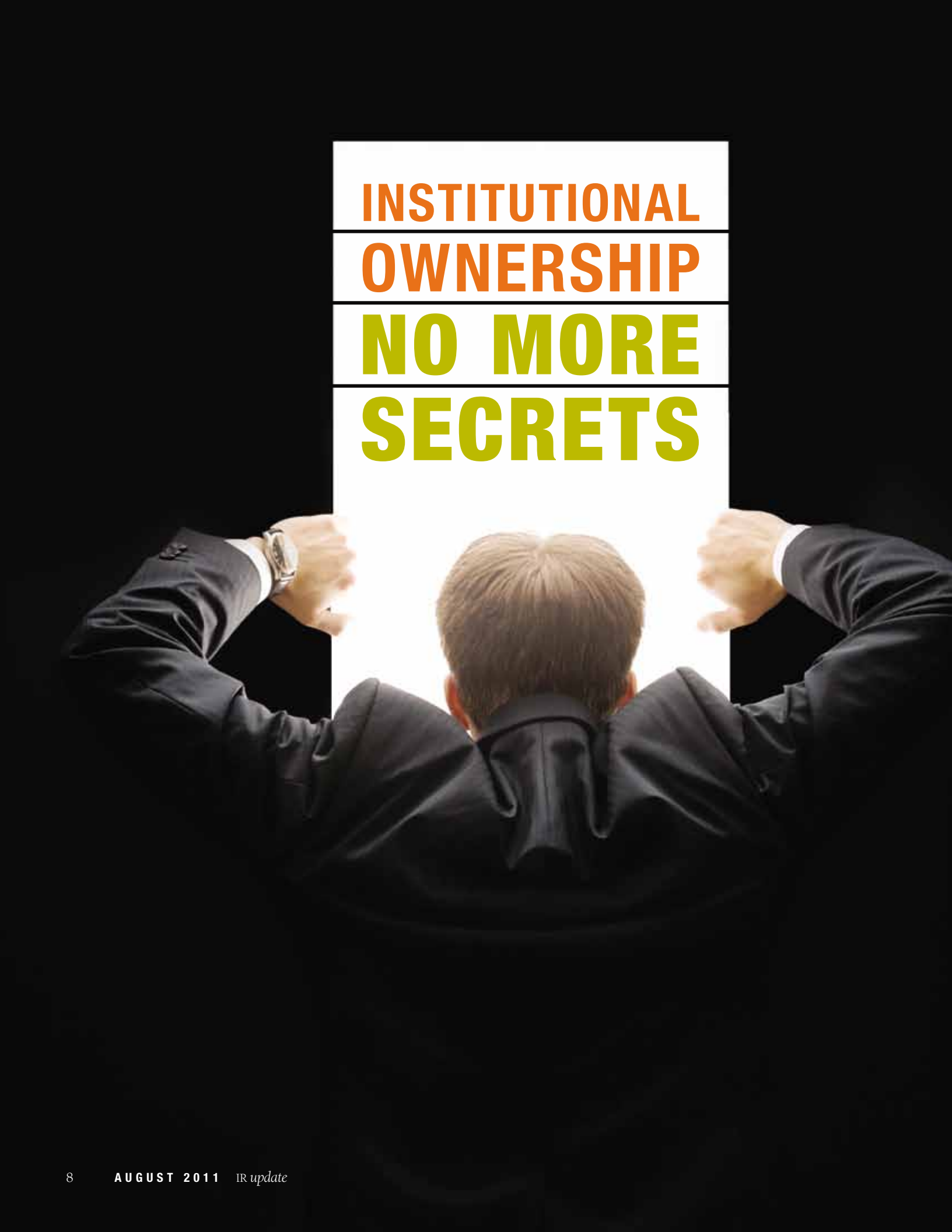
INSTITUTIONAL OWNERSHIP NO MORE SECRETS



Why Revise 13F?

Because quarterly reporting was established before technology advances made reporting much easier, NIRI supports a reporting format similar to what now occurs with retail investors—receiving investment reports on a monthly basis within 10 days of the end of the month. "Institutional holders should abide by the same frequent public reporting scheme and abandon the quarterly requirement," Morgan says. "Reporting rules should be strictly enforced with meaningful penalties for noncompliance."

Francis Byrd, senior vice president and corporate governance and risk practice leader at Laurel Hill Advisory Group, a proxy solicitation firm, believes that refining the reporting requirements for institutional investors could help companies identify their shareholder base without harming institutions. "The argument institutions give is that they don't want their investment strategy essentially broadcast by the SEC disclosure," he says. "The primary issue of importance to issuers is the ability to identify those institutions or individuals who own shares of the company to be able to determine who they are for purposes of engagement with them, to be able to identify who they are with respect to various corporate actions that the company might be proposing, and be able to make a determination about whether they have shareholders within their base who happen to be hostile to the company and to the management or might potentially become hostile."

He cites the example of a midsized S&P 400 company that may have received a negative recommendation from Glass Lewis on Say-on-Pay. "You need to be able to make a determination about who actually holds your shares," he says. "You need to be able to identify who your shareholder base is, what that community of ownership looks like, and determine how best to reach out to those owners and discuss with them your pay decisions vis-a-vis the recommendations from the proxy advisory firm. All that you have to go on is a 13F filing that is essentially out-of-date. If you pull it off-line, you get one that is basically 45 days old. In that period of time, the nature of your shareholder base can have shifted considerably and your ability to reach out appropriately and identify the right individuals is pushed back. That's a scenario where the ability to have current information on your shareholders would be helpful."

Douglas R. Wilburne, CFA, NIRI chairman and vice president of investor relations, Textron, agrees. "Filing ownership positions 45 days after the fact is very anachronistic and makes it very difficult for companies to manage that part of their responsibilities relative to share price," he says. "Issuers should have access to more real-time information to understand both who's buying and selling the company's shares and why."

SEC staff members point out that more frequent reporting on Form 13F would require an act of Congress. They add that the Commission can bring administrative cease-and-desist proceedings and require the payment of civil money penalties for violations of section 13(f) of the Securities Exchange Act of 1934 and rule 13f-1 thereunder. *See e.g., In the Matter of Quattro Global Capital, LLC,* Securities Exchange Act Release No. 56252 (Aug. 15, 2007).

Technology Allows Faster 13D Filings

Current SEC requirements require a Schedule 13D to be filed by any person or group of persons that becomes a 5 percent holder within 10 days after crossing the 5 percent threshold. Based on technology improvements over the last several decades and the speed at which information now flows, NIRI sees no reason for such a delay in reporting this material shareholder ownership information and proposes reducing the reporting requirement to 5 days from the current 10 days.

"That's completely realistic and achievable," notes Wilburne. "With today's

Pssst...Can We Keep This Hush Hush?

Between January 2008 and December 2009, the Securities and Exchange Commission received about 400 requests for confidentiality in 13F reporting. The NIRI proposal touches on the often contentious topic, specifying that confidential reporting requests should be permitted a reporting delay of no more than 60 days.

When is confidential treatment available? Section 13(f)(3) of the Securities Exchange Act states that the Commission shall not disclose Form 13F information that identifies securities held by a natural person, an estate, or a personal trust (excluding business trusts or investment companies).

Section 13(f)(3) also states that the Commission may prevent or delay public disclosure of Form 13F information for public interest reasons or the protection of investors. This must be done in accordance with the Freedom of Information Act.

Such requests typically relate to an open risk arbitrage position or when a manager is actively in the process of implementing a program of buying or selling a particular security.

SEC staff members report that policies and procedures for reviewing requests for confidential treatment have been improved, consistent with the recommendations in the Office of Inspector General's September 27, 2010 audit report.

More information is available on the SEC website at www.sec.gov/divisions/investment/13ffaq.htm.

technology, there's no reason why that can't happen, although professional investment firms would probably resist the change because they would rather not reveal their active strategies and tactics."

Section 929R of the Dodd-Frank Act gives the SEC the authority to shorten the reporting deadline for 13Ds. An SEC rule proposal issued March 17, 2011 (http://www.sec.gov/rules/proposed/2011/34-64087fr.pdf) announced that the SEC staff is engaged in a project "to develop proposals to modernize reporting under Exchange Act Sections 13(d) and 13(g)." SEC staff members report they have no further comment beyond that.

Richard Swanson, partner, Arnold & Porter, LLP, explains how institutional investors occasionally take advantage of current 13D requirements. "If you are an active investor who crosses 5 percent, the 13D reporting rules give you 10 days before you have to file. If you're taking a more passive investment position, you have a longer period of time to report under 13G. Some money managers will use that 10-day period to acquire additional shares, without a doubt. That's not a new tactic though. It's been going on since the 1970s." In Europe, he adds, the thresholds for both the percentage and the time period are lower.

Swanson shares an example of how activists can work the system, surprising public companies with secret shares. "Suppose your company has an activist investor with 2 percent. The investor buys up to 4.5 percent, 0.5 percent shy of that 13D filing level. He puts in a request for confidential treatment on a 13F, which again is just a broad-based filing disclosing all of your investment positions in common stock. Meanwhile, he is buying in the market while the SEC acts upon that confidential treatment request."

Although possible, the situation doesn't often occur, Swanson insists. "The reason why it's not happening all that commonly is you have to have a good faith basis to make the claim for confidential treatment. In the past, when they got too many confidential treatment requests under 13F, the SEC put out guidance saying, 'Hey guys, you have to remember the requirements and you have to be prepared to meet them when you make these requests.' The SEC hasn't made any noises along those lines for some time."

Disclosing Short Sales

The NIRI Board has also adopted an advocacy position stating that public companies should expect the same level of disclosure from all institutional investors (investment funds, hedge funds, activists, etc.) maintaining a short position in their stocks as are required of the funds that are long investors of their stocks. Investment managers are currently required to publicly file periodic reports disclosing only their long-equity positions—not their short positions.

"Dodd-Frank legislation calls for an evaluation of short-sale reporting," Morgan says. "We believe short-sale reporting should be publicly available in the same manner as long-position reporting. Long- and short-disclosure requirements should be the same for all institutional asset managers, including hedge funds."

SEC staff explains that the Commission has worked with several self-regulatory organizations (SROs) to increase substantially the public availability of short-sale related information. They cite, for example, the daily publication by the SROs of short-sale volume information, disclosure by the SROs of short-sale transaction information, and twice-monthly disclosure by the Commission of fails-to-deliver data, available at http://www.sec.gov/foia/docs/failsdata.htm. More

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Laurel Hill Advisory Group

recently, the Commission, on May 4, 2011, requested public comment on short-sale position and transaction disclosure as part of a study mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act. Visit http://www..sec.gov/rules/other/2011/34-64383.pdf for more information.

"A reporting regime should be set up in a way that does not impinge on the efficiency of the market," Wilburne says. "Companies are at a loss to be able to react to investment sentiments that are being expressed by the short in their shares when they don't really have information regarding who is shorting their shares and what their motivations might be. Companies would like to be able to understand that—particularly if misinformation is the basis for short selling—so they can correct it. In the cases where it's a judgment and they disagree with the judgment, companies might be able to take appropriate actions to manage the stock's value."

Companies also want to be able to assess voting power, a picture that is often clouded by short sales, Byrd explains. "13F and 13G filings are usually a static picture of ownership. You're never going to get a daily filing where you can drill down and see where everybody is, but issuers would like the ability to make determinations about the voting shares in terms of voting power. Because shares can be short sold, institutional investors might have 500,000 shares but they may be actually holding 5,000 shares. To know that would be very important to issuers."

Wilburne believes increased short-selling disclosure will aid companies in their market analysis. "It would help to understand motivations and to be sure that the information in the marketplace reflects reality the way the company sees it," he says. "We could better understand the dynamics of both the buy- and sell-side equation—why people buy and why people sell and why people short the stock."

Why investors buy is a critical factor for issuers, Byrd emphasizes. "Are investors looking for a short-term arbitrage opportunity based on projected news that may come out about earnings? Are they expecting an announcement on a takeover or corporate action and they're really only in the stock for the next week or two? Are they long-term holders with a history of shareholder activism either as a governance advocate seeking changes in classification of the board or independence of the directors? Are they long-term value investors who will consider performance and perhaps press for changes in strategy?

"With this information, companies can start to make determinations about who is in their shareholder base and why," Byrd concludes. "If you don't know the whom, the why is more than elusive—it's illusionary." IRU

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NIRI Adopts Revised Advocacy Platform

One of the four primary mission areas of the National Investor Relations Institute (NIRI) is advocacy regarding regulatory initiatives impacting the investor relations profession. This important function aggregates the opinions of more than 3,500 NIRI members, representing $5.4 trillion in combined public company market capitalization, bringing the IRO's voice to the regulatory table in Washington D.C. This key member benefit is particularly critical in today's rapidly changing regulatory atmosphere.

The Advocacy Committee of the NIRI Board of Directors is charged with identifying emerging issues that will require NIRI advocacy and determining the appropriate advocacy approach. In keeping with this mission, the NIRI Board adopted a revised advocacy agenda that will advance the investor relations profession and ultimately benefit all public companies.

The five key platform tenets are:

1. NIRI supports equity ownership disclosure by all institutional investors (mutual funds, hedge funds, activist investors, etc.) including:

- Long equity positions
- Short equity positions
- Derivative positions

2. NIRI supports a comprehensive evaluation of the current shareholder voting and communications system in order to modernize the corporate governance processes used by public company shareholders.

3. NIRI supports increased transparency and regulatory oversight of proxy advisory services and the processes used by these firms in generating voting recommendations and making voting decisions.

4. NIRI supports a comprehensive evaluation of market stabilizing systems and processes used during times of extreme volatility, including some form of short-selling circuit breakers.

5. NIRI supports initiatives to strengthen the initial public offering (IPO) market in the United States.

More information and background is available on the NIRI website at www.niri.org/reformissues.