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ARTICLE

Beyond "Market Transparency": Investor Disclosure and Corporate Governance

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Abstract. The ability to identify a firm's shareholders is essential to modern corporate-governance practice. Corporate managers, activist hedge funds, shareholder-proposal sponsors, and other market actors all use this information in their efforts to shape corporate action. They can do so, however, only by dint of regulatory fiat. Since the 1970s, the U.S. Securities and Exchange Commission (SEC) has required institutional investors to disclose their equity holdings every quarter on Form 13F. Today, these disclosures provide the best (and often the only) identifying information about a firm's shareholders. But while countless studies in law and finance rely on 13F data, none have turned the microscope around to examine the program itself.

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This Article fills this gap by comprehensively mapping 13F's significant impacts across a wide range of corporate-governance processes. It examines numerous ways 13F shapes the corporate-governance ecosystem, most of which have never previously been identified, much less closely examined. Among other findings, it shows that 13F likely mitigates the short-term bias of hedge fund activism; bolsters institutional-investor advocacy on environmental, social, and governance topics; promotes more "collaborative" engagements between shareholders and managers; drives a robust "competition for votes" ahead of key elections; and facilitates the anticompetitive effects of common ownership.

There is an urgent need to understand these effects. In 2020, the SEC proposed eliminating 90% of 13F reports. Now, there are proposals pending before the Agency and Congress to expand the volume and frequency of reporting. But these proposals and the commentary surrounding them universally fail to consider 13F's role in corporate governance. In addition to mapping 13F's current impacts, this Article also analyzes how each proposed reform would reshape this landscape. Surprisingly, I find several areas where shareholders and other corporate stakeholders could be made better off with less transparency about institutional holdings. As policymakers weigh changes to 13F, they should look past the impact on "market transparency" to consider how this information is actually being used on the ground, by whom, and to what ends.

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Introduction

> *Every quarter, hedge funds and mutual funds have to report what stocks and bonds they own, using the U.S. Securities and Exchange Commission's Form 13F.* I forget why*?*
>
> —Matt Levine, Bloomberg[1]

An upstart hedge fund recently took on ExxonMobil and won. The fund, Engine No. 1, bought $50 million worth of Exxon stock,[2] dropped another $30 million persuading fellow shareholders that Exxon was not transitioning quickly enough away from fossil fuels, and won enough votes at the company's 2021 shareholder meeting to get three of its candidates elected to the board of directors.[3] Remarkably, Engine No. 1 achieved this victory despite holding just 0.02% of Exxon's outstanding shares.[4]

When success depends on the ability to win support from other shareholders, as it does for activists like Engine No. 1, the ability to *identify* those shareholders is essential. Activists may evaluate a potential corporate target's shareholder base to assess their prospects before even launching a campaign. They may also tailor campaigns to appeal to the particular preferences of these shareholders. And once a campaign is underway, activists may also use this information to support targeted lobbying efforts. Engine No. 1, for instance, made calls to key investors to shore up support in the final hours of its successful campaign.[5]

Nor are activists the only parties who benefit from the ability to identify a firm's shareholders. Managers of targeted firms also may leverage this information to aid in their own lobbying efforts. Exxon, for instance, made "calls to investors in a last-ditch attempt to win their votes."[6] Before the vote, managers also may use this information to gauge an activist's prospects of success and may be willing to negotiate settlements with the most promising

1. Matt Levine, *Money Stuff: We Has Decided to Make Money*, BLOOMBERG (July 13, 2020, 8:59 AM PDT) (emphasis added), https://perma.cc/5KFQ-F567.
2. Engine No. 1 LLC, Holdings Report (Form 13F), Information Table (May 17, 2021), https://perma.cc/LPZ3-EXT5 (to locate, select "View the live page," then select "Form13F_InfoTable.html").
3. Press Release, ExxonMobil, ExxonMobil Updates Preliminary Results on Election of Directors (June 2, 2021), https://perma.cc/5UMQ-VCL9; Justin Baer, Dawn Lim & Cara Lombardo, *Investors Give Exxon Payback for Frustrations on Strategy and Climate*, WALL ST. J. (updated May 28, 2021, 4:34 PM ET), https://perma.cc/YCH6-RMLC.
4. Christopher M. Matthews, *Activist Likely to Gain Third Seat on Exxon Board*, WALL ST. J. (updated June 2, 2021, 6:11 PM ET), https://perma.cc/573Z-LVD6.
5. Baer et al., *supra* note 3.
6. *Id.*

campaigns, just as Exxon did with another hedge fund that had launched a campaign a few weeks before Engine No. 1.[7]

This information—the identities of a company's investors—seems elementary, if not downright primitive. In today's world of algorithmic traders, machine learning, and robo-advisors, a list of a company's shareholders doesn't exactly get the blood pumping. It is easy to see how it could come to be taken for granted.

And so it has. The best—and, in many cases, the only—source for information about a firm's shareholders is produced under a mostly forgotten provision of federal securities law. For forty years, institutional investors like mutual funds and hedge funds have been disclosing their equity-portfolio holdings every quarter as required under section 13(f) of the Securities Exchange Act of 1934 (Exchange Act) and the rules promulgated under that statute (hereinafter, collectively, 13F).[8] And yet the possibility that 13F plays a role in activism or other corporate-governance interactions has been almost completely overlooked. Although countless studies in law and finance rely on 13F disclosures, none have turned the microscope around to examine the program itself.[9] Similarly, accounts of the federal regulations that mediate the relationship between investors and corporations uniformly omit 13F.[10]

7. Christopher M. Matthews & Dave Sebastian, *Exxon Adds New Board Members amid Activist Pressure*, WALL ST. J. (updated Mar. 1, 2021, 12:15 PM ET), https://perma.cc/KL3R-6AV5.

8. Exchange Act § 13(f), 15 U.S.C. § 78m(f); 17 C.F.R. § 240.13f-1 (2021); *see also infra* Part I.B.3 (discussing the lack of adequate substitute sources of this information).

9. *See infra* Part I.A (surveying the extremely limited legal and financial literature on 13F's role in corporate governance).

10. *See* INSTITUTIONAL INVESTOR ACTIVISM: HEDGE FUNDS AND PRIVATE EQUITY, ECONOMICS AND REGULATION 549-759 (William W. Bratton & Joseph A. McCahery eds., 2015) (devoting over 200 pages, the entirety of Part IV, to "the regulatory framework" governing institutional investors' role in corporate governance without mentioning 13F (capitalization altered)); MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE 21-145 (1994) (showing, through detailed case studies of banking, mutual fund, pension fund, and insurance regulation—but without mentioning 13F—how U.S. law has constrained institutional-investor influence on corporations); John C. Coates IV, *Thirty Years of Evolution in the Roles of Institutional Investors in Corporate Governance*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER 79, 87-88 (Jennifer G. Hill & Randall S. Thomas eds., 2015) (reviewing the "impact of law on institutional owners in governance" and discussing "disclosure obligations in sections 10(b), 13(d), 14(a), and 16 of the Securities and Exchange Act of 1934," as well as the Employee Retirement Income Security Act of 1974 (ERISA) and proxy-voting regulations, but failing to mention 13F (capitalization altered)); ALAN PALMITER, FRANK PARTNOY & ELIZABETH POLLMAN, BUSINESS ORGANIZATIONS: A CONTEMPORARY APPROACH 472-74 (3d ed. 2019) (discussing legal restrictions that mediate the relationship between institutional investors and corporations, including blockholder disclosure, Regulation Fair Disclosure, and the short-swing profits rule, but not 13F); LISA M. FAIRFAX, SHAREHOLDER DEMOCRACY: A PRIMER ON SHAREHOLDER

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But 13F can no longer be ignored. In 2020, the U.S. Securities and Exchange Commission (SEC) pulled the provision out of obscurity and onto the chopping block, proposing to eliminate about 90% of current reports.[11] Now there is a concerted effort to significantly *expand* the reporting required under this regime.[12] Although these reforms point in opposite directions, they have one thing in common: Each ignores the impact of 13F on corporate governance.[13]

This Article fills that gap. I present an original, holistic account of 13F's impact on corporate governance.[14] I trace the impact of this provision and the information it generates across five key domains: hedge fund activism,[15] shareholder proposals,[16] shareholder litigation,[17] engagement,[18] and what I call

ACTIVISM AND PARTICIPATION 7-11 (2011) (discussing federal regulations "impacting shareholder rights," including proxy-voting rules, the Investment Company Act, the Investment Advisers Act, exchange-listing standards, the Sarbanes–Oxley Act, and the Dodd–Frank Act, but not 13F (capitalization altered)); JAMES P. HAWLEY & ANDREW T. WILLIAMS, THE RISE OF FIDUCIARY CAPITALISM: HOW INSTITUTIONAL INVESTORS CAN MAKE CORPORATE AMERICA MORE DEMOCRATIC 148-51 (2000) (discussing key federal regulations governing institutional voice, including blockholder disclosure, the short-swing profits rule, ERISA, and proxy-solicitation rules, but not 13F); MARC I. STEINBERG, THE FEDERALIZATION OF CORPORATE GOVERNANCE (2018) (discussing expanding the role of the U.S. Securities and Exchange Commission (SEC) in corporate governance—including through the regulation of insider trading, shareholder proposals, and tender offers, enforcement against directors and officers, and more—but not 13F); Amil Dasgupta, Vyacheslav Fos & Zacharias Sautner, *Institutional Investors and Corporate Governance*, 12 FOUNDS. & TRENDS FIN. 276, 293-320 (2021) (reviewing the "legal environment" surrounding institutional investors and corporate governance, including the fiduciary duties governing institutional voting, proxy-solicitation rules, shareholder proposals, proxy fights, proxy advisors, blockholder disclosure, and restrictions on communication, but not 13F); JOHN C. COFFEE, JR., HILLARY A. SALE & M. TODD HENDERSON, SECURITIES REGULATION: CASES AND MATERIALS 43-49 (13th ed. 2015) (discussing SEC rules governing proxy solicitation that mediate the relationship between institutional investors and companies, the regulation of takeover contexts, the short-swing profits rule, blockholder disclosure, hedge fund and mutual fund registration, and ERISA, but not 13F).

11. Reporting Threshold for Institutional Investment Managers, 85 Fed. Reg. 46,016 (July 31, 2020) (to be codified at 17 C.F.R. pts. 240, 249).
12. *See infra* Parts I.C.2-.3 (discussing proposals).
13. *See infra* Part I.C.
14. I use the term "corporate governance" here in a procedural sense, not a normative one—referring to the "set of processes and practices that govern how a company is managed." *See* Dorothy S. Lund & Elizabeth Pollman, Essay, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2563 (2021); Merritt B. Fox, *Required Disclosure and Corporate Governance*, 62 LAW & CONTEMP. PROBS. 113, 115 (1999).
15. *See infra* Part II.A.
16. *See infra* Part II.B.
17. *See infra* Part II.C.
18. *See infra* Part II.D.

"tacit shareholder influence."[19] In each area, I show how 13F systematically alters governance outcomes by supplying actors with information to which they would not otherwise have access. In total, I map twenty discrete ways across the five domains listed above in which 13F is altering the corporate-governance landscape—the overwhelming majority of which have never been previously identified, much less closely examined. Although scholars have devoted substantial attention to the role of securities regulation in advantaging shareholders over management (or vice versa) in each of these domains, they have entirely overlooked 13F's vital role.[20]

As I show, 13F has played an important role in driving key governance trends that have been of particular interest for recent scholarship in law and finance. Among other findings, I show that 13F:

- *Mitigates the short-term bias of hedge fund activism*: 13F allows hedge fund activists to specifically tailor campaigns toward winning support from existing firm shareholders and, as a result, aligns activism with the interests of long-term investors.[21]
- *Fosters "collaboration" between shareholders and managers*: 13F may promote settlements between managers and shareholders in the contexts of hedge fund activism, shareholder proposals, and litigation; it also promotes direct engagement between shareholders and managers.[22]

19. *See infra* Part II.E. This term refers to shareholders' capacity to exert power over managers of a company without directly interacting with them.

20. *See infra* Part I.A.

21. *See infra* Part II.A.2; *see also* Simi Kedia, Laura T. Starks & Xianjue Wang, *Institutional Investors and Hedge Fund Activism,* 10 REV. CORP. FIN. STUD. 1, 5 (2021) (reporting that when hedge fund activists select targets based on their existing shareholder base, the results of the campaigns are better for long-term shareholders). *See generally* Manish Jha, Catching the Conscience of Kings: How Activists Align with Mutual Funds (July 10, 2022) (unpublished manuscript), https://perma.cc/G65W-G2LA (reporting that activists tailor their campaigns to match the particular environmental, social, and corporate-governance (ESG) priorities of a target's leading investors).

22. *See infra* Parts II.A.6, II.B.4, II.C.4, II.D. *See generally* Jill E. Fisch & Simone M. Sepe, *Shareholder Collaboration,* 98 TEX. L. REV. 863 (2020) (discussing various forms of collaboration between managers and shareholders); Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections,* 126 YALE L.J. 262 (2016) (discussing settlements between managers and proponents of shareholder proposals); Lucian A. Bebchuk, Alon Brav, Wei Jiang & Thomas Keusch, *Dancing with Activists,* 137 J. FIN. ECON. 1 (2020) (discussing settlements between managers and hedge fund activists); John C. Coffee, Jr., Robert J. Jackson, Jr., Joshua R. Mitts & Robert E. Bishop, *Activist Directors and Agency Costs: What Happens When an Activist Director Goes on the Board?,* 104 CORNELL L. REV. 381 (2019) (same).

- *Facilitates a "competition for votes"*: 13F enables interested parties to lobby shareholders in corporate elections, in some cases skewing outcomes in favor of management.[23]
- *Fosters coordination among shareholders*: 13F may enable information sharing and other forms of coordination among shareholders on governance activities in voting and engagement.[24]
- *Promotes institutional investor support of "stakeholder"-friendly policies*: 13F may enable various key channels for institutional activists to advance progressive environmental, social, and corporate-governance (ESG) policies in their portfolio companies, including through activism, shareholder proposals, engagement, and public statements.[25]
- *Facilitates the anticompetitive effects of common ownership*: 13F serves as a "causal mechanism" for the anticompetitive effects of common ownership because, as explicitly admitted by the National Association of Manufacturers and other key interest groups, corporate managers use 13F disclosures specifically to learn about the extent to which their companies' own shareholders are also invested in competitors.[26]

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23. *See infra* Parts II.A.3, II.B.2. *See generally* Kobi Kastiel & Yaron Nili, *Competing for Votes,* 10 HARV. BUS. L. REV. 287 (2020) (discussing the vigorous competition between managers and hedge fund activists to win votes from large institutional investors in proxy contests and other corporate elections); Yazhou Ellen He, *Communications in Proxy Contests,* J. CORP. FIN., Aug. 2021, at 1 (2021) (studying the communications by hedge fund activists and managers with institutional investors in proxy contests); Laurent Bach & Daniel Metzger, *How Close Are Close Shareholder Votes?,* 32 REV. FIN. STUD. 3183 (2019) (documenting managers' disproportionate success in persuading shareholders to vote with management in closely contested corporate elections).

24. *See infra* Parts II.A.4, II.B.3, II.D.3. *See generally* Luca Enriques & Alessandro Romano, *Institutional Investor Voting Behavior: A Network Theory Perspective,* 2019 U. ILL. L. REV. 223 (discussing the various effects of "networks" among institutional investors in shaping voting behavior); Gregor Matvos & Michael Ostrovsky, *Heterogeneity and Peer Effects in Mutual Fund Proxy Voting,* 98 J. FIN. ECON. 90, 91 (2010) (documenting "peer effects" in mutual fund voting, where certain funds' probability of voting against management is correlated with certain other funds also doing so); Elroy Dimson, Oğuzhan Karakaş & Xi Li, *Coordinated Engagements* (Eur. Corp. Governance Inst., Fin. Working Paper No. 721/2021, 2021), https://perma.cc/SKZ8-HC2T (analyzing the role of a prominent UN-backed NGO in facilitating communication and coordination among different institutional investors on targeted engagements with portfolio companies regarding ESG topics).

25. *See infra* Parts II.A.2, II.B, II.D.3, II.E.1. *See generally* Madison Condon, *Externalities and the Common Owner,* 95 WASH. L. REV. 1 (2020) (providing an optimistic assessment of the role that large diversified institutional investors can play in reducing portfolio companies' carbon emissions); Dimson et al., *supra* note 24 (studying a set of "coordinated engagements" among various institutional investors on ESG topics).

26. *See infra* Part II.E.2; *see also* Einer Elhauge, *The Causal Mechanisms of Horizontal Shareholding,* 82 OHIO ST. L.J. 1, 5 (2021) (arguing that there is "ample proof" of various causal mechanisms driving the anticompetitive effects of common ownership).

This Article's original account shows that the consequences of the informational subsidy provided by 13F are complex. 13F does not uniformly favor a particular constituency; it advantages shareholders over managers in some domains, and the opposite in others. Nor is there an easy conclusion regarding the net welfare effects of the program; some impacts seem obviously beneficial, while others seem just as obviously harmful, and many elide easy assessment.

Nevertheless, no substantial reform of 13F may be responsibly undertaken without accounting for how the reform will alter the corporate-governance landscape. To that end, this Article analyzes how each of the major proposed reforms would likely reshape the governance landscape by changing the impacts tracked here. Contrary to conventional wisdom, I find that, in several areas, shareholders and/or other corporate stakeholders might be made better off with *less transparency* about institutional holdings.[27]

My findings pose a direct challenge to a dominant theme in the universally hostile[28] reaction to the SEC's 2020 proposal to curtail 13F: that the 13F program's core purpose is to promote "market transparency."[29] The proposals to expand the program are similarly grounded in the alleged importance of expanding "transparency."[30] I argue that this mode of analysis is misguided; "transparency" is not, by itself, a sound basis for policymaking in this domain.[31] The information produced by 13F has unequal effects—it advantages certain groups over others and skews the results of governance processes. To evaluate the program, policymakers must look past its effect on "transparency" to examine how the information is actually being used in the marketplace, by whom, and to what ends.[32]

The findings presented here that 13F has been skewing corporate-governance outcomes also support a broader critique. Corporate scholars often rely on the outcomes of purportedly neutral governance processes as evidence of efficiency or the "market's voice," without attending to the contingent forces that distort those processes.[33] The fact that an obscure and overlooked

27. *See infra* Part III.A.

28. Chuck Mikolajczak, *Goldman Sachs Expects Rejection of SEC Plan to Raise 13F Reporting Threshold*, REUTERS (Oct. 19, 2020, 7:33 AM), https://perma.cc/NR52-KC2S (noting that 99% of public comments opposed the proposed rule).

29. *See infra* Part III.B (collecting many examples).

30. *See infra* Part I.C.3.

31. *Cf.* David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100 (2018) (discussing the political ambivalence of government transparency).

32. *See infra* Part III.B.

33. For recent critiques, see Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework:*
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disclosure program (13F) has been systematically skewing governance outcomes for many years provides another reason to be wary of easy inferences from the outcomes of these processes. These outcomes may or may not be efficient, but the mere fact that they come out the way they do cannot be taken as dispositive one way or the other.[34]

This Article makes five important contributions:

First, it contributes to an important ongoing policy debate in Congress and the SEC regarding 13F reform.[35] The recent flurry of proposals to expand or contract 13F have almost entirely neglected the role 13F plays in corporate governance or how that role would be altered by the proposed changes.[36]

Second, it contributes to the literature analyzing various levers of securities regulation that mediate the relationship between institutional investors and corporations they own.[37] This relationship has never been more important—for scholars, markets, and the economy as a whole.[38] Yet, to date, scholars have ignored 13F's role in allocating power among these actors.

Third, it contributes to the scholarship analyzing key corporate-governance processes like hedge fund activism, shareholder proposals, shareholder litigation, engagement, and tacit shareholder influence.[39] Theoretical and empirical scholarship analyzing these processes has failed to recognize, test, or control for the role that 13F plays in driving the processes' outcomes.

Fourth, it illuminates some of the most important and controversial recent phenomena in corporate governance, including the role of institutional investors in pushing for ESG reforms,[40] coordination among shareholders,[41] collaboration between shareholders and management,[42] and the anticompetitive effects of common ownership.[43] As this Article shows, 13F plays an important role in driving each of these trends.

Beyond the Twentieth-Century Synthesis, 129 YALE L.J. 1784, 1804-06 (2020); and Lund & Pollman, *supra* note 14.

34. *See infra* Part III.C.

35. *See infra* Parts I.C, III.A.

36. *See infra* Part I.C (discussing recent proposals to reform 13F).

37. *See infra* Part I.A.

38. *See infra* Part I.A.

39. *See infra* Part II.

40. *See infra* Parts II.A.2, II.B, II.D.3, II.E.1. *See generally* Condon, *supra* note 25; Dimson et al., *supra* note 24.

41. *See infra* Parts II.A.4, II.B.3, II.D.3. *See generally* Enriques & Romano, *supra* note 24; Matvos & Ostrovsky, *supra* note 24; Dimson et al., *supra* note 24.

42. *See infra* Parts II.A.6, II.B.4, II.C.4, II.D. *See generally* Fisch & Sepe, *supra* note 22; Haan, *supra* note 22; Bebchuk et al., *supra* note 22.

43. *See infra* Part II.E.2.

Fifth, the Article contributes to the literature on the relationship between mandatory disclosure and corporate governance.[44] To date, this literature has mainly focused on issuer disclosure, not investor disclosure. In the modern era of significant (and growing) shareholder power, policy choices regarding the level of transparency imposed on investors may have impacts no less significant than those flowing from issuer disclosure rules.

This Article proceeds in three parts. Part I explains why, as a matter of both policy and law, an understanding of 13F's impact on corporate governance is urgently needed. Part II presents that analysis, examining twenty impacts across five governance domains. Part III discusses key implications of this analysis for 13F reform, the limited value of "transparency" as a north star for financial regulation, and the limited value of "transparency" for the "efficiency" of corporate governance.[45]

I. The Need To Understand 13F's Impacts on Corporate Governance

A. Institutional Investors, Securities Regulation, and Corporate Governance

For much of the twentieth century, corporate shareholders were fragmented, with limited ability and incentive to monitor corporate managers.[46] Corporate managers possessed wide discretion to run companies as they saw fit without facing meaningful accountability from their shareholders.[47] But things changed.[48] Today, households account for just 38% of direct stock ownership (down from 93% in 1950).[49] The rest is held by

44. *E.g.*, Paul G. Mahoney, *Mandatory Disclosure as a Solution to Agency Problems*, 62 U. CHI. L. REV. 1047, 1111 (1995); Fox, *supra* note 14, at 114.

45. This Article focuses on 13F's impact on corporate governance. Other potentially important effects of the program—on policymaking, investing, and systemic risk—are beyond its scope.

46. *See* ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 110 tbl.12 (1932). *But see* ROE, *supra* note 10 (highlighting the role of law and politics in limiting the power of institutional investors during this period).

47. Harwell Wells, *Shareholder Power in America, 1800-2000: A Short History*, *in* RESEARCH HANDBOOK ON SHAREHOLDER POWER, *supra* note 10, at 13, 20-21.

48. Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 865 (2013) ("[T]he Berle–Means premise of dispersed share ownership is now wrong."). For historical accounts of the institutionalization of stock ownership, see, for example, Edward B. Rock, *Institutional Investors in Corporate Governance*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 363 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018); HAWLEY & WILLIAMS, *supra* note 10, at 42-68; and Gilson & Gordon, *supra*, at 878-88.

49. Dasgupta et al., *supra* note 10, at 278 tbl.1.1.

institutional investors—like mutual funds, pension funds, and hedge funds.[50] These institutions have also grown increasingly concentrated,[51] with the largest 1% of asset managers now controlling 61% of assets managed by the sector.[52]

This institutionalization of stock ownership has fundamentally shifted the balance of power between managers and shareholders. In the late 1970s and 1980s, a new breed of "corporate raiders" led a flurry of debt-financed hostile takeovers.[53] Attention shifted in the 1990s to the governance activities of public pension funds like the California Public Employees' Retirement System (CalPERS).[54] The 2000s gave birth to a new genre of "activist" hedge funds that made returns by taking substantial but noncontrolling stakes (usually between 5-10%) in a company and then leveraging that stake to push for value-enhancing changes.[55] Most recently, scholars are captivated by giant asset managers like BlackRock, Vanguard, State Street, and Fidelity, and their evolving role in what they call "corporate stewardship."[56]

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50. *Id.*

51. Lewis Braham, *Mutual Fund Companies Are Merging Like Crazy. Here Are the Risks You Need to Know.*, BARRON'S (updated Oct. 7, 2019), https://perma.cc/85XT-2W7C (to locate, select "View the live page"); Brian Chappatta, *The Asset Manager Arms Race Has Only Just Begun*, BLOOMBERG (updated Dec. 15, 2020, 10:23 AM PST), https://perma.cc/EZH5-X6MV (to locate, select "View the live page"); Alicia McElhaney, *Consolidation Is Coming for the Asset Management Industry*, INSTITUTIONAL INV. (Oct. 27, 2020), https://perma.cc/4Y2T-7CT4.

52. Siobhan Riding, *Trillion-Dollar Club Tightens Grip on Fund Market During Crisis*, FIN. TIMES (May 9, 2020), https://perma.cc/EQ2A-9GH8 (to locate, select "View the live page").

53. For key scholarly treatments of this period, see generally Martin Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW. 101 (1979); Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981); and Lucian A. Bebchuk, Comment, *The Case for Facilitating Competing Tender Offers*, 95 HARV. L. REV. 1028 (1982).

54. For key treatments, see Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520, 568, 571, 575-91 (1990); John Coffee, *Liquidity Versus Control: The Institutional Investor as Corporate Monitor*, 91 COLUM. L. REV. 1277, 1336-38 (1991); and Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered*, 93 COLUM. L. REV. 795, 796-97 (1993).

55. *See infra* Part II.A (reviewing hedge fund activism).

56. Alexander I. Platt, *Index Fund Enforcement*, 53 U.C. DAVIS L. REV. 1453, 1457 (2020); Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 COLUM. L. REV. 2029, 2033 (2019); Marcel Kahan & Edward B. Rock, *Index Funds and Corporate Governance: Let Shareholders Be Shareholders*, 100 B.U. L. REV. 1771, 1774 (2020); Dorothy S. Lund, *The Case Against Passive Shareholder Voting*, 43 J. CORP. L. 493, 516-17 (2018); Asaf Eckstein, *The Virtue of Common Ownership in an Era of Corporate Compliance*, 105 IOWA L. REV. 507, 514 (2020); John C. Coates, *The Future of Governance Part I: The Problem of Twelve* 13-19 (Harvard Pub. L. Working Paper, Paper No. 19-07, 2019), https://perma.cc/NS4L-JUJE; Jeffrey N. Gordon,
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The era of unchecked managerial discretion is now over. Whether the further expansion of shareholder power is beneficial continues to be the subject of debate. Key justifications for increasing shareholder power include the arguments that doing so reduces managerial agency costs[57] and improves corporate performance (measured by stock returns and other accounting metrics),[58] benefits society by ensuring that capital is put toward its most efficient use,[59] and ensures political liberty;[60] and that shareholders have optimal incentives (out of all possible corporate constituencies) to exercise this control because of their status as "residual claimants."[61] Critics of shareholder power argue (among other things) that shareholders come with their own "principal" costs;[62] that other "principals" also make valuable firm-specific investments and therefore have equally good incentives to ensure the firm is well-governed;[63] that directors are better situated to efficiently maximize the firm's value for residual claimants;[64] that firms who perfectly serve the interests of shareholders produce harmful externalities;[65] and that the voices of

Systematic Stewardship 2-11 (Eur. Corp. Governance Inst., L. Working Paper No. 566/2021, 2021), https://perma.cc/7FPT-GLH5. *See generally* Condon, *supra* note 25.

57. *See* Michael C. Jensen & William H. Meckling, *The Theory of the Firm*, 3 J. FIN. ECON. 305 (1976). *But see* Brian Cheffins, *The Most Famous Article on the Theory of the Firm Is Widely Misunderstood*, PROMARKET (Apr. 4, 2021), https://perma.cc/MC7Q-9N2K (noting that Jensen and Meckling did not embrace many of the policies aimed at reducing agency costs which were subsequently advanced in their names).

58. Lucian Arye Bebchuk, *The Case for Expanding Shareholder Power*, 118 HARV. L. REV. 833, 836 (2005) [hereinafter Bebchuk, *The Case*]; Lucian A. Bebchuk, Essay, *The Myth that Insulating Boards Serves Long-Term Value*, 113 COLUM. L. REV. 1637, 1669-75, 1681-85 (2013) [hereinafter Bebchuk, *The Myth*].

59. *See* Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, J. APPLIED CORP. FIN., Fall 2001, at 8, 11 ("200 years' worth of work in economics and finance indicate that social welfare is maximized when all firms in an economy maximize their own total firm value.").

60. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133-34 (1962).

61. FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 67 (1991).

62. *See* Zohar Goshen & Richard Squire, Essay, *Principal Costs: A New Theory for Corporate Law and Governance*, 117 COLUM. L. REV. 767, 775 (2017) (arguing that the optimal governance structure is one that minimizes the sum of agent costs, produced when managers exercise control, and principal costs, produced when investors exercise control).

63. Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 271-76 (1999).

64. *See* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 550, 572, 576-77 (2003).

65. LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 1-3, 87-89, 97-99 (2012); *see also* William W. Bratton & Michael L. Wachter, *The Case Against Shareholder Empowerment*, 158 U. PA. L. REV. 653, 659 (2010).

shareholders with shorter-term investment horizons may predominate, leading the firm to generate short-lived increases in stock price at the expense of long-term growth, sound risk management, and investments in research and development.[66]

Federal securities regulation has been a frequent battleground for proponents and critics of shareholder power. The SEC has access to many regulatory levers to tilt the corporate-governance playing field in favor of one side or the other.[67] Scholars have debated the governance impacts of SEC actions on numerous issues, including proxy access,[68] the regulation of proxy advisors,[69] and shareholder proposals,[70] among many others.

The SEC's blockholder-disclosure rules provide a key precedent. Under the Williams Act as amended in 1970[71] and the SEC's implementing regulations

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66. *See generally* sources cited *supra* note 65.

67. *See* STEINBERG, *supra* note 10; Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 611-20 (2003); *see also* Fenner Stewart, Jr., *The Primacy of Delaware and the Embeddedness of the Firm*, *in* THE EMBEDDED FIRM: CORPORATE GOVERNANCE, LABOR, AND FINANCE CAPITALISM 104, 107-15 (Cynthia A. Williams & Peer Zumbansen eds., 2011) (surveying the academic debate over the federal role in corporate governance through securities regulation).

68. The SEC's proxy-access rule would have enabled shareholders to nominate directors and have those directors included in the companies' proxy statements. Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56,668, 56,782 (Sept. 16, 2010) (codified in scattered sections of 17 C.F.R.). The rule was subsequently struck down by the D.C. Circuit in *Business Roundtable v. SEC*, 647 F.3d 1144, 1146 (D.C. Cir. 2011), but not before prompting a vigorous debate. *Compare, e.g.*, Lucian A. Bebchuk & Scott Hirst, *Private Ordering and the Proxy Access Debate*, 65 BUS. LAW. 329 (2010) (arguing that the SEC proxy-access rule would improve firm performance and value), *with* Joseph A. Grundfest, *The SEC's Proposed Proxy Access Rules: Politics, Economics, and the Law*, 65 BUS. LAW. 361 (2010) (arguing that the SEC proxy-access rule has nothing to do with shareholder wealth maximization or optimal governance and merely reflects rent seeking by dominant politically connected constituencies).

69. *Compare* PAUL ROSE & CHRISTOPHER J. WALKER, CTR. FOR CAP. MKTS. COMPETITIVENESS, EXAMINING THE SEC'S PROXY ADVISOR RULE 5 (2020), https://perma.cc/BGY3-KSC8 (praising the SEC's new regulation of proxy advisors as "a step in the right direction to address deficiencies in the proxy advisory system"), *with* George W. Dent, Jr., *A Defense of Proxy Advisors*, 2014 MICH. ST. L. REV. 1287 (arguing that calls for SEC regulation of proxy advisors are mostly unwarranted).

70. Virginia Harper Ho, *From Public Policy to Materiality: Non-financial Reporting, Shareholder Engagement, and Rule 14a-8's Ordinary Business Exception*, 76 WASH. & LEE L. REV. 1231, 1235, 1244-52 (2019) (arguing that the SEC, through its limited interpretation of Rule 14a-8, has hindered the ability of shareholders' proposals to change corporate practices); Kobi Kastiel & Yaron Nili, *The Giant Shadow of Corporate Gadflies*, 94 S. CAL. L. REV. 569, 574 (2021) (arguing that SEC regulation of shareholder proposals has the potential to limit the influence of powerful individual shareholders); *see also infra* Part II.B.1.

71. *See* Act of Dec. 22, 1970, Pub. L. No. 91-567, 84 Stat. 1497 (codified as amended in scattered sections of 15 U.S.C.).

(referred to as Rule 13D), any shareholder who acquires 5% or more of a company's shares with the "purpose, or with the effect, of changing or influencing the control of the issuer" must file a disclosure with the Agency within ten days.[72] In 2011, leading management-side firm Wachtell, Lipton, Rosen & Katz petitioned the SEC to tighten this regime by (among other things) shortening the disclosure window under Rule 13D from ten days to one and by prohibiting investors from acquiring any additional beneficial ownership during the time between acquisition of 5% ownership and making a public disclosure.[73] Wachtell argued that the reporting regime was failing "to fulfill its stated purposes" of increasing "market transparency" and was instead enabling "aggressive investors" to secretly continue to accumulate substantial shares during the ten-day lag period.[74]

Lucian Bebchuk and Robert Jackson, Jr., responded to the proposal to amend Rule 13D with a more complete account of the costs and benefits of the regime.[75] They challenged Wachtell's premise that "more prompt disclosure of information is unambiguously desirable under principles of market transparency"[76] by showing that blockholders provide significant governance benefits[77] and that these benefits were linked to the ten-day disclosure window.[78] Tightening the disclosure window as Wachtell proposed would deter these blockholders from seeking to acquire a block in the first place, and therefore also reduce the benefits they provide to other investors.[79] Bebchuk and Jackson also rejected Wachtell's assertion that Congress's purpose in enacting the Williams Act was to maximize transparency without regard to any impacts on corporate governance.[80] They showed that the ten-day window was not a mere "'gap' left open by incompetent drafters"; to the contrary, Congress considered and rejected a proposal that would have prohibited any investor from acquiring more than 5% without making prior

72. 17 C.F.R. § 240.13d-1 (2021); Exchange Act § 13(d), 15 U.S.C. § 78m(d).

73. Wachtell, Lipton, Rosen & Katz, Comment Letter on Petition for Rulemaking Under Section 13 of the Securities Exchange Act of 1934, at 5 (Mar. 7, 2011), https://perma.cc/JCL7-3W8V.

74. *Id.* at 2-3.

75. Lucian A. Bebchuk & Robert J. Jackson, Jr., *The Law and Economics of Blockholder Disclosure*, 2 HARV. BUS. L. REV. 39 (2012).

76. *Id.* at 41.

77. *Id.* at 47-49 (collecting studies).

78. *Id.* at 49-51 (explaining that a blockholder's incentive to acquire a stake in a firm depends on his or her ability to acquire shares at a low price, and that the opportunity to do this ends as soon as the market learns of the blockholder's presence).

79. *Id.*

80. *Id.* at 44.

disclosures.[81] Bebchuk and Jackson also analyzed the legislative history, showing that Congress understood the key corporate-governance benefits that could be provided by blockholders, and they offered additional evidence that such impacts had to be considered as part of any reform effort.[82]

Although Bebchuk and Jackson's article was hardly the last word,[83] their analysis changed the tenor of the debate. Any effort to reform Rule 13D now seemingly must address the specific corporate-governance impacts the two identified, and cannot merely appeal to notions of "transparency."

13F plays a similarly vital role in facilitating interactions between and among shareholders and managers.[84] Yet 13F has been all but ignored. While countless studies rely on the disclosures produced under this regime,[85] these studies invariably take 13F for granted, not as an object for critical evaluation or even a variable to be controlled for. Legal scholarship examining 13F's impact on corporate governance is virtually nonexistent.[86] And, as discussed

81. *Id.*

82. *Id.* at 44-46.

83. For continued debate over the SEC's blockholder-disclosure rules under Rule 13D, see, for example, Adam O. Emmerich, Theodore N. Mirvis, Eric S. Robinson & William Savitt, *Fair Markets and Fair Disclosure: Some Thoughts on the Law and Economics of Blockholder Disclosure, and the Use and Abuse of Shareholder Power*, 3 HARV. BUS. L. REV. 135, 140 (2013) (presenting an argument by a group of Wachtell lawyers that because a shortened disclosure window would be "consistent with" section 13(d)'s original "purpose of ensuring market transparency," no "extensive cost–benefit analysis" would be necessary to justify the change (capitalization altered)); Gilson & Gordon, *supra* note 48, at 902-12; Alon Brav, J.B. Heaton & Jonathan Zandberg, *Failed Anti-activist Legislation*, 11 J. BUS. ENTREPRENEURSHIP & L. 329, 343-47 (2018); and Maria Lucia Passador, *The Woeful Inadequacy of Section 13(d): Time for a Paradigm Shift?*, 13 VA. L. & BUS. REV. 279, 280-81 (2019).

84. *See infra* Part II.D.

85. Antoinette Schoar & Haoxiang Zhu, MIT Sloan Sch. of Mgmt., Comment Letter on Proposed Amendment to Reporting Threshold for Institutional Investment Managers 3 (Aug. 28, 2020) [hereinafter MIT Comment], https://perma.cc/W247-5R6A (noting the widespread use of 13F data by scholars).

86. According to Westlaw, eighty-seven law review articles, notes, or comments have cited either Rule 13F or section 13(f) of the Exchange Act. But the vast majority of these have done so in the context of explaining research methodology (that is, they rely on the disclosures produced under the program to test some other hypothesis) or discussing some non-governance topic. Of the few pieces that do examine 13F in the context of corporate governance, none attempt to look at multiple impacts of the regime in this domain (much less attempt a global analysis), and all mention it only in a very cursory manner—in one paragraph or less. Several papers from the last two decades mention 13F in explicating the disclosure obligations of hedge fund activists. *See* Marcel Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. PA. L. REV. 1021, 1063 (2007) (single paragraph); Joel Slawotsky, *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. 275, 325 n.257 (2015) (single footnote); David William Roberts, Note, *Agreement in Principle: A*

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above, accounts of the regulations that mediate the relationship between institutional investors and corporations universally fail to mention 13F.[87]

The next Subpart introduces the 13F regime and demonstrates why the information it provides is potentially valuable to a variety of corporate-governance actors.

B. The Unique and Important Information Generated by 13F

1. The 13F regime

Section 13(f) of the Exchange Act[88] and SEC Rule 13f-1[89] require "institutional investment managers" to make quarterly disclosures of their

Compromise for Activist Shareholders from the UK Stewardship Code, 48 VAND. J. TRANSNAT'L L. 543, 563 (2015) (two paragraphs). A few papers from the 1990s very briefly mention the possibility of 13F enabling some form of beneficial-shareholder interaction. Randall S. Thomas, *Improving Shareholder Monitoring of Corporate Management by Expanding Statutory Access to Information*, 38 ARIZ. L. REV. 331, 331 n.3 (1996) (single footnote); Black, *supra* note 54, at 542 (single sentence); Robert G. Miller, *Comparing the Annual Shareholders Meeting in the United States with That in Germany—Use of Yankee Concepts of Due Process Discerned by Alexis de Tocqueville*, 19 N.Y. L. SCH. J. INT'L & COMPAR. L. 1, 23 (1999) (single paragraph). And one early paper discussed (in a single paragraph) the use of 13F to participants in takeover activity for both targets and acquirers. Thomas P. Lemke & Gerald T. Lins, *Disclosure of Equity Holdings by Institutional Investment Managers: An Analysis of Section 13(f) of the Securities Exchange Act of 1934*, 43 BUS. LAW. 93, 95-96 (1987) (briefly mentioning 13F's possible role in takeovers in a paper primarily devoted to non-governance topics). Finally, two sets of papers provide focused discussions of what section 13(f) *could* do if it were expanded to cover other types of holdings, such as short positions, non–publicly traded stocks, and derivative positions—all proposals that are beyond the scope of this Article. *See* Henry T.C. Hu & Bernard Black, *Empty Voting and Hidden (Morphable) Ownership: Taxonomy, Implications, and Reforms*, 61 BUS. LAW. 1011, 1047-54 (2006) (proposing to expand 13F to derivatives and short positions to help combat problems associated with the decoupling of economic interest from voting power); Henry T.C. Hu & Bernard Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership*, 79 S. CAL. L. REV. 811, 875-86 (2006) (same); Barbara A. Bliss, Peter Molk & Frank Partnoy, *Negative Activism*, 97 WASH. U. L. REV. 1333, 1372, 1375 (2020) (noting that section 13(f) does not require disclosure of short positions and thereby favors negative over positive activism). Another related paper is Michael C. Schouten, *The Case for Mandatory Ownership Disclosure*, 15 STAN. J.L. BUS. & FIN. 127 (2009). Schouten does not mention section 13(f) or analyze how it impacts corporate governance, but instead is primarily concerned with blockholder disclosure. *See id.* Schouten is also almost exclusively focused on Europe, not the United States, and his central theme is the importance of derivatives—a subject entirely outside of this Article's scope. *See id.*

87. *See supra* note 10 and accompanying text.

88. 15 U.S.C. § 78m(f).

89. 17 C.F.R. § 240.13f-1 (2021).

securities holdings on Form 13F.[90] The statute defines "institutional investment manager" capaciously.[91] For instance, it includes entities that invest in securities for their own account (like banks and insurance companies), as well as those that do so for the benefit of others (like mutual funds).[92] It includes purely private entities (like broker-dealers), governmental ones[93] (like public pension funds and sovereign wealth funds), and institutions that arguably fall somewhere in between (university endowments and union pension funds[94]). It includes gigantic asset managers as well as much smaller ones (subject to the limitation discussed below). It includes entities who are highly active stock traders (like hedge funds), as well as passive, "buy and hold" investors (like index funds). It includes both registered and unregistered investment advisers.[95] It includes not only domestic institutions but also foreign institutions with U.S. investments.[96] The one thing it does not include is actual human investors.[97]

These institutions are required to file Form 13F reports only if they manage[98] $100 million or more of covered securities.[99] Every quarter, the SEC publishes a list of the "13F securities" that count toward this limit,[100] which

90. Form 13F: Information Required of Institutional Investment Managers Pursuant to Section 13(f) of the Securities Exchange Act of 1934 and Rules Thereunder (n.d.) [hereinafter Form 13F], https://perma.cc/CF2N-KKZ5.

91. *See* Exchange Act § 13(f), 15 U.S.C. § 78m(f)(6)(A).

92. *See id.*; *see also Frequently Asked Questions About Form 13F*, SEC, https://perma.cc/7FBY-7YF2 (last updated Feb. 24, 2020) [hereinafter *SEC 13F Questions*].

93. *See SEC 13F Questions*, *supra* note 92; Division of Investment Management's Interpretative Positions Relating to Rule 13f-1 and Related Form 13F, Exchange Act Release No. 15,292, 16 SEC Docket 9, 11 (Nov. 2, 1978); Exchange Act § 3(a), 15 U.S.C. § 78c(a)(9) (defining "person" for purposes of the Exchange Act, including § 13(f), as including a "government, or political subdivision, agency, or instrumentality of a government"); Joel Slawotsky, *Incipient Activism of Sovereign Wealth Funds and the Need to Update United States Securities Laws*, 2015 INT'L REV. L., no. 2, at 1, 27.

94. *E.g.*, Bd. of Trs. of the Leland Stanford Junior Univ., Form 13F (May 13, 2022), https://perma.cc/L4DA-PJDB (to locate, select "View the live page," then select "form13fInfoTable.html"); *SEC 13F Questions*, *supra* note 92.

95. *SEC 13F Questions*, *supra* note 92.

96. *See id.*

97. Exchange Act § 13(f), 15 U.S.C. § 78m(f)(6)(A).

98. More precisely, the institutions must "exercise[] investment discretion" over these securities. *Id.*, 15 U.S.C. § 78m(f)(1); *see id.* § 3(a), 15 U.S.C. § 78c(a)(35) (defining the term "investment discretion"); *see also* 17 C.F.R. § 240.13f-1(b) (2021); *SEC 13F Questions*, *supra* note 92.

99. Exchange Act § 13(f), 15 U.S.C. § 78m(f)(1). The obligation to file kicks in at the end of any calendar year where an institution's assets reached the $100 million threshold on the final trading day of at least one month. *Id.*; *see also* 17 C.F.R. § 240.13f-1(a)(1) (2021).

100. Exchange Act § 13(f), 15 U.S.C. § 78m(f)(4); 17 C.F.R. § 240.13f-1(c) (2021).

generally include "equity securities that are traded on an exchange or quoted on [NASDAQ], equity options and warrants, shares of closed-end investment companies, and some convertible debt securities."[101] The list includes securities issued by foreign companies if those shares are traded on a U.S. exchange or quoted on NASDAQ.[102] It does not include shares in mutual funds, short sales, or most other derivatives.[103]

Within forty-five days after the end of each quarter, all institutions that meet this threshold must submit a report to the SEC on Form 13F[104] that lists, for each covered security, the number of shares held on the last date of the quarter and the market value of those shares.[105] These filings are made available to the public via EDGAR.[106] Under certain circumstances, however, the SEC will grant institutional requests to keep 13F filings out of the public domain—either temporarily or permanently.[107] The SEC also has the power to exempt any institution or class of institutions from filing forms altogether.[108]

2. How 13F data is used

Modern data-processing capabilities make it possible for 13F data to be quickly digested and easily combined with other information.[109] Various intermediaries process 13F filings and repackage them to suit the needs of investors, managers, researchers, and others.[110] With a few clicks, these intermediaries can produce highly actionable information. For instance, a manager can use 13F data to determine which firm shareholders have consistently held significant stakes over the last one, three, five, or ten years. An activist contemplating a proxy fight (or a firm targeted by such an effort) can use 13F data to see which current firm shareholders have a track record of

101. OFF. OF AUDITS, SEC, REPORT NO. 480, REVIEW OF THE SEC'S SECTION 13(F) REPORTING REQUIREMENTS, at v (2010) [hereinafter OIG REPORT], https://perma.cc/M8SG-22CU.

102. *SEC 13F Questions*, *supra* note 92.

103. OIG REPORT, *supra* note 101, at 25-26.

104. Form 13F, *supra* note 90, at 1.

105. *Id.* at 5; *see also* Exchange Act § 13(f), 15 U.S.C. § 78m(f)(1).

106. *See* Exchange Act § 13(f), 15 U.S.C. § 78m(f)(4); Rulemaking for EDGAR System, 64 Fed. Reg. 2843 (Jan. 19, 1999) (codified at 17 C.F.R. pts. 232, 240, 249).

107. Exchange Act § 13(f), 15 U.S.C. § 78m(f)(4); *SEC 13F Questions*, *supra* note 92.

108. Exchange Act § 13(f), 15 U.S.C. § 78m(f)(3).

109. *Cf.* Tom C.W. Lin, *Reasonable Investor(s)*, 95 B.U. L. REV. 461, 487-95 (2015) (reviewing the technological transformation of securities markets).

110. Edward Pekarek, *Hogging the Hedge? "Bulldog's" 13F Theory May Not Be So Lucky*, 12 FORDHAM J. CORP. & FIN. L. 1079, 1104 (2007) (describing the "cottage industry" of informational intermediaries).

supporting (or opposing) activists in prior campaigns.[111] An investor contemplating sponsoring a shareholder proposal may do the same.[112] A lawyer considering a securities class action may use 13F data to determine which investors bought or sold securities while the fraud was "on the market."[113] And firm managers thinking of taking an action on an ESG topic may use 13F data to determine what proportion of its current shareholders have publicly declared positions on that topic.[114]

3. The lack of any substitute source for 13F data

There is no real substitute for 13F data.[115] While various provisions of state and federal law require corporations to compile a list of their

111. *See infra* Part II.A.1. Some institutional investors are required to disclose their proxy-voting records. *See* 17 C.F.R. § 270.30b1-4 (2021) ("Every registered management investment company [mutual fund] . . . shall file an annual report . . . containing the registrant's proxy voting record . . . ."). Some others do so even absent federal mandates. *E.g.*, *Proxy Voting*, CALPERS, https://perma.cc/NK2U-JAY8 (last updated May 2, 2022) ("We . . . publicly post our votes in advance of each company's annual general meeting.").

112. *See infra* Part II.B.1.

113. *See infra* Parts II.C.1, .4.

114. *See infra* Part II.E.1.

115. *See* Daniel Collins, WhaleWisdom, Comment Letter on Proposed Amendment to Reporting Threshold for Institutional Investment Managers 3 (Sept. 29, 2020) [hereinafter WhaleWisdom Comment], https://perma.cc/8EFX-S8J9 ("Form 13F reports cannot be replaced by alternate means."); James G. Martin, Soc'y for Corp. Governance, Comment Letter on Proposed Amendment to Reporting Threshold for Institutional Investment Managers 8 (Sept. 29, 2020) [hereinafter Soc'y for Corp. Governance Comment], https://perma.cc/9ZA2-FFYZ (noting that "all stock surveillance programs rely on the disclosures provided on Form 13F to form the initial basis of their analysis"); Tawny A. Bridgeford, Nat'l Mining Ass'n, Comment Letter on Proposed Amendment to Reporting Threshold for Institutional Investment Managers 2 (Sept. 29, 2020) [hereinafter NMA Comment], https://perma.cc/Y8X8-467C ("The information found in 13F reports cannot simply be replaced by hiring stock surveillance firms as even these companies rely on the quarterly 13F data in their research efforts."); Andrew R. Brownstein, David A. Katz & Oluwatomi O. Williams, Wachtell, Lipton, Rosen & Katz, *Proposed Rules Relating to the Reporting Threshold for Institutional Investment Managers*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 6, 2020), https://perma.cc/2Q3F-SGRL (disputing the view that "market surveillance firms could replicate Form 13F information" because "Form 13F filings are themselves the most reliable (if sometimes outdated) information market surveillance firms have available to them"); Wachtell, Lipton, Rosen & Katz, Comment Letter on Proposed Amendment to Reporting Threshold for Institutional Investment Managers 10 (Sept. 29, 2020) [hereinafter Wachtell Comment], https://perma.cc/YQ7W-8YR5 (similar); *cf.* Stephen Taub, *The SEC Is Proposing a Big Change. These Firms Are Not Happy About It.*, INSTITUTIONAL INV. (July 13, 2020), https://perma.cc/BFS3-EWNW (noting the many market-surveillance and research firms opposed to a rule that would raise the threshold for 13F disclosures).

stockholders before annual meetings and other voting events,[116] this list is severely limited because the large majority of shares are held for the benefit of investors in "street name" by brokers.[117] Under SEC rules, brokers may not identify these shareholders to corporations if they object to such identification[118]—which the overwhelming majority of them do.[119] As the SEC explained in an earlier 13F rulemaking, issuers find 13F "useful because much of their shareholder list may reflect holdings in 'street name' rather than beneficial ownership."[120]

Other disclosure regimes also fall short. Certain private pension funds are required to disclose their holdings—but only annually.[121] Public pension funds generally have no such obligations.[122] The blockholder disclosures required under sections 13(d) and (g) of the Exchange Act only apply to the small subset of investors who acquire 5% of a company.[123]

The only disclosure regime that rivals 13F in scope and utility is the one applicable to mutual funds. These funds are required to submit a report to the SEC on Form N-PORT each month listing their "portfolio holdings."[124] Only

116. *E.g.*, DEL. CODE ANN. tit. 8, § 219 (2022); 17 C.F.R. § 240.14a-7 (2021).

117. *See* ALAN L. BELLER & JANET L. FISHER, THE OBO/NOBO DISTINCTION IN BENEFICIAL OWNERSHIP: IMPLICATIONS FOR SHAREOWNER COMMUNICATIONS AND VOTING 5 (2010), https://perma.cc/XA36-9SBK; Marcel Kahan & Edward Rock, *The Hanging Chads of Corporate Voting*, 96 GEO. L.J. 1227, 1236-42 (2008). The Depository Trust Company (through the Depository Trust and Clearing Corporation, or CEDE), in turn, holds the securities for the benefit of these brokers. However, CEDE makes available a list of brokers holding the stock in CEDE's name. *See* 17 C.F.R. § 240.14a-13(a) note 1 (2021); *see also* Jessica Erickson, *Automating Securities Class Action Settlements*, 72 VAND. L. REV. 1817, 1834 (2019) (explaining this system).

118. 17 C.F.R. § 240.14b-1(b)(3)(i) (2021).

119. BELLER & FISHER, *supra* note 117, at 5 ("Over 75 percent of customers holding shares in street name are [Objecting Beneficial Owners, or OBOs], and 52-60 percent of the shares of publicly-held companies in the United States are therefore held by OBOs.").

120. Rulemaking for EDGAR System, 64 Fed. Reg. 2843, 2852-53 (Jan. 19, 1999) (codified at 17 C.F.R. pts. 232, 240, 249).

121. 29 U.S.C. § 1023(b)(3)(C); 29 C.F.R. §§ 2520.103-10 to -11 (2022); *see also* 1 RONALD J. COOKE, ERISA PRACTICE AND PROCEDURE § 3:31 (West 2021).

122. *See* David H. Webber, *The Use and Abuse of Labor's Capital*, 89 N.Y.U. L. REV. 2106, 2112 n.26 (2014) ("[I]t is nearly impossible for the public to ascertain the content of public pension fund portfolios."). Some of the largest funds do provide holdings disclosures on an annual or quarterly basis. *See, e.g.*, STATE OF WIS. INV. BD., SCHEDULE OF INVESTMENTS AS OF DECEMBER 31, 2019 (2019), https://perma.cc/HCC6-UBTA; N.Y. STATE & LOC. RET. SYS., OFF. OF THE N.Y. STATE COMPTROLLER, NEW YORK STATE COMMON RETIREMENT FUND ASSET LISTING AS OF MARCH 31, 2020 (2020), https://perma.cc/QG8A-BPFE; N.Y. STATE TCHRS.' RET. SYS., DOMESTIC EQUITY HOLDINGS AS OF MARCH 31, 2022 (2022), https://perma.cc/VP6H-V8WR.

123. Exchange Act § 13(d), (g), 15 U.S.C. § 78m(d), (g).

124. 17 C.F.R. § 270.30b1-9 (2021); Investment Company Reporting Modernization, 81 Fed. Reg. 81,870, 81,872-73 (2016) (codified in scattered sections of 17 C.F.R.).

the third monthly report of each quarter, however, is made public. Thus, the public disclosures for mutual funds on N-PORT line up with those obligated under Form 13F. If 13F were eliminated or reduced, we would still have access to substantially the same information regarding mutual funds. Given that the same agency (the SEC) oversees both 13F and N-PORT, however, for purposes of this Article I assume that any changes to the scope of disclosures mandated by 13F could easily be combined with parallel changes to N-PORT.[125]

Finally, the rise of both (1) indexation as an investment strategy;[126] and (2) giant asset managers like BlackRock, State Street, and Vanguard with a focus on this strategy[127] somewhat reduces the importance of 13F—but only *somewhat*. For companies on major stock indices, one does not need to check 13F to know that Vanguard, BlackRock, and State Street each have a large position.[128] Yet 13F is necessary to reveal the particular size of these giant institutions' stakes, which vary substantially across different companies.[129] These institutions' ownership stakes tend to be more heavily concentrated in the largest U.S. companies, in part because these companies appear on more popular indices like the S&P 500; for smaller or non-U.S. companies not included on those popular indices, these institutions play a somewhat less dominant role.[130] Even among S&P 500 companies, the level of these firms'

125. N-PORT requires disclosure of a somewhat broader list of securities, including derivatives, nonconvertible debt, private companies, and more. *See* SEC, Form N-PORT 11-17 (2022), https://perma.cc/J83Z-UTXC.

126. Platt, *supra* note 56, at 1464 (explaining that "indexing" is "an investment strategy whereby an investor manages his or her portfolio of securities to track a particular benchmark index, i.e., a list of companies typically created and maintained by a third-party financial services organization" such as the S&P 500).

127. *Id.* at 1467-69.

128. More broadly, a company listed on any popular index will know that asset managers with funds tracking that index are shareholders.

129. Jan Fichtner, Eelke M. Heemskerk & Javier Garcia-Bernardo, *Hidden Power of the Big Three? Passive Index Funds, Re-concentration of Corporate Ownership, and New Financial Risk*, 19 BUS. & POL. 298, 312 tbl.2 (2017) (reporting that Vanguard held more than 10% of 163 global firms and more than 3% of 2,821, and that State Street similarly held at least 10% of 13 firms and more than 3% of at least 1,113).

130. *See, e.g.*, Todd A. Gormley, Vishal K. Gupta, David A. Matsa, Sandra C. Mortal & Lukai Yang, *The Big Three and Board Gender Diversity: The Effectiveness of Shareholder Voice* 39 tbl.1 (Eur. Corp. Governance Inst., Fin. Working Paper No. 714/2020, 2021), https://perma.cc/6U9U-4AZE (finding a large standard deviation in ownership levels for each of the Big Three across all firms); Lucian Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. REV. 721, 734 fig.1 (2019) (finding a substantially greater percentage of Big Three equity ownership in large-cap—S&P 500—companies as compared to the broader market—Russell 3000). This increased concentration of ownership among the largest firms enables financial empiricists to exploit the discontinuity in institutional ownership that occurs when (otherwise very similarly situated) firms move up or down between the (small-cap or mid-cap) Russell 2000 and the (large-cap) Russell 1000. *E.g.*, Ian R. Appel, Todd A. Gormley & Donald B. Keim,
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ownership stakes can vary significantly.[131] And although these institutions play an extremely important role, they are not the only game in town. If the Big Three vote an average 25% of the stock in S&P 500 companies, that leaves a substantial amount of voting power in the hands of other investors. Confirming these points, much of the empirical corporate-governance research discussed below separates out the influence of the Big Three asset managers on various studied effects, and shows that these few concentrated institutions are not dominating or driving the results.[132]

None of this is to suggest that 13F data is perfect. To the contrary, scholars have identified a host of problems.[133] Still, in many cases 13F currently provides the best available information about corporate ownership.

Identification Using Russell 1000/2000 Index Assignments: A Discussion of Methodologies, 12 CRITICAL FIN. REV. (forthcoming), https://perma.cc/NL8J-65T8.

131. Fichtner et al., *supra* note 129, at 313-14.

132. Jha, *supra* note 21, at 7 (refuting the claim that "the usual suspects such as BlackRock, Fidelity, and Vanguard are the major shareholders in all the [hedge fund activist] fights" and finding instead that those firms owned less than 1% of the target in 47%, 65%, and 36% of all attacks, respectively); Kedia et al., *supra* note 21, at 32-33 (reporting that the returns on campaigns are not driven by the presence of the Big Three); Martin C. Schmalz, *Recent Studies on Common Ownership, Firm Behavior, and Market Outcomes*, 66 ANTITRUST BULL. 12, 16 (2021) (emphasizing that "the empirical literature shows that the rise in common shareholding is driven not only by the growth of the Big Three index fund families but rather by the increased diversification of all institutional investors, including active funds"); Dimson et al., *supra* note 24, at 22 (finding that the Big Three were not involved in any of the coordinated engagements reported in the study); Alon Brav, Wei Jiang, Tao Li & James Pinnington, *Picking Friends Before Picking (Proxy) Fights: How Mutual Fund Voting Shapes Proxy Contests* 1, 5, 9 (Eur. Corp. Governance Inst., Fin. Working Paper No. 601/2019, 2019), https://perma.cc/QUE9-MYA7 (finding that activists are more likely to target firms with more activist-friendly investors, and finding that passive funds managed by the Big Three were significantly less activist friendly than others).

133. For examples, see generally Anne Anderson & Paul Brockman, Form 13F (Mis)Filings (Oct. 15, 2016) (unpublished manuscript), https://perma.cc/M5P4-TAUD (reviewing a sample of 13F filings by bank holding companies and finding, among other problems, frequent inaccuracies of the market prices, and thus total holding values, of the listed securities); Sean Cao, Zhi Da, Daniel Jiang & Baozhong Yang, The Strategic Use of 13F Restatements by Hedge Funds (Aug. 20, 2021) (unpublished manuscript), https://perma.cc/UY4M-BLCF (finding evidence that hedge funds deliberately file inaccurate 13Fs and then later amend them in order to delay disclosure of profitable market activities); and Vikas Agarwal, Wei Jiang, Yuehua Tang & Baozhong Yang, *Uncovering Hedge Fund Skill from the Portfolio Holdings They Hide*, 63 J. FIN. 739 (2013) (finding evidence that hedge funds frequently exploit the confidential-treatment request process to delay disclosure of especially significant, market-moving holdings). *Cf.* Matthew Backus, Christopher Conlon & Michael Sinkinson, *Common Ownership in America: 1980-2017*, 13 AM. ECON. J. 273, 282-83 (2021) (noting the "documented data issues" in the Thomson Reuters database of 13F filings, which is used by many academic researchers). One factor leading to these problems may be the SEC itself, which, according to a 2010 Office of the Inspector General report, had not only failed to conduct "any regular or systematic review of the data filed on Form 13F" but also

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C. Efforts to Reform 13F

After years of obscurity, 13F is suddenly making headlines.[134] In the final months of the Trump Administration, the SEC proposed dramatically curtailing the program.[135] Now there is a concerted push in the opposite direction.[136] All of these proposals share a common trait: They fail to consider 13F's impacts on corporate governance.[137]

1. The SEC's proposal (2020)

In July 2020, the SEC proposed reducing by about 90% the number of institutions required to make 13F disclosures.[138] As discussed above, the current rule applies to institutions managing $100 million or more. The SEC's proposal would have raised this reporting threshold to $3.5 billion.[139]

The SEC's proposal all but ignored corporate governance.[140] Instead, the Commission justified the proposal by emphasizing the major market changes

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had failed to even delegate authority to a particular division or office "to review and analyze the 13F reports," which meant that "no division or office considers this task as falling under its official responsibility." OIG REPORT, *supra* note 101, at vi.

134. *E.g.*, Corrie Driebusch & Juliet Chung, *SEC Rule Proposal Would Slash Number of Investment Managers That Need to Report Quarterly Holdings*, WALL ST. J. (July 10, 2020, 9:04 PM ET), https://perma.cc/QGD6-S46D (to locate, select "View the live page"); Ortenca Aliaj, *SEC Disclosure Change Would Allow Activist Investors to "Go Dark," Lawyers Warn*, FIN. TIMES (July 22, 2020), https://perma.cc/H2ZQ-DQDS (to locate, select "View the live page").

135. *Infra* Part I.C.1.

136. *Infra* Parts I.C.2-.3.

137. Proposals to expand the substantive scope of 13F to require disclosure of derivatives and short positions are beyond the scope of this Article.

138. Reporting Threshold for Institutional Investment Managers, 85 Fed. Reg. 46,016, 46,022 (July 31, 2020) (to be codified at 17 C.F.R. pts. 240, 249).

139. *Id.* at 46,020. Some have called for a more modest increase of the reporting threshold. *See, e.g.*, Soc'y for Corp. Governance Comment, *supra* note 115, at 2 ($450 million); James C. Allen & Stephen Deane, CFA Inst., Comment Letter on Proposed Amendment to Reporting Threshold for Institutional Investment Managers 5 (Sept. 29, 2020) [hereinafter CFA Inst. Comment], https://perma.cc/XY6V-55LD ($330 million); Aron Szapiro, Barbara Noverini & Sagar Patel, Morningstar, Inc., Comment Letter on Proposed Amendment to Reporting Threshold for Institutional Investment Managers 2 (Sept. 29, 2020) [hereinafter Morningstar Comment], https://perma.cc/ALU6-3GV3 ($300 million); OIG REPORT, *supra* note 101, at 26-27 (referring to the possibility of raising the threshold to $300 million). In 1981, the White House apparently considered a legislative amendment to section 13(f) that would have raised the reporting threshold to $1 billion. Letter from Edward H. Auchincloss, President, Auchincloss & Lawrence Inc., to C. Boyden Gray, Couns. to the Vice President 1-2 (July 23, 1981), https://perma.cc/4ZMT-4EB8.

140. *Cf.* Reporting Threshold for Institutional Investment Managers, 85 Fed. Reg. at 46,023 (acknowledging that "Form 13F currently is used for a wide variety of purposes" and

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since the $100 million threshold was set in 1975[141] and the compliance burden associated with producing the reports.[142]

According to a March 2021 regulatory filing, the SEC is "considering recommendations for next steps" on the proposal, "including whether to recommend targeted amendments to Form 13F and targeted exemptions from the filing requirements where duplicative filings exist."[143] In November 2021, the SEC confirmed that it was "not re-proposing the amendments to raise the reporting thresholds."[144]

2. The NYSE's rulemaking petition (2013)

In 2013, a group led by the New York Stock Exchange (NYSE) petitioned the SEC to shorten the 13F reporting window from forty-five days at the end of the quarter to two business days.[145] This proposal has been revived in the wake of the SEC's 2020 proposal, with many influential interest groups expressing support.[146]

As with the SEC's 2020 proposal, the primary justification offered for shortening the reporting window is background changes in the underlying

"the pool of users of the data has expanded to include academics, market researchers, the media, attorneys pursuing private securities class-action matters, and market participants (including institutional investors themselves) who use the data to enhance their ability to compete"); *id.* ("We recognize that raising the Form 13F reporting threshold would decrease holdings data available to . . . corporate issuers, market participants, and other analysts and researchers . . . .").

141. *Id.* at 46,018-20 (explaining that the proposal was "based on the growth of the U.S. equities market that occurred between the adoption of section 13(f) in 1975 and December 2018, and it is designed to reflect proportionally the same market value of U.S. equities that $100 million represented in 1975").

142. *Id.* at 46,022 (estimating annual compliance-cost savings of the proposal at between $15,000 and $30,000 per manager).

143. Regulatory Flexibility Agenda, 86 Fed. Reg. 17,040, 17,046 (Mar. 31, 2021) (listing "Amendments to Form 13F Filer Threshold" as an agenda item for the SEC).

144. Electronic Submission of Applications for Orders Under the Advisers Act and the Investment Company Act, Confidential Treatment Requests for Filings on Form 13F, and Form ADV-NR; Amendments to Form 13F, 86 Fed. Reg. 64,839, 64,841 (Nov. 19, 2021) (to be codified in scattered sections of 17 C.F.R.).

145. Janet McGinness, Kenneth A. Bertsch & Jeffrey D. Morgan, NYSE Euronext, Soc'y of Corp. Secy's & Governance Pros. & Nat'l Inv. Rels. Inst., Comment Letter on Petition for Rulemaking Under Section 13(f) of the Securities Exchange Act of 1934, at 9 (Feb. 1, 2013), https://perma.cc/5APL-BWXA [hereinafter NYSE Petition].

146. *See, e.g.*, Wachtell Comment, *supra* note 115, at 14; Soc'y for Corp. Governance Comment, *supra* note 115, at 17; Nat'l Inv. Rels. Inst. et al., Comment Letter on Proposed Amendment to Reporting Threshold for Institutional Investment Managers 1 (Aug. 28, 2020) [hereinafter NIRI Comment], https://perma.cc/YT7E-VWWR; Michelle Leder, Opinion, *Hedge Funds Need to Come Out of the Shadows*, BLOOMBERG (Jan. 6, 2021), https://perma.cc/ULH7-EQJK.

market context, specifically, the "massive technological advances in recordkeeping and reporting systems" since the 1970s.[147]

Generally, the petition ignores the corporate-governance implications of 13F information. The sole exception is a reference of how the current, forty-five-day delay between the end of the quarter and the disclosure "hampers public companies' ability to identify and engage with their shareholders, including their ability to consult with shareholders regarding 'say on pay,' proxy access and other key corporate-governance issues."[148] But the petition does not explain why public-company managers need to identify and engage with the subset of shareholders who acquired shares only in the most recent period on these ballot items, as opposed to the many longer-term investors who have presumably been reporting their share ownership over many periods. More broadly, the petition entirely fails to consider the possibility that, even if there was some advantage to corporate managers being able to identify and engage with these shareholders more quickly, this may not be in the best interest of shareholders or other corporate stakeholders.

Although this 2013 petition did not immediately lead to regulatory action, the petition has been revitalized by the SEC's 2020 proposal. Many of the commentators who vigorously objected to the SEC's efforts to scale back 13F specifically cited the 2013 petition as the kind of change the Agency ought to consider.[149]

147. NYSE Petition, *supra* note 145, at 2.

148. *Id.* at 3.

149. *E.g.*, NIRI Comment, *supra* note 146, at 1; Tyler Gellasch, Healthy Mkts., Comment Letter on Proposed Amendment to Reporting Threshold for Institutional Investment Managers 4 (Aug. 28, 2020) [hereinafter Healthy Mkts. Comment], https://perma.cc/3DUX-6ZU8; Barbara L. Becker, N.Y.C. Bar Comm. on Mergers, Acquisitions & Corp. Control Contests, Comment Letter on Proposed Amendment to Reporting Threshold for Institutional Investment Managers 4 (Aug. 31, 2020), https://perma.cc/5VW3-GUN6; Barbara Roper, Consumer Fed'n of Am., Comment Letter on Proposed Amendment to Reporting Threshold for Institutional Investment Managers 12-13 (Sept. 16, 2020) [hereinafter Consumer Fed'n Comment], https://perma.cc/5VPD-WXXM; Chris T. Taylor & Hope M. Jarkowski, NYSE et al., Comment Letter on Proposed Amendment to Reporting Threshold for Institutional Investment Managers 5 (Sept. 21, 2020) [hereinafter NYSE Comment], https://perma.cc/2XJE-LX6J; Christopher A. Iacovella, Am. Sec. Ass'n, Comment Letter on Proposed Amendment to Reporting Threshold for Institutional Investment Managers 3 (Sept. 29, 2020), https://perma.cc/BCH8-LCFX; Morningstar Comment, *supra* note 139, at 2; Wachtell Comment, *supra* note 115, at 13; Soc'y for Corp. Governance Comment, *supra* note 115, at 17; James J. Angel, Georgetown Univ., Comment Letter on Proposed Amendment to Reporting Threshold for Institutional Investment Managers 8 (Sept. 29, 2020), https://perma.cc/WZ7Z-7NLS.

3. Proposed legislation (2021)

The backlash to the SEC's 2020 proposal also inspired some new proposals. In June 2021, the U.S. House Financial Services Committee took up consideration of the Short Sale Transparency and Market Fairness Act.[150] The bill would, among other changes, require monthly instead of quarterly reporting.[151] The SEC is reportedly considering a similar change.[152] A memo prepared by the Financial Services Committee's majority staff discusses the proposal but fails to address the corporate-governance impacts.[153] Instead, the memo focuses on the importance of "market transparency"—noting that the SEC's 2020 proposal to reduce 13F disclosures "was met with wide-spread, cross industry criticism for its projected reduction in market transparency" and pointing to the January 2021 "short squeeze" involving GameStop as eliciting "further industry feedback regarding increased market transparency."[154]

D. The Legal Case for Considering 13F's Corporate-Governance Impacts

Proponents of the reforms discussed above and other commenters argue that, in enacting section 13(f), Congress was not intending to interfere one way or the other with corporate governance, and that it is therefore unnecessary (and perhaps even inappropriate) to consider any impacts in that domain.

For instance, the SEC's 2020 proposal attributed to Congress a narrow legislative purpose that seemingly attached no significance to the corporate-governance impacts or uses of 13F disclosures.[155] The proposal emphasized

150. H.R. 4618, 117th Cong. (2021).

151. *Id.* § 2. Several 2020 commentators endorsed the proposed shift to monthly disclosures. Darrell Heaps, Q4 Inc., Comment Letter on Proposed Amendment to Reporting Threshold for Institutional Investment Managers 3 (Aug. 10, 2020), https://perma.cc/K7PH-BFFK; NIRI Comment, *supra* note 146, at 1; NMA Comment, *supra* note 115, at 4.

152. Ben Bain, Joe Light & Robert Schmidt, *SEC to Examine Fund Disclosure After Archegos Blowup*, BOS. GLOBE (Apr. 23, 2021, 3:39 AM), https://perma.cc/4F29-T5LQ (to locate, select "View the live page") (reporting that the SEC is evaluating "if firms should submit 13Fs more frequently than every three months"); *see* Letter from Ams. for Fin. Reform to Allison Herren Lee, Acting Chair, SEC (Mar. 31, 2021), https://perma.cc/L5D3-SG3X (calling on SEC to "expand . . . the frequency of Form 13F reporting," among other things).

153. *See* Memorandum from the House Fin. Servs. Comm. Majority Staff to House Comm. on Fin. Servs. Members 3 (May 3, 2021), https://perma.cc/UQC7-2HST.

154. *Id.*

155. Reporting Threshold for Institutional Investment Managers, 85 Fed. Reg. 46,016, 46,018 (July 31, 2020) (to be codified at 17 C.F.R. pts. 240, 249) (listing the following "three primary goals" of the section 13(f) disclosure program: (1) "to create a central repository of historical and current data about the investment activities of institutional investment managers"; (2) "to improve the body of factual data available regarding the holdings of institutional investment managers and thus facilitate consideration of the influence and impact of institutional investment managers on the

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that 13F was "originally designed to assist regulators and the public" but that the "pool of users of the data" subsequently expanded to include new users including "attorneys pursuing private securities class-action matters, and market participants."[156] Later, when questioned about the proposal in a congressional hearing, SEC Chair Jay Clayton similarly emphasized that the use of 13F disclosures by issuers to detect their shareholders was something the statute "wasn't intended for."[157]

Similarly, a number of market players who opposed the SEC's 2020 proposed rule did so in part on the grounds that any reduction in market transparency was contrary to the statute's pro-transparency purposes.[158] The NYSE's 2013 rulemaking petition to speed up disclosure also argued that its proposal was not only permitted but in fact mandated by the Congressional "objectives" behind section 13(f). According to the petition, Congress wanted to maximize transparency without regard to the corporate-governance impacts of the disclosure requirement. The petition stated that the Commission originally set the deadline at forty-five days because of "practical

securities markets and the public policy implications of that influence"; and (3) "to increase investor confidence in the integrity of the U.S. securities markets" (citing Filing and Reporting Requirements Relating to Institutional Investment Managers, 43 Fed. Reg. 26,700, 26,701 & n.4 (June 22, 1978) (codified at 17 C.F.R. pts. 240, 249))).

156. *Id.* at 46,023; *see also id.* ("Since Form 13F data became publicly available, different uses for the data have developed."). There are reasons to wonder if the SEC has legal authority to raise the reporting threshold. *See* Alexander I. Platt, *The SEC's Proposal to Raise the § 13(f) Reporting Threshold Rests on a Misinterpretation of the Provision's Legislative History*, YALE J. ON REGUL.: NOTICE & COMMENT (July 16, 2020), https://perma.cc/6UL4-3WY7. But the policy is worth evaluating because the legal question is debatable and because Congress remains free to make a change.

157. *Oversight of the Securities and Exchange Commission: Hearing Before the S. Comm. on Banking, Hous., & Urb. Affs.*, 116th Cong. (2020), https://perma.cc/LW2Z-B2ST.

158. Wachtell Comment, *supra* note 115, at 12-13 (arguing that the SEC's proposal was "out of sync . . . with the statutory purposes Section 13(f) was intended to play" because it "materially decreases market transparency"); Soc'y for Corp. Governance Comment, *supra* note 115, at 3-4 (stating that the proposal "conflict[s] with the policy rationale underlying 13(f)" because it "widens—not closes—the very same gaps [in information] that the SEC was concerned with in the 1970s"); Morningstar Comment, *supra* note 139, at 1 (noting that "the current proposal conflicts with the commission's duty to uphold transparency"); NYSE Comment, *supra* note 149, at 2 (suggesting that the proposal's "limitation on transparency is at odds with the Commission's regulatory agenda in general"); Daniel Zinn & Cass Sanford, OTC Mkts., Comment Letter on Proposed Amendment to Reporting Threshold for Institutional Investment Managers 2 (Sept. 30, 2020), https://perma.cc/9MM5-PW3D ("Loosening the disclosure requirements for institutional investors runs contrary to the Commission's stated goals of transparency in the name of investor protection and market efficiency.").

considerations," but that "substantial advances in information technology in the 34-year interim" had rendered these concerns "no longer relevant."[159]

This is incorrect. Congress was not single-mindedly seeking to maximize the volume of information, but was rather cognizant of the broad range of possible costs and benefits such disclosure might impose, including in the domain of corporate governance. For one thing, the statute includes a mix of transparency-enhancing[160] and transparency-reducing[161] components, indicating that Congress was not just pursuing maximal information disclosure, but was instead carefully balancing an interest in enhancing transparency against other competing considerations.

The legislative history confirms that Congress was well aware of the important potential impacts on corporate governance. The single most

159. NYSE Petition, *supra* note 145, at 5; *see also* Deborah K. Pawlowski, Nat'l Invs. Rel. Inst. Virtual Chapter, Comment Letter on Proposed Amendment to Reporting Threshold for Institutional Investment Managers 2 (Sept. 1, 2020), https://perma.cc/9CD3-KDZD ("[W]e suggest the SEC recognize the advances in technology since 1978 and promote more timely and complete disclosure by supporting more frequent reporting, requiring the public disclosure of short positions, and cutting the 45-day reporting period."); Howard Ungerleider, Dow Inc., Comment Letter on Proposed Amendment to Reporting Threshold for Institutional Investment Managers 4 (Sept. 11, 2020), https://perma.cc/7GS7-MF38 ("While Dow recognizes that the current 45-day reporting period for Form 13F was borne of practical considerations for the time required for data collection and submission, we believe these considerations are now less relevant as advances in information technology have significantly expedited these processes."); Mark R. George, Norfolk S. Corp., Comment Letter on Proposed Amendment to Reporting Threshold for Institutional Investment Managers 2 (Sept. 22, 2020), https://perma.cc/235Z-D8SF ("[W]e urge the Commission to consider reducing the time period for reporting to adjust for recordkeeping advances . . . .").

160. *See* Exchange Act § 13(f), 15 U.S.C. § 78m(f)(6)(A) (defining covered "institutional investment manager" very broadly); *id.* § 3, 15 U.S.C. § 78c(a)(11) (defining covered "equity securit[ies]" very broadly); *id.* § 13(f), 15 U.S.C. § 78m(f)(1) (setting the reporting threshold at "$100,000,000 or such lesser amount" as the Commission may choose, allowing the SEC to lower the threshold but not raise it); *id.* (providing that an institutional investment manager triggers the reporting obligation if it meets the reporting threshold on the last trading day "in *any* of the preceding twelve months" (emphasis added)); *id.* (setting one year as the floor for the frequency of reporting); *id.* (requiring a long list of information that must be included in reports).

161. *Id.* § 13(f), 15 U.S.C. § 78m(f)(3), (5) (giving the SEC broad authority to "exempt, conditionally or unconditionally, any institutional investment manager or security or any class of institutional investment managers or securities from any or all of the provisions of this subsection or the rules thereunder" where doing so is "consistent with the protection of investors and the purposes of this subsection"); *id.*, 15 U.S.C. § 78m(f)(4) (giving the SEC authority to "delay or prevent public disclosure of any such information in accordance with [the Freedom of Information Act]"); *id.* § 13(d), (f), 15 U.S.C. § 78m(d)(1), (d)(5), (f)(1) (excluding major categories of securities from coverage, including nonconvertible debt securities); *id.* § 13(f), 15 U.S.C. § 78m(f)(1) (prohibiting the Agency from lowering the reporting threshold below $10 million); *id.* (prohibiting the Agency from making disclosures more frequent than quarterly).

important event leading to Congress's 1975 adoption of section 13(f) was a study of institutional investors completed by the SEC in 1971 at Congress's direction.[162] The study devotes an entire chapter (over 300 pages) to "institutional relationships with portfolio companies."[163] The chapter begins by explaining that the growth of institutions poses a "formidable potential counter-force to corporate managerial hegemony,"[164] and noting that this development has not yet been adequately reflected in either state or federal law.[165] It then dives into a survey of important mechanisms by which these institutions can exert their power, including through voting,[166] pushing for "socially responsible" conduct,[167] and facilitating takeovers[168] or other types of activist-driven changes in corporate control.[169] The chapter describes the important role of "passive" institutions that consistently vote with management[170] and the concern that institutions will promote stock market short-termism.[171] One Commissioner summarized this part of the report as raising "the age-old dispute as between financial and management control of the American industrial system."[172]

That these issues were discussed so extensively in a report that all parties agree was the single most important precipitating cause leading to Congress's adoption of section 13(f) provides strong evidence that Congress appreciated

162. *See* S. REP. NO. 94-75, at 78-79 (1975); Filing and Reporting Requirements Relating to Institutional Investment Managers, 43 Fed. Reg. 26,700, 26,701 (June 22, 1978) (codified at 17 C.F.R. pts. 240, 249); Reporting Threshold for Institutional Investment Managers, 85 Fed. Reg. 46,016, 46,018 (July 31, 2020) (to be codified at 17 C.F.R. pts. 240, 249); Senators Sherrod Brown, Tammy Baldwin, Jack Reed & Chris Van Hollen, Comment Letter on Proposed Amendment to Reporting Threshold for Institutional Investment Managers 1-2 (Oct. 21, 2020), https://perma.cc/797Q-PDM7; Soc'y for Corp. Governance Comment, *supra* note 115, at 3.

163. SEC, INSTITUTIONAL INVESTOR STUDY REPORT, H.R. DOC. NO. 92-64, at 2529-849 (1971) (capitalization altered).

164. *Id.* at 2530.

165. *Id.* at 2549.

166. *Id.* at 2750.

167. *Id.* at 2761.

168. *Id.* at 2762.

169. *Id.* at 2826.

170. *Id.* at 2751.

171. *Id.* at 2772.

172. Richard B. Smith, Comm'r, SEC, Remarks on "The Institutional Investor Study" Before the Exchequer Club, Sheraton Carlton Hotel, Washington, D.C. 6 (Jan. 15, 1969), https://perma.cc/NUG7-3FZA.

the potential for this program to have impacts on the relationship between institutions and the companies they own.[173]

In any case, Congress removed any doubt in 1996 when it mandated that the SEC consider the impact of "efficiency, competition, and capital formation" whenever making rules under the Exchange Act.[174] At least one court has construed this language as encompassing cost–benefit analysis including corporate-governance dynamics.[175]

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A complete understanding of the corporate-governance implications of 13F is sorely needed. The information produced under that provision appears to have an enormous range of potential effects on how corporate managers and institutional investors interact with one another. Yet these effects have been overlooked by scholars, leaving policymakers without a sound basis for reasoned action. There is an urgent need for analyzing the impacts of 13F, as the SEC and Congress face mounting calls to revisit this regime. The next Part turns to answer this call.

II. 13F's Impacts on Corporate Governance

By enabling managers, shareholders, and other market actors to identify a firm's shareholders, 13F facilitates a host of important corporate-governance interactions and functions. This Part analyzes 13F's impact across five governance domains: (1) hedge fund activism; (2) shareholder proposals;

173. Two other studies also influenced Congress's decision to adopt section 13(f): a 1973 report from President Nixon's Commission on Financial Structure and Regulation and a 1973 report on the role of institutional investors in the stock market prepared by the staff of the Senate Committee on Finance. Filing and Reporting Requirements Relating to Institutional Investment Managers, 43 Fed. Reg. 26,700, 26,701 (June 22, 1978) (codified at 17 C.F.R. pts. 240, 249). Both reports emphasized corporate-governance issues. PRESIDENT'S COMM'N ON FIN. STRUCTURE & REGUL.,THE REPORT OF THE PRESIDENT'S COMMISSION ON FINANCIAL STRUCTURE AND REGULATION 105 (1971) (noting that institutional investors with a "sizable amount of a corporation's equity securities" could "have a significant influence on the management of that enterprise" by voting those shares, and that this justifies disclosure); STAFF OF S. COMM. ON FIN., 93D CONG., THE ROLE OF INSTITUTIONAL INVESTORS IN THE STOCK MARKET app. A at 23 (Comm. Print 1973) (excerpting an article warning about the "complete dominance of . . . our corporations by a relatively small handful of institutions" (quoting Securities Industry Association chairman and Goldman Sachs partner John C. Whitehead)).

174. National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, § 106(b), 110 Stat. 3416, 3424-25 (codified as amended at 15 U.S.C. § 78c).

175. Bus. Roundtable v. SEC, 647 F.3d 1144, 1155 (D.C. Cir. 2011). *But see* John Coates IV, *Cost–Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882, 887, 1011 (2015) (arguing that "precise, reliable, quantified" cost–benefit analysis is "unfeasible" for much financial regulation and criticizing the use of cost–benefit analysis as a framework for judicial review of agency action).

(3) shareholder litigation; (4) engagement; and (5) tacit shareholder influence. In each area, there are multiple interactions that 13F may facilitate. For each interaction, the Article explains how 13F may facilitate the interaction, surveys available evidence as to whether 13F's impact is significant, and evaluates whether this effect benefits or harms shareholders and stakeholders.[176] Table 1 provides a summary of these findings.

176. This Article takes an ecumenical approach to the debate over corporate purpose. For one excellent resource on this point, see RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD (Elizabeth Pollman & Robert B. Thompson eds., 2021). For important recent contributions criticizing the shareholder-centric model and arguing for greater consideration of other constitutencies, see generally Bus. Roundtable, Statement on the Purpose of a Corporation (2019), https://perma.cc/EP2Z-Y626; Leo E. Strine, Jr., Aneil Kovvali & Oluwatomi O. Williams, *Lifting Labor's Voice: A Principled Path Toward Greater Worker Voice and Power Within American Corporate Governance*, 106 MINN. L. REV. 1325 (2022); Brett H. McDonnell & Matthew T. Bodie, *From Mandates to Governance: Restructuring the Employment Relationship*, 81 MD. L. REV. 887 (2022); Lund & Pollman, *supra* note 14; and Stavros Gadinis & Amelia Miazad, *A Test of Stakeholder Capitalism*, 47 J. CORP. L. 47 (2021). For important recent contributions defending the shareholder-centric model, see generally Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91 (2020); Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *For Whom Corporate Leaders Bargain*, 94 S. CAL. L. REV. 1467 (2021); and Jonathan M. Karpoff, *On A Stakeholder Model of Corporate Governance*, 50 FIN. MGMT. 321 (2021).

Table 1
13F's Impacts on Corporate Governance

Channel	Description of 13F's Impact	Significant?	Normative Upshot
Hedge Fund Activism	1. Enables activists to identify promising targets with sympathetic shareholder bases	Yes	Uncertain
	2. Aligns activism with the interests of long-term shareholders by encouraging activists to select targets and tailor campaigns based on preferences of the shareholder base	Yes	Beneficial
	3. Improves the quality of information ahead of proxy contests by enabling a vigorous "competition" for shareholder votes	Yes	Uncertain
	4. Helps shareholder voters overcome incentives to remain passive and deferential to management	Maybe	Uncertain
	5. Discourages activism by enabling managers and others to detect activists' presence before they launch campaigns	Weak	Uncertain
	6. Promotes settlement between managers and activists by reducing informational asymmetries	Maybe	Uncertain

Channel	Description of 13F's Impact	Significant?	Normative Upshot
Shareholder Proposals	7. Enables proposal targeting by sponsors	Maybe	Uncertain
	8. Enables efficient targeting of proposals for exclusion by managers	Maybe	Uncertain
	9. Helps management "always win the close ones," snatching victories away from proposal sponsors in closely contested votes	Yes	Harmful
	10. Helps shareholder voters overcome incentives to remain passive and deferential to management	Maybe	Uncertain
	11. Facilitates settlement by reducing informational asymmetries regarding prospects of success	Maybe	Uncertain
Shareholder Litigation	12. Helps plaintiffs' attorneys and/or courts identify suitable lead plaintiffs	Weak	N/A
	13. Helps parties litigate and courts resolve motions for class certification	Weak	N/A
	14. Helps identify eligible claimants for settlements	Maybe	N/A
	15. Facilitates settlement by reducing informational asymmetries on damages	Maybe	Beneficial
Engagement	16. Promotes manager-initiated engagement	Yes	Uncertain
	17. Promotes shareholder-initiated engagement	No	N/A
	18. Promotes "coordinated engagements" by multiple shareholders on ESG topics with the same company	Maybe	Uncertain

Channel	Description of 13F's Impact	Significant?	Normative Upshot
Tacit Shareholder Influence	19. Amplifies the effect of investor policy statements in guidelines, stewardship codes, and other documents	Yes	Uncertain
	20. Facilitates the anticompetitive effects of common ownership	Yes	Harmful

Evidence regarding the significance of 13F's effects is limited by the blind spot that scholars have had for 13F—taking the provision for granted without critically evaluating it or directly controlling for it in empirical studies. Although no prior study actually tests the impact of 13F, many studies rely heavily on 13F data and therefore can support inferences regarding the effect that 13F is likely having in a given domain. This Article also draws on other sources of evidence to evaluate 13F's impact, including comment letters filed by various corporate-governance actors in reaction to the SEC's 2020 proposal. While these comment letters cannot always be taken at face value, they provide some indication of how market players are using 13F data. But this evidence still only gets us so far. As Table 1 shows, there are quite a few areas where the combination of theory and empirical and anecdotal data is just not sufficient to draw any conclusion as to whether the effect is significant. These are areas where additional research may be especially valuable.

As to assessing the normative upshot of each effect, this Article takes a minimalist and conservative approach. The primary goal of this Part is to map the effects of 13F across the corporate-governance universe, not to wade into (much less resolve) foundational debates about the purposes of corporate law or whether enhanced or reduced shareholder power in a given domain is likely to be beneficial. In each case, I provide a brief, balanced assessment of the current state of theoretical and empirical research—assessing impacts on shareholders and other stakeholders.[177] Since many of these debates are ongoing, the most frequent answer in this column is "uncertain." Readers, of course, are free to draw their own conclusions. This conservative approach makes the few areas where I do reach a conclusion on the normative effect all the more notable.

177. *See, e.g.*, *infra* Part II.A.1 (reviewing the debate over hedge fund activism); *infra* Part II.A.6 (reviewing the debate over hedge fund–activist settlements); *infra* Part II.B.1 (reviewing the debate over shareholder proposals); *infra* Part II.B.4 (reviewing the debate over shareholder-proposal settlements); *infra* Part II.C.4 (reviewing the debate over securities class actions); *infra* Part II.D.1 (reviewing the debate over engagement); *infra* Part II.D.3 (same).

A. Hedge Fund Activism

"Hedge fund activists" seek to make returns by buying up a substantial portion (usually less than 10%)[178] of a public company's stock and then trying to get the company to change its business plan, leadership, governance system, or corporate structure in some way.[179] To impose these changes, activists can threaten or pursue a "proxy fight," putting forward a rival set of directors to run against the incumbent group and seeking the support of enough fellow shareholders to win.[180] Targets may also enter into "settlement" agreements with activists, making concessions in exchange for the activists' agreement to not pursue a proxy fight.[181] Hedge fund activists can be usefully contrasted with non-activist hedge funds, which seek to make returns through various trading strategies but do not attempt to influence the companies they invest in,[182] and with private equity firms, which seek to profit by changing a company's business plan or structure (but only after acquiring a controlling share and taking the company private).[183] These activists have become important players in the U.S. corporate landscape.[184] Between 2015 and 2019, an average of 272 (public) activist campaigns were pursued against U.S. issuers every year.[185]

178. Gilson & Gordon, *supra* note 48, at 899 (collecting sources).

179. For overviews, see Bebchuk, *The Myth*, *supra* note 58; 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 (2016); and Leo E. Strine, Jr., *Who Bleeds When the Wolves Bite?: A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System*, 126 YALE L.J. 1870, 1885-87 (2017).

180. William W. Bratton, *Hedge Funds and Governance Targets*, 95 GEO. L.J. 1375, 1402-05 (2007); Paul H. Edelman, Randall S. Thomas & Robert B. Thompson, *Shareholder Voting in an Age of Intermediary Capitalism*, 87 S. CAL. L. REV. 1359, 1411 (2014).

181. Bebchuk et al., *supra* note 22, at 2; Coffee et al., *supra* note 22, at 395-400.

182. Bratton, *supra* note 180, at 1383.

183. *Id.*

184. Zohar Goshen & Sharon Hannes, *The Death of Corporate Law*, 94 N.Y.U. L. REV. 263, 283 (2019); Kobi Kastiel, *Against All Odds: Hedge Fund Activism in Controlled Companies*, 2016 COLUM. BUS. L. REV. 60, 64; Marcel Kahan & Edward Rock, *Anti-activist Poison Pills*, 99 B.U. L. REV. 915, 917 (2019); Assaf Hamdani & Sharon Hannes, *The Future of Shareholder Activism*, 99 B.U. L. REV. 971, 973 (2019).

185. SULLIVAN & CROMWELL, REVIEW AND ANALYSIS OF 2019 U.S. SHAREHOLDER ACTIVISM 14 (2019), https://perma.cc/8QSN-AKSZ. Nearly one activist campaign was launched against a new target company every day in 2018. Mark R. DesJardine & Rodolphe Durand, *Disentangling the Effects of Hedge Fund Activism on Firm Financial and Social Performance*, 41 STRATEGIC MGMT. J. 1054, 1055 (2020). In 2017, the *Wall Street Journal* published an average of over one article per day on the subject. Ed deHaan, David Larcker & Charles McClure, *Long-Term Economic Consequences of Hedge Fund Activist Interventions*, 24 REV. ACCT. STUD. 536, 537 (2019).

13F is an important tool for activists, their targets, and the shareholders in the target firm. This Subpart considers six potential channels in which 13F may impact hedge fund activism: (1) activist target selection; (2) activist campaign design; (3) the "competition" between activists and targets for shareholder votes; (4) other shareholders' internal voting decisions; (5) the target's defense against activists; and (6) settlements between the activist and the target firm.

1. Activist targeting

Because activists typically acquire just a 5-10% stake of the target, their success depends on winning support from other shareholders—or convincing management that it is likely to obtain such support.[186] Activists' necessary dependency on support from other shareholders suggests that, before even launching a campaign, activists would want to learn about the composition of the firm's shareholders and the extent to which these shareholders might be inclined to support an activist campaign.

13F can be useful here. It enables activists to identify institutional investors with current stakes in the firm as well as the size and duration of those stakes. And, in combination with other public data (such as voting records), it can give an activist a good sense of their prospects of success. For instance, if the activist finds that the firm is dominated by institutions with a long track record of supporting management against proxy contests, the activist may think twice before investing time and money in a proxy fight. The same is true if the activist learns that a firm is dominated by institutions that have been steadily growing their stake in the firm, or that have demonstrated intense loyalty to the firm's management by consistently voting in their favor. By contrast, if the activist finds that the firm has a substantial share of institutional owners with a track record of supporting activists in other firms, or that have been voting against management of this firm, or which have been reducing their exposure to the firm, they may feel emboldened to pursue a campaign.

Recent empirical work confirms this effect—and places 13F solidly at the center of it. In a recent study, Alon Brav and co-authors confirmed (using 13F data) that activists are significantly more likely to target firms whose shareholder base is comprised of more activist-friendly shareholders, as indicated by their level of support for earlier activist campaigns and their

186. *See, e.g.*, Bebchuk & Jackson, *supra* note 75, at 51-53; Gilson & Gordon, *supra* note 48, at 896-98; Hamdani & Hannes, *supra* note 184, at 975; Virginia Harper Ho, *Risk-Related Activism: The Business Case for Monitoring Nonfinancial Risk*, 41 J. CORP. L. 647, 678 (2016); Bebchuk & Hirst, *supra* note 56, at 2136.

propensity to be swayed by the recommendations of proxy advisors.[187] Another study (also relying on 13F data) by Simi Kedia and co-authors reached the same conclusion—finding that activists were more likely to target firms with more "activist-friendly" investors, as indicated by each investor's prior record voting against management at the target company, prior record of voting at other firms targeted by activism, and prior investment behavior at other firms targeted by activism.[188] Finally, Ian Appel and co-authors also found (using 13F data) that activists pursue *more* aggressive goals (like seeking a board seat) in campaigns where a larger share of the target firm's stock is held by certain types of institutional investors (namely, passively managed mutual funds), and are more likely to succeed in those cases.[189]

Accordingly, 13F seems to reduce the costs of activism by making it easier for activists to select promising targets, and thus may tend to increase the volume of activism. Whether this effect is beneficial or harmful is less certain. The costs and benefits of hedge fund activism are the subject of an ongoing, active debate among scholars. Proponents see activists as "governance entrepreneurs" who invest in underperforming or poorly governed companies, impose value-enhancing changes to each target's governance or business model, and then appropriately share the rewards when the market recognizes the value of those changes.[190] But critics argue that shareholder gains produced through activism are inevitably short-lived and come at the expense of long-term shareholders and/or other corporate stakeholders.[191] The debate extends to "spillover" effects on firms that make changes in the

187. Brav et al., *supra* note 132, at 6, 18, 32 (focusing on one type of institutional investor: mutual funds).

188. Kedia et al., *supra* note 21, at 3-4, 14-17, 27.

189. Ian R. Appel, Todd A. Gormley & Donald B. Keim, *Standing on the Shoulders of Giants: The Effect of Passive Investors on Activism*, 32 REV. FIN. STUD. 2720, 2723 (2019); *see also* Matthew R. Denes, Jonathan M. Karpoff & Victoria B. McWilliams, *Thirty Years of Shareholder Activism: A Survey of Empirical Research*, J. CORP. FIN., June 2017, at 405, 415 (finding that targets of hedge fund activism "tend to have high institutional ownership").

190. Gilson & Gordon, *supra* note 48, at 897; Bebchuk, *The Myth*, *supra* note 58, at 1670-76; James D. Cox & Randall S. Thomas, *Corporate Darwinism: Disciplining Managers in a World with Weak Shareholder Litigation*, 95 N.C. L. REV. 19, 23, 40 (2016).

191. Martin Lipton, Wachtell, Lipton, Rosen & Katz, *Bite the Apple; Poison the Apple; Paralyze the Company; Wreck the Economy*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 26, 2013), https://perma.cc/EL2K-EE2X; Leo E. Strine, Jr., Essay, *One Fundamental Corporate Governance Question We Face: Can Corporations Also Be Managed for the Long Term Unless Their Powerful Electorates Also Act and Think Long Term?*, 66 BUS. LAW. 1, 7-9, 26 (2010); Caleb N. Griffin, *The Hidden Cost of M&A*, 2018 COLUM. BUS. L. REV. 70, 122-27; Bratton & Wachter, *supra* note 65, at 657-59.

shadow of activism.[192] Some empirical studies report that activism produces long-term increases in shareholder value[193] and other significant benefits in long-term corporate performance.[194] Others, however, have called some of these findings into question[195] and report that increases in firm value are produced mainly by transferring wealth from other stakeholders.[196] While it is likely that 13F increases the volume of activism, therefore, the normative upshot of this change is more debatable.

2. Activist campaign tailoring

13F not only helps activists select targets; it also leads activists to design their campaigns in a manner that responds to the preferences of the firm shareholders whose votes activists depend on.

Scholars have long conjectured that activists' need to win support from other institutional investors who hold shares of a target firm could mitigate activists' short-termist incentives and force them to pursue agendas that will

192. *Compare, e.g.*, Bebchuk, *The Myth*, *supra* note 58, at 1676-81 ("Without board insulation, the fear of being replaced by shareholders gives insiders incentives to avoid observable departures from shareholder interests."), *with* Martin Lipton, Wachtell, Lipton, Rosen & Katz, *Empiricism and Experience; Activism and Short-Termism; The Real World of Business*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 28, 2013), https://perma.cc/4YEW-3HS6 ("To avoid becoming a target, companies seek to maximize current earnings at the expense of sound balance sheets, capital investment, research and development and job growth.").

193. Lucian A. Bebchuk, Alon Brav & Wei Jiang, *The Long-Term Effects of Hedge Fund Activism*, 115 COLUM. L. REV. 1085, 1090-91 (2015); Kedia et al., *supra* note 21, at 6.

194. Nickolay Gantchev, Merih Sevilir & Anil Shivdasani, *Activism and Empire Building*, 138 J. FIN. ECON. 526, 527 (2020); Nickolay Gantchev, Oleg R. Gredil & Chotibhak Jotikasthira, *Governance Under the Gun: Spillover Effects of Hedge Fund Activism*, 23 REV. FIN. 1031, 1033 (2019); Alon Brav, Wei Jiang, Song Ma & Xuan Tian, *How Does Hedge Fund Activism Reshape Corporate Innovation?*, 130 J. FIN. ECON. 237, 238-39 (2018); Alon Brav, Wei Jiang & Hyunseob Kim, *The Real Effects of Hedge Fund Activism: Productivity, Asset Allocation, and Labor Outcomes*, 28 REV. FIN. STUD. 2723, 2725-26 (2015).

195. Martijn Cremers, Saura Masconale & Simone M. Sepe, *Activist Hedge Funds and the Corporation*, 94 WASH. U. L. REV. 261, 266-70 (2016); deHaan et al., *supra* note 185, at 538-42; James Park, *Averages or Anecdotes? Assessing Recent Evidence on Hedge Fund Activism*, 62 UCLA L. REV. DISCOURSE 100, 101 (2014). *But see* Lucian Bebchuk, Alon Brav, Wei Jiang & Thomas Keusch, *The Long-Term Effects of Hedge Fund Activism: A Reply to Cremers, Giambona, Sepe, and Wang*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 10, 2015), https://perma.cc/V2S4-82QV (attempting and failing to replicate the results of the Cremers study referenced above).

196. DesJardine & Durand, *supra* note 185, at 1056; Anup Agrawal & Yuree Lim, *Where Do Shareholder Gains in Hedge Fund Activism Come From? Evidence from Employee Pension Plans*, 67 J. FIN. & QUANTITATIVE ANALYSIS 2140, 2142 (2022); *see also* Coffee et al., *supra* note 22, at 391 (finding that informed trading increases when an activist-nominated director is appointed to a corporate board).

increase the company's value over the long term.[197] As long as activists know they have to win support from longer-term shareholders, they will design campaigns that will appeal to those shareholders and that will include plans designed to enhance the firm's long-term value.

13F seems to facilitate this interaction. Without the ability to identify existing firm shareholders, activists would be incentivized to look for alternative ways to increase their prospects of success: for instance, by arranging for *new* shareholders (such as other hedge funds) to take positions in the target at the time of the campaign. Activists who rely on such "wolf packs" have less need to tailor their campaign to win votes from longer-term investors, since they can be more assured of winning sufficient support from their fellow "wolves." All things equal, activists may have some reasons to limit reliance on wolf packs: There is a legal risk that the activist and other tipped funds would be found to be a "group" for securities-regulation purposes, triggering several adverse legal consequences.[198] By allowing activists to identify the target firm's shareholder base, 13F may incentivize activists to rely more heavily on current longer-term shareholders, resulting in activist campaigns that are designed to promote long-term value.

Recent empirical work provides strong support for this conjecture. Simi Kedia and co-authors relied on 13F data to find that long-run (five-year) returns are better for activist campaigns where more "activist-friendly" institutional investors were present at the outset of the intervention.[199] Another study similarly found that activist targets with more "long-term investors" experience greater improvements in operating performance over longer periods as compared to other targets.[200] This effect seems clearly beneficial for shareholders. A dominant critique of hedge fund activism for

197. Kahan & Rock, *supra* note 86, at 1089; Rock, *supra* note 48, at 363, 385; Bebchuk, *The Myth*, *supra* note 58, at 1664; Gilson & Gordon, *supra* note 48, at 897-98; Coffee & Palia, *supra* note 179, at 572; Edelman et al., *supra* note 180, at 1420; Robert C. Pozen, *The Role of Institutional Investors in Curbing Corporate Short-Termism*, FIN. ANALYSTS J., Sept./Oct. 2015, at 10, 10.

198. Yu Ting Forester Wong, *Wolves at the Door: A Closer Look at Hedge Fund Activism*, 66 MGMT. SCI. 2347, 2347, 2369 n.1 (2019).

199. Kedia et al., *supra* note 21, at 4, 27. To determine whether an investor was activist friendly, the authors looked at (1) how the investor voted in the target firm and on other activist campaigns; and (2) their investment behavior in other firms targeted by activists. *Id.* at 10.

200. Aslı Togan Eğrican, *Shareholder Coordination, Institutional Investment Horizon, and Hedge Fund Activism*, 54 APPLIED ECON. 2390, 2392 (2022); *see also* Appel et al., *supra* note 189, at 2724 (finding that among firms targeted by activists, a greater percentage of shares held by passive investors correlated with more activist success in campaigns pursuing changes in corporate control but not more success "for outcomes passive investors often associate with short termism, such as increased payouts and changes to the capital structure").

over a decade now is that it creates only short-term benefits at the expense of long-term shareholders.[201] 13F seems to mitigate this negative effect.

Moreover, the desire to win votes from these other institutions may lead hedge funds to incorporate various pro-stakeholder reforms as part of their plans to change corporate performance. Some institutional investors have become increasingly interested in these issues,[202] and activists seeking to win support from these institutions have an incentive to incorporate these concerns into their campaigns. Newspapers have reported on this trend.[203] And a recent empirical study confirmed it systematically: Using 13F data, Manish Jha reported that activists tailor their campaigns to the idiosyncratic preferences of targets' largest institutional owners.[204] That is, where the target's large shareholders have demonstrated support for shareholder proposals on specific ESG issues, activists are more likely to include language on those particular items in their campaign communications. Jha also found that this strategy pays off—such tailored attacks are more successful in winning support from these institutional investors.

Again, this seems beneficial. Another long-standing criticism of hedge fund activism is that any benefit it creates for shareholders comes at the expense of other corporate stakeholders.[205] 13F also appears to mitigate this negative effect.

3. Competing for shareholder votes in proxy contests

13F enhances the information available to investors ahead of key votes in proxy contests by enabling hedge fund activists and the managers of the firms they target to engage in lobbying to win support for their cause. As Kobi Kastiel and Yaron Nili have explained, proxy campaigns involve a "competition" for shareholder votes in which both activists and target management engage in various lobbying efforts seeking to sway shareholders

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201. *See supra* Part I.A.

202. *See generally* Condon, *supra* note 25 (climate); José Azar, Miguel Duro, Igor Kadach & Gaizka Ormazabal, *The Big Three and Corporate Carbon Emissions Around the World*, 142 J. FIN. ECON. 674 (2021) (climate); Gormley et al., *supra* note 130 (board gender diversity).

203. Corrie Driebusch, *The Next Wave in Shareholder Activism: Socially Responsible Investing*, WALL ST. J. (updated Mar. 8, 2020, 9:51 AM ET), https://perma.cc/3NAZ-M4ZL (to locate, select "View the live page"); Amy Whyte, *Hedge Fund Activists Pivot to ESG*, INSTITUTIONAL INV. (Jan. 23, 2020), https://perma.cc/XMF8-5PYX; Simon Jessop, *Exclusive: Activist Investor Ferrari Targets Environment, Social Laggards with New Fund*, REUTERS (Nov. 27, 2020, 1:26 AM), https://perma.cc/QM3Z-R5DS; Thomas Franck, *Social and Sustainable Investing Gets a Boost from an Unlikely Source: Wall Street Activists*, CNBC (updated Apr. 27, 2018, 8:02 AM EDT), https://perma.cc/RF7X-3S8U.

204. Jha, *supra* note 21, at 3-4, 10-11.

205. *See supra* Part II.A.1.

to their side.[206] Among other techniques, both sides often produce detailed shareholder presentations and arrange for in-person meetings with various large shareholders to go over these presentations.[207]

13F may play an important role in enabling vigorous competition for shareholder votes. Many issuer groups acknowledge relying on 13F in order to identify shareholders and lobby them ahead of contested votes.[208] It seems likely that the same is true for insurgents.

There is strong evidence that "competition" for votes in the context of proxy fights drives results. A recent study reported that in proxy campaigns, whichever side (management or dissident) is *first* to make a shareholder presentation is significantly more likely to prevail.[209] Another study found a strong correlation between the amount of resources that activists invest in their proxy-solicitation efforts and their prospects of success.[210] As one Wachtell attorney put it: "No technique is more effective in winning the vote than direct shareholder outreach."[211] It seems quite likely that 13F plays an important role in facilitating this competition by enabling both sides to identify potential voters, although this research does not specifically address the issue.

Kastiel and Nili have made the case that increased competition for votes is beneficial, since, among other things, it helps "improve the overall information levels in the market."[212] But while it is not unreasonable to think that more informed shareholder voting leads to better outcomes, this conclusion rests on an assumption that the voters' (that is, shareholders') interests are poised to

206. Kastiel & Nili, *supra* note 23, at 301.

207. Kahan & Rock, *supra* note 56, at 1806; Bach & Metzger, *supra* note 23, at 3200; Kastiel & Nili, *supra* note 23, at 289, 298-99, 301.

208. Chris Netram, Nat'l Ass'n of Mfrs., Comment Letter on Proposed Amendment to Reporting Threshold for Institutional Investment Managers 5 (Sept. 29, 2020) [hereinafter NAM Comment], https://perma.cc/U5YU-AB8D; Nasdaq, Inc. et al., Comment Letter on Proposed Amendment to Reporting Threshold for Institutional Investment Managers 1 (Sept. 22, 2020) [hereinafter Nasdaq Comment], https://perma.cc/U88T-YU6A; William Jackson & Jennifer Warren, Georgeson LLC & Computershare, Comment Letter on Proposed Amendment to Reporting Threshold for Institutional Investment Managers 3 (Sept. 28, 2020) [hereinafter Georgeson Comment], https://perma.cc/B9RP-ZA9Q; NYSE Comment, *supra* note 149, at 3; Lisa Caperelli et al., Nat'l Inv. Rels. Inst., Phila. Chapter, Comment Letter on Proposed Amendment to Reporting Threshold for Institutional Investment Managers 2 (Sept. 28, 2020), https://perma.cc/4TFZ-3CTJ; NYSE Petition, *supra* note 145, at 2.

209. He, *supra* note 23, at 2.

210. Choonsik Lee, *Mitigating Information Imperfections in Proxy Contests: The Effect of Dissidents' Proxy Solicitation*, J. CORP. FIN., Aug. 2021, at 1, 2.

211. Jeremy L. Goldstein, Wachtell, Lipton, Rosen & Katz, *Say on Pay 2012,* HARV. L. SCH. F. ON CORP. GOVERNANCE (July 14, 2012), https://perma.cc/45M6-D8VR.

212. Kastiel & Nili, *supra* note 23, at 291.

generate these outcomes. Many scholars just do not think this is true: They believe that even the best-informed shareholders will not produce socially beneficial results because their incentives are not well aligned with society's interests.[213] At least some of these critics believe that we would be better off letting the company's board of directors make decisions without facing constant pressure from shareholders—well-informed or not.[214] To date, empirical research has not directly tested Kastiel and Nili's claims by evaluating, for instance, how the long-term returns and stakeholder consequences of proxy fights change based on varying levels of "competition" for shareholder votes. Without such evidence, the normative upshot of this effect must be regarded as uncertain.

4. Enhancing shareholder voting in proxy contests

Many institutional investors face powerful disincentives to invest the time and effort necessary to appropriately evaluate activist proposals.[215] Institutions may also face incentives to side with management, including the fear of losing lucrative business.[216]

13F may help institutions overcome these obstacles. First, 13F may facilitate "strategic" voting by providing institutions with information about the other voters comprising the electorate. Rational voters incorporate their expectations of how others will vote into their voting decisions.[217] Once the identities of these other actors are revealed, it becomes possible to seek information regarding how these actors are likely to vote. Such "strategic" voting may help institutions more efficiently allocate their limited voting resources. If these institutions understand which items have a realistic chance of winning substantial support from other shareholders, they can concentrate their scarce research, analysis, and engagement resources on those items and

213. *See supra* Part I.A (reviewing arguments that increasing shareholder power may cause companies to produce negative externalities).

214. *Id.*

215. *See* Platt, *supra* note 56, at 1482-83 (discussing the lack of incentive compensation for fund managers, collective-action problems, the expertise and costs required to make an impact through voice, and the minimal impact of an increase in any single company's value on portfolio performance).

216. *Id.* at 1483.

217. *See* Zohar Goshen, *Controlling Strategic Voting: Property Rule or Liability Rule?*, 70 S. CAL. L. REV. 741, 746 (1997) (defining strategic voting and arguing that it causes significant distortions in corporate elections); Michael C. Schouten, *The Mechanisms of Voting Efficiency*, 2010 COLUM. BUS. L. REV. 763, 806 (2010).

rest assured that their (uninformed) votes on the remainder will not have any impact.[218]

Second, institutions may pass along information to one another about particular votes through formal or informal networks.[219] As Luca Enriques and Alessandro Romano explain, institutional investors are not atomistic operators, but rather are "embedded in a network" and are "connected with each other through a complex web of formal, geographical, and co-ownership ties."[220] 13F may facilitate the sharing of information across these networks by helping institutions identify one another.

Third, 13F may enable institutions to overcome fear of management retaliation. Knowing how the rest of the electorate looks may provide institutions with "safety in numbers." Institutions may be more inclined to take on risk and vote their true preferences if they know a substantial group of other institutions will be there alongside them in the effort.[221]

There is no direct empirical evidence on these effects in the context of proxy contests. One study of mutual fund voting on uncontested director elections, however, documented significant "peer effects," finding that funds are more likely to vote against management where other funds invested in the same company had a demonstrated track record of voting against management.[222] It is possible that this effect carries over to proxy fights.

To the extent 13F does facilitate more active, less deferential voting in proxy fights by institutional investors, proponents of shareholder power will view this as a positive development. Lucian Bebchuk and co-authors characterize the institutional disincentives to actively engage on matters of corporate governance as an "agency cost" that inhibits more productive involvement.[223] Insofar as 13F helps investors overcome these "agency costs" and engage more actively, it may be seen as beneficial.

But not everyone sees things this way. The value (for both shareholders and stakeholders) of more active shareholder involvement in corporate governance remains hotly contested,[224] as does that of hedge fund activism.[225]

218. *Cf.* Kahan & Rock, *supra* note 56, at 1779 (emphasizing that only a "small number of votes per year . . . are potentially consequential").

219. Enriques & Romano, *supra* note 24, at 259-60.

220. *Id.* at 229.

221. *See* Matvos & Ostrovsky, *supra* note 24, at 91 (stating that management's "ability to punish any individual fund would be diminished if it had to retaliate against a larger number of funds").

222. *Id.*

223. Lucian A. Bebchuk, Alma Cohen & Scott Hirst, *The Agency Problems of Institutional Investors*, J. ECON. PERSPS., Summer 2017, at 89, 95-104.

224. *See supra* Part I.A.

225. *See supra* Part II.A.1.

For skeptics of shareholder primacy, enabling more active and impactful institutional-investor voting on proxy fights may well do more harm than good. These critics may prefer a universe in which institutions play a more passive and deferential role in governance. Accordingly, the normative upshot of this development seems to depend on one's views of shareholder power.

5. Activist detection and defense

A particularly influential argument in the debate following the SEC's 2020 proposal was that 13F allows corporate managers and other investors to detect hedge fund activism. Many of those who challenged the SEC's proposal argued that it would enable activists to "go dark," build up positions in companies in secret, and then "ambush" unsuspecting managers.[226]

To the extent 13F lets managers spot activists earlier, this may allow firms to implement a range of defenses, including low-threshold poison pills[227] and

226. Adam O. Emmerich, David M. Silk & Sabastian V. Niles, Wachtell, Lipton, Rosen & Katz, *Going Dark: SEC Proposes Amendments to Form 13F*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 19, 2020), https://perma.cc/QBK3-AF4T; *see* Eduardo Gallardo, *Why the SEC's Proposal to Amend Rule 13f-1 Should Fail*, COLUM. L. SCH.: CLS BLUE SKY BLOG (July 27, 2020), https://perma.cc/C357-X2P9; David Bell & Julia Forbess, Fenwick & West LLP, *Proposed Form 13F Changes Would Reduce Visibility into Stockholder Base and Activist Activities*, JD SUPRA (Aug. 19, 2020), https://perma.cc/7E2U-KTA4; Aliaj, *supra* note 134; Driebusch & Chung, *supra* note 134; Miles Weiss, Benjamin Bain & Hema Parmar, *Tepper, Einhorn, Soros Stock Holdings Would Go Dark in SEC Plan*, BLOOMBERG (updated July 14, 2020, 3:01 PM EDT), https://perma.cc/Z7ES-SP73 (to locate, select "View the live page"); Maria Ghazal, Bus. Roundtable, Comment Letter on Proposed Amendment to Reporting Threshold for Institutional Investment Managers 3 (Sept. 29, 2020) [hereinafter Bus. Roundtable Comment], https://perma.cc/X4JA-BSUX; NAM Comment, *supra* note 208, at 4-5; Tom Quaadman, Ctr. for Cap. Mkts. Competitiveness, Comment Letter on Proposed Amendment to Reporting Threshold for Institutional Investment Managers 3 (Sept. 29, 2020) [hereinafter Ctr. for Cap. Mkts. Comment], https://perma.cc/WHL9-CKTB; Soc'y for Corp. Governance Comment, *supra* note 115, at 10-11; NIRI Comment, *supra* note 146, at 2-3; Marcie Frost, CalPERS, Comment Letter on Proposed Amendment to Reporting Threshold for Institutional Investment Managers 4-5 (Sept. 28, 2020) [hereinafter CalPERS Comment], https://perma.cc/XUN3-42QL; Nasdaq Comment, *supra* note 208, at 5; NYSE Comment, *supra* note 149, at 4; Healthy Mkts. Comment, *supra* note 149, at 9-11; Consumer Fed'n Comment, *supra* note 149, at 7-8.

227. *See* Third Point LLC v. Ruprecht, Nos. 9469, 9497 & 9508, 2014 WL 1922029, at *3, *10 (Del. Ch. May 2, 2014); Kahan & Rock, *supra* note 184, at 953-54; Bernard S. Sharfman, *The Tension Between Hedge Fund Activism and Corporate Law*, 12 J.L. ECON. & POL'Y 251, 273 (2016); Bebchuk & Jackson, *supra* note 75, at 56 n.57. A "poison pill"—also referred to as a "shareholder-rights plan"—is a commonly used defensive tactic for firms seeking to deter hostile takeovers or activist attacks. It works by authorizing other shareholders to purchase new shares at a discount the moment an insurgent acquires a certain percentage or more of the company's shares, effectively diluting the voting power and value of the insurgent's shares. Kahan & Rock, *supra* note 184, at 921-22, 921 n.18.

other tools.[228] The availability of these defenses increases the risk that the activist campaign will fail.[229] Accordingly, activists who know that their presence will be prematurely disclosed via 13F may be less likely to pursue a campaign in the first place.[230]

13F may also decrease activism levels to the extent that it enables other *investors* to detect activism. Investors who sniff out a potential activist attack might pile into the stock (expecting the activist to pursue a campaign that results in an increase in value), thereby causing the price to increase and making it more costly for the activist to continue to build its position.[231]

There are reasons, however, to doubt that 13F is such a valuable instrument for detecting activists. In a large subset of activist campaigns, activists establish their positions so quickly that these disclosures do not matter. Rule 13f-1 requires the disclosure of end-of-quarter holdings within forty-five days of the quarter ending. So a fund that begins building a position in a target in early January does not have to make any 13F disclosures until mid-May. Activists often move much faster than this. An early study found that, of the 13Ds filed by activists between 2001 and 2005, fewer than one-third were preceded by a 13F disclosure.[232] In addition, activists often announce themselves to the target voluntarily before disclosing their position via 13F or 13D. A recent study found that about a quarter (24%) of all activist campaigns begin with the activist communicating with the target firm prior to making any sort of regulatory filing.[233]

Take, for example, the case of Exxon and Engine No. 1. Engine No. 1 filed its first 13F form on February 16, 2021,[234] forty-five days after the end of the fourth quarter of 2020. But this disclosure did not tip off Exxon to Engine No. 1's presence, because Engine No. 1 had announced itself to the company

228. Martin Lipton, Wachtell, Lipton, Rosen & Katz, *Dealing with Activist Hedge Funds and Other Activist Investors*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 25, 2019), https://perma.cc/XSQ6-J2GT.

229. *See* Kahan & Rock, *supra* note 184, at 925.

230. *See id.*

231. *Cf.* Bebchuk & Jackson, *supra* note 75, at 50 (discussing a similar potential effect of the proposal to shorten the 13D disclosure window from ten days to one).

232. Alon Brav, Wei Jiang, Frank Partnoy & Randall Thomas, *Hedge Fund Activism, Corporate Governance, and Firm Performance*, 63 J. FIN. 1729, 1738, 1758, 1764 (2008).

233. Adam L. Aiken & Choonsik Lee, *Let's Talk Sooner Rather than Later: The Strategic Communication Decisions of Activist Blockholders*, J. CORP. FIN., June 2020, at 1, 1-2.

234. *See* Engine No. 1 LLC, Holdings Report (Form 13F) (Feb. 16, 2021), https://perma.cc/CG6V-EM4Z.

back in December 2020—when it launched its campaign website, sent a letter to the board, and alerted the media.[235]

13F seems especially weak as a tool for identifying activists when it comes to smaller firms. Many commentators warned that the SEC's 2020 proposal would be especially dire for mid-capitalization and small-capitalization firms.[236] But activists targeting smaller firms are much more likely to pass the 5% threshold than activists targeting larger firms—both because they can afford it and in order to make their investment pay off. By contrast, the largest firms—like Exxon—will have to rely on 13F to spot activists because acquiring 5% of such a large company is likely to be prohibitively expensive for virtually all activists.

Further, the signal from 13F is noisy. Activists may acquire stock in a company not only because they are planning a campaign, but also because they think the company is a good investment. Once again, take the example of Engine No. 1. When Exxon's shareholders voted in favor of Engine No. 1's rival slate of directors, the fund's most recent 13F disclosure indicated that it not only held $51 million in Exxon stock, but also over $28 million in John Deere, $34 million in Square, and several other significant positions.[237] Should these other companies have also battened down the hatches in preparation for an attack?

Tellingly, the academics who study hedge fund activism do not rely heavily on 13F to identify activist campaigns. A 2016 review found that just one out of twenty-two academic studies on the topic relied even in part on 13F filings.[238] While one comment on the SEC's 2020 proposal suggested that the literature on hedge fund activism "relies heavily on 13F data,"[239] the cited literature review actually explains that "the most reliable source" for activist events "comes from Schedule 13D filings" (not 13F). The literature review goes on to discuss five different approaches used by researchers, only one of which makes use of 13F filings to find activist events.[240]

235. *See* Press Release, Engine No. 1, Engine No. 1 to Nominate Four Highly Qualified, Independent Director Candidates to ExxonMobil Board (Dec. 7, 2020), https://perma.cc/58Z7-9GGD; Letter from Engine No. 1 LLC to Bd. of Dirs., Exxon Mobil Corp. 1-2 (Dec. 7, 2020), https://perma.cc/R7UL-JA7K.

236. Consumer Fed'n Comment, *supra* note 149, at 7; NYSE Comment, *supra* note 149, at 3-4; NIRI Comment, *supra* note 146, at 2.

237. Engine No. 1, *supra* note 2, Information Table (to locate, select "View the live page," then select "Form13F_InfoTable.html").

238. Denes et al., *supra* note 189, app. A at 420-22.

239. MIT Comment, *supra* note 85, at 3.

240. Alon Brav, Wei Jiang & Hyunseob Kim, *Hedge Fund Activism: A Review*, 4 FOUNDS. & TRENDS FIN. 185, 193-97 (2009). This 13F search yielded only 27 activist events, against the 1,032 that had already been identified using 13Ds. *Id.*

Accordingly, 13F does not seem to provide a significant tool to discourage activism, at least not by enabling managers or others to detect activists earlier than they would like. To the extent 13F *does* serve this function, the normative upshot of this effect is unclear. As discussed above, there is a vigorous debate as to the effects of hedge fund activism for long-term shareholders and other corporate stakeholders.[241] Proponents of each side of this debate will reach diverging conclusions.

6. Activist settlements

13F may also play a role in facilitating settlements of activist campaigns. A significant proportion of activist campaigns end with a settlement agreement before anyone casts a vote.[242] In these cases, the activist and the target company's management reach a negotiated settlement which grants the target some relief in exchange for the activist dropping the campaign. One common variant is a grant to activists of board representation in exchange for a promise not to engage in hostile activity for some period.[243]

Managers have strong incentives to try to settle with an activist they think is likely to succeed.[244] For one thing, managers may be able to achieve a more collaborative and favorable arrangement through negotiation. Further, waging a proxy fight is expensive and time-consuming: Responsible managers may wish to avoid these costs where they can. Finally, there may be reputational costs associated with fighting and losing a public battle, and reaching a negotiated settlement may be a face-saving tactic.[245]

13F may provide an important input into this calculation by giving management important information about the prospects of the activist's success. It may do this directly, by giving management insight into the past voting behavior of its current shareholders. It may also do this indirectly, by enabling management to effectively poll its shareholders to gauge their support. There is no direct evidence, however, on the extent to which 13F is actually driving settlements. Several studies have confirmed the general intuition that the likelihood of settlement is positively related to various indicia of an activist's prospects of success.[246] But no study tests the relationship between settlements and shareholder composition.[247]

241. *See supra* Part II.A.1.

242. *See* Bebchuk et al., *supra* note 22, at 5.

243. Fisch & Sepe, *supra* note 22, at 881-82; Bebchuk et al., *supra* note 22, at 12-17.

244. Bebchuk et al., *supra* note 22, at 6-7.

245. *Id.* at 13.

246. *Id.* at 9.

247. *Id.* at 8 (describing explanatory variables linked to an activist's prospects of success, including the size of the activist's stake, the level of insider ownership, the target firm's

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To the extent that 13F does facilitate activist settlements, the normative upshot of this effect is uncertain. Not only is there an ongoing debate about hedge fund activism,[248] but there is also a specific debate about settlements in this domain. Proponents of settlements argue that they allow for the accomplishment of the results of activist campaigns while avoiding unnecessary expenditures associated with proxy fights.[249] Critics worry that privately negotiated settlements create asymmetric benefits for activists at the expense of other shareholders.[250] The empirical literature is mixed on these questions. In a recent study, Lucian Bebchuk and co-authors painted a uniformly positive picture, finding that (1) settlements are on average accompanied by positive abnormal stock returns; (2) the activist-appointed directors who get board seats through settlements do not subsequently receive less support from other shareholders than other directors; and (3) targets do not provide "greenmail" (that is, asymmetric financial benefits to activists) as part of the settlement.[251] By contrast, in another recent study, John Coffee, Jr., and co-authors painted a darker picture, finding that when activist-appointed directors take seats through settlements, there is a corresponding increase in informed trading in the corporation's stock—suggesting that these directors may be illegally passing along material nonpublic information to their hedge fund sponsors.[252]

B. Shareholder Proposals

Federal securities law requires public companies to give shareholders the chance to vote on certain shareholder-originated proposals.[253] Some of the most popular proposal subjects in recent years have been disclosure of corporate climate-impact and sustainability risks; disclosure of corporate political spending; expanded diversity policies at the workplace level; and alteration of the company's corporate-governance policies (for example, "de-staggering" the board of directors, separating out the CEO and chairman

share-class structure, the average market reaction to prior campaigns launched by the activist, the activist's level of success in prior engagements, and the target firm's financial performance); Lee Harris, *Corporate Elections and Tactical Settlements*, 39 J. CORP. L. 221, 221-24 (2014) (controlling for challenger ownership and insider ownership, but not overall institutional ownership).

248. *See supra* Part II.A.1.

249. Bebchuk et al., *supra* note 22, at 34.

250. *Id.* at 3 & n.7.

251. *Id.* at 3.

252. Coffee et al., *supra* note 22, at 431. *But see id.* at 390 ("Inferences of illegality cannot be drawn from our data, standing alone.").

253. 17 C.F.R. § 240.14a-8 (2021).

positions, and restricting anti-takeover defenses).[254] Although technically nonbinding, companies have come under increasing pressure to implement shareholder proposals that win a majority of support.[255]

13F may be an important tool for shareholder-proposal sponsors, management of the firms targeted by these proposals, and other shareholders in the target firm. This Subpart considers four channels in which 13F may impact shareholder proposals: (1) target selection by proponents and firm managers; (2) the "competition" for votes; (3) enhancing voting by other shareholders; and (4) facilitating settlements between proponents and management.

1. Proposal targeting by sponsors and management

One possible way 13F can affect shareholder proposals is by giving proponents and their targets information about the prospects of success of a given proposal in a given firm. Just like an activist hedge fund may use 13F data to ascertain its prospects of success before launching a campaign,[256] a would-be proposal sponsor might similarly use 13F (in combination with voting records or other public statements from various institutions[257]) to gauge the prospects of success before moving forward. On the other hand, some sponsors of certain shareholder proposals may be indifferent to *success*, and instead may be driven by a more expressive purpose that is served by merely offering the proposal.[258]

Some evidence confirms that proposal sponsors target their proposals based on the shareholder base of the target firm. One study found that U.S. Fortune 250 firms were more likely to receive a shareholder proposal on environmental issues if they had a higher proportion of institutional owners that had signed onto the U.N.'s Principles for Responsible Investment (PRI).[259] Other studies have similarly found a relationship between the general level of institutional ownership and the propensity to be targeted by a shareholder

254. For overviews, see Kastiel & Nili, *supra* note 70, at 583-84; and Haan, *supra* note 22, at 272-73.

255. Haan, *supra* note 22, at 294; Kastiel & Nili, *supra* note 70, at 586.

256. *See supra* Part II.A.1.

257. *See infra* Part II.E.1.

258. Roberto Tallarita, *Stockholder Politics*, 73 HASTINGS L.J. 1617, 1622-23 (2022) (discussing the "expressive" motives driving stockholder behavior).

259. Erwin Eding & Bert Scholtens, *Corporate Social Responsibility and Shareholder Proposals*, 24 CORP. SOC. RESP. & ENV'T MGMT. 648, 649 (2017).

proposal, although the studies are mixed regarding the direction of the relationship.[260]

To the extent 13F does enable sponsors to better target their proposals at firms where they are more likely to win sufficient support, the normative upshot of this effect depends on one's views regarding shareholder proposals generally. Proponents argue that this mechanism provides an important channel to enhance accountability for managers[261] and promote the interests of corporate stakeholders.[262] Critics worry that proposals advance narrow particularistic interests[263] and impose costly distractions on firm managers.[264] Empirical evidence is mixed. Many studies find that shareholder proposals do not produce a significant impact on firm financial or accounting performance.[265] When the sample is narrowed to the subset of proposals that result in closely contested votes, however, those that pass with a small margin of votes do result in a positive abnormal return.[266] In any case, the studies are limited in scope because they fail to evaluate longer-term returns or stakeholder consequences.

A different possible "targeting" effect occurs on the managerial side. Managers often attempt to exclude a shareholder proposal on legal grounds by seeking a "no-action" letter from the SEC.[267] 13F may help managers anticipate which proposals are likely to obtain necessary shareholder support before they are up for a vote, and thus determine which proposals are worth attempting to exclude.

260. Denes et al., *supra* note 189, at 414 tbl.3 (noting that four studies found targets had a higher level of institutional ownership, whereas three found a lower level); *see also* Maxime Couvert, *What Are the Shareholder Value Implications of Non-voted Shareholder Proposals?* 13, 19 (Swiss Fin. Inst., Rsch. Paper No. 18-79, 2020), https://perma.cc/MEC9-P5V4 (finding that proponents target companies with less institutional ownership).

261. Paul Rose, *Shareholder Proposals in the Market for Corporate Influence*, 66 FLA. L. REV. 2179, 2185 (2014); Bebchuk, *The Case*, *supra* note 58, at 894.

262. Eding & Scholtens, *supra* note 259, at 650.

263. Haan, *supra* note 22, at 317 (reaching this conclusion regarding settlements of campaign finance–related shareholder proposals). *But see* Randall S. Thomas & Kenneth J. Martin, *Should Labor Be Allowed to Make Shareholder Proposals?*, 73 WASH. L. REV. 41, 72 (1998) (considering and rejecting this argument in the context of proposals sponsored by labor unions).

264. John G. Matsusaka, Oguzhen Ozbas & Irene Yi, *Can Shareholder Proposals Hurt Shareholders? Evidence from Securities and Exchange Commission No-Action-Letter Decisions*, 64 J.L. & ECON. 107, 135, 138 (2021); Leo E. Strine, Jr., Essay, *Can We Do Better by Ordinary Investors? A Pragmatic Reaction to the Dueling Ideological Mythologists of Corporate Law*, 114 COLUM. L. REV. 449, 456 (2014).

265. Denes et al., *supra* note 189, at 408-09.

266. Vicente Cuñat, Mireia Gine & Maria Guadalupe, *The Vote Is Cast: The Effect of Corporate Governance on Shareholder Value*, 67 J. FIN. 1943, 1945 (2012).

267. Haan, *supra* note 22, at 273-74 (reviewing this process).

There are reasons to think 13F is used to support such efforts. One corporate proxy-solicitation firm—which strongly opposed the SEC's recent proposal to reduce 13F filings—advertises to firms that it will help them understand how their shareholders are "likely to vote on particular topics" and "[p]redict how much support a proposal can expect to receive."[268] Another advertises the ability to "[t]ake the guesswork out of shareholder relations."[269]

No empirical studies, however, directly test 13F's effect on managerial attempts to exclude shareholder proposals. Two studies did find (using 13F data) a negative relationship between the level of institutional ownership and a firm's propensity to attempt to exclude a proposal.[270]

To the extent that 13F is aiding management's target selection, the normative upshot of this effect seems debatable. Proponents of shareholder power will find this effect disturbing. But one recent study found that the market responds *favorably* when the SEC permits exclusion of proposals.[271] Ultimately, the evaluation of this effect likely depends on one's views regarding the overall value of shareholder proposals, which, as discussed above, remains hotly contested.[272]

2. Competing for votes on shareholder proposals

As with proxy contests, 13F can facilitate a "competition for votes" on shareholder proposals.[273] Although 13F information is equally available to both sides, this competition is not a fair fight. The informational subsidy provided by 13F seems to tip the scales decisively in management's favor.

Managers have several advantages over shareholders. First, they can access real-time voting information, enabling them to keep tabs on voting results as they come in and then leap into action if and when necessary.[274] Second,

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268. *Gain Shareholder Intelligence*, GEORGESON, https://perma.cc/9L7X-8EYH (archived May 11, 2022); Georgeson Comment, *supra* note 208.

269. *Shareholder Data Services: Convert Data into Intelligence*, BROADRIDGE, https://perma.cc/K5JB-DLCQ (archived May 11, 2022).

270. Eugene Soltes, Suraj Srinivasan & Rajesh Vijayaraghavan, *What Else Do Shareholders Want? Shareholder Proposals Contested by Firm Management* 14-19 (Harvard Bus. Sch. Working Paper, Paper No. 16-132, 2017), https://perma.cc/NAE5-99E5; Couvert, *supra* note 260, at 31.

271. Matsusaka et al., *supra* note 264, at 109.

272. *See supra* text accompanying notes 261-66.

273. *See supra* Part II.A.3; Kastiel & Nili, *supra* note 23, at 291.

274. SEC INV. ADVISORY COMM., RECOMMENDATIONS OF THE INVESTOR ADVISORY COMMITTEE: IMPARTIALITY IN THE DISCLOSURE OF PRELIMINARY VOTING RESULTS 2-4 (2014), https://perma.cc/N3NN-NT2Q. *But see* Press Release, Broadridge, New AI Platform Provides Proxy Voting Data from Broadridge (Jan. 12, 2021),
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managers have the ability to leverage corporate resources in support of lobbying efforts, while sponsors of proposals—who are, in many cases, individuals, nonprofits, or other resource-limited institutions—must rely on their own resources and are simply outgunned. Finally, managers have stronger incentives than proposal sponsors given that they often possess a direct financial stake in the results of the election. Managers have invested substantial human capital in the organization and may have substantial compensation tied up in the firm's performance. By contrast, sponsors' interests may be primarily expressive or political rather than financial. And even to the extent that sponsors have a financial stake in the outcome, it is likely to be less relatively significant for them than it is for managers.[275]

Empirical studies have confirmed the dominant effect of managerial lobbying on voting outcomes in the context of shareholder proposals. In a 2008 paper, Yair Listokin found that management-sponsored proposals are "overwhelmingly more likely to win a corporate vote by a very small amount than lose by a very small amount—to a degree that cannot occur by chance."[276] Listokin posited the following explanation: As the deadline for votes approaches, management obtains information that the vote is likely to be close and then applies "intense campaigning effort to sway votes."[277] Scholars have interpreted Listokin's findings to reflect "management's ability to lobby shareholders" before the vote closes.[278] More recently, Laurent Bach and Daniel Metzger expanded Listokin's findings to the context of closely contested shareholder proposals and found that these are also disproportionately more likely to be won by management than by shareholders.[279] Bach and Metzger posited that "when management strongly opposes a shareholder proposal, it takes meticulous actions to make sure it does not pass."[280]

https://perma.cc/WBN8-45Y7 (introducing a new product that can make voting information available to subscribing shareholders).

275. *See* Tallarita, *supra* note 258, at 1622-23, 1660, 1669.

276. Yair Listokin, *Management Always Wins the Close Ones*, 10 AM. L. & ECON. REV. 159, 161 (2008) (emphasis omitted).

277. *Id.* at 161-62; *see also id.* at 178-79 (noting that management has access to real-time voting information, and therefore if it is "just slightly behind as the voting nears an end, it can campaign heavily to eke out a victory").

278. David Yermack, *Shareholder Voting and Corporate Governance*, 2 ANN. REV. FIN. ECON. 103, 107 (2010).

279. Bach & Metzger, *supra* note 23, at 3184.

280. *Id.*; *see also id.* at 3199 (noting that 13F forms may provide a path for issuers to identify shareholders to lobby, although acknowledging that these forms are a "noisy" source of such information); Ilona Bebenko, Goeun Choi, & Rik Sen, Management (of) Proposals 18, 22 (Dec. 17, 2019) (unpublished manuscript), https://perma.cc/6AA7-D8ZU (reconfirming Listokin's findings with respect to management proposals and

footnote continued on next page

These studies raise the possibility that 13F is facilitating effective managerial lobbying ahead of contested votes on shareholder proposals, allowing managers to snatch victories away from shareholders in some substantial number of cases. Managers have confirmed as much. In its comment letter opposing the SEC's 2020 proposal to dramatically curtail the scope of 13F filings, the National Association of Manufacturers (a prominent issuer-aligned interest group) explained that 13F is an essential tool that corporate managers rely on as part of their efforts to "[h]elp[] investors . . . understand management's perspectives" ahead of routine and contentious votes on ballot questions such as shareholder proposals.[281]

Here, a good case can be made that the effect is harmful for shareholders. 13F is enabling management to leap into action to silence shareholders' voices precisely in the cases where these voices seem poised to prevail. As discussed above, there is empirical evidence that, within the subset of shareholder proposals that result in closely contested votes, those that pass with a small margin of votes do result in a positive abnormal return.[282] It is precisely those cases that management (using 13F) is avoiding by reaching out and snatching away what would otherwise have been narrow shareholder victories. Further, adding insult to injury, 13F supports management using *corporate resources* to engage in this targeted lobbying—a questionable use of corporate assets.[283] It is possible that management's last-ditch lobbying to defeat these proposals actually benefits shareholders and stakeholders. For instance, some may argue that managers are better able to predict the long-term consequences of a given proposal. Yet there is simply no compelling theoretical or empirical support for that claim in this context. Accordingly, it is reasonable to think that, in this domain, shareholders may be better off with less transparency regarding institutional ownership.

3. Enhancing voting on shareholder proposals

As discussed above in the context of proxy votes, 13F may facilitate more active engagement on shareholder proposals by otherwise rationally reticent institutional investors by helping them overcome powerful incentives to remain passive or deferential to management. First, 13F may enable institutions to predict which shareholder proposals are likely to attract a

attributing these results in part to management's "selective campaigning for proposals that are contested").

281. NAM Comment, *supra* note 208, at 5.

282. Cuñat et al., *supra* note 266, at 1954.

283. *Cf.* Peter Iliev & Svetla Vitanova, *The Effect of the Say-on-Pay Vote in the United States*, 65 MGMT. SCI. 4505, 4507 (2019) (noting that the act of management "lobbying for support from shareholders . . . might be value destructive on its own").

substantial amount of investor support, and thus are worth investing time and effort in analyzing. Second, 13F may aid in the sharing of information about shareholder proposals among shareholders considering a vote one way or the other. Third, 13F may provide a "safety in numbers" protection, empowering investors to vote confidently against management, secure in the knowledge that many others will be voting alongside them. There is no empirical evidence directly on point. As discussed above, there is one study finding significant "peer effects" among mutual funds in the context of uncontested director elections.[284] It is possible that this effect could carry over into the shareholder-proposal context.

To the extent 13F *is* supporting more active and less deferential voting by institutional investors on shareholder proposals, the normative upshot of this effect is uncertain. Even setting aside the debate surrounding shareholder proposals,[285] the notion that removing obstacles to active voting will be beneficial presupposes that shareholders' underlying interests will produce beneficial results. As discussed above, there is a long-standing debate as to whether this is indeed the case.[286]

4. Settlement of shareholder proposals

Finally, 13F may facilitate settlements between proponents and target-firm management by giving the latter an accurate sense of their prospects of success. Many shareholder proposals are never put to a vote, but rather are voluntarily withdrawn by the proponent in exchange for an agreement by management to accede to some, or all, of the proponent's demands.[287]

As in the activism context, managers who expect a shareholder proposal to succeed have strong incentives to negotiate a settlement. For one thing, they may be able to negotiate a collaborative or more favorable arrangement through settlement negotiations than what could occur if the proposal were to win a majority of shareholder votes.[288] For another, managers may want to avoid the potential reputational harms associated with losing a shareholder vote.[289]

13F may inform managers' assessments of the prospects that any given proposal is likely to succeed, and thus give them reason to come to the table to

284. *See supra* text accompanying note 222.

285. *See supra* Part II.B.1.

286. *See supra* Part I.A.

287. Haan, *supra* note 22, at 279-84.

288. *Id.* at 294-96.

289. *Id.*

reach a settlement.[290] Empirical evidence supporting this claim is mixed. One study found that proposals sponsored by institutional investors were more likely to be settled when there was a larger level of institutional ownership of the firm, and that all proposals were more likely to be settled as the share of ownership by certain types of institutional investors increased.[291] Another study found that proposals submitted to firms with a *lower* level of institutional ownership were more likely to be settled.[292] And a third found that neither the level of institutional ownership nor the presence of blockholders had *any* statistical effect on the likelihood of settlement.[293]

To the extent that 13F is driving settlements of shareholder proposals, the normative upshot turns not only on the contested value of shareholder proposals generally,[294] but also on a more specific debate over shareholder-proposal settlements. Proponents of these settlements treat them as a form of "beneficial, informal shareholder activism."[295] Critics, however, worry that settlements negotiated between the proposal sponsor and management without the input or knowledge of other shareholders may create asymmetric benefits for the sponsor at the expense of other shareholders and stakeholders.[296]

C. Shareholder Litigation

Shareholders may pursue several types of legal claims against corporations, including class-action claims alleging secondary-market securities fraud under Exchange Act section 10(b) and Rule 10b-5.[297] 13F may play a role at various stages of this litigation, including in (1) the selection of

290. Rob Bauer, Frank Moers & Michael Viehs, *Who Withdraws Shareholder Proposals and Does It Matter? An Analysis of Sponsor Identity and Pay Practices*, 23 CORP. GOVERNANCE 472, 476 (2015) (hypothesizing that settlements are more likely when management "fears the pressure from a larger institutional shareholder base, because these shareholders can threaten to sell off their stakes").

291. *Id.* at 480.

292. Couvert, *supra* note 260, at 31.

293. Maggie Foley, Richard Cebula, Chulhee Jun & Robert Boylan, *An Analysis of Withdrawn Shareholder Proposals*, 15 CORP. GOVERNANCE 546, 551 (2015).

294. *See supra* Part II.B.1.

295. *See* Haan, *supra* note 22, at 293 (criticizing this view).

296. *E.g.*, *id.* at 293-300.

297. *See generally* Amanda Marie Rose, *The Shifting Raison D'être of the Rule 10b-5 Private Right of Action*, *in* RESEARCH HANDBOOK ON REPRESENTATIVE SHAREHOLDER LITIGATION 39 (Sean Griffith, Jessica Erickson, David H. Webber & Verity Winship eds., 2018) (providing an overview of securities class-action litigation). My discussion here focuses on the potential impact of 13F on securities class actions under Rule 10b-5, although impacts on other types of shareholder litigation are also possible.

lead plaintiffs; (2) class certification; (3) claims processing; and (4) settlement. As I show, 13F likely does not have a significant effect on the first two stages, but its effects on the last two are more uncertain.

1. Identifying lead plaintiffs

13F may play a role at the outset of a case by assisting lawyers in identifying potential lead plaintiffs. The Private Securities Litigation Reform Act of 1995 (PSLRA) requires the appointment of a lead plaintiff in securities class actions and requires courts to presumptively select as lead plaintiff the investor (or group of investors) with the largest financial stake in the litigation.[298] Plaintiffs' lawyers might theoretically use 13F data to identify eligible institutions that bought (or sold) large quantities of stock during the class period, and then conduct outreach to encourage institutions to sign on as lead plaintiff in the case.

Apart from one early case encouraging plaintiffs' lawyers to go out and do this,[299] however, there does not appear to be any evidence indicating that 13F is being used for this purpose. Given that lead plaintiffs in shareholder litigation are often repeat players, the need to find new ones may be less important.[300] Leading plaintiffs' firms are well-known to have "stables" of institutional clients with whom they have relationships and repeatedly call upon in successive cases.[301] In many cases, law firms have long-term, free "portfolio monitoring" arrangements with institutions. Under these arrangements, the institution gives the firm direct access to its investment portfolio (obviating the need for 13F) so that the firm can alert the institution to any possible litigation opportunities.[302]

Further, many classes of institutional investors have conspicuously avoided taking on lead-plaintiff roles, limiting the real pool of potential participants to mainly public pension funds.[303] Though 13F may be useful for

298. *See* 15 U.S.C. § 78u-4(a)(3)(B).

299. Ravens v. Iftikar, 174 F.R.D. 651, 676 (N.D. Cal. 1997) (calling on plaintiffs' counsel to identify prospective lead plaintiffs by "compiling a list from publicly available information such as Form 13F filings").

300. *See* Stephen J. Choi & Robert B. Thompson, *Securities Litigation and Its Lawyers: Changes During the First Decade After the PSLRA*, 106 COLUM. L. REV. 1489, 1490 (2006).

301. *See, e.g.*, Stephen J. Choi, Jessica Erickson & A.C. Pritchard, *Coalitions Among Plaintiffs' Attorneys in Securities Class Actions* 8, 35 (N.Y. Univ. Sch. of L. L. & Econ. Paper Series, Working Paper No. 20-42, 2020), https://perma.cc/D2DK-LPPK.

302. *See* Michael J. Kaufman & John M. Wunderlich, *The Bromberg Balance: Proper Portfolio-Monitoring Agreements in Securities Class Actions*, 68 SMU L. REV. 771, 774-76 (2015).

303. *See* Stephen J. Choi & A.C. Pritchard, *Lead Plaintiffs and Their Lawyers: Mission Accomplished, or More to Be Done?*, *in* RESEARCH HANDBOOK ON REPRESENTATIVE SHAREHOLDER LITIGATION, *supra* note 297, at 271, 274-75; Sean J. Griffith & Dorothy S.
footnote continued on next page

finding eligible public pension funds, now, over twenty-five years after the PSLRA, many such funds may already have strong relationships with plaintiffs' firms or have no interest in joining the game.

13F data is used in resolving disputes among competing prospective lead plaintiffs. For instance, this data has been used to verify the magnitude of losses, to raise doubts about the validity of a rival potential lead plaintiff's asserted losses, and to make comparisons between a rival's losses and those of other institutions.[304] But the effect is unlikely to be significant; an attorney who misrepresents the truth about a client's losses risks being sanctioned or worse if and when the truth is disclosed.[305] This disclosure is inevitable at the end of the case, when the client will have to provide brokerage statements verifying specific transactions in order to receive a portion of the settlement. Accordingly, 13F does not seem to have a large effect in this context.

2. Class certification

Parties in securities class actions may also use 13F data in litigating motions for class certification to make (or refute) claims that the securities at issue traded in an efficient market. Securities-fraud plaintiffs must prove "reliance" on a material misstatement or omission.[306] Since reliance has

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Lund, *A Mission Statement for Mutual Funds in Shareholder Litigation,* 87 U. CHI. L. REV. 1149, 1177-201 (2020).

304. *E.g.,* Memorandum of Law of the Public Employees' Retirement System of Mississippi in Opposition to the Competing Motions at 6-7, *In re* Boeing Co. Aircraft Sec. Litig., No. 19-cv-02394, 2019 WL 6052399 (N.D. Ill. Nov. 15, 2019), ECF No. 93; Memorandum of Law in Further Support of the Motion of Washington State Plumbing & Pipefitting Pension Trust for Consolidation, Appointment as Lead Plaintiff & Approval of Selection of Lead Counsel, & in Opposition to the Competing Motion at 5, Zirkin v. Quanta Cap. Holdings, No. 07-cv-00851 (S.D.N.Y. Apr. 23, 2007), ECF No. 16; Brief in Further Support of the Motion of the Institutional Investor Group for Appointment as Lead Plaintiff, Approval of Its Selection of Co-lead Counsel & Consolidation of All Related Actions at 16, Pipefitters Local 537 Annuity Fund v. Wilmington Tr. Corp., No. 10-cv-01020 (D. Del. Feb. 4, 2011), 2011 WL 11722268, ECF No. 10; The Pentwater Funds' Memorandum of Law in Opposition to the Motion of Leo Fund Managers Ltd. & State-Boston Retirement System for Limited Discovery of Pentwater Capital Management LP & David Morris Zirin at 10, Woburn Ret. Sys. v. Salix Pharms., Ltd., Nos. 14-cv-08925 & 14-cv-09226, 2015 WL 1311073 (S.D.N.Y. Mar. 23, 2015), 2015 WL 998902, ECF No. 60; Employees' Retirement System of the State of Rhode Island & the Employees' Retirement System of the City of Kansas City, Missouri Trust's Application for Appointment of Lead Plaintiffs & Co-lead Counsel at 15, *In re* Viacom Inc. S'holders Litig., No. 2019-0948 (Del. Ch. Jan. 30, 2020), 2020 WL 584584.

305. *Cf. In re* Grupo Televisa Sec. Litig., No. 18-cv-01979, 2021 WL 2000005, at *1, *3 (S.D.N.Y. May 19, 2021) (dismissing the lead plaintiff's counsel for failing to disclose that the lead plaintiff had a short position in the corporate defendant through its investment in a hedge fund).

306. Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 267 (2014).

traditionally been regarded as a highly individualized issue, proving reliance would seem to preclude the certification of a class of securities-fraud plaintiffs.[307] Under *Basic Inc. v. Levinson*[308] (as ratified by the more recent case *Halliburton Co. v. Erica P. John Fund, Inc.*[309]), however, plaintiffs are entitled to a presumption that they relied on the material misstatement if they transacted in an "efficient" market.[310] Some courts have recognized that a large amount of institutional ownership of a particular security is an important factor weighing in favor of a finding of market efficiency,[311] and 13F data is useful to support or challenge such an argument. But the level of institutional ownership is not usually a primary factor driving this legal question. Courts have articulated a set of five primary[312] and three additional[313] factors for determining market efficiency. The level of institutional ownership appears on neither list.

3. Claims processing

After a settlement has been reached, claims administrators might use 13F to help identify potential claimants. One informational intermediary[314] stated that its law-firm clients were concerned the SEC's proposal to curtail 13F reporting would make it harder "to identify eligible claimants" in securities

307. *Id.* at 268.

308. 485 U.S. 224 (1988).

309. 573 U.S. 258.

310. *Basic*, 485 U.S. at 246-47; *Halliburton*, 573 U.S. at 269.

311. Cosby v. KPMG, LLP, No. 16-cv-00121, 2020 WL 3548379, at *20 (E.D. Tenn. June 29, 2020); Bennett v. Sprint Nextel Corp., 298 F.R.D. 498, 511 (D. Kan. 2014); *In re* HealthSouth Corp. Sec. Litig., 261 F.R.D. 616, 637 (N.D. Ala. 2009); *In re* Enron Corp. Sec. Derivative & "ERISA" Litig., 529 F. Supp. 2d 644, 756 (S.D. Tex. 2006); Serfaty v. Int'l Automated Sys., Inc., 180 F.R.D. 418, 423 (D. Utah 1998) (finding that a small amount of institutional ownership weighed against a finding of efficiency); City of Ann Arbor Emps.' Ret. Sys. v. Sonoco Prods. Co., 270 F.R.D. 247, 256 (D.S.C. 2010); Di Donato v. Insys Therapeutics, Inc., 333 F.R.D. 427, 441 (D. Ariz. 2019); *In re* CenturyLink Sales Pracs. & Sec. Litig., 337 F.R.D. 193, 207 (D. Minn. 2020).

312. Cammer v. Bloom, 711 F. Supp. 1264, 1286-87 (D.N.J. 1989) (listing the following factors for determining whether a stock trades on an efficient market for purposes of the *Basic* presumption: (1) the stock's average weekly trading volume; (2) the number of securities analysts that followed and reported on the stock; (3) the presence of market makers and arbitrageurs; (4) the company's eligibility to file a Form S-3 registration statement; and (5) a cause-and-effect relationship, over time, between unexpected corporate events or financial releases and an immediate response in stock price).

313. Krogman v. Sterritt, 202 F.R.D. 467, 474 (N.D. Tex. 2001) (listing the following additional factors for determining whether a stock trades on an efficient market: "(1) the capitalization of the company; (2) the bid–ask spread of the stock; and (3) the percentage of stock not held by insiders").

314. *See supra* Part I.B.2.

class actions.[315] In her detailed study of the claims-administration process, however, Jessica Erickson suggests that 13F does not play an important role; instead, she describes how claims administrators typically just "send notice of the settlements and the accompanying claim forms to banks and brokers," who are then "supposed to pass along these notices to their investor clients."[316] Accordingly, it is unclear whether 13F has any significant effect in this context.

4. Facilitating settlement

13F may facilitate settlement by supporting more determinate damages models. Damages experts often incorporate 13F data into their trading models,[317] although simple reliance on 13F typically will not suffice. Because 13F reports are only published quarterly, they do not provide the kind of granularity needed to accurately estimate or model damages.[318] But experts sometimes rely on 13F to identify upper and lower bounds for damages. Most importantly, 13F can help identify the number of outstanding shares that stayed under the control of a single institution during the class period (and therefore were not bought or sold in reliance on any material misstatement or omission), establishing a ceiling on the number of shares that should be included in an expert's trading model.[319] In some cases, experts may also be able to use 13Fs to identify a minimum number of shares that they know did change hands during the class period (because they were purchased or sold by reporting institutions), which can establish a floor for the number of shares to be included in a trading model.[320]

315. *See* WhaleWisdom Comment, *supra* note 115, at 2.

316. Erickson, *supra* note 117, at 1826.

317. Joseph Thompson, David Neuzil & Paul Skluzak, *How to Calculate Securities Fraud Class Size with SEC Data*, LAW360 (Sept. 11, 2020, 2:00 PM EDT), https://perma.cc/7LT9-AF2E (to locate, select "View the live page").

318. People *ex rel.* James v. Exxon Mobil Corp., No. 452044/2018, 2019 WL 6795771, at *28-29 (N.Y. Sup. Ct. Dec. 10, 2019) (endorsing a critique of an expert's bare reliance on 13F data).

319. CATHERINE J. GALLEY, ERIN E. MCGLOGAN & PIERRICK MOREL, CORNERSTONE RSCH., APPROVED CLAIMS RATES IN SECURITIES CLASS ACTIONS 2 (2017), https://perma.cc/Z6B4-J3LQ (noting that one "common adjustment[]" in damages models is to subtract the "estimated long-term holdings by larger institutional investors" as indicated on 13Fs); MARCIA KRAMER MAYER, NERA ECON. CONSULTING, BEST-FIT ESTIMATION OF DAMAGED VOLUME IN SHAREHOLDER CLASS ACTIONS: THE MULTI-SECTOR, MULTI-TRADER MODEL OF INVESTOR BEHAVIOR 7-8 (2000), https://perma.cc/C6HN-V4EU (similar).

320. Reporting Threshold for Institutional Investment Managers, 85 Fed. Reg. 46,016, 46,023 n.51 (July 31, 2020) (to be codified at 17 C.F.R. pts. 240, 249) (noting that some private securities actions "use Form 13F data to produce a more reliable, 'lower bound' estimate of damages" and that "a reduction in publicly available Form 13F data may result in increased use of other methods to estimate shareholder harm").

The vast majority of securities class actions are either dismissed or settled without any adversarial testing of damages calculations.[321] But these damages calculations play an important role in facilitating settlement negotiations.[322] Some economic settlement models project that the greater the information asymmetries between the parties, the less likely a case is to settle.[323] For instance, if only the corporate defendant knows the extent of its own negligence, a plaintiff will not know how much to settle for and may decide to proceed to trial rather than accept a settlement offer that could be too low.[324] To the extent that this theory is correct, the information provided by 13F somewhat mitigates this asymmetry or divergence by providing some objective information about the number of shares traded in the marketplace during the class period. 13F thus may facilitate the parties' ability to come together and reach a settlement.[325]

The effect, however, is not necessarily significant. Even with 13F, the parties are still likely to have widely divergent initial estimates of damages, not to mention divergences in their understanding of the strengths of the underlying case. The damages models used in securities class actions are notoriously imprecise, necessarily involving a host of debatable assumptions about trading behavior in order to estimate the number of investors who bought (or sold) shares during the class period, at what prices, how many of the acquisitions were made by "in-and-out" traders (buying and selling at the

321. Because of this infrequency, at least one leading casebook does not even cover damages in its chapter on Rule 10b-5. *See* COFFEE ET AL., *supra* note 10, at 1039-166.

322. *See* GALLEY ET AL., *supra* note 319, at 1.

323. *E.g.*, Lucian Ayre Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 RAND J. ECON. 404, 405, 409, 414 (1984). The main rival theory is that the parties' "divergent expectations," rather than their access to information, is the primary reason settlement fails to occur—for example, the parties' mutual optimism or overconfidence about their respective prospects at trial will interfere with settlement even when they have access to identical information. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 18 (1984); *see also, e.g.*, William H.J. Hubbard, *Testing for Change in Procedural Standards, with Application to* Bell Atlantic v. Twombly, 42 J. LEGAL STUD. 35, 38-39 (2013) (describing the information-asymmetry and divergent-expectations models as the "two canonical" models of settlement). For a review of studies elaborating on and applying these competing theories, see Daniel Klerman, *The Economics of Civil Procedure*, 11 ANN. REV. L. & SOC. SCI. 353 (2015).

324. *See* Yun-chien Chang & William Hubbard, *Does the Priest and Klein Model Travel? Testing Litigation Selection Hypotheses with Foreign Court Data* 2-3 (Univ. of Chi. L. Sch., Coase–Sandor Working Paper Series in L. & Econ. No. 838, 2018), https://perma.cc/6UJS-LUXT.

325. *Cf. id.* at 3 (noting that one "obvious policy prescription that might flow from [the information-asymmetry model] is to eliminate information asymmetry" by enabling "broad discovery" at the outset of legal disputes, as the Federal Rules of Civil Procedure do).

fraudulently increased price before the truth was revealed),[326] what portion of the market losses were caused by the underlying misconduct (as opposed to other factors), and more. Thus, even with the objective "backstop" provided by 13F, plaintiffs and defendants, relying on different assumptions, routinely come up with significantly variant estimates.[327] And, further proving the point, the number of claims submitted after a settlement is often dramatically different than what experts had projected.[328]

To the extent that 13F is facilitating quicker settlement of shareholder litigation, this effect is arguably beneficial. While there is a substantial debate over the social value of shareholder litigation,[329] 13F may play a beneficial role simply by reducing litigation costs and moving settlement forward.

D. Engagement

13F may also have important effects on "engagement" (that is, direct interactions between institutional investors and managers).[330] Engagement takes various forms, including personal meetings, phone calls, emails, and group events like investor conferences.[331] Shareholders and managers have

326. Elizabeth Chamblee Burch, *Reassessing Damages in Securities Fraud Class Actions*, 66 MD. L. REV. 348, 391 (2007).

327. John D. Finnerty & Gautam Goswami, *Determinants of the Settlement Amount in Securities Fraud Class Action Litigation*, 2 HASTINGS BUS. L.J. 453, 458 (2006); Burch, *supra* note 326, at 391-92; Alex Sussman, Experts in PSLRA Cases: Materiality, Loss Causation and Damages 28 (2006), https://perma.cc/LPL3-XAZV; *see also* Richard A. Booth, *The End of the Securities Fraud Class Action as We Know It*, 4 BERKELEY BUS. L.J. 1, 7 (2007) (noting that some commentators have called trading models designed to estimate damages "junk statistics").

328. Narinder Walia & Adam Werner, *Trading Models Underestimate Securities Class Damages*, LAW360 (Oct. 25, 2019), https://perma.cc/S78Y-ZS4Z (to locate, select "View the live page"). However, the difference in the number of class members projected by experts and the number of actual claims filed may be due to factors unrelated to the correctness of the experts' calculations. *Cf.* James D. Cox & Randall S. Thomas, *Letting Billions Slip Through Your Fingers: Empirical Evidence and Legal Implications of the Failure of Financial Institutions to Participate in Securities Class Action Settlements*, 58 STAN. L. REV. 411, 413, 420-25 (2005) (demonstrating that institutional investors who are part of a class and thus eligible to file claims in a securities class-action settlement often fail to do so, and exploring potential causes of this behavior).

329. Howell E. Jackson & Mark J. Roe, *Public and Private Enforcement of Securities Laws: Resource-Based Evidence*, 93 J. FIN. ECON. 207, 209 (2009) (endorsing the "conventional legal academic view" that securities litigation is "seriously compromised"); *see also* Platt, *supra* note 56, at 1474-79 (reviewing this debate and pointing out some of the potential benefits of litigation).

330. Fisch & Sepe, *supra* note 22, at 887 (describing engagement).

331. *E.g.*, *id.* at 888 (listing different types of engagement).

increasingly emphasized the importance of engagement as an alternative to more confrontational channels of governance, such as voting or litigation.[332]

This Subpart examines how 13F may facilitate three types of engagement: (1) manager-initiated engagement; (2) shareholder-initiated engagement; (3) coordinated engagement by multiple shareholders. 13F likely has a significant effect only on the first and third of these engagement types.

1. Manager-initiated engagement

Managers have many reasons to reach out and engage with investors. As discussed above, when management is facing a close proxy fight, it will want to lobby investors to support its cause.[333] Management also may want to build trust with and support from shareholders for long-term plans;[334] to prevent future conflicts;[335] and to maintain an open dialogue to promote the free flow of useful information from investors to the company.[336]

13F likely plays an important role in facilitating this type of engagement by enabling managers to identify their current shareholders. 13F may be particularly useful for managers engaging with what some call "quality shareholders," investors who actively and deliberately choose which companies they invest in (unlike passive indexed investors) but who still have a long-term investment horizon.[337] 13F identifies these shareholders by revealing those that (1) have held the company's stock over a long period of time; and (2) are not equally invested across a given sector (that is, are not indexers or quasi-indexers).

What is less clear, however, is whether such manager-driven engagement makes shareholders and other stakeholders better or worse off. Proponents say engagement can foster a collaborative relationship between investors and managers, akin to that in a venture capital–backed startup;[338] that investors

332. Matthew J. Mallow & Jasmin Sethi, *Engagement: The Missing Middle Approach in the Bebchuk–Strine Debate*, 12 N.Y.U. J.L. & BUS. 385, 392 (2016); Joseph A. McCahery, Zacharias Sautner & Laura T. Starks, *Behind the Scenes: The Corporate Governance Preferences of Institutional Investors*, 71 J. FIN. 2905, 2906, 2911-12 (2016); Martin Lipton, Wachtell, Lipton, Rosen & Katz, *Engagement—Succeeding in the New Paradigm for Corporate Governance*, HARV. L. SCH. F. ON CORP GOVERNANCE (Jan. 23, 2018), https://perma.cc/DN6W-CLBY.

333. *See supra* Part II.A.3.

334. Lisa M. Fairfax, *Mandating Board–Shareholder Engagement?*, 2013 U. ILL. L. REV. 821, 832-34.

335. *Id.*

336. Eckstein, *supra* note 56, at 512-13, 550-61.

337. *See* Lawrence A. Cunningham, *The Case for Empowering Quality Shareholders*, 46 BYU L. REV. 1, 5 (2020).

338. *See* Fisch & Sepe, *supra* note 22, at 866, 886-90.

can use engagement to pass along valuable information in their possession to management;[339] and that engagement can allow both sides to avoid unnecessary and costly confrontations.[340] Critics, on the other hand, worry that engagement is a vehicle that serves the interests of the few largest shareholders at the expense of others.[341] Empirical evidence has failed to resolve this question, in part because hard data on engagement is difficult to come by (since there is no necessary paper trail for these interactions).[342] Existing studies have relied on proprietary datasets provided by institutional investors regarding their targeted engagements with portfolio companies to analyze the effects of engagement.[343] But because these studies focus on shareholder-initiated engagements, not management-initiated ones, they are inapposite here. Accordingly, the normative upshot of 13F's subsidy of managerial engagement is uncertain.

2. Shareholder-initiated engagement

Much of the current dialogue about engagement focuses on shareholder-driven engagement.[344] But 13F's impact in this domain is likely to be limited. Shareholders do not need to read their own 13F filings to know what companies they invest in.

One possible way for 13F disclosures to facilitate shareholder-driven engagement is to help busy managers select which shareholder-requested meetings to take and which to decline.[345] According to some accounts, shareholders may overstate (or simply lie about) their holdings to get a meeting

339. Eckstein, *supra* note 56, at 512-13, 550-61.

340. Fairfax, *supra* note 334, at 832-34.

341. Virginia Harper Ho, *Nonfinancial Risk Disclosure and the Costs of Private Ordering*, 55 AM. BUS. L.J. 407, 453-54 (2018).

342. McCahery et al., *supra* note 332, at 2905 ("[W]e have little direct knowledge regarding how institutional investors engage with portfolio companies, as many of these interactions occur behind the scenes . . . .").

343. *See* Andreas G.F. Hoepner, Ioannis Oikonomou, Zacharias Sautner, Laura T. Starks & Xiao Y. Zhou, *ESG Shareholder Engagement and Downside Risk* 4 (Eur. Corp. Governance Inst., Fin. Working Paper No. 671/2020, 2022), https://perma.cc/RBQ2-P3DM; Tamas Barko, Martijn Cremers & Luc Renneboog, *Shareholder Engagement on Environmental, Social, and Governance Performance*, 180 J. BUS. ETHICS 777, 778 (2022); *see also* Azar et al., *supra* note 202, at 678 (finding that Big Three engagements with particular companies—as disclosed in their annual investment-stewardship reports—correlate with declines in their carbon dioxide emissions as listed by Trucost).

344. *E.g.*, Fisch & Sepe, *supra* note 22.

345. *See* NIRI Comment, *supra* note 146, at 2; Ctr. for Cap. Mkts. Comment, *supra* note 226, at 4; Soc'y for Corp. Governance Comment, *supra* note 115, at 7-9; NAM Comment, *supra* note 208, at 3; Nasdaq Comment, *supra* note 208, at 1; NYSE Comment, *supra* note 149, at 4.

with an executive or director. 13F provides an objective check on this behavior.[346]

Absent 13F, however, managers could readily require that any shareholders requesting a meeting submit brokerage statements confirming their purchases of the company's securities (as they are required to do when they file claims for securities class-action settlements).[347] True, shareholders could fabricate brokerage statements, or send in outdated or incomplete ones. But 13F is hardly an ironclad solution itself. An investor holding $0 in a stock on March 30 could acquire $100 million at the end of the quarter on March 31, sell it all the next day on April 1, report the $100 million end-of-quarter position on Form 13F, and then use 13F to demand a meeting. Accordingly, 13F does not appear to play a significant role in facilitating shareholder-driven engagement.

3. Coordinated engagement

Finally, 13F may facilitate "coordinated engagement" by multiple (non-activist) institutional investors. A recent empirical study of such coordinated engagement orchestrated by the U.N.'s PRI (Principles for Responsible Investment) on the topic of environmental and social issues showed that this strategy can be particularly effective in bringing about desired changes.[348]

13F may facilitate these coordinated engagements. The aforementioned study of the PRI coordination mechanism explained that "after one or several investors identify an issue relating to a company or sector and determine that there is a case for change," the PRI selects a "lead" investor for the engagement and then works with that investor to recruit "supporting investors" to join the team, sending "engagement invitations" to PRI signatories and others.[349] Although the study did not address 13F specifically, it is reasonable to suppose that 13F data can assist in the identification of potential supporting investors.[350]

346. *E.g.*, NIRI Comment, *supra* note 146, at 2 n.3; Soc'y for Corp. Governance Comment, *supra* note 115, at 8.

347. Erickson, *supra* note 117, at 1826.

348. *See* Dimson et al., *supra* note 24, at 6-7, 28-31, 35; *see also* Jean-Pascal Gond & Valeria Piani, *Enabling Institutional Investors' Collective Action: The Role of the Principles for Responsible Investment Initiative*, 52 BUS. & SOC'Y 64 (2013); Gaia Balp & Giovanni Strampelli, *Institutional Investor Collective Engagements: Non-activist Cooperation vs Activist Wolf Packs*, 14 OHIO ST. BUS. L.J. 135 (2020).

349. Dimson et al., *supra* note 24, at 3, 5 & n.6, 14, 26 n.19.

350. The study acknowledges some legal questions regarding how Regulation Fair Disclosure would apply to such actions, and its results are drawn from global firms. *Id.* at 3, 15 & n.9.

The normative upshot of this is contestable. Gaia Balp and Giovanni Strampelli argue that coordinated engagements are beneficial because they help institutional investors overcome various obstacles to more active engagement with firms by distributing the costs of engagement, limiting collective-action problems, and sharing information and expertise (among other advantages).[351] But, as discussed above, this argument assumes that the underlying interests of shareholders are well aligned to produce socially beneficial results—an assumption that remains hotly contested.[352]

E. Tacit Shareholder Influence

13F may also serve as a channel to convey investor preferences to managers without any actual interaction or conversation occurring. Institutional investors hold divergent interests and preferences as to optimal management of the companies they own.[353] Some have long investment horizons and might prefer the company to invest in projects that allow for steady growth over the long term, while others may prefer projects that optimize returns over a shorter horizon.[354] Some institutions bet on a single company to beat the competition; others bet on an entire industry; still others bet on the entire market. These institutions may also hold divergent positions on how companies should act regarding politically charged topics such as climate change, diversity, and political spending. And some institutional investors may represent the particular interests of groups, like labor unions, who have a strong financial interest in steering corporate policy in their favor.[355]

Corporate officers and directors have strong incentives to learn about these preferences. Because directors are elected by shareholders, they may want to appease these shareholders in order to keep their jobs.[356] Managers, in turn, are accountable to the directors, and both have their compensation reviewed and voted on by shareholders. Separately, corporate directors have a fiduciary

351. Balp & Strampelli, *supra* note 348, at 183-94.

352. *See supra* Part I.A.

353. *See* Jay Clayton, Chairman, SEC, Opening Remarks to SEC–NYU Dialogue on Securities Markets #4: Shareholder Engagement (Jan. 19, 2018), https://perma.cc/8TB7-TEJR.

354. STOUT, *supra* note 65, at 63-73; Strine, *supra* note 191, at 7-8; MARTIN LIPTON, WACHTELL, LIPTON, ROSEN & KATZ, THE NEW PARADIGM: A ROADMAP FOR AN IMPLICIT CORPORATE GOVERNANCE PARTNERSHIP BETWEEN CORPORATIONS AND INVESTORS TO ACHIEVE LONG-TERM INVESTMENT AND GROWTH 5 (2016), https://perma.cc/X57D-F5BD.

355. DAVID WEBBER, THE RISE OF THE WORKING CLASS SHAREHOLDER: LABOR'S LAST BEST WEAPON, at xii (2018).

356. Fairfax, *supra* note 334, at 832-33.

duty to operate the company in the interests of the shareholders. Arguably, this duty can be best served by learning about the particular preferences of the shareholder base.[357]

13F may allow these officers and directors to learn the interests and preferences of their company's particular shareholder base and steer the company in that direction. This Subpart considers two ways in which 13F may have this effect: (1) in combination with public statements by investors regarding general policy preferences; and (2) by revealing which investors are also invested in the firm's competitors and would thus prefer a less competitive strategy. As explained below, both of these effects may be significant.

1. Policy statements

Institutional investors increasingly make their preferences on various corporate-governance matters known via various types of public statements. Many institutions regularly publish their own individualized governance guidelines, providing detailed guidance as to how they will vote and engage with portfolio companies on a wide range of topics.[358] Institutions also signal their voting and engagement priorities by signing onto various group policy statements created by NGOs[359] and governments.[360]

There is some evidence linking these policy commitments to changes in corporate conduct. A recent study found that, following the Big Three's public commitment to push companies to increase boardroom gender diversity, companies with more shares held by these institutions were more likely to add more women to their boards.[361] Another found that, between 2011 and 2014, the chances that a U.S. Fortune 250 firm received shareholder proposals on environmental issues increased with the proportion of the firm's largest fifty institutional owners who had signed onto the U.N.'s PRI.[362] An international

357. *See* Soc'y for Corp. Governance Comment, *supra* note 115, at 8 (suggesting that boards rely on 13F to "ascertain to whom (and to what type of investors) they owe their fiduciary duties"). *But see* J. Travis Laster, *Fiduciary Duties in Activist Situations*, 13 VA. L. & BUS. REV. 75, 82-84 (2019) (noting that Delaware courts have rejected this notion); Robert Anderson IV, *The Long and Short of Corporate Governance*, 23 GEO. MASON L. REV. 19, 21 (2015) (arguing that recognizing divisions of interest among shareholders with different investment horizons would trigger pervasive duty-of-loyalty issues).

358. Gordon, *supra* note 56, at 4.

359. *See Signatory Directory*, PRINCIPLES FOR RESPONSIBLE INV., https://perma.cc/T7GM-MSCS (archived May 11, 2022); *Investor Signatories*, CLIMATE ACTION 100+, https://perma.cc/BL3B-EMZS (archived May 11, 2022); *Members*, THIRTY PERCENT COAL., https://perma.cc/2WZ9-YJMQ (archived May 11, 2022).

360. *See* Jennifer G. Hill, *Good Activist/Bad Activist: The Rise of International Stewardship Codes*, 41 SEATTLE U. L. REV. 497, 507-08 (2018); Coates, *supra* note 56, at 20.

361. Gormley et al., *supra* note 130, at 40.

362. Eding & Scholtens, *supra* note 259, at 655, 658.

study found that greater ownership by PRI signatories significantly increased a portfolio firm's environmental and social performance.[363]

In combination with these pronouncements, 13F likely provides an important tool for an individual company to understand the preferences of its shareholder base. This may enable a company to better tailor its actions to suit the particular preferences and interests of its shareholders, without requiring any specific voting, engagement, or litigation.

Whether this effect is beneficial or harmful is debatable. Public pronouncements may be a positive, cost-effective method for shareholders to improve governance performance without having to engage in costly or time-consuming direct engagement. Some scholars, however, warn that these policy statements are necessarily limited to promoting a kind of "one-size-fits-all" governance that may be harmful,[364] and may also exacerbate inequality by further empowering the most powerful shareholders at the expense of other voices.[365]

2. Anticompetitive effects of common ownership

Imagine you own 100% of the stock of Delta Airlines. The management of the company comes to you with a plan to launch a price war to win sales away from American Airlines. You have good reason to support such a campaign, since any sales won away from American would benefit the company you own. But if you own 100% of both Delta and American, you are no longer interested in this price war, since any sales won away from American would essentially amount to shifting money from one pocket to the other (with some falling on the floor in the form of lower prices).[366]

Economists long theorized that the same anticompetitive effect operated even when the level of "common ownership" across competitors was less than 100% (and even less than a controlling share).[367] That is, economists theorized that as the rate of common ownership across competitors increases, the firm's incentive to compete decreases, prices go up, and output falls.

363. Alexander Dyck, Karl V. Lins, Lukas Roth & Hannes F. Wagner, *Do Institutional Investors Drive Corporate Social Responsibility? International Evidence*, 131 J. FIN. ECON. 693, 694 (2019).

364. Lund, *supra* note 56, at 516-17; Bebchuk & Hirst, *supra* note 56, at 2089; Gormley et al., *supra* note 130, at 5 n.3. *But see* Yaron Nili & Kobi Kastiel, *The Corporate Governance Gap*, 131 YALE L.J. 782 (2022) (documenting substantial variation in the governance practices between small-cap and large-cap companies).

365. *See* Coates, *supra* note 56, at 21.

366. *See* Einer Elhauge, Essay, *Horizontal Shareholding*, 129 HARV. L. REV. 1267, 1269 (2016).

367. Martin C. Schmalz, *Common-Ownership Concentration and Corporate Conduct*, 10 ANN. REV. FIN. ECON. 413, 419-24 (2018) (reviewing theoretical literature).

The rise of modern portfolio theory and diversification[368] has brought this scenario to life. Today, a substantial proportion of Delta Airlines shareholders *are* also invested in American Airlines and Delta's other competitors.[369] A string of empirical studies has confirmed what theorists long argued: The increased rate of common ownership across these concentrated industries is correlated with decreased competition, increased prices, and decreased output.[370]

This literature, however, remains hotly contested.[371] One key criticism is that there is no plausible "causal mechanism" by which these diversified institutional owners relay their anticompetitive desires to management to take anticompetitive actions.[372] Given the risk of antitrust violations, the strong incentives these institutions have to remain passive and deferential to management, and the relatively minor benefits at stake, scholars have argued that it is just not plausible to imagine any of these institutional investors calling up the CEO of Delta and asking for a price increase.[373]

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368. *See supra* Part I.A.

369. *See* Elhauge, *supra* note 366, at 1267; José Azar, Martin C. Schmalz & Isabel Tecu, *Anticompetitive Effects of Common Ownership*, 73 J. FIN. 1513, 1525 (2018).

370. *See* Azar et al., *supra* note 369, at 1519; José Azar, Sahil Raina & Martin Schmalz, *Ultimate Ownership and Bank Competition*, 51 FIN. MGMT. 227, 232-33 (2022). For a review of the empirical literature to date, see Einer Elhauge, *How Horizontal Shareholding Harms Our Economy—And Why Antitrust Law Can Fix It*, 10 HARV. BUS. L. REV. 207, 213-14, 217-19, 239-44 (2020); Elhauge, *supra* note 26, at 3 n.1.

371. *E.g.*, Jeremy McClane & Michael Sinkinson, Uncommon Implications of the Common Ownership Hypothesis 3-7 (Sept. 1, 2021) (unpublished manuscript), https://perma.cc/7YH6-PYM4; Katharina Lewellen & Michelle Lowry, *Does Common Ownership Really Increase Firm Coordination?*, 141 J. FIN. ECON. 322, 323 (2021); Andrew Koch, Marios Panayides & Shawn Thomas, *Common Ownership and Competition in Product Markets*, 139 J. FIN. ECON. 109, 111 (2021); *see also* MATTHEW BACKUS, CHRISTOPHER CONLON & MICHAEL SINKINSON, THE COMMON OWNERSHIP HYPOTHESIS: THEORY AND EVIDENCE 1-2 (2019), https://perma.cc/KY6R-FLT9 (providing a skeptical review of the literature). For a critique based on antitrust law, see generally Thomas A. Lambert, *Mere Common Ownership and the Antitrust Laws*, 61 B.C. L. REV. 2913 (2020). For critiques based on the lack of a "causal mechanism," see the sources cited in note 372 below.

372. Org. for Econ. Coop. & Dev. [OECD], *Hearing on Common Ownership by Institutional Investors and Its Impact on Competition—Note by the United States*, ¶ 13, OECD Doc. DAF/COMP/WD(2017)86 (Dec. 6, 2017), https://perma.cc/5CLX-9WVV; Bebchuk & Hirst, *supra* note 56, at 2131-33; C. Scott Hemphill & Marcel Kahan, *The Strategies of Anticompetitive Common Ownership*, 129 YALE L.J. 1392, 1397-99, 1447-48 (2020); Noah Joshua Phillips, Comm'r, FTC, Taking Stock: Assessing Common Ownership, Remarks at the Concurrences Review and NYU Stern Global Antitrust Economics Conference 5-6 (June 1, 2018), https://perma.cc/P95H-LEAH.

373. *See, e.g.*, sources cited *supra* note 372.

Einer Elhauge, a leading proponent of the common-ownership thesis, has theorized that 13F may provide an answer.[374] 13F provides officers and directors with insight into one potentially important dimension of their shareholders' financial interests: the extent to which these shareholders are also invested in the firm's competitors. A director or officer might learn from 13F that a substantial portion of her firm's shareholders are also invested in the firm's main competitors, and thus would *not* stand to gain from aggressive competition against those firms. To the extent that directors or officers are motivated to please or accommodate the interests of their particular shareholders,[375] 13F may undermine product market competition.

But there has not been any concrete evidence that managers use 13F for this purpose—until now. In opposing the SEC's 2020 proposal, several leading interest groups representing issuers explicitly confirmed that it is common practice for issuers to use 13F disclosures to understand their shareholders' entire portfolios, including their exposure to industry competitors. For instance, the National Association of Manufacturers urged the SEC not to cut back on 13F because issuers use 13F disclosures to understand "shareholders' portfolios" and the extent to which investors have "exposure to a certain industry," and to compare their shareholder base with that of "industry peers."[376] The National Mining Association similarly emphasized that 13F helps issuers "understand shareholder portfolios."[377] These statements by leading interest groups representing the desires of corporate issuers strongly support the theory that the road from common ownership to anticompetitive firm conduct may run through 13F.[378]

To the extent that 13F is indeed driving the anticompetitive effects of common ownership, this is a harmful outcome for at least one key set of corporate stakeholders—namely, consumers who are forced to pay higher prices. It may also contribute to other economic problems, including declining corporate investment and output,[379] persistently weak links between CEO pay

374. Elhauge, *supra* note 366, at 1270 (noting that "[w]ithout any active communication, corporate managers know the identity of their shareholders and the fact that their shareholders also own shares in their rivals" because "SEC rules require all institutional investors to disclose all their holdings quarterly").

375. *See supra* notes 356-57 and accompanying text.

376. NAM Comment, *supra* note 208, at 4.

377. NMA Comment, *supra* note 115, at 2-3.

378. To be clear, according to proponents, the plausibility of the anticompetitive effect of common ownership does not necessarily depend on managers or directors knowing who their shareholders are. *See, e.g.*, Elhauge, *supra* note 26, at 13-18, 22-23.

379. Elhauge, *supra* note 366, at 1281-91; Elhauge, *supra* note 370, at 218-22.

and firm-specific (as opposed to industry-wide) performance,[380] and rising economic inequality.[381]

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Although this Part has attempted to offer a global analysis of 13F's impacts on corporate governance, there are undoubtedly some important issues left out of the foregoing discussion.

For instance, 13F's unique applicability to institutional (and not retail) investors may have a significant impact on the relative power that each group exercises across various governance domains. It is possible that this may tend to (further) weaken the comparative influence of retail investors in corporate governance. Using 13F, activists, shareholder-proposal proponents, corporate managers, and others can (and do) take various governance actions based on the composition of the *institutional* shareholder base of a given company, but not the *retail* shareholder base. On the other hand, preserving the anonymity of these retail shareholders may actually serve to strengthen the independence of their voice.

Similarly, 13F may play an important role in the market for corporate control. Acquirers may well consider the composition of a targets' shareholder base before deciding to move forward with an acquisition, just as hedge fund activists do before launching an attack. And proponents and opponents of a merger may use 13F data to identify shareholders to lobby ahead of contentious merger votes. These issues, and other topics not addressed above, should be the subject of future research.

III. Implications

13F has a substantial impact on a broad range of corporate-governance processes. Given the neglect of this provision by scholars to date, this general finding is itself an important contribution to the literature. But the nature of 13F's impact is neither generalizable nor reducible to a simple formula. The winners and losers appear to vary by domain. And the net consequences—for shareholders and for society at large—are difficult to assess and point in

380. Elhauge, *supra* note 366, at 1278-81; Elhauge, *supra* note 370, at 216-18; Miguel Antón, Florian Ederer, Mireia Giné & Martin C. Schmalz, *Common Ownership, Competition, and Top Management Incentives* 2 (Eur. Corp. Governance Inst., Fin. Working Paper No. 511/2017, 2022), https://perma.cc/ZD6J-9TXD. *But see* David I. Walker, *Common Ownership and Executive Incentives: The Implausibility of Compensation as an Anticompetitive Mechanism*, 99 B.U. L. REV. 2373, 2375-77 (2019).

381. Elhauge, *supra* note 366, at 1291-301; Elhauge, *supra* note 370, at 219-22, 241-42; Zohar Goshen & Doron Levit, *Common Ownership and the Decline of the American Worker* (Eur. Corp. Governance Inst., L. Working Paper No. 584/2021, 2021), https://perma.cc/457Q-DQ5T.

different directions. Further, it is difficult to predict how private actors would adapt if the regime were to be substantially abolished. As explained above, there is currently no good substitute for 13F data.[382] Removing 13F will clearly substantially reduce the available information regarding who owns what. And yet new substitutes and alternative sources of information may emerge in the wake of such a regulatory change. Some actors (like hedge fund activists) might be willing and able to invest additional resources to gather—or, more likely, pay others to gather—as much of this valuable information as possible in the absence of a regulatory mandate. Others who currently rely on 13F might be unable to afford these emergent substitutes. Similarly, some currently reporting institutional investors who see significant advantages in being visible to the marketplace might begin voluntarily disclosing their holdings. Others may opt to remain invisible.

In the face of this complexity and uncertainty, it is tempting to throw one's hands in the air and fall back on first principles. Some may continue favoring preserving or expanding 13F for the sake of increased "market transparency." Others may favor the opposite for the sake of minimizing government intrusion into the marketplace.

Policymakers should resist this temptation. The complexity of 13F's impacts on corporate governance is not a license to ignore them. This Part evaluates how each of the proposed reforms to 13F would likely alter the major effects documented above. It also critically examines the concept of "market transparency," which was used to great effect in opposing the SEC's proposal to curtail 13F in 2020.[383] Finally, and most broadly, it draws on the findings above to support an important critique of corporate-governance scholarship as too easily relying on purportedly neutral market processes to produce "efficient" outcomes.

A. 13F Reform

13F reform is on the agenda. As discussed above, several proposals have been floated to reduce, expand, and otherwise alter the regime.[384] But so far, there has been little to no discussion as to how these proposals would impact corporate governance. This Subpart considers how some of the main proposed reforms would intersect with the major impacts discussed in the preceding Part. It does not offer a definitive recommendation. Instead, the goal is to identify the major tradeoffs involved in any reform and identify key open questions that must be addressed before reform is undertaken.

382. *See supra* Part I.B.3.

383. *See infra* text accompanying notes 401-05.

384. *See supra* Part I.C (discussing various recent proposals to reform 13F).

1. Hedge fund activism

One very good reason not to dramatically curtail the volume of 13F reports (as the SEC proposed in 2020) is that doing so could create a bigger wedge between the interests of hedge fund activists and long-term shareholders. By depriving activists of the ability to identify existing firm shareholders (and tailor their campaigns accordingly), this proposal would likely force activists to rely more on their next best alternative strategy: arranging for *new* shareholders (for example, other hedge funds) to take positions in the target at the time of the campaign, commonly referred to as creating a "wolf pack."[385] This, in turn, would tend to (further) unleash activists' short-termist incentives, since they would no longer need to secure votes from existing firm investors. While activists may be indifferent as to where their returns come from, for everyone else, it matters a great deal whether activists pursue strategies that create or destroy value for other corporate constituencies. Removing 13F would seem to push activism in exactly the wrong direction.

While it could be argued that curtailing 13F may *bolster* hedge fund activism by depriving managers and others of the ability to spot activists early, I believe that this effect would be somewhat limited. As noted, 13F in its current form provides a relatively weak activist-detection device. It is true that, to the extent activists have traditionally built their positions quickly precisely to avoid 13F disclosures,[386] eliminating these disclosures might well lead to more activists pursuing slow and stealthy accumulations over a longer period of time. And it is also true that, to the extent activists have "voluntarily" disclosed their presence to targets in the shadow of looming regulatory deadlines, the SEC's proposal might well lead to more activists taking advantage of the longer time to accumulate positions.

But there are important fixed economic reasons for activists to move quickly that would likely not be diminished by any change in disclosure requirements. Sitting on a sizable investment in a potential target for an extended period of time is likely to be inconsistent with the core activist investment strategy.[387] The longer that an activist sits on its position before

385. *See* Wong, *supra* note 198, at 2347 (confirming empirically that activists rely on this strategy).

386. *See* Taub, *supra* note 115 ("[S]everal activist hedge fund firms have confirmed to *Institutional Investor* over the years that they intentionally time their trading activity to avoid prematurely disclosing a position in a 13F document or triggering the 5 percent thresholds for other filing disclosures before they are ready to go public with their position.").

387. Bratton & Wachter, *supra* note 65, at 682; Sharfman, *supra* note 227, at 256; Paul Rose & Bernard S. Sharfman, *Shareholder Activism as a Corrective Mechanism in Corporate*

footnote continued on next page

taking action, the more likely that conditions on the ground will shift: other attractive opportunities may come and go; the potential target's institutional ownership may change, making it less amenable to an activist campaign; market conditions may make activism more or less profitable; and so on. Managers of activist funds are likely to have their compensation structured in a way that encourages speed.[388] And research confirms that activists typically hold their positions for relatively short periods.[389]

All of this should be familiar: It is precisely this investment model that motivates the key criticism of hedge fund activists as producing only short-term gains in value.[390] Indeed, critics of hedge fund activism have proposed solutions that would impose penalties or otherwise limit the rights of shareholders who hold stocks for short periods.[391] The reasons hedge funds tend not to hold positions for very long would presumably remain just as powerful notwithstanding any change to 13F, and this would likely mitigate any "going dark" effect.

On the other hand, switching from quarterly to monthly 13F reporting and shortening the disclosure window from forty-five days to two days would likely have a substantial negative impact on the volume of hedge fund activism. This proposal would dramatically shorten (by about 80%) the period in which activists can build their positions before detection by managers or the marketplace, from four and a half months to one month and two days. Upon detection, management can put into place various defensive strategies which can reduce the activist's prospects of success. Similarly, once an activist's presence is revealed to the market, other investors may pile into the stock (in anticipation that the activist will launch a value-enhancing campaign), causing the price to go up, making it more expensive for the activist to continue to build its position, and thereby eating into the prospective returns.[392] In both cases, shifting to monthly reporting with an abbreviated reporting window would significantly raise the costs of activism, and thus would likely lead to a reduction in the volume of activism in the market.

Governance, 2014 BYU L. REV. 1015, 1046; Strine, *supra* note 179, at 1944; Coffee & Palia, *supra* note 179, at 567.

388. Strine, *supra* note 179, at 1915.

389. Brav et al., *supra* note 232, at 1749.

390. Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1290-91 (2008); *see also supra* note 191 (collecting sources critical of hedge fund activism).

391. Andrew Ross Sorkin, *Hillary Clinton Aim Is to Thwart Quick Buck on Wall Street*, N.Y. TIMES: DEALBOOK (July 27, 2015), https://perma.cc/CA69-HGA8; Coffee & Palia, *supra* note 179, at 594-95.

392. *See* Bebchuk & Jackson, *supra* note 75, at 43, 50.

A strong argument can be made that this means 13F should *not* be made more frequent, for similar reasons as articulated by Bebchuk and Jackson in opposition to the proposal to speed up blockholder disclosures.[393] As discussed above, Bebchuk and Jackson cautioned against shortening the reporting window for 13D from ten days to one; they argued that, since blockholders provide key governance benefits linked to their ability to build a position in secret, shrinking the reporting window would eliminate this secrecy, cut into blockholders' returns, and diminish their incentives to provide governance benefits.[394] Similarly, in the context of 13F, it may be argued that hedge fund activists provide key governance benefits, that their incentives to provide these benefits depend in part on their ability to build positions over time in secret, and that tightening the reporting window from four and a half months to one month would undermine this secrecy, impair their ability to make returns, and reduce their incentives to provide governance benefits.

But there is a critical difference between the Bebchuk and Jackson article and this one: The literature on activists has evolved substantially in the intervening years.[395] Today, it is more difficult to definitively conclude that discouraging activism per se will be harmful, on net, to shareholders. Thus, while ramping up the frequency of 13F would clearly tend to reduce the level of activism, it is difficult to reach a firm conclusion as to whether this effect is beneficial or harmful.

2. Shareholder proposals

In the domain of shareholder proposals, shareholders might be better off with *less* transparency about institutional-investor holdings. Reducing the volume of 13F reports could bolster sponsors of shareholder proposals and other shareholders who support them. As explained above, 13F plays a key role in enabling management to "always win the close ones."[396] Taking away this informational subsidy might actually increase the rate of success for sponsors. Making 13F disclosures more frequent and timelier might have the opposite effect, exacerbating management's asymmetric advantages in winning closely contested votes on shareholder proposals.

This effect arguably provides a good reason to *not* enhance the frequency of 13F—and perhaps even to reduce or eliminate it. As discussed above, there is some evidence that managerial victories in *closely contested* shareholder

393. *See supra* Part I.A.

394. *See supra* Part I.A.

395. *See supra* text accompanying notes 190-96 (surveying the conflicting empirical literature on hedge fund activism).

396. *See supra* Part II.B.2; Listokin, *supra* note 276, at 161-62.

proposals are bad for shareholder value.[397] Accordingly, by enabling management to snatch victories away from shareholders, 13F plausibly seems to harm shareholders—who may be better off without it.

3. Shareholder litigation

It is unlikely that any proposed change to 13F would have a significant effect on shareholder litigation. Reducing the volume of 13F disclosures might impede settlements by taking away parties' ability to rely on this information as a backstop in damages calculations in securities class actions. But the effect is likely to be small. As discussed above, this information comprises only a small part of the damages calculation, and it still leaves room for substantial disagreement between the parties. Further, securities class actions that survive a motion to dismiss invariably settle and do not proceed to trial.[398] There are many reasons for this, and those reasons are unlikely to change even if 13F were to disappear. Accordingly, the parties would still likely find a way to reach a settlement, and the effect of 13F changes may simply be to push these settlements to a later stage of litigation, increasing costs to parties.

Similarly, speeding up the frequency of 13F disclosures could enhance the ability to settle by producing more reliable estimates of damages caps (thus generating more certainty for the parties regarding their prospects). But even monthly disclosures provide a limited picture of market activities in the underlying securities during the class period, and such disclosures would still leave a substantial amount of the calculation subject to rival expert trading models with various assumptions. So, once again, the effects on shareholder litigation are likely to be fairly marginal.

4. Engagement

Altering 13F might have a significant impact on management-driven shareholder engagement. Curtailing 13F could obstruct management's ability to identify its shareholder base, and therefore make it more difficult (if not impossible) for management to engage with shareholders. Speeding up 13F disclosures, on the other hand, could make it easier for management to quickly identify significant changes in the magnitude of positions by existing shareholders and proactively engage them on that basis.[399]

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397. *See supra* text accompanying note 266.

398. STEPHEN J. CHOI & A.C. PRITCHARD, SECURITIES REGULATION: CASES AND ANALYSIS 248 (5th ed. 2019).

399. While a shorter disclosure window would enable managers to more quickly spot and proactively engage a *newer* shareholder, engagement is typically defended as a strategy for building relationships with *longer-term shareholders*. *See supra* text accompanying notes 332-38.

Separately, curtailing 13F may also substantially impede the ability of shareholders to *coordinate with one another* on engagements with the same company. As discussed above, such coordinated engagements appear to be an effective tool for shareholders to push companies to make changes.[400]

5. Tacit shareholder influence

One potential benefit of curtailing 13F may be reducing the anticompetitive effects of common ownership. Without 13F, management would find it more challenging to assess the proportion of its shareholder base that also holds stakes in the firm's competitors, and thus would have reduced incentives to steer the firm away from vigorous competition. If this is correct, reducing 13F disclosures might help at least one important group of corporate stakeholders—consumers—by stimulating more vigorous product market competition.

At the same time, though, curtailing 13F might significantly undercut shareholder voice by making firms *less* responsive to shareholders' publicly stated preferences. A firm would no longer be able to cross-check its institutional owners against the various individual and group public statements made by institutional investors on various governance topics. As such, removing 13F may tend to undercut the importance of these public pronouncements on changing firm practices.

B. The Case Against "Market Transparency" as a Regulatory Touchstone

After the SEC proposed to eliminate 13F for 90% of reporting institutions in 2020, the ensuing commentary from usually warring factions converged around the common complaint that the proposal presented a dangerous threat to "market transparency." SEC Commissioner Allison Herren Lee set the tone with her initial commentary in response to the proposal, characterizing it as one in "a long list of recent actions that decrease transparency" and proceeding to use the term "transparency" nine more times in the short statement.[401] Commissioner Lee's rhetoric was echoed by corporate managers,[402]

400. *See supra* Part II.D.3.

401. Allison Herren Lee, *Statement on the Proposal to Substantially Reduce 13F Reporting*, SEC (July 10, 2020), https://perma.cc/W2Q6-P8KC.

402. Wachtell Comment, *supra* note 115, at 3; Ctr. for Cap. Mkts. Comment, *supra* note 226, at 1; Soc'y for Corp. Governance Comment, *supra* note 115, at 3; NAM Comment, *supra* note 208, at 2; Bus. Roundtable Comment, *supra* note 226, at 1; NIRI Comment, *supra* note 146, at 3; Prat Bhatt, Fin. Execs. Int'l Comm. on Corp. Reporting, Comment Letter on Proposed Amendment to Reporting Threshold for Institutional Investment Managers 1 (Sept. 29, 2020), https://perma.cc/ZQ6W-CYB3.

investors,[403] exchanges,[404] and other advocacy groups,[405] all of whom opposed the rule on similar grounds.

But "market transparency" is not a valid touchstone. Although securities regulation is often associated with transparency,[406] neither the law nor the principles that shape it seek only to advance transparency. Instead, they reflect an equally strong respect for the benefits of opacity and secrecy. For instance, the securities laws not only require extensive disclosures for public offerings and public companies;[407] they also carve out space for private offerings and private companies to operate *without* making these disclosures.[408] These exemptions promote equally vital goals of the regime, including the encouragement of emerging and smaller companies, innovation, and competition.[409]

403. CalPERS Comment, *supra* note 226, at 4 ("The SEC should not use its exemptive authority to relieve institutional investment managers from providing market transparency."); Jeffrey P. Mahoney, Council of Institutional Invs., Comment Letter on Proposed Amendment to Reporting Threshold for Institutional Investment Managers 1 (Sept. 17, 2020), https://perma.cc/TC69-8EFH (warning that the proposal "could reduce, rather than increase, the transparency of market information"); Morningstar Comment, *supra* note 139, at 1 (complaining that the proposal "would dramatically reduce market transparency"); CFA Inst. Comment, *supra* note 139, at 12 (opposing the proposal because it "would undermine market transparency").

404. NYSE Comment, *supra* note 149, at 1; Nasdaq Comment, *supra* note 208, at 1.

405. Lev Bagramian, Better Mkts., Comment Letter on Proposed Amendment to Reporting Threshold for Institutional Investment Managers 2 (Sept. 29, 2020), https://perma.cc/CVE9-6BDZ; Ams. for Fin. Reform Educ. Fund, Comment Letter on Proposed Amendment to Reporting Threshold for Institutional Investment Managers 1 (Sept. 29, 2020), https://perma.cc/3BGC-L4FZ.

406. *E.g.*, EASTERBROOK & FISCHEL, *supra* note 61, at 276 (characterizing "the need to disclose information" as "the principal federal component of corporate law"); Stephen M. Bainbridge, *Mandatory Disclosure: A Behavioral Analysis*, 68 U. CIN. L. REV. 1023, 1023 (2000) ("a—if not *the*—defining characteristic"); Colleen Honigsberg, Robert J. Jackson, Jr. & Yu-Ting Forester Wong, *Mandatory Disclosure and Individual Investors: Evidence from the JOBS Act*, 93 WASH. U. L. REV. 293, 295 (2015) ("cornerstone"); Elisabeth de Fontenay, *Do the Securities Laws Matter? The Rise of the Leveraged Loan Market*, 39 J. CORP. L. 725, 726 (2014) ("crown jewel"); Paul G. Mahoney, *The Exchange as Regulator*, 83 VA. L. REV. 1453, 1465 (1997) ("most prominent feature").

407. Securities Act of 1933 (Securities Act) § 10, 15 U.S.C. § 77j; Exchange Act § 13(a), 15 U.S.C. § 78m(a); Regulation S-K, 17 C.F.R. pt. 229 (2021); Regulation S-X, 17 C.F.R. pt. 210 (2021).

408. Securities Act § 4, 15 U.S.C. § 77d(a)(2); Regulation D, 17 C.F.R. §§ 230.500-.508 (2021); Regulation A, 17 C.F.R §§ 230.251-.263 (2021).

409. Alexander I. Platt, *Unicorniphobia*, 12 HARV. BUS. L. REV. (forthcoming 2022) (manuscript at 53), https://perma.cc/DGT3-CCBQ; Geoffrey A. Manne, *The Hydraulic Theory of Disclosure Regulation and Other Costs of Disclosure*, 58 ALA. L. REV. 473, 478 (2007); COFFEE ET AL., *supra* note 10, at 9; EASTERBROOK & FISCHEL, *supra* note 61, at 310-11.

Even for the companies and offerings subject to the full force of mandatory disclosure, many categories of material information need not be disclosed. While "market transparency" would be enhanced by imposing a general duty to disclose all material information, the securities laws have never imposed such a duty.[410] Instead, disclosure rules embody a respect for opacity, recognizing that mandated transparency might do more harm than good even when the information would be highly relevant to an investor's trading decision.[411]

Similarly, the securities laws require individuals in possession of material nonpublic information to either disclose or abstain from trading—but not always.[412] The goal of "market transparency" might be best served by a flat rule prohibiting trading on inside information in all cases, but the law has long rejected such a prohibition. As the Court explained in *Dirks v. SEC*: "Imposing a duty to disclose or abstain solely because a person knowingly receives material nonpublic information from an insider and trades on it could have an inhibiting influence on the role of market analysts, which the SEC itself recognizes is necessary to the preservation of a healthy market."[413]

Perhaps the example most closely on point is blockholder disclosure, as required under section 13(d) of the Exchange Act.[414] As previously discussed, investors who acquire more than 5% of a company's stock must disclose this fact to the SEC and to the marketplace.[415] But the rule builds in a substantial delay of ten days between the time the investor crosses the 5% threshold and the time the disclosure must be filed.[416] If "market transparency" were the primary goal, this would call for eliminating the delay and requiring immediate reporting by investors who cross the 5% threshold. Indeed, some have proposed that the SEC make exactly this change.[417] And yet the Agency

410. *E.g.*, CHOI & PRITCHARD, *supra* note 398, at 50; COFFEE ET AL., *supra* note 10, at 921. *But see* Elad L. Roisman, *Statement at Open Meeting on Disclosure of Payments by Resource Extraction Issuers*, SEC (Dec. 16, 2020), https://perma.cc/4ZKM-2QKX ("[O]ur existing rules require disclosure of all material information.").

411. Basic Inc. v. Levinson, 485 U.S. 224, 234-35, 239 n.17 (1988) (explaining that the securities laws allow companies to avoid disclosing material merger negotiations to investors, and that this avoidance may help "avoid a 'bidding war' over [the] target").

412. *See* Chiarella v. United States, 445 U.S. 222, 232-35 (1980) (rejecting the conviction of an individual notwithstanding the fact that he traded on material nonpublic information); Dirks v. SEC, 463 U.S. 646, 659-62 (1983) (rejecting an SEC enforcement action against an individual notwithstanding the fact that he had passed along material nonpublic information to individuals who traded on it).

413. *Dirks*, 463 U.S. at 658.

414. Exchange Act § 13(d), 15 U.S.C. § 78m(d); 17 C.F.R. § 240.13d-1 (2021).

415. Exchange Act § 13(d), 15 U.S.C. § 78m(d); 17 C.F.R. § 240.13d-1.

416. Exchange Act § 13(d), 15 U.S.C. § 78m(d); 17 C.F.R. § 240.13d-1.

417. *See supra* Part I.A (discussing Wachtell's proposal to reform 13D).

has retained the ten-day delay. As explained above, scholars have articulated a strong policy justification for the delay: These blockholders arguably provide important corporate-governance benefits, and the ten-day reporting delay plays an essential role in incentivizing blockholders to take positions by enabling them to build those positions at a low price before the market learns of their presence and other investors pile in.[418]

Similarly, in the case of 13F, "market transparency" does not represent either a complete theoretical account of the rule's purposes or a defensible justification for reform. This Article has shown that, in several areas, shareholders and other corporate stakeholders may be better off with *less* transparency regarding institutional holdings. For instance, in the domain of hedge fund activism, greater 13F transparency may chill potentially value-enhancing activity. In the domain of shareholder proposals, greater 13F transparency may exacerbate management's asymmetric lobbying advantage ahead of closely contested votes. And in the domain of tacit shareholder influence, greater 13F transparency may facilitate the anticompetitive effects of common ownership, harming consumers. Properly evaluating 13F requires looking past its impact on "transparency" and understanding (1) the actual uses of this information in the marketplace; and (2) whether the benefits of such uses exceed their costs.

Even the many commentators who opposed the SEC's curtailment of 13F on the grounds that it would reduce "market transparency" seem to recognize that pure transparency is not a sound policy goal. Nasdaq and the Society for Corporate Governance—who opposed the curtailment of 13F on the grounds that it would put "transparency at risk"[419] and "significantly reduce market transparency,"[420] respectively—each also recently urged the Commission to *reduce* transparency by changing issuers' periodic disclosure obligations from quarterly to semiannual.[421] Management-side groups like the Business Roundtable, the Chamber of Commerce, the National Association of Manufacturers, and the National Investor Relations Institute—all of whom opposed the SEC's efforts to curtail 13F on the grounds that it would harm "market transparency"—each *opposed* creating new transparency-enhancing

418. *See supra* Part I.A (discussing Bebchuk and Jackson's argument regarding the importance of the ten-day delay).

419. Nasdaq Comment, *supra* note 208, at 1.

420. Soc'y for Corp. Governance Comment, *supra* note 115, at 3.

421. John Zecca, Nasdaq, Inc., Comment Letter on Earnings Releases and Quarterly Reports 8-9 (Mar. 21, 2019), https://perma.cc/L74C-722B; James G. Martin, Soc'y for Corp. Governance, Comment Letter on Earnings Releases and Quarterly Reports 3 (Apr. 19, 2019), https://perma.cc/KEF8-FBAY.

ESG disclosures for issuers.[422] The National Association of Manufacturers, who opposed the 13F proposal because it would create "a significant reduction in market transparency,"[423] actually *sued* the SEC (successfully) to stop it from imposing additional disclosure obligations regarding "conflict minerals."[424] And CalPERS, which urged the SEC not to "relieve institutional investment managers from providing market transparency,"[425] recently *opposed* the Agency's proposal to mandate new disclosures for proxy advisors.[426]

This is not necessarily hypocrisy. The simple, but essential, point is that "market transparency" may be beneficial in some contexts and harmful in others. Evaluating 13F, and any other disclosure program, therefore requires looking at more than just "transparency."

Unfortunately, researchers' blind spot for 13F has left policymakers without a complete evidentiary basis for policymaking in this domain. This Article will hopefully help spur on additional empirical research that will correct this deficiency. But even in the face of empirical uncertainty, policymakers still have a duty to consider the full range of likely and potential ramifications of their policy choices. Before expanding or contracting the scope and frequency of 13F reporting, policymakers must go beyond simple rhetorical appeals to "transparency" and actually explain why the likely benefits of their proposed changes on corporate governance would outweigh the costs.

C. The Contingency of Corporate Governance

Corporate scholars have a track record of relying on the outcomes of governance processes as indicia of "efficiency" or what "the market" wants.[427]

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422. *See* John Hayes, Bus. Roundtable, Comment Letter on Business and Financial Disclosure Required by Regulation S-K, at 1 (July 21, 2016), https://perma.cc/W4HX-7DTQ; Tom Quaadman, Ctr. for Cap. Mkts. Competitiveness, Comment Letter on Business and Financial Disclosure Required by Regulation S-K, at 2 (July 20, 2016), https://perma.cc/YA93-3W73; Christina Crooks, Nat'l Ass'n of Mfrs., Comment Letter on Business and Financial Disclosure Required by Regulation S-K, at 2 (July 21, 2016), https://perma.cc/SV7T-XG7S; Edward S. Knight, Nasdaq, Inc., Comment Letter on Business and Financial Disclosure Required by Regulation S-K, at 4 (Sept. 16, 2016), https://perma.cc/6EWZ-NREV; Matthew D. Brusch & Michael C. McGough, Nat'l Inv. Rels. Inst., Comment Letter on Business and Financial Disclosure Required by Regulation S-K, at 4 (Aug. 4, 2016), https://perma.cc/WZ2B-C7PM.

423. NAM Comment, *supra* note 208, at 2.

424. Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 522, 524 (D.C. Cir. 2015).

425. CalPERS Comment, *supra* note 226, at 4.

426. Marcie Frost, CalPERS, Comment Letter on Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice 4 (Feb. 3, 2020), https://perma.cc/9H7P-Z3CX.

427. For a recent example, consider the argument—raised by both sides in the ongoing debates over whether the SEC should require companies to disclose political spending,
footnote continued on next page

But of course, these processes are not "neutral" at all, and are instead shaped by a host of contingent legal, institutional, and cultural forces.[428]

Two recent, widely discussed papers start from very different perspectives and arrive at the same critique. In *The Corporate Governance Machine*, Dorothy Lund and Elizabeth Pollman challenge the wisdom that "shareholder primacy" reflects an optimal, efficient private-ordering arrangement for corporate governance by mapping out the contingent forces that have promoted and entrenched this norm.[429] By unmasking the complex machinations of the "corporate-governance machine" behind shareholder primacy, Lund and Pollman aim to show that the raw fact of shareholder primacy's dominance cannot be taken as evidence that it is "optimal."

From the opposite corner, in *The Corporate Governance Gap*, Yaron Nili and Kobi Kastiel uncover a massive divergence in governance arrangements between large and small firms and reject the idea that this fact reflects an optimal result of private ordering.[430] Instead, Nili and Kastiel insist that "corporate governance is not self-driven" and identify a host of "barriers for initiating governance changes" that apply specifically to small firms—including the lack of attention from large diversified institutional investors, shareholder-proposal sponsors, and hedge fund activists; the more limited disclosures of governance practices from these firms; and the prevalence of insider owners and lower average institutional ownership.[431]

These two papers are worlds apart. Lund and Pollman set out to debunk the shareholder-primacy norm, while Nili and Kastiel urge it onward toward the next frontier. But methodologically, the papers are in sync. Both identify a state of affairs (the dominance of the shareholder-primacy norm and the "governance gap" between small and large firms, respectively); confront a conventional understanding of that state of affairs as the result of neutral, market-driven corporate-governance processes; and then challenge that

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climate risks, and other topics—that the success rate or failure rate of shareholder proposals calling for similar disclosures provides an important indication of what "the market" does or does not want the SEC to do on this front. Lucian A. Bebchuk, Robert J. Jackson, Jr., James D. Nelson & Roberto Tallarita, *The Untenable Case for Keeping Investors in the Dark*, 10 HARV. BUS. L. REV. 1, 14-15, 14 n.42, 15 n.43 (2020) (collecting examples where opponents of mandatory political-spending disclosure have relied on the lack of support that shareholder proposals on this topic have received).

428. Lund & Pollman, *supra* note 14, at 2565; *see also* Britton-Purdy et al., *supra* note 33, at 1805 (describing the historical emergence of the principle of shareholder-value maximization in corporate law).

429. Lund & Pollman, *supra* note 14, at 2565-66.

430. Nili & Kastiel, *supra* note 364, at 789.

431. *Id.* at 789, 801-14.

conventional account by providing a richer institutionalist picture of the forces that explain it.

My account of 13F's hidden subsidy for certain corporate-governance activities provides additional support for the kind of argument made in these two pieces. By mandating that institutional investors disclose their holdings periodically, Congress and the SEC have effectively tilted the governance playing field in favor of some players and actions—and against others. Without the informational subsidy provided by 13F, many outcomes of the corporate-governance game would be different. In some cases, 13F likely helps produce better results—in other cases, the opposite. Regardless, it is indisputable that 13F shows governance is not a "neutral"[432] or a "self-driven" phenomenon,[433] but rather is heavily and asymmetrically influenced by contingent forces including federal regulation.[434] The outcomes of these processes may or may not be ultimately efficient—but we cannot easily infer efficiency from the mere fact that they are outcomes.

Conclusion

Recognizing that it is extremely challenging for policymakers to keep up with rapidly changing market realities, some scholars have proposed including sunset provisions in all new financial regulations, causing the legislation to expire automatically unless specifically reenacted.[435] This technique, it is argued, would force policymakers to reconsider the regulation in light of any economic and technological changes that may have occurred in the interim.[436]

After forty-five years and massive changes in underlying markets and technology, 13F finally got a "sunset." The SEC's July 2020 proposal to substantially curtail the volume of 13F disclosures invited some much overdue scrutiny of the provision and how it is being used in the contemporary marketplace. But this reevaluation, though long overdue, will only be valuable to the extent policymakers are able to identify reliable assessments of the program's impact.

This Article provides a first step. It has shown how 13F impacts a variety of corporate-governance activities and mapped its effect across key channels of shareholder voice. And, drawing on this account, it has provided an assessment

432. Lund & Pollman, *supra* note 14, at 2606.

433. Nili & Kastiel, *supra* note 364, at 789.

434. *See* Lund & Pollman, *supra* note 14, at 2581.

435. Roberta Romano, *Regulating in the Dark and a Postscript Assessment of the Iron Law of Financial Regulation*, 43 HOFSTRA L. REV. 25, 38-40 (2014).

436. *Id.* at 39-40.

of how proposed 13F reforms would likely change the corporate-governance landscape.

But more work is needed to fully inform policymakers considering reforms to this program. For decades now, scholars have had a blind spot for 13F. Empiricists have relied on the disclosures produced by the program without testing or controlling for the program's impacts. Theorists have proposed innumerable accounts of the purposes of mandatory disclosure for *issuers*, but not *investors*. And scholars have carefully studied federal oversight of institutional investors' role in corporate governance, coordination among investors, collaboration between investors and managers, and the growing voice of institutions in pressing for ESG reforms—all without considering the role played by 13F in facilitating each of these interactions. Hopefully, this Article will correct this blind spot and open new lines of research that can produce innovative solutions and better-informed policymaking.