

# Why Give Hedge Fund Raiders 10 Days to Disclose?

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Bill Ackman's hedge fund, Pershing Square Capital Management LP, acquired 9.7 percent of Allergan Inc. in less than two months without having to [disclose](#) this fact until yesterday. Is there something wrong with that?

Not according to the rules, which date to the 1960s. But it's also true that the disclosure regulations in this area are a mess -- a throwback to the days before electronic filing or widespread use of overnight mail. They say outside investors must disclose their stakes publicly within 10 days after reaching the 5 percent mark, an amount of stock that regulators have deemed to be important.

Why 5 percent and not 10 percent? Well, it used to be 10 percent, until Congress [lowered](#) it to 5 percent in 1970. The line is arbitrary. It could have been set at 4 percent or 11 percent or 22 percent. But people seem to like round numbers that are divisible by five, and lawmakers settled on 5 percent.

It's important to note that the companies that might be takeover targets aren't the only intended recipients of this disclosure. Existing shareholders, as well as potential ones, at some point have a right to know if a company is about to be the target of a takeover attempt. That's why the rules say the 5 percent stock-accumulation disclosure must be made in a publicly available [filing](#) with the Securities and Exchange Commission, as opposed to, say, a private letter to the company's board. Yet the disclosure need not be immediate, even though today's technology makes immediate disclosure easy.

So here's the rub: If the information is truly material, and the investing public has a right to know what a large blockholder's intentions are, why make the public wait 10 days to find out? Either it's important for the public to have the information or it isn't. If it's important, the disclosure deadline should be the next day, at the latest. And if it isn't important, why require the disclosure at all? The rules lack logical consistency.

I'm not sure the investing public should have a right to know within 10 days that someone like Ackman has acquired a 5 percent stake in a given public company. This may interfere with Ackman's right to trade based on information of his own creation -- namely, what Ackman's own [intentions](#) are. To be sure, in this instance, the situation is a bit more complex than usual because Ackman is [teaming up](#) with another drug company, Valeant Pharmaceuticals International Inc., in a hostile bid for Allergan. But the broader point remains: The disclosure rules don't make sense.

And if the purpose of the delay is to give a large stockholder more opportunity to accumulate shares without alerting the target company, then why have a 5 percent rule at all?

This is a subject that Harvard Law School professor [Lucian Bebchuk](#) and famed corporate lawyer [Marty Lipton](#) have been [arguing](#) about for years in various open forums. Lipton advocates speeding up the disclosure deadlines, but possibly not for the most noble of reasons. He wants companies to have the ability to fend off activists with poison pills and other devices that shareholders detest because they hurt stock prices and protect ineffective managers and directors.

Bebchuk has [argued](#) that the disclosure rules for large stockholders don't need to be changed. In his view, outside blockholders can be a useful check on entrenched, inefficient management and shouldn't be discouraged from acquiring stakes.

So how about this for an idea: Raise the threshold to 10 percent, but require disclosure within 24 hours.

All sorts of nefarious activity can occur when information is deemed to be material but disclosure is needlessly delayed. A case in point: the stock-options backdating scandal that broke eight years ago. What made the backdating possible was that, before 2002, companies sometimes had more than a year to disclose option grants to officers and directors in their public filings. SEC rules said the information was important enough to merit disclosure. Yet the delay is what made it possible for executives to enrich themselves unjustly, by retroactively timing their option grants to coincide with low points in their companies' stock prices. The practice went largely undetected for years; the executives had figured out how to rig the system, but the regulators hadn't.

Likewise, we have no idea what kind of monkey business might ensue because the securities rules give large blockholders 10 days between the time of the disclosure event and the disclosure filing. Time lags such as this don't make sense anymore.