The SEC Shortens the Time to Report Going Long

Article By:

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The Securities and Exchange Commission (SEC) has implemented rule revisions governing beneficial ownership reporting under Section 13(d) and 13 (g) of the Securities Exchange Act of 1934. The SEC also elaborated on its stance concerning the conditions under which it is determined that two or more individuals have established a collective entity for the regulatory scope of Sections 13(d) and (g) of the Securities Exchange Act of 1934.

Beneficial Ownership Reporting Filing Deadlines

Schedule 13D

The initial filing deadline for Schedule 13D has been shortened from ten to five business days after the date on which a person Loses eligibility to report on Schedule 13G.
The filing deadline for amendments will be two business days after a material change occurs rather than “promptly”.

Schedule 13G

13G for Qualified Institutional Investors (QII's)

The initial filing deadline is 45 days after the end of the calendar quarter in which a person acquires beneficial ownership of more than 5% of a covered class.

The requirement to amend for a material change has been changed from 45 days after year-end to 45 days after quarter-end.

The requirement to amend when a person acquires beneficial ownership of more than 10% of a covered class has been shortened from ten business days to five business days after month-end, and thereafter within five business days of month-end for any greater than a 5% change in ownership.

13G for Passive Investors

The initial filing deadline is five business days after a person acquires beneficial ownership of more than 5% of a covered class.

A quarterly amendment, due 45 days after quarter-end, is required for any material change.

The requirement to amend when a person acquires beneficial ownership of more than 10% of a covered class is no longer “promptly”, but two business days, and thereafter within two business days for any greater than a 5% change in ownership.
13G for Exempt Investors

The initial filing deadline is 45 days after the end of the calendar quarter in which a person acquires beneficial ownership of more than 5% of a covered class.

A quarterly amendment, due 45 days after quarter-end, is required for any material change.

To facilitate the shortened filing deadlines, the SEC has extended the filing cut-off times for Schedules 13D and 13G from 5:30 p.m. ET to 10:00 p.m. ET.

Formation of a Group

The SEC issued guidance on the application of the existing legal standard established in Section 13(d)(3) and 13(g)(3) with respect to group formation.

The SEC has reiterated that whether a group has been formed depends on the determination, analyzing all the relevant facts and circumstances, as to whether two or more persons have taken concerted actions for the purpose of acquiring, holding or disposing of securities of an issuer, noting that no express agreement is required to make a determination that a group has been formed.

The SEC has adopted an amendment to 13d-5 which;

Makes it explicit that a group recognized as an entity under Section 13(d) or 13(g) will be considered to gain any additional securities procured by a member of the group subsequent to the group’s establishment, excluding transfers within the group.
The SEC has addressed some common fact patterns in a Q&A session, in which they illustrate various examples of 13D group determinations.

**Cash Settled Derivative Securities**

The SEC amended item 6 of Schedule 13D to require disclosure of all cash-settled derivative securities, including security-based swaps ("SBS"), which use a covered class as a reference security. Acknowledging that for purposes of determining beneficial ownership under Rule 13d-3, cash-settled derivative securities generally only convey an economic interest to the holder not the voting or investment control interests driving disclosure. However, the SEC noted three instances where ownership of a cash-settled derivative would require beneficial ownership disclosure:

- If the derivative security directly or indirectly grants the holder exclusive or joint voting or investment power over the reference class of securities through a contractual provision or otherwise.
- If derivative security is acquired with the purpose of divesting or preventing the vesting of beneficial ownership of the reference covered class of securities or as part of a scheme to evade reporting requirements.
- If, although cash-settled, the derivative also conveyed to the holder:
A right to acquire beneficial ownership of the equity security within 60 days, or
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.

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