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Study Disputes Filing Advantage for Activists

By [DAVID BENOIT](#)

A new study concludes that activist investors tend to build big positions quickly and typically don't take advantage of a 10-day reporting window to load up on extra shares.

The study, authored by noted shareholder-rights supporter Lucian A. Bebchuk of Harvard Law School and other academics, reviewed investor behavior around a rule that gives activist investors 10 days to make a public filing after they build a position of more than 5% with plans to influence company management.

The new research shows that heavy buying is generally concentrated on the day the 5% threshold is crossed or the day after—not several days later. If an activist investor announces its position on the first day the position exceeds 5%, rather than waiting, the size of the stake actually tends to be slightly bigger than positions revealed at the end of the 10-day window.

The study comes amid a review by the Securities and Exchange Commission of a rule that lets activists take up to 10 days to reveal their positions over 5%.

Activist investors typically take stakes in companies and then press corporate leadership for change, from a management overhaul to a breakup or share buyback.

Opponents of the 10-day rule, including veteran deals lawyer Martin Lipton, say the window raises an issue of transparency for other investors, who could be buying and selling shares without realizing that an activist is lurking.

The rule, adopted 45 years ago, was conceived when filings were a more-cumbersome process, they say. Amid fast-paced trading and modern filing technology, 10 days aren't necessary, they say.

Activists say shrinking the 10-day reporting window would take away some incentive for investors to build large stakes by forcing them to share ideas sooner. The emergence of any well-known activist in a stock often boosts shares, at least in the short term, which could make it more expensive for activists to keep buying after disclosing their stake.

"It is far from clear that reducing the disclosure window...would reduce the frequency or size of blocks of stock significantly above 5%," wrote Mr. Bebchuk and his co-authors, Alon Brav of Duke University and Robert J. Jackson Jr. and Wei Jiang, both of Columbia University.

Mr. Lipton, in an interview, said "Lucian is kind of stuck in a time warp where he decided that shareholder rights were paramount to the rights of all of the other stakeholders in a business corporation and that it is good for America."

He added "The fact that [the window is] available to activists affects every company, not just the ones the activists attack."

Messrs. Bebchuk and Lipton have often sparred publicly, but both say they like each other. "What's doubly unfortunate is that he's so bright and so well liked that his erroneous views are accepted," Mr. Lipton said of Mr. Bebchuk.

The study looked at a set of 13D filings made between 1994 and 2007. These filings tell the public an investor has taken a stake above 5% in a company and could agitate for change. An investor who instead intends to be "passive" can file a 13G and take more time to do so.

The academics reviewed all 13D filings they say were filed by "activist hedge funds," or around 2,000 filings. While more than 45% of all filings were made eight to 10 days after triggering the filing requirement, the stake revealed in the filings didn't grow on average as time passed. The average position reported in all filings was an 8.8% stake, the same stake that was reported on average after eight to 10 days. The average stake reported early was actually a slightly larger at 9.1%.

Write to David Benoit at david.benoit@dowjones.com

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