July 22, 2026

The Honorable Paul Atkins
Chairman
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

VIA EMAIL

Re.: Request for Revised Guidance for Determining "Group" Status of Investors

Dear Chairman Atkins:

The Committee on Capital Markets Regulation (the "Committee") writes to recommend that the Securities and Exchange Commission (the "SEC") revise its guidance regarding the regulatory standard for "group" formation of investors to facilitate communications between investors that benefit U.S. capital markets.

Founded in 2006, the Committee is dedicated to enhancing the competitiveness of U.S. capital markets and ensuring the stability of the U.S. financial system. Our membership includes forty-seven leaders drawn from the finance, investment, business, law, accounting, and academic communities. The Committee is chaired jointly by R. Glenn Hubbard (Emeritus Dean, Columbia Business School) and John L. Thornton (Former Chairman, The Brookings Institution) and is led by Hal S. Scott (Emeritus Nomura Professor of International Financial Systems at Harvard Law School and President of the Program on International Financial Systems). The Committee is an independent and nonpartisan 501(c)(3) research organization, financed by contributions from individuals, foundations, and corporations.

Background on Sections 13(d) and 13(g)

Sections 13(d) and 13(g) of the Securities Exchange Act of 1934 require public disclosure when an investor acquires beneficial ownership of more than 5% of a public company's equity securities.[1] These provisions are designed to notify the issuer that a significant ownership stake has been accumulated and to inform the market about the plans or intentions of the 5% holder regarding control of the issuer.[2]

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[1] SECURITIES EXCHANGE ACT OF 1934 [hereinafter, "1934 Act"] §§ 13(d), (g) [15 U.S.C. § 78m(d), (g)].
[2] *See* Curtis A. Doty, Marla L. Matusic, and Anna T. Pinedo, *SEC Proposes Amendments to Schedules 13D and 13G,* HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Mar. 6, 2022), https://corpgov.law.harvard.edu/2022/03/06/sec-proposes-amendments-to-schedules-13d-and-13g.

An investor that acquires more than 5% of a public company's equity determines whether to file under Section 13(d) or Section 13(g) based on whether the investor acquired or holds the securities with the purpose or effect of "changing or influencing the control" of the company.[3]

Section 13(d) applies to investors with an intent or effect of changing or influencing corporate control.[4] For example, this would include an investor seeking representation on a public company's board of directors or pushing for strategic business transactions such as a merger or spin-off. These are strategies commonly employed by "activist" investors. Section 13(d) requires detailed disclosures, including source of funds, purpose of the transaction, ownership information, and any contracts or arrangements relating to the securities.[5] Any subsequent material change in those disclosures must be reported in an amended filing within two days.[6] Disclosures made pursuant to Section 13(d) are referred to as Schedule 13D filings.

Section 13(g), by contrast, is for investors whose holdings are acquired without the intent or effect of influencing control, and typically in the ordinary course of an investor's business, such as index funds or actively managed mutual funds.[7] These investors are typically referred to as "passive" investors, even though they include actively managed registered funds. These investors typically vote their shares and engage with corporate management about performance and routine governance matters, but such actions do not reflect an intent to influence control over a public company.[8] Unlike Section 13(d), Section 13(g) requires only limited, standardized disclosures and a certification of passive intent, without requiring disclosure of the source of funds, the purpose of the transaction, or plans regarding the issuer, thereby reducing compliance and administrative costs.[9] Section 13(g) also does not impose Section 13(d)'s more immediate two-day amendment obligation. Disclosures made pursuant to Section 13(g) are referred to as Schedule 13G filings.

The Exchange Act applies these disclosure requirements not only to individual investors, but also to a "group" of investors. Under Sections 13(d)(3) and 13(g)(3), when "two or more persons act as a . . . group for the purpose of acquiring, holding, or disposing of securities," the group is treated as a single person, and the members' holdings are aggregated to determine whether a filing obligation is triggered.[10]

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[3] *See* 17 C.F.R. § 240.13d-1.
[4] *See* 15 U.S.C. § 78m(d)(5).
[5] *See* 17 C.F.R. § 240.13d-101.
[6] *See* 17 C.F.R. § 240.13d-2.
[7] *See* 15 U.S.C. § 78m(d)(5); § 240.13d-1(b).
[8] *See*, *e.g.*, Lucian A. Bebchuk and Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 (8) COLUMBIA LAW REVIEW 2029 (2019).
[9] *See* 17 C.F.R. § 240.13d-102.
[10] 1934 Act § 13(d)(3) [15 U.S.C. § 78m(d)(3)].

Critically, a group may file on the less burdensome Schedule 13G only if *all* members are independently eligible to do so by meeting the passivity criteria.[11] As a result, a passive investor that would otherwise qualify for Schedule 13G - such as a large index fund or actively managed fund - would be required to file Schedule 13D if it is deemed to be part of a group with a non-passive investor, such as an activist fund, even if that non-passive investor holds less than a 5% position. That consequence is significant not only because Schedule 13D is more burdensome, but also because a Schedule 13D filing will signal to the market that the group may be seeking to influence or change control of the issuer, even where the passive investor has no such intent.

2023 Guidance

In October 2023, the SEC issued guidance seeking to clarify the standard for group formation (the "2023 Guidance").[12] Prior to the 2023 Guidance, case law and SEC enforcement practice indicated to market participants that an agreement among investors was necessary for group formation,[13] such as an agreement to vote shares together in a proxy contest or on a governance proposal.[14] Group formation required evidence of a "meeting of the minds" to act together with respect to acquiring, holding, voting, or disposing of the issuer's securities.[15]

The 2023 Guidance eroded the SEC's well-established agreement-based approach, however, by stating that group formation "does not depend solely on the presence of an express agreement" and instead may "depend[] on the particular facts and circumstances."[16] The 2023 Guidance provides that "[i]f two or more persons took similar actions, that fact is not conclusive in and of itself that a group has been formed."[17] The SEC also indicated that some evidence of concerted action or an informal agreement in furtherance of a common purpose remains necessary.[18] However, the Guidance did not clearly define what communication or conduct would be sufficient to establish

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[11] *See* Arthur L. Zwickel and Alicia M. Harrison, *SEC Reporting Obligations Under Section 13 and Section 16 of the Exchange Act*, PAUL HASTINGS LLP (Feb. 10, 2025), https://www.paulhastings.com/insights/client-alerts/sec-reporting-obligations-under-section-13-and-section-16-of-the-exchange.

[12] SECURITIES & EXCHANGE COMMISSION [hereinafter, "SEC"], *Modernization of Beneficial Ownership*, 88 FED. REG. 76,896 (Nov. 7, 2023), https://www.federalregister.gov/documents/2023/11/07/2023-22678/modernization-of-beneficial-ownership-reporting.

[13] *See*, *e.g.,* INVESTMENT COMPANY INSTITUTE, *Comment Letter Re: Modernization of Beneficial Ownership Reporting (File No. S7-06-22)* (Apr. 7, 2022), https://www.ici.org/system/files/2022-04/34102a.pdf.

[14] *See* SEC, *Modernization of Beneficial Ownership Reporting*, 87 FED. REG. 13,846, 13,887 & n.200 (proposed Mar. 10, 2022), https://www.federalregister.gov/documents/2022/03/10/2022-03222/modernization-of-beneficial-ownership-reporting (describing then-current Rule 13d-5(b) as applying when two or more persons "agree to act together" for the purpose of acquiring, holding, voting, or disposing of equity securities).

[15] *See, e.g.,* AMERICAN BAR ASSOCIATION, *Letter Re: Comments on Modernization of Beneficial Ownership Reporting (File No. S7-06-22)* (Apr. 28, 2022), https://www.cooley.com/~/media/cooley/pdf/alerts/aba-comment-letter-modernization-beneficial-ownership-april-2022.pdf.

[16] SEC, *supra* note 12, at 76,907–08.

[17] *Id*. at 76,933.

[18] *See id*. at 76,932-3.

that standard.[19] By expanding beyond a clear express-agreement requirement without providing further clarity, the 2023 Guidance creates the risk that group status may be inferred in part from parallel shareholder conduct even absent an agreement to act together. This uncertainty has resulted in significant chilling of communications between activists and other institutional investors,[20] depriving investors and markets of the important informational, governance, and market efficiency benefits of such engagement.

This letter now proceeds in three parts. First, we explain the benefits of communication between activists and other institutional investors. Second, we consider the consequences of the 2023 Guidance. Third, we recommend that the SEC restore its prior agreement-based standard for group determinations.

Benefits of Communication Between Activists and Other Investors

Communication between activists and other institutional investors provides important benefits for asset managers and the capital markets more broadly.

Activists take positions in public companies with the aim of influencing company management, the board of directors, or both, to take corporate actions or make strategic shifts that they believe would increase the company's value.[21] In developing their investment theses, activists typically conduct extensive company-specific research based on publicly available information and develop informed views on strategy, capital allocation, and governance.[22] When shared with other institutional investors, those views can help provide relevant information for making investment and voting decisions in the best financial interests of their clients. These informational benefits also extend to the rest of the market. If institutional investors choose to incorporate activist insights into their trading and voting decisions, stock prices are more likely to reflect firm-specific information, improving price efficiency for all investors, including retail investors.[23]

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[19] *See id*. at 76934-35.

[20] This concern was also raised prior to the issuance of the guidance, *see*, *e.g.*, Jeffrey N. Gordon, *Letter Re: Comments on Modernization of Beneficial Ownership Reporting (File No. S7-06-22)* (Jun. 20, 2022), https://www.sec.gov/comments/s7-06-22/s70622-20132543-303070.pdf; David H. Webber, *Letter Re: Comments on Modernization of Beneficial Ownership Reporting (File No. S7-06-22)* (Apr. 11, 2022), https://www.sec.gov/comments/s7-06-22/s70622-20123321-279614.pdf; Allison K. Thacker, President and Chief Investment Officer of Rice Management Company, *Letter Re: Comments on Modernization of Beneficial Ownership Reporting (File No. S7-06-22)* (Mar. 21, 2022), https://www.sec.gov/comments/s7-06-22/s70622-20120779-272959.pdf.

[21] Ronald J. Gilson and Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUMBIA LAW REVIEW 863, 867.

[22] *See*, *e.g.*, Maximilian Pfirrmann and Korbinian Eichner, *How activist investors value target firms: Evidence from hedge fund presentations*, 35(2) THE JOURNAL OF CORPORATE ACCOUNTING & FINANCE 357 (2024).

[23] *See*, *e.g.*, Lucian A. Bebchuk, Alov Brav, and Wei Jiang, *The Long-Term Effects of Hedge Fund Activism*, 115 (5) COLUMBIA LAW REVIEW 1085 (2015).

Communication is also important because institutional investors often play a central role in determining whether an activist campaign succeeds by voting their shares.[24] To evaluate the merits and likely viability of a campaign, those investors must understand the activist's investment thesis and proposed changes.[25] Constructive engagement between institutional investors and activists therefore helps institutional investors distinguish value-enhancing activism from less persuasive campaigns, while also providing information about the likely level of shareholder support. That information is particularly important for institutional investors, who have a fiduciary duty to vote in the best interests of their clients. Informed voting decisions may be impaired if investors are unable to discuss an activist's thesis and proposed changes. Information about likely shareholder support can also be critical during a campaign because the likelihood of success often shapes settlement negotiations and may help avoid costly proxy contests.[26] In this way, communication between activists and institutional investors benefits clients and the broader market by supporting informed voting decisions and facilitating settlements that address credible concerns without the expense of a contested vote. Moreover, by increasing the likelihood that value-enhancing campaigns receive informed shareholder support, constructive engagement helps realize the documented benefits of activism, including improvements in firm performance, productivity, innovation, and corporate governance at targeted firms.[27]

Consequences of the SEC's Revised Guidance

Institutional investors, including passive index funds and actively managed mutual funds, have strong reasons to preserve their ability to report on Schedule 13G rather than be pushed into the more burdensome Schedule 13D regime.[28] A Schedule 13D filing not only increases compliance and administrative costs but can also mischaracterize an institutional investor as seeking to influence control when it is not. That signal can conflict with investor communications, including

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[24] *See*, *e.g.*, Simi Kedia, Laura T. Starks, and Xianjue Wang, *Institutional Investors and Hedge Fund Activism*, 10(1) THE REVIEW OF CORPORATE FINANCE STUDIES 1 (2021).

[25] *See* INVESTMENT COMPANY INSTITUTE, *supra* note 13, at 20.

[26] *See*, *e.g.*, Alon Brav et al., *Picking Friends Before Picking (Proxy) Fights: How Mutual Fund Voting Shapes Proxy Contest*, EUROPEAN CORPORATE GOVERNANCE INSTITUTE (last revised Jan. 9, 2023), https://dx.doi.org/10.2139/ssrn.3101473.

[27] *See*, *e.g.*, Alon Brav, Wei Jiang, and Hyunseob Kim, *The Real Effects of Hedge Fund Activism: Productivity, Asset Allocation, and Labor Outcomes*, NBER Working Paper 17517 (2015), https://www.nber.org/papers/w17517; Alon Brav et al., *How does hedge fund activism reshape corporate innovation*, 130(2) JOURNAL OF FINANCIAL ECONOMICS 237 (2018); Siwen Chen and Emilia R. Feldman, *Activist-Impelled Divestitures and Shareholder Value*, 39(10) STRATEGIC MANAGEMENT JOURNAL 2726 (2018).

[28] Ronald O. Mueller et al., *The Passive/Aggressive Investor: Significant New SEC Staff Interpretive Guidance on Schedule 13G Eligibility*, GIBSON DUNN (Feb. 18, 2025), https://www.gibsondunn.com/passive-aggressive-investor-significant-new-sec-staff-interpretive-guidance-on-schedule-13g-eligibility/.

fund prospectuses, and can complicate relationships with issuers whose management may engage differently if they perceive the institutional investor as seeking to influence control.[29]

That risk has materially altered the incentives of institutional investors when interacting with activists.[30] Under the SEC's prior agreement-based framework, institutional investors had a relatively clear line they could avoid crossing by abstaining from an agreement to act together with an activist. The 2023 Guidance, by contrast, leaves investors uncertain about when ordinary communications may later be cited as part of a "facts and circumstances" analysis supporting a group determination.[31] Faced with that uncertainty, passive institutional investors have strong incentives to curtail communications with activists altogether. And when such communications do occur, they are more likely to be one-way engagement, with institutional investors in "listen only" mode, withholding their own views to avoid creating a record that could later be characterized as evidence of coordinated action.[32] The result is a breakdown of constructive two-way dialogue and the loss of informational benefits that such engagement can produce.

Although the 2023 Guidance states that communications between a shareholder and an activist investor, "alone and without more," would not satisfy the "act as a group" standard, that assurance provides little value as the 2023 Guidance does not meaningfully explain what constitutes the "more" that would trigger group status.[33] That uncertainty creates practical problems for shareholder communications. For example, suppose an actively managed mutual fund manager and an activist fund manager discuss views on a firm's future prospects and separately reach favorable conclusions about the firm, leading each fund to independently purchase shares. The revised guidance creates uncertainty as to whether those coincident purchases could later be treated as the "more" supporting group formation. Or suppose an index fund manager independently agrees with an activist fund manager's criticism of a director and based on its own assessment, the index fund manager votes against that director, as does the activist fund manager. Even without agreement, the 2023 Guidance creates concern that the common voting behavior could be cited as evidence of a group, effectively recasting the index fund as an activist to the market.

The 2023 Guidance offers no basis for distinguishing protected communications from interactions that might later be characterized as the additional facts and circumstances necessary to establish a group. By making group formation turn on indeterminate, hindsight-driven judgments rather than

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[29] *See*, *e.g.*, INVESTMENT COMPANY INSTITUTE, *supra* note 13; *see also* VANGUARD WORLD FUNDS, *Summary Prospectuses* (2026), https://personal1.vanguard.com/pub/Pdf/sai023.pdf.

[30] *See*, *e.g.*, Benjamin Edwards et al., *Letter Re: Comments on Modernization of Beneficial Ownership Reporting (File No. S7-06-22)* (Apr. 11, 2022), https://www.sec.gov/comments/s7-06-22/s70622-20123317-279611.pdf.

[31] *See* SEC, *supra* note 12, at 76,929.

[32] *See*, *e.g.*, Merel Spierings et al., *Shareholder Engagement Under the New 13G Regime: Key Takeaways From Recent Panel*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Oct. 10, 2025), https://corpgov.law.harvard.edu/2025/10/10/shareholder-engagement-under-the-new-13g-regime-key-takeaways-from-recent-panel/.

[33] *Id*. at 76,934.

an agreement, the guidance discourages value-enhancing dialogue among shareholders and undermines engagement that can improve corporate governance, firm performance, and market efficiency.

Recommendation

We recommend that the SEC amend the 2023 Guidance for determining group status to restore the prior agreement-based approach under Sections 13(d) and 13(g). Group status should arise only where shareholders have agreed to act together. Parallel conduct or similar trading activity, absent documented evidence of a meeting of the minds, should not be sufficient to evidence the existence of an implicit agreement. That approach would again provide investors with practical certainty that routine discussions with other shareholders about company performance, strategy, governance, voting, or other value-enhancing matters will not, absent an agreement to act together, result in them being deemed to be in a group with an activist fund and therefore subject to Schedule 13D disclosure requirements as an investor seeking to change or influence control over a public company. The SEC guidance should make clear that shareholders do not form a group merely because they independently communicate similar views and subsequently trade or vote similarly based on the same underlying facts. In short, the SEC should establish a clear and workable standard that eliminates the current chilling effect and gives investors the certainty needed to engage in ordinary shareholder communications.

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Thank you for your consideration of the Committee's position. Should you have any questions or concerns, please do not hesitate to contact the Committee's President, Professor Hal S. Scott (hscott@capmktsreg.org) or its Executive Director, John Gulliver (jgulliver@capmktsreg.org) at your convenience.

Respectfully submitted,

Robert Glenn Hubbard

John L. Thornton	Hal S. Scott	R. Glenn Hubbard
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