

SEC Accelerates Filing Deadlines for Beneficial Ownership Reports by 5% Shareholders, and Further Amends and Guides Reporting Standards

by Christopher L. Doerksen

On October 10, 2023, the Securities and Exchange Commission (“SEC”) approved amendments to the Regulation 13D-G reporting regime for persons who beneficially own more than 5% of a class of securities (“5% Owners”) that is registered under Section 12 of the Securities and Exchange Act of 1934, as amended (the “Exchange Act”). The amendments accelerate the deadlines by which 5% Owners must file initial reports and amendments on Schedule 13D or 13G, mandate the use of machine-readable language in those reports, and provide for additional amendments and guidance as discussed below.

About Regulation 13D-G

Regulation 13D-G requires 5% Owners of Section 12 registered securities to file beneficial ownership reports with the SEC on Schedule 13D or Schedule 13G. Section 12 registered securities include all securities that are listed on Nasdaq, the New York Stock Exchange, NYSE American or another U.S. national securities exchange, as well as many other classes of securities for which issuers file ongoing reports with the SEC. The reporting obligations apply to 5% Owners wherever located, including 5% Owners that reside overseas, and 5% Owners of foreign private issuers whose securities are registered under Section 12.

When determining whether a person is a 5% Owner, an investor must generally include all securities for which the person has either sole or shared voting power or sole or shared investment power, as well as all securities for which the person has the right to obtain any such rights within 60 days, such as securities underlying options, warrants or convertible securities exercisable within 60 days. As a result, securities may be beneficially owned by more than one person, a person may be required to report securities that are not yet issued or not yet held by such person, and a person may be required to report as a 5% Owner based on the investor’s contractual and non-contractual rights and powers. In addition, persons who act together for purposes of holding, voting or disposing of securities may be deemed to be part of a “group”, with

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each member of the group's beneficial ownership being aggregated and with the group's aggregate holdings required to be reported by each member of the group.

5% Owners must report their beneficial ownership with the SEC on a Schedule 13D, unless they qualify for an exemption that allows the filing of a Schedule 13G, due to the investor's status as (i) a qualified institution that holds passively in the ordinary course of business (a "Qualified Institution"), (ii) another passive investor that beneficially owns less than 20% of the class (a "Passive Investor"), or (iii) an exempt investor that was a 5% Owner when the class was first registered under Section 12 and has not engaged in any transaction causing the loss of exempt investor status (an "Exempt Investor").

Accelerated Filing Deadlines

Once effective, the amendments will accelerate the filing deadlines for many Schedule 13D and 13G filings, as well as the filing deadlines and triggers for many amendments to Schedule 13D and 13G. The following table summarizes the effect of the amendments on the applicable filing deadlines:

	Old Filing Due Date	New Filing Due Date
Initial Schedule 13D	Ten calendar days after becoming a 5% Owner or losing eligibility for Schedule 13G	Five business days after becoming a 5% Owner or losing eligibility for Schedule 13G
Amendments to Schedule 13D	Promptly after a material change	Two business days after a material change
Initial Schedule 13G for Qualified Institutions and Exempt Investors	45 days after the end of the first year after becoming a 5% Owner	45 days after the end of the first quarter after becoming a 5% Owner
Initial Schedule 13G for Passive Investors	Ten calendar days after becoming a 5% Owner	Five business days after becoming a 5% Owner
Amendments to Schedule 13G	45 days after the end of any year in which any change occurs	45 days after the end of any quarter in which any material change occurs
Additional amendments to Schedule 13G for Qualified Institutions	10 days after the end of the first month in which a Qualified Institution exceeds 10% and thereafter, 10 days after the end of each month in which there has been a 5% increase or decrease	Five business days after the end of the first month in which a Qualified Institution exceeds 10% and thereafter, five business days after the end of each month in which there has been a 5%

		increase or decrease
Additional amendments to Schedule 13G for Passive Investors	Promptly after a Passive Investor exceeds 10% and thereafter, “promptly” after the end of each month in which there has been a 5% increase or decrease	Two business days after a Passive Investor exceeds 10% and thereafter, two business days after there has been a 5% increase or decrease
Last time of day to receive that day’s filing date	5:30 p.m. Eastern time	10:00 p.m. Eastern time

Other Amendments and Guidance

The amendments also:

- Amend Schedule 13D to clarify that Item 6 requires disclosure regarding cash-settled derivatives.
- Clarify the treatment of acquisitions by members of a “group” that occur on the same day the “group” is created.
- Require that Schedules 13D and 13G be filed using a machine readable, XML-based language that will be specific to 13D/G.

In addition, the SEC provided further guidance regarding “group” status, in the form of a Q&A discussing several common situations. The SEC’s Q&A is attached hereto as Schedule A.

Compliance Dates

The amended rules will take effect 90 days after publication in the Federal Register, except that (i) compliance with the revised Schedule 13G filing deadlines will not be required before September 30, 2024, and (ii) compliance with the new XML filing format for Schedules 13D and 13G will not be required until December 18, 2024.

Schedule A

SEC Questions and Answers Regarding “Group” Status

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 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,⁵⁵⁸ 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 consenting or committing to a course of action,⁵⁵⁹ 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.⁵⁶⁰ 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.⁵⁶¹ 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 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).⁵⁶² 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.⁵⁶³ 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.⁵⁶⁴ Such arrangements also raise investor protection concerns regarding perceived unfairness and trust in markets.⁵⁶⁵

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.

558 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.

559 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.

560 Amendments to Beneficial Ownership Reporting Requirements, Release No.

34-39538 (Jan. 12, 1998) [63 FR 2854, 2858 (Jan. 16, 1998)].

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

562 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.

563 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).

564 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/SB10001424052702304888404579381250791474792> (“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.”).

565 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 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 NonInside 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).