
SEC Proposes Amendments to Schedules 13D and 13G Beneficial Ownership Reporting Rules

On February 10, 2022, the Securities and Exchange Commission (the “SEC”) proposed amendments to its rules governing beneficial ownership reporting that would (1) accelerate the filing deadlines for beneficial ownership reports on Schedule 13D and Schedule 13G, (2) expand beneficial ownership reporting obligations to include the acquisition of certain derivative securities, and (3) clarify the standards for formation of a “group” that would be subject to beneficial ownership reporting obligations.¹ The proposed amendments specifically aim to provide more timely information to meet the needs of the current financial markets and reduce information asymmetries.

I. Background

Pursuant to Sections 13(d) and 13(g) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”), an investor who beneficially owns more than 5% of a covered class of equity securities registered under Section 12 of the Exchange Act (a “covered class”) must publicly report such beneficial ownership by filing either a Schedule 13D or a Schedule 13G with the SEC. Exempt Investors,² Qualified Institutional Investors³ (“QIIs”), and Passive Investors⁴ are eligible to file the shorter Schedule 13G in lieu of the longer-form Schedule 13D. The current deadline for filing an initial Schedule 13D is 10 days after the date the investor’s beneficial ownership first exceeds 5% of the covered class. The current deadlines for filing an initial Schedule 13G are 45 days after the end of the year in which the investor’s beneficial ownership first exceeds 5% of the covered class for a Schedule 13G filer that is a QII or Exempt Investor, and 10 days after the date the investor’s beneficial ownership first exceeds 5% of the covered class for a Schedule 13G filer that is a Passive Investor. These Schedule 13D and Schedule 13G deadlines have not been changed since 1968 and 1977, respectively, when they were originally adopted.

¹ See Securities and Exchange Commission Release Nos. 33-11030; 34-94211 “Modernization of Beneficial Ownership Reporting” (<https://www.sec.gov/rules/proposed/2022/33-11030.pdf>). Unless otherwise specified, quoted statements in this memorandum are taken from this release.

² “Exempt Investors” means persons holding beneficial ownership of more than 5% of a covered class at the end of the calendar year, but who have not made an acquisition subject to Section 13(d). See Exchange Act Section 13(d)(6); Exchange Act Rule 13d-1(d).

³ “Qualified Institutional Investors” means regulated institutions of a category listed in Rule 13d-1(b) who acquired and hold the securities in the ordinary course of business and “not with the purpose nor with the effect of changing or influencing the control of the issuer, nor in connection with or as a participant in any transaction having such purpose or effect.” See Exchange Act Rule 13d-1(b).

⁴ “Passive Investors” means investors holding beneficial ownership of more than 5% but less than 20% of the relevant class and did not acquire and do not hold “the securities with any purpose, or with the effect, of changing or influencing the control of the issuer, or in connection with or as a participant in any transaction having that purpose or effect.” See Exchange Act Rule 13d-1(c).

II. Proposed Amendments

a. Schedule 13D filing deadlines

The proposed amendments would shorten the deadline under Rule 13d-1 for filing an initial Schedule 13D from 10 days to 5 (calendar) days⁵ after the date the investor's beneficial ownership first exceeds 5% of the covered class and would also require that amendments to a Schedule 13D be filed within one business day after the triggering event, a change from the existing requirement of filing "promptly" after the triggering event.

b. Schedule 13G filing deadlines

The proposed amendments would shorten the initial filing deadline for Schedule 13G filers who are QIIs or Exempt Investors from 45 days after year-end to five *business* days after the end of the month in which the investor's beneficial ownership first exceeds 5% of the covered class. For Schedule 13G filers who are Passive Investors, the proposed amendments would shorten the initial filing deadline from 10 days to five (calendar) days after the date the investor's beneficial ownership first exceeds 5% of the covered class.

Under the proposed amendments, any Schedule 13G filer would be required to file an amendment to its Schedule 13G in the event of a "material" change in the information previously reported on Schedule 13G, as opposed to the current "any change" standard, and any such amendment would be required to be filed within five business days after the end of the month in which the material change occurred, compared to the previous 45-days-after-year-end deadline. Any QII or Passive Investor would also be required to file an amendment to its Schedule 13G upon exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership of a covered class, in which case (1) a QII would be required to file the amendment within five days after the triggering event, and (2) a Passive Investor would be required to file the amendment within one business day after the triggering event.

The proposed amendments would extend the filing "cut-off" times for Schedules 13D and 13G from 5:30 p.m. to 10:00 p.m. (Eastern time) to address the administrative challenges associated with the shortened filing deadlines.

c. Derivative securities

The proposed amendments, specifically the proposed changes to Rule 13d-3(e) under the Exchange Act, would deem holders of cash-settled derivative securities, other than security-based swaps, to be beneficial owners of the equity securities used as a reference security if the derivatives are held "with the purpose or effect of changing or influencing the control of the issuer" of the reference securities, "or in connection with or as a participant in any transaction having such purpose or effect."

Additionally, the proposed amendments would revise Item 6 of Schedule 13D to clarify that beneficial owners must disclose interests in "all derivative securities" that use the issuer's equity security as a reference security, including derivatives not issued by the issuer of the reference security.

d. Group formation and related exemptions

The proposed amendments would broaden the definition of "group" for purposes of Sections 13(d) and 13(g) by clarifying that parties do not need to have an express agreement to act together in order to be a "group" as long as they act as a group for purposes of acquiring, holding or disposing securities. The SEC is proposing to amend Rule 13d-5 to provide that a group will be deemed to have been formed if (1) a person shares information about their upcoming Schedule 13D filing, to the extent that information is not yet public and is "communicated with the purpose

⁵ As is the case under the current rules, if the last day to file on time falls on a federal holiday, a Saturday or a Sunday, then the filing may be made on the next succeeding business day.

of causing others to make purchases,” and (2) another person subsequently purchases the issuer’s securities based on that information. The SEC noted that the proposed rule “would serve as an additional, not exclusive, means of establishing that the tipper and tippee formed a group that made an acquisition subject to Section 13(d)” and “would not supersede or replace the existing regulatory provisions under which the tipper-tippee could become subject to Section 13(d).”

The proposed amendments also provide two new exemptions from Sections 13(d)(3) and 13(g)(3) under the Exchange Act. Under the first exemption, two or more persons would not be deemed a “group” solely because they take “concerted actions” with respect to the issuer or its securities, including engaging with each other or the issuer, so long as they independently determined to take such actions, they are not directly or indirectly obligated to do so, and certain other conditions are met. The second exemption would provide that two or more persons would not be deemed a “group” solely by entering into an agreement governing the terms of a derivative security that is “a bona fide purchase and sale agreement entered into in the ordinary course of business.”

III. Next Steps

If adopted, the proposed amendments would shorten significantly the timeframes for filing Schedules 13D and 13G and amendments thereto and would also expand the universe of those who must file. The public comment period will remain open until April 11, 2022.

* * *

If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Geoffrey E. Liebmann (partner) at 212.701.3313 or gliebmann@cahill.com; or Catherine Schaefer (associate) at 212.701.3101 or cschaefer@cahill.com, or email publications@cahill.com.

This memorandum is for general information purposes only and is not intended to advertise our services, solicit clients or represent our legal advice.