Client Alert

October 2023

SEC Adopts Updates to Schedule 13D and 13G Reporting

On October 10, 2023, the Securities and Exchange Commission (the "SEC") announced that it has adopted amendments to the rules governing beneficial ownership reporting on Schedules 13D and 13G.

In its adopting release entitled "Modernization of Beneficial Ownership Reporting," the SEC has amended certain rules regarding 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 business days after crossing the threshold and clarifying that the deadline for filing Schedule 13D amendments will be within two business days after the triggering event.

We are pleased that the new rule amendments set forth more reasonable filing deadlines than those initially proposed by the SEC in February 2022 and do not codify certain rules governing group activity or when to deem certain holders of cash-settled derivative securities as beneficial owners of the reference security, as originally proposed. For example, the originally proposed rules, if adopted, would have (1) required an initial Schedule 13D to be filed within five calendar days after crossing the 5% beneficial ownership threshold and Schedule 13D amendments to be filed within one business day of a triggering event; and (2) codified circumstances under which two or more persons would be deemed to have formed a "group" within the meaning of Section 13(d)(3) of the Exchange Act.

Below is a brief summary of the key takeaways from the new rules.

New filing deadlines

- The filing deadline for an initial Schedule 13D will be **five business days** (from ten calendar days) after crossing 5% or losing eligibility to report on Schedule 13G, such as following a change in investment intent or crossing 20%;
- The filing deadline for any required amendments to a Schedule 13D will be **two business days** after the date on which a "material" change occurs;

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- The filing deadline for initial Schedule 13G filings for Qualified Institutional Investors (QIIs) and certain exempt investors will be **45 days after the end of the calendar quarter** in which the QII or exempt investor beneficially owns more than 5%, computed as of the end of that quarter;
    - The filing deadline for initial Schedule 13G filings for QIIs will be accelerated to **five business days** after the end of the first month in which the QII's beneficial ownership exceeds 10%, computed as of the end of that month;
    - For QIIs and certain exempt investors, amendments for any "material" change subsequent to the original Schedule 13G filing will be due **45 days after the end of the calendar quarter** during which such change occurs;
    - For QIIs, amendments due to crossing 10% or any deviation thereafter by more than 5% will be due **five business days** after the end of the month during which such change occurs;
- The filing deadline for initial Schedule 13G filings for passive investors who do not qualify as a QII or exempt investor will be **five business days after crossing 5%** (from ten days);
    - For passive investors, amendments for any "material" change subsequent to the original Schedule 13G filing will be due **45 days after the end of the calendar quarter** during which such change occurs;
    - For passive investors, amendments due to crossing 10% or any deviation therefrom by more than 5% will be due **two business days** thereafter;
- Schedules 13D and 13G can 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.

Other Amendments

- Item 6 to Schedule 13D has been amended to clarify that a filer is required to disclose interests in all security-based swaps or any other derivative securities that use the issuer's equity security as a reference security; and
- Schedules 13D and 13G filings will be required to be made using a structured, machine-readable data language.

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Guidance on Cash-Settled Derivative Securities

The SEC has not adopted substantive amendments relating to cash-settled derivative securities. Instead, the SEC issued guidance on circumstances in which a holder of a cash-settled derivative security may be deemed the beneficial owner of the reference securities, which the SEC notes is similar to the guidance it has previously issued with respect to security-based swaps, including cash-settled swaps. Specifically, the SEC notes that its existing regulatory regime may require the reporting of beneficial ownership in cases in which a cash-settled derivative security or security-based swap:

(1) confers voting and/or investment power over the reference security through a contractual term of the derivative security or otherwise;

(2) is used with the purpose or effect of divesting or preventing the vesting of beneficial ownership as part of a plan or scheme to evade the reporting requirements; or

(3) grants a right to acquire an equity security within 60 days or acquires the right to acquire beneficial ownership of the equity security with the purpose or effect of changing or influencing the control of the issuer of the security for which the right is exercisable, or in connection with or as a participant in any transaction having such purpose or effect, regardless of when the right is exercisable.

Guidance on Group Formation

Rather than adopt specific rules regarding when a group is formed, the SEC instead issued guidance in the form of a Q&A regarding the appropriate legal standard for determining whether a group is formed. The SEC's Q&A is attached hereto as Annex A.

As an initial matter, the SEC acknowledges that neither the statute nor its rules provide a definition for a "group". However, in the SEC's guidance, the SEC notes that whether two or more persons have formed a group depends on relevant facts and circumstances as to whether they acted together for the purpose of "acquiring," "holding," or "disposing of" securities of an issuer. An express agreement is not required and a group can be established by activities that fall far short of an express agreement. The SEC notes that evidence must show, at a minimum, an informal arrangement or coordination in furtherance of a common purpose to acquire, hold or dispose of securities of an issuer.

Some key takeaways from the SEC's Q&A are as follows:

- a discussion, whether held in private, such as a meeting between two parties, or in a public forum, such as a conference that involves an independent and free exchange of ideas and views among shareholders, alone and without an intent to engage in concerted

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actions or other agreement with respect to the acquisition, holding, or disposition of securities, would not be sufficient to constitute group activity.

- engaging in discussions with an issuer's management with other shareholders would not rise to group activity, even if the shareholders make joint recommendations regarding the structure and composition of the issuer's board, so long as the discussion does not involve an attempt to convince the board to take specific actions or bind the board to take action.

- a group is not formed if shareholders jointly submit a non-binding shareholder proposal to an issuer.

- a conversation, email, phone contact, or meetings between a shareholder and an activist investor that is seeking support for its proposals to an issuer's board or management, without more, would not constitute group activity.

- an announcement or a communication by a shareholder of the shareholder's intention to vote in favor of an unaffiliated activist investor's director nominees, without more, would not constitute group activity.

- information shared by the holder of a substantial block of shares that is or will be required to file a Schedule 13D with the purpose of causing others to make purchases in the same stock and the purchases were made as a direct result of such large holder's information, could raise the possibility that all of the stockholders are acting as a group.

Compliance with the updated Schedule 13G filing deadlines will be required beginning September 30, 2024. Compliance with the structured data requirements for Schedules 13D and 13G will be required beginning December 18, 2024. Compliance with the other rule amendments is expected to be required at some point during January 2024.

Please contact the Olshan attorney with whom you regularly work or one of the attorneys below if you would like to discuss further or have questions.

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Annex A

SEC Q&A on Group Formation

Question: Is a group formed when two or more shareholders communicate with each other regarding an issuer or its securities (including discussions that relate to improvement of the long-term performance of the issuer, changes in issuer practices, submissions or solicitations in support of a non-binding shareholder proposal, a joint engagement strategy (that is not control-related), or a "vote no" campaign against individual directors in uncontested elections) without taking any other actions?

Response: No. In our view, a discussion whether held in private, such as a meeting between two parties, or in a public forum, such as a conference that involves an independent and free exchange of ideas and views among shareholders, alone and without more, would not be sufficient to satisfy the "act as a . . . group" standard in Sections 13(d)(3) and 13(g)(3). Sections 13(d)(3) and 13(g)(3) were intended to prevent circumvention of the disclosures required by Schedules 13D and 13G, not to complicate shareholders' ability to independently and freely express their views and ideas to one another. The policy objectives ordinarily served by Schedule 13D or Schedule 13G filings would not be advanced by requiring disclosure that reports this or similar types of shareholder communications. Thus, an exchange of views and any other type of dialogue in oral or written form not involving an intent to engage in concerted actions or other agreement with respect to the acquisition, holding, or disposition of securities, standing alone, would not constitute an "act" undertaken for the purpose of "holding" securities of the issuer under Section 13(d)(3) or 13(g)(3).

Question: Is a group formed when two or more shareholders engage in discussions with an issuer's management, without taking any other actions?

Response: No. For the same reasons described above, we do not believe that two or more shareholders "act as a . . . group" for the purpose of "holding" a covered class within the meaning of those terms as they appear in Section 13(d)(3) or 13(g)(3) if they simply engage in a similar exchange of ideas and views, alone and without more, with an issuer's management.

Question: Is a group formed when shareholders jointly make recommendations to an issuer regarding the structure and composition of the issuer's board of directors where (1) no discussion of individual directors or board expansion occurs and (2) no commitments are made, or agreements or understandings are reached, among the shareholders regarding the potential withholding of their votes to approve, or voting

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against, management's director candidates if the issuer does not take steps to implement the shareholders' recommended actions?

Response: No. Where recommendations are made in the context of a discussion that does not involve an attempt to convince the board to take specific actions through a change in the existing board membership or bind the board to take action, we do not believe that the shareholders "act as a . . . group" for the purpose of "holding" securities of the covered class within the meaning of those terms as they appear in Sections 13(d)(3) or 13(g)(3). Rather, we view this engagement as the type of independent and free exchange of ideas between shareholders and issuers' management that does not implicate the policy concerns addressed by Section 13(d) or Section 13(g).

Question: Is a group formed if shareholders jointly submit a non-binding shareholder proposal to an issuer pursuant to Exchange Act Rule 14a-8 for presentation at a meeting of shareholders?

Response: No. The Rule 14a-8 shareholder proposal submission process is simply another means through which shareholders can express their views to an issuer's management and board and other shareholders. For purposes of group formation, we do not believe shareholders engaging in a free and independent exchange of thoughts about a potential shareholder proposal, jointly submitting, or jointly presenting, a non-binding proposal to an issuer in accordance with Rule 14a-8 (or other means) should be treated differently from, for example, shareholders jointly meeting with an issuer's management without other indicia of group formation. Accordingly, where the proposal is non-binding, we do not believe that the shareholders "act as a . . . group" for the purpose of "holding" securities of the covered class within the meaning of those terms as they appear in Section 13(d)(3) or 13(g)(3). Assuming that the joint conduct has been limited to the creation, submission, and/or presentation of a non-binding proposal,[1] those statutory provisions would not result in the shareholders being treated as a group, and the shareholders' beneficial ownership would not be aggregated for purposes of determining whether the five percent threshold under Section 13(d)(1) or 13(g)(1) had been crossed.

Question: Would a conversation, email, phone contact, or meetings between a shareholder and an activist investor that is seeking support for its proposals to an issuer's board or management, without more, such as

[1] The conclusion reflected in this example assumes the Rule 14a-8 or other non-binding shareholder proposal is submitted jointly and without "springing conditions" such as an arrangement, understanding, or agreement among the shareholders to vote against director candidates nominated by the issuer's management or other management proposals if the non-binding proposal is not included in the issuer's proxy statement or, if passed, not acted upon favorably by the issuer's board.

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consenting or committing to a course of action,[2] constitute such coordination as would result in the shareholder and activist being deemed to form a group?

Response: No. Communications such as the types described, alone and without more, would not be sufficient to satisfy the "act as a . . . group" standard in Sections 13(d)(3) and 13(g)(3) as they are merely the exchange of views among shareholders about the issuer. This view is consistent with the Commission's previous statement that a shareholder who is a passive recipient of proxy soliciting activities, without more, would not be deemed a member of a group with persons conducting the solicitation.[3] Activities that extend beyond these types of communications, which include joint or coordinated publication of soliciting materials with an activist investor might, however, be indicative of group formation, depending upon the facts and circumstances.

Question: Would an announcement or a communication by a shareholder of the shareholder's intention to vote in favor of an unaffiliated activist investor's director nominees, without more, constitute coordination sufficient to find that the shareholder and the activist investor formed a group?

Response: No. We do not view a shareholder's independently-determined act of exercising its voting rights, and any announcements or communications regarding its voting decision, without more, as indicia of group formation. This view is consistent with our general approach towards the exercise of the right of suffrage by a shareholder in other areas of the Federal securities laws.[4] Shareholders, whether institutional or otherwise, are thus not engaging in conduct at risk of being deemed to give rise to group formation as a result of simply independently announcing or advising others—including the issuer—how they intend to vote and the reasons why.

Question: If a beneficial owner of a substantial block of a covered class that is or will be required to file a Schedule 13D intentionally communicates to other market participants (including investors) that such a filing will be made (to the extent this information is not yet public) with the purpose of causing such persons to make purchases in the same

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[2] Examples of the type of consents or commitments given in furtherance of a common purpose to acquire, hold (inclusive of voting), or dispose of securities of an issuer could include the granting of irrevocable proxies or the execution of written consents or voting agreements that demonstrate that the parties had an arrangement to act in concert.

[3] *Amendments to Beneficial Ownership Reporting Requirements*, Release No. 34-39538 (Jan. 12, 1998) [63 FR 2854, 2858 (Jan. 16, 1998)].

[4] For example, public announcement of a voting intention qualifies for the exclusion from the definition of solicitation under Rule 14a-1(l)(2)(iv).

covered class, and one or more of the other market participants make purchases in the same covered class as a direct result of that communication, would the blockholder and any of those market participants that made purchases potentially become subject to regulation as a group?

Response: Yes. To the extent the information was shared by the blockholder with the purpose of causing others to make purchases in the same covered class and the purchases were made as a direct result of the blockholder's information, these activities raise the possibility that all of these beneficial owners are "act[ing] as" a "group for the purpose of acquiring" securities of the covered class within the meaning of Section 13(d)(3). Such purchases may implicate the need for public disclosure underlying Section 13(d)(3) and these purchases could potentially be deemed as having been undertaken by a "group" for the purpose of "acquiring" securities as specified under Section 13(d)(3).[5] Given that a Schedule 13D filing may affect the market for and the price of an issuer's securities, non-public information that a person will make a Schedule 13D filing in the near future can be material.[6] By privately sharing this material information in advance of the public filing deadline, the blockholder may incentivize the market participants who received the information to acquire shares before the filing is made.[7] Such arrangements also raise investor protection concerns regarding perceived unfairness and trust in markets.[8]

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[5] While each group member individually bears a reporting obligation arising under Rule 13d-1(k)(2), a tippee would not become a member of a group, and thus would not incur a reporting obligation, until it makes a purchase of securities of the same covered class in response to having been tipped even if the tippee already is a beneficial owner of that class

[6] *See* Alon Brav, Wei Jiang, Frank Partnoy, and Randall S. Thomas, *Hedge Fund Activism, Corporate Governance and Firm Performance*, 61 J. FIN. 1729 (2008) (finding on average an abnormal short-term return of 7% over the window before and after a Schedule 13D filing); Marco Brecht, Julian Franks, Jeremy Grant, and Hammes F. Wagner, *The Returns to Hedge Fund Activism: An International Study*, CENTER FOR ECONOMIC POLICY RESEARCH, Discussion Paper No. 10507 (Mar. 15, 2015).

[7] *See, e.g.*, Susan Pulliam, Juliet Chung, David Benoit, and Rob Barry, *Activist Investors Often Leak Their Plans to a Favored Few*, WALL ST. J. (Mar. 26, 2014), *available at* https://www.wsj.com/articles/SB1000142405270230488840457938125079147479 2 ("Activists, who push for broad changes at companies or try to move prices with their arguments, sometimes provide word of their campaigns to a favored few fellow investors days or weeks before they announce a big trade, which typically jolts the stock higher or lower.")

[8] For example, any near-term gains made by these other investors attributable to information about the impending filing may cause uninformed shareholders who sell at prices reflective of the *status quo* to question the efficacy of existing regulatory framework. Even though the demand to acquire shares in the covered class may increase as a direct result of the blockholder's communications, and in

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The final determination as to whether a group is formed between the blockholder and the other market participants will ultimately depend upon the facts and circumstances, including (1) whether the purpose of the blockholder's communication with the other market participants was to cause them to purchase the securities and (2) whether the market participants' purchases were made as a direct result of the information shared by the blockholder.

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turn increase the prices at which selling shareholders exit, such prices may be discounted in comparison to the price such shareholders would have realized had the information about the impending Schedule 13D filing been public. *See, e.g.* John C. Coffee, Jr. & Darius Palia, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance*, 41 J. CORP. L. 545, 596 (2016) (explaining that "the gains that activists make in trading on asymmetric information—before the Schedule 13D's filing—come at the expense of selling shareholders [and] represent[ ] another wealth transfer"). Consequently, this informational imbalance could, to the extent some perceive it to be unfair, diminish trust in markets. *See, e.g.*, Georgy Chabakauri et al., *Trading Ahead of Barbarians' Arrival at the Gate: Insider Trading on Non-Inside Information* (Colum. Bus. Sch. Rsch. Paper, Jan. 2022), *available at* https://ssrn.com/abstract=4018057 (finding a significant concurrence between purchases of stock by insiders of the issuer and purchases by an activist in the 60 days, and particularly in the last 10 days, preceding a Schedule 13D filing).

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