

Client Alert

May 4, 2023

SEC Reopens Comment Period for Proposed Updates to Schedule 13D and 13G Reporting

On April 28, 2023, the Securities and Exchange Commission (the “SEC”) announced that it has reopened the public comment period for its proposed amendments to the rules governing beneficial ownership reporting on Schedules 13D and 13G. The public comment period will remain open until June 27, 2023.

In its proposing release issued in February 2022 and entitled “Modernization of Beneficial Ownership Reporting,” the SEC proposed to amend certain rules to modernize the beneficial ownership reporting regime, most notably by shortening the deadline for filing an initial Schedule 13D from the existing ten calendar days after the date one crosses the 5% beneficial ownership threshold to five calendar days after crossing the threshold and compressing the deadline for filing Schedule 13D amendments. The proposed filing deadlines as well as other amendments clarifying the operation of Schedule 13D reporting applied to ownership of derivative securities and group formation are summarized on [Annex A](#) below.

The reopening of the comment period comes after a full year of near silence by the SEC on the status of the rule proposal following the closing of the initial comment period in April 2022. After reviewing comments submitted during the initial comment period, the staff of the SEC’s Division of Economic and Risk Analysis (the “Staff”) prepared a [memorandum](#) containing supplemental data and analysis related to the potential economic effects of the proposed rules.

The SEC’s decision to prepare the memorandum and reopen the comment period was informed by suggestions from commenters that the rule proposal could be enhanced by including (a) existing studies on activist campaigns and quantification of the potential effects of the proposed amendments on activist campaigns, and (b) a quantitative analysis of the potential harms to selling shareholders (*i.e.*, shareholders selling to opportunistic traders who are not the 13D filer) during the current ten-day initial Schedule 13D filing window. The memorandum, which focuses on

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these two areas, was added to the public comment file in order to allow interested parties to further evaluate the rule proposal.

Categories of Initial Schedules 13D Examined

The Staff analyzed two categories of initial Schedules 13D filed from 2011 to 2021 – (i) filings less likely to relate to activist campaigns (*i.e.*, filings involving the acquisition of shares relating to certain corporate actions and other off-market transactions), or “corporate action filings,” and (ii) filings more likely to be characterized as announcements of activist campaigns (*i.e.*, filings that report a transaction history in tabular format that are typically associated with open-market share accumulation programs and are more likely to disclose the initiation of an activist campaign), or “non-corporate action filings.”

Key Takeaways from Staff’s Analysis

“Corporate Action Filings” (13Ds Less Likely to be Associated with Activist Campaigns)

Impact on Filer Activities

- These filings typically report one or two transactions that involve off-market transfers of beneficial ownership that rarely occur following the fifth day after the filer crosses the 5% threshold. The terms of the reported transactions are also likely agreed upon in advance.
- The Staff therefore believes changing the filing deadline to five days after crossing the 5% threshold “would not significantly impact the activities of these filers,” although it could increase their compliance costs.

Impact on Selling Shareholders

- The vast majority of the stock price reaction to these filings occurred close to the day the filers crossed the 5% threshold.
- Therefore, the limited market reaction between the proposed five-day deadline and the actual filing date “implies that little market-moving information is revealed during this period” and therefore the benefits of a shortened filing window may be limited for these filings if the goal is to reduce information asymmetry for shareholders who sell during this period.

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“Non-Corporate Action Filings” (13Ds More Likely to be Associated with Activist Campaigns)

Impact on Filer Activities

- Approximately two-thirds of these filers completed the acquisition of their reported stake by the proposed five-day deadline while the remaining one-third of filers continued their acquisitions after the proposed five-day deadline.
- Furthermore, 92% of filers completed acquiring 90% of their reported stake by the proposed five-day deadline while 98% of filers completed acquiring 75% of their reported stake by the proposed five-day deadline.
- The Staff therefore believes shortening the filing deadline “likely would not impact such accumulation patterns, even if these filers currently file the Schedule 13D after the proposed deadline.”
- However, the Staff acknowledged that it could not “predict how, if at all, a particular filer may change its behavior in response to a shortened filing deadline” (e.g., how, if at all, the shortened deadline would impact an activist’s decision to pursue campaigns or timing its acquisition programs).

Impact on Selling Shareholders

- In assessing the potential harms under the current regime to shareholders selling to opportunistic traders (excluding the filer) who become aware of a potential activist campaign before the filing of the Schedule 13D, the Staff analyzed abnormal trading volumes in the days prior to a filing.
- To quantify the potential harms to selling shareholders during the ten-day filing window, the Staff also analyzed “abnormal returns,” representing the amount of appreciation foregone by selling shareholders who sell to opportunistic traders prior to a filing.
- Analyzing abnormal returns and abnormal volume between the fifth day after the 5% threshold is triggered and the filing date, the Staff found that both abnormal returns (representing the degree of wealth transferred by selling shareholders to opportunistic traders) and abnormal volume (representing the potential number of these transfers) are elevated and are even

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higher when the filer is still building a significant portion of its reported stake after day five.

- Therefore, the Staff believes these potential harms to selling shareholders caused by the “information asymmetry stemming from the current initial Schedule 13D filing deadline” may be prevented or reduced by a shortened filing window.

While data rich and informative, it is difficult to assess whether the memorandum will meaningfully inform the views of interested parties who have previously submitted comments or are evaluating the rule proposal for the first time. The numerous assumptions made by the Staff in building its quantitative analysis as well as widespread caveats, including the Staff’s own admission that “we may be somewhat over-inclusive in our application of the term ‘activist campaign’” in our view renders this more of an academic exercise that is unlikely to change the dynamics surrounding this hotly debated and polarizing rule proposal.

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Annex A**Summary of SEC Rule Proposal to Modernize
Beneficial Ownership Reporting**

- Shortens the deadline for filing an initial Schedule 13D from the existing ten calendar days after the date that one crosses 5% beneficial ownership to five calendar days after crossing 5%;
- Shortens the time period for filing any required amendments to a Schedule 13D from “promptly” (typically two business days) after the date on which a “material” change occurs to one business day following the date of any such “material” change;
- Shortens the deadline for converting a Schedule 13G to a Schedule 13D due to a change in intentions, or otherwise, from the existing ten calendar to five calendar days;
- Allows Schedules 13D and 13G to be filed up to 10:00 pm Eastern Time on a given business day, as opposed to the current 5:30 pm Eastern Time filing cut-off time for EDGAR;
- Adds a new paragraph to the definition of “beneficial ownership” to deem holders of certain cash-settled derivative securities as beneficial owners of the reference covered class as if they held such securities directly (such application would be limited to those persons who hold cash-settled derivatives in the context of changing or influencing control of the issuer of the reference security). By contrast, security-based swaps would not be included among the derivative securities covered by proposed Rule 13d-3(e). In a separate rulemaking, the SEC has proposed to require disclosure of security-based swap positions reporting on proposed Schedule 10B of, among other things: (1) certain large positions in security-based swaps; (2) positions in any security or loan underlying the security-based swap position; and (3) any other instrument relating to the underlying security or loan or group or index of securities or loans. The SEC believes disclosures with respect to cash-settled security-based swaps required under proposed Rule 10B-1, if adopted, would provide sufficient information regarding holdings of security-based swaps such that additional regulation under Regulation 13D-G would be unnecessarily duplicative;

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- Adds a new provision that would affirm that if a person, in advance of filing a Schedule 13D, discloses to any other person that such filing will be made and such other person acquires securities in the covered class for which the Schedule 13D will be filed, then those persons are deemed to have formed a group within the meaning of Section 13(d)(3);
- Sets forth the circumstances under which two or more persons may communicate and consult with one another and engage with an issuer without concern that they will be subject to regulation as a group;
- Sets forth the circumstances under which two or more persons may enter into an agreement governing a derivative security in the ordinary course of business without concern that they will become subject to regulation as a group; and
- Amends Item 6 to Schedule 13D to clarify that a person is required to disclose interests in all derivative securities that use the issuer's equity security as a reference security and that the derivative security need not have originated with the issuer in order for the disclosure obligation to arise – Item 6 would explicitly state that use of cash-settled security-based swaps and other derivatives settled exclusively in cash require disclosure.

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