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The SEC Should Address the Risk of Activist "Lightning Strikes"

As the new leadership of the Securities and Exchange Commission considers the agency's regulatory priorities, they might take note of the recent decision of the Delaware Court of Chancery in *The Williams Companies Stockholder Litigation*. As we recently noted, the primary import of that decision was to remind corporate boards not to overreach in their efforts to protect corporations from threats, including those exacerbated by regulatory gaps. The question for the SEC is why corporate boards should have to engage in such "gap-filling" exercises at all.

It has long been recognized that the regulatory framework designed more than 50 years ago to provide early warning for shareholders, companies and the market in general of impending changes of corporate control is anachronistic, lags behind disclosure rules in every other modern economy, and is in urgent need of reform. Yet American corporations are still vulnerable to sudden and dramatic changes in control as a result of what the Delaware Court referred to as "lightning strikes" during the Regulation 13D ten-day window by shareholder activists maneuvering under cover of regulatory darkness, utilizing derivative securities not reached by the 13D disclosure requirements, and backed up by "wolf packs" of me-too investors who often have information about the activist scheme that gives them an unfair advantage over regular Main Street investors, but whose behavior is carefully calibrated to evade the 13D disclosure rules.

In its opinion in *Williams*, the Court of Chancery noted:

> "Lightning strikes go undetected under the federal disclosure regime, which requires stockholders to disclose their ownership position after crossing the 5% threshold but gives stockholders ten days to do so. The federal disclosure regime does not prohibit stockholders from continuing to acquire stock during that ten-day period and does not capture 'wolf pack' activity."

Our formal petition to reform and update the rules under Section 13(d) of the Securities Exchange Act was submitted to the SEC ten years ago this week. The Dodd-Frank Wall Street Reform and Consumer Protection Act authorized the SEC to reduce the ten-day window and address derivatives in order to fix this broken regulatory regime even earlier than that. We urge the new leadership of the SEC to address these glaring gaps in the securities laws.

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