten-day period following its crossing of the 5% threshold in late September 2010, Pershing Square then acquired common stock and cash-settled total return swaps, ultimately accumulating ownership of 10.9% of Fortune Brands’ common stock prior to filing its initial Schedule 13D on October 8, 2010.<sup>25</sup> In the first full trading day after Pershing Square filed its Schedule 13D report, Fortune Brands’ common stock closed at \$55.50, compared to the average closing price of \$49.55 over the ten days prior to the filing while Pershing Square acquired ownership of an additional 6% of Fortune Brands’ common stock. Just two months after the initial 13D filing, Fortune Brands announced plans to split up the company as had been reportedly pressed by Pershing Square, further illustrating the influence and control that can be secretly acquired during the ten-day window period.<sup>26</sup>

The prospect of possible closing of the ten-day window has already generated vocal opposition by the hedge fund activists who have gamed the window to their own advantage. One well-known activist has argued that the ten-day window period is needed to incentivize hedge funds to make sizable investments in companies seeking to force company actions that generate short-term profits arguably for the benefit of the issuer's shareholders.<sup>27</sup> However, the purpose

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<sup>23</sup> See, e.g., Maxwell Murphy, Deal Journal, *How Bill Ackman Stalked J.C. Penney*, Wall St. J., October 8, 2010; Joann S. Lublin & Karen Talley, *Big Shoppers Bag 26% of J.C. Penney*, Wall St. J., October 9, 2010.

<sup>24</sup> Press Release, J.C. Penney Company, Inc., JCPenney Agrees to Name William Ackman and Steven Roth to Board of Directors (Jan. 24, 2011).

<sup>25</sup> See, e.g., Matt Phillips, MarketBeat, *Ackman in Action*, Wall St. J. (Oct. 8, 2010).

<sup>26</sup> David Kesmodel, *Fortune Brands Plans to Split Up*, Wall St. J. (Dec. 8, 2010).

<sup>27</sup> See, e.g., Joshua Gallu, *Secret Corporate Raids to Get Harder Under SEC Rule Change*, Bloomberg, February 22, 2011 (quoting William Ackman as saying that closing the ten-day window would decrease the number of activist

of the 13D window period was never to grant a license to hedge funds to make extraordinary profits by trading ahead of the undisclosed, market-moving information contained in their delayed 13D filings, nor to provide additional inducements to spur hedge fund activity. The activists' purported rationale for the window period is directly contrary to the overall purposes of the 13D reporting requirements – namely, to inform investors and the market promptly of potential acquisitions of control and influence so that investors have equal access to this material information before trading their shares. Indeed, the initial 10% reporting threshold in the Williams Act was amended to 5% in 1970 because of concerns that even 5% ownership conferred significant control rights and should require public disclosure.<sup>28</sup> The advent over the last four decades of computerized trading and extraordinary derivative opportunities to acquire substantial share positions has effectively neutralized the impact of the 1970 amendment, as investors have filed initial 13D forms reporting substantially over 10 percent ownership due to rapid acquisitions during the window period. The need for reform could not be clearer.

### *Derivatives and Beneficial Ownership*

The concept of beneficial ownership, as used throughout the reporting rules and in the calculation of when the minimum ownership threshold has been reached, encompasses only those securities over which an investor (or group of investors) holds either “voting power” or “investment power,” including the power to “dispose of, or to direct the disposition of,” a security.<sup>29</sup> Other forms of ownership, including through derivatives, are currently explicitly counted for purposes of the 13(d) reporting rules only where they confer upon the holder the right to acquire beneficial ownership (*i.e.*, either voting power or investment power) over the underlying security within sixty days.<sup>30</sup> This paradigm fails to adequately address many ways in which modern investors may acquire economic exposure to a security, including through the purchase of non-traditional or cash-settled derivatives. Perhaps more importantly, it fails to recognize circumstances in which an investor may amass influence or control over both the voting and disposition of substantial blocks of securities, while maintaining the bare legal fiction that a third party holds such rights. We have extensively discussed elsewhere our concerns with this trend towards “empty voting,” or otherwise decoupling the economic impact of security ownership from voting control,<sup>31</sup> and continue to believe that it poses a threat to the efficient

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investors challenging corporate management because “[i]f forced to disclose the position, the opportunity to buy at an attractive price disappears”).

<sup>28</sup> See, *e.g.*, Staff of S. Comm. on Banking and Currency, Subcomm. on Securities, Report on Additional Consumer Protection in Corporate Takeovers and Increasing the Securities Act Exemptions for Small Businessmen 1 (Comm. Print 1970) (“Ten percent of the stock of large corporations, indeed even 5 percent, can . . . have a significant impact on corporate control.”).

<sup>29</sup> 17 C.F.R. § 240.13d-3(a).

<sup>30</sup> 17 C.F.R. §240-13d-3(d)(1).

<sup>31</sup> See, *e.g.*, Adam O. Emmerich and William Savitt, *Stealth and Ambush Equity Accumulation – Use of Synthetic Ownership Arrangements Continues to Pose Danger to Securities Markets and Public Companies* (2010), <http://www.wlrk.com/webdocs/wlrknew/WLRKMemos/WLRK/WLRK.18056.10.pdf>; Theodore N. Mirvis, Adam O. Emmerich and Adam M. Gogolak, *Beneficial Ownership of Equity Derivatives and Short Positions – A Modest Proposal to Bring the 13D Reporting System into the 21<sup>st</sup> Century* (2008) (hereafter “A Modest Proposal”), <http://www.wlrk.com/webdocs/wlrknew/WLRKMemos/WLRK/WLRK.15395.08.pdf>; Theodore N. Mirvis and Adam O. Emmerich, *De-Coupling of Economic and Voting Power in Public Companies – Equity Ownership*

operation of our public corporations and financial markets. In addition, we believe that recognition of the rise of this phenomenon by the Commission in the context of the beneficial ownership reporting rules is vital if such rules are to serve their intended purposes.

As a result of these developments, the current definition of beneficial ownership does not account for the realities of how derivatives and other synthetic instruments and ownership strategies are used today in complex trading strategies. To address this issue, the definition of beneficial ownership for Section 13 reporting purposes should encompass ownership of any derivative instrument which includes the opportunity, directly or indirectly, to profit or share in any profit derived from any increase in the value of the subject security.<sup>32</sup> Derivative instruments should include, subject to certain exceptions, any instrument or right “with an exercise or conversion privilege or a settlement payment or mechanism at a price related to an equity security or similar instrument with a value derived in whole or in part from the value of an equity security, whether or not such instrument or right shall be subject to settlement in the underlying security or otherwise.”<sup>33</sup> In addition, it should be made explicitly clear that the definition encompasses ownership of short positions in a security, as such positions have the same potential as long positions to influence the trading of the subject security.

Each of these types of derivative transactions permits an acquiror to exercise the type of market control in the relevant security, and potentially to exert the type of influence over the issuer, that the Section 13(d) reporting obligations are designed to address, yet are currently conducted outside of the disclosure regime. This deprives the market, and other investors, of valuable information that might influence their trading behavior if it were made accessible. Even in the absence of voting or dispositive power, participants in large hedging transactions gain influence in a number of ways. The shares subject to the hedge may be eliminated from the universe of voting shares entirely, depending on the terms of the transaction. In other situations, voting of the shares may be subject to counterparty influence or control, either directly or because the counterparty is motivated to vote the hedged shares in a way that will please the investor and induce them to continue to transact with such counterparty. Net short positions further create price pressure both through the influence of the short sales themselves, and also due to the need for their counterparties in such transactions to purchase shares to meet their potential obligations. Even those derivatives that are characterized as “cash-settled” may ultimately be settled in kind, creating further market pressure as the participants need to acquire shares for such settlement.

Derivatives are increasingly being employed to accumulate “empty voting” positions in an issuer’s stock or to accumulate large stakes prior to making any Section 13(d) disclosures,

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*Derivatives Create Unforeseen Dangers* (2008),

<http://www.wlrk.com/webdocs/wlrknew/WLRKMemos/WLRK/WLRK.15268.08.pdf>.

<sup>32</sup> See “A Modest Proposal” at 3. We note that we do not currently believe that equivalent changes are required or advisable with respect to the definition of “beneficial ownership” with respect to Section 16 of the Exchange Act and the rules promulgated thereunder, which we do not believe present the same risk of abuse as the Section 13 reporting rules.

<sup>33</sup> See “A Modest Proposal” at 3.



such as in the CSX proxy contest,<sup>34</sup> the Jana/CNET situation<sup>35</sup> and, more recently, J.C. Penney and Fortune Brands as described above. These illustrate the need for these reforms, but are only a fraction of the instances where the revised rules would have the impact of compelling much-needed material disclosure.

We do not believe that enacting these changes to the definition of beneficial ownership would create undue confusion or burden on reporting investors, a belief we base in large part on the fact that similar changes have been adopted in a number of other jurisdictions (including the United Kingdom,<sup>36</sup> Germany,<sup>37</sup> Switzerland,<sup>38</sup> Australia<sup>39</sup> and Hong Kong,<sup>40</sup> each of which use a broadened definition of beneficial ownership encompassing a range of derivative mechanisms). The shift to a broad, modernized definition of beneficial ownership in these jurisdictions and elsewhere both demonstrates that it is a workable construct and, we believe, compels the Commission to enact related reforms, lest the United States markets continue to remain more susceptible to manipulative maneuvers than other nations with similarly developed financial markets.

In addition to clarifying the Commission's authority to act, the Dodd-Frank Act creates added urgency for rulemaking with respect to Section 13 reporting. Section 766(e) of the Dodd-Frank Act, discussing security-based swaps,<sup>41</sup> arguably will reverse, and certainly creates confusion with respect to, currently settled rules and practice with respect to derivatives and beneficial ownership absent Commission action. Section 766(e) provides that ownership of security-based swaps constitutes ownership of the underlying security only to the extent that the Commission deems it so by rule.<sup>42</sup> In the absence of prompt action by the Commission in advance of this provision's July 2011 effective date, even the protections currently in place with respect to the treatment of derivatives for beneficial ownership purposes could be lost. This would be an unwarranted and harmful step in the wrong direction. It is imperative that the Commission act to prevent this occurrence, and take action to address the other significant gaps in the reporting rules discussed herein.

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<sup>34</sup> *CSX Corp. v. Children's Inv. Fund Mgmt. (UK) LLP, et al*, 562 F. Supp.2d 511 (S.D.N.Y. June 11, 2008), affirmed without opinion by *CSX Corp. v. Children's Inv. Fund. Mgmt. (UK) LLP, et al.*, 292 Fed. Appx. 133 (2d Cir. 2008).

<sup>35</sup> See, e.g., Andrew Ross Sorkin, Dealbook, What is Jana Doing?, N.Y. Times (Feb. 7, 2008).

<sup>36</sup> See Chapter 5 of the Financial Services Authority's Disclosure Rules and Transparency Rules.

<sup>37</sup> See Part 4 of the German Securities Trading Act. A bill further expanding the universe of derivatives captured by German disclosure requirements (including, for example, cash-settled options) has passed the Bundestag (the lower house of German Parliament), and has been referred to the Bundesrat (the upper house) for an additional required approval. See *Gesetz zur Stärkung des Anlegerschutzes und Verbesserung der Funktionsfähigkeit des Kapitalmarkts (Anlegerschutz-und Funktionsverbesserungsgesetz)* (Feb. 11, 2011), available at [http://www.bundesrat.de/cln\\_161/nn\\_8694/SharedDocs/Drucksachen/2011/0101-200/101-11,templateId=raw,property=publicationFile.pdf/101-11.pdf](http://www.bundesrat.de/cln_161/nn_8694/SharedDocs/Drucksachen/2011/0101-200/101-11,templateId=raw,property=publicationFile.pdf/101-11.pdf).

<sup>38</sup> See Article 20 of the Federal Act on Stock Exchange and Securities Trading in Switzerland.

<sup>39</sup> See The Australian Takeover Panels Guidance Note 20.

<sup>40</sup> See Part XV of the Securities and Futures Ordinance.

<sup>41</sup> Dodd-Frank Act §766(e).

<sup>42</sup> *Id.*

*Remedies*

Even if our recommended amendments were to be adopted, the risk that the Section 13 reporting rules will continue to be disregarded or manipulated by sophisticated investors would remain high unless appropriate remedies are made available to issuers and investors. Currently, there is no clear path for an issuer facing flagrant reporting violations by an investor to obtain relief or protection for its stockholders. The CSX Corporation proxy contest provides a stark example of this state of affairs. After finding that an activist investor had intentionally used derivative instruments “as part of a plan or scheme to evade the reporting requirements of Section 13(d)” in connection with substantial share acquisitions in advance of a proxy contest<sup>43</sup>, a federal court concluded that existing law did not permit it to enjoin the investor from voting its shares, despite a statement by the court that it would otherwise grant such relief.<sup>44</sup> The lack of an effective remedy even in such extreme situations will encourage certain investors to flout the rules, whether or not they are updated. We recommend that, in connection with the amendments described herein, the Commission undertake a study of enhanced remedies for violations of the Section 13 reporting rules.

*Conclusion*

Investor confidence in our financial markets depends in large part on the kind of transparency that the Section 13 reporting rules are designed to, and should, provide with respect to the acquisition of potential control positions in public companies. We firmly believe that closing the ten-day window and adapting the definition of beneficial ownership to fully address the reality of the way securities are currently traded is both workable and integral to the future proper functioning of the United States securities markets, and urge the Commission to undertake these reforms promptly.

Please feel free to contact Theodore N. Mirvis, Andrew R. Brownstein, Eric S. Robinson, Adam O. Emmerich, David M. Silk, Trevor S. Norwitz, David C. Karp or William Savitt at 212-403-1000 to discuss any of these matters in more detail.

Very truly yours,

Wachtell, Lipton, Rosen & Katz

cc: Meredith Cross  
Michele Anderson

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<sup>43</sup> CSX at 548 (S.D.N.Y. 2008).

<sup>44</sup> Id. at 573-74.