

BIG CHANGES TO 13D-13G REPORTING PROPOSED BY SEC

Feb 16, 2022

On February 10, 2022, the SEC proposed significant changes to Section 13(d) reporting obligations, including:

- Significantly accelerating filing deadlines
- Extending the filing cut-off from 5:30 pm ET to 10 pm ET
- Expanding beneficial ownership concepts to include certain cash-settled derivative securities
- Expanding and clarifying the meaning of groups
- Exempting certain communications and consultation from regulation as a group
- Requiring 13D and 13Gs be filed using an XML machine-readable data language

The SEC is requesting comments on virtually all aspects of the proposals. The deadline for comments is 30 days after publication in the Federal Register or April 11, 2022, whichever is later.

Accelerated filing deadlines

The proposed deadlines would be accelerated as follows:

For initial filings

- For 13D or converting from 13G to 13D due to change in eligibility, from 10 calendar days after the acquisition of more than 5% beneficial ownership, or from the date of losing eligibility to file on 13G, as applicable, to five calendar days
- For 13G by “qualified institutional investors (QIIs)” or “exempt investors,” from 45 days after calendar year-end to within five business days after the last day of the month in which beneficial ownership exceeded 5%
- For 13G by “passive investors,” from within 10 calendar days after the acquisition of more than 5% to five calendar days

For amendments

- For 13Ds, from “promptly” after the date of a material change to one business day
- For 13Gs by all filers, from within 45 days after calendar-year end to within five business days after the end of the month in which a material change occurs – other than a change in percentage owned resulting solely from a change in the number of shares of the class outstanding
 - The general obligation would be triggered only by a “material change” instead of any change in previously reported information
- For 13Gs by QIIs reporting beneficial ownership in excess of 10%, or deviations of more than 5%, from within 10 calendar days to five calendar days
- For 13Gs by passive investors reporting beneficial ownership in excess of 10%, or deviations of more than 5%, from “promptly” to within one business day

The SEC believes that developments in the financial markets – particularly since the establishment of the deadline for initial 13Ds in 1968 – raise a concern that material information is not being disseminated in a sufficiently timely manner for the protection of investors in today’s financial markets.

Filing day cut-off time extended

Regulation S-T would be amended to permit filings made on or before 10 pm ET to be credited as having been filed on that business day, instead of the current 5:30 pm ET cut-off.

The SEC proposes to eliminate the ability of 13D or 13G filers to request a temporary hardship exemption due to unanticipated technical difficulties; however, it notes that filers may request a filing date adjustment under the same circumstances as the temporary hardship exemption would have provided.

Certain cash-settled derivative securities included in beneficial ownership

Holders of certain cash-settled derivatives would be deemed to beneficially own the reference securities. The scope of the proposed rule would be limited to persons who hold the derivative with the purpose or effect of changing or influencing the control of the issuer or in connection with or as a participant in any transaction with such purpose or effect. The proposed amendment would exclude security-based swaps from Section 13(d) reporting, as those are covered by a [separate SEC proposal](#) calling for public reporting on Schedule 10B.

The proposal reflects the SEC’s concern that such holders may have both the incentive and ability to influence or control the issuer. For example, it notes that an investor in a cash-settled derivative

“may be positioned, by virtue of its commercial relationship with a counterparty, to acquire any reference securities that the counterparty may acquire to hedge the economic risk of that transaction, including any obligations that may arise in connection with settlement.” It believes this dynamic could result in a “rapid accumulation” of shares or the risk of “parking” of large holdings with institutional counterparties. Further, in its view, such holders may possess economic power that could influence outcomes through engagement with a counterparty or the issuer and potentially affect the stock price.

For percentage calculation purposes, shares that are not outstanding but are referenced by the relevant cash-settled derivative security would be deemed to be outstanding for the holder but not for any other person.

The proposal sets forth the formula for calculating the number of reference securities a holder would be deemed to own, recognizing there may not be a one-to-one relationship. Only long positions would be counted; short positions would not be netted against long positions or otherwise taken into account. Calculations would be performed on a daily basis.

Formation of groups

The reference to beneficial ownership by groups would be revised to remove any potential implication that an express or implied agreement among group members is a necessary precondition to the formation of a group. The proposed rules would also indicate that the group will be deemed to have acquired beneficial ownership of all of the equity securities of a class beneficially owned by each of the group’s members as of the date on which the group is formed.

New provisions would establish that:

- If a person directly or indirectly discloses its plan to file a 13D before making the filing with the purpose of causing others to make purchases, and the other persons acquire securities in the covered class based on such information, then those persons will be deemed to have formed a group
- A group subject to reporting obligations will be deemed to acquire any additional equity securities acquired by a member of the group after the date of the group’s formation (excluding intra-group transfers) – for purposes of determining whether a 13D vs 13G is required to be filed

No substantive changes are proposed for the existing exemption for concerted actions by QIIs relating to private placements.

Exemptions from group status

A new rule would add two exemptions that would address when two or more persons may avoid group status when taking actions that do not have the purpose or effect of changing or influencing

the control of an issuer, and not in connection with or as participants in a transaction with such purpose or effect:

- Communicating and consulting with one another and engaging with the issuer, provided such persons are not directly or indirectly obligated to take concerted actions, such as pursuant to a cooperation or joint voting agreement
- Entering into a bona fide purchase and sale agreement governing a derivative security in the ordinary course of business

Disclosure of derivative securities

Item 6 of 13D would be amended to make clear that a reporting person is required to disclose interests in all derivative securities that use a covered class as a reference security – including derivatives not originating with the issuer such as cash-settled options not sold by the issuer and security-based swaps.

Required use of XML-based language

All disclosures, including quantitative data, textual narratives and identification checkboxes on 13D or 13G would be required to be filed using a structured, machine-readable data language, i.e., 13D/G-specific XML. Exhibits would be excluded from this requirement. The purpose is to facilitate the access, compilation and analysis of information by investors and markets.

Filers would be given the option to either submit filings directly to EDGAR in 13D/G-specific

XML or use a web-based reporting application developed by the SEC that would generate the filing in 13D/G-specific XML.

Effect on Section 16 reporting

The SEC is not proposing any changes to Section 16 rules that govern reporting on Forms 3, 4 and 5. This is because it believes those rules have the same purpose as Regulation 13D-G, namely, to identify persons who can influence or control the issuer as the result of equity ownership. As a result, persons who would be deemed to beneficially own 10% under the proposed 13D amendments may become subject to Section 16 reporting and liability rules.

For further information on this topic, please contact [Randy Wang](#) or any other BCLP Securities and Corporate Governance lawyer. Additional resources are available on our website for the [BCLP Securities and Corporate Governance Practice](#). Bryan Cave Leighton Paisner LLP makes available the information and materials in its website for informational purposes only. The information is general in nature and does not constitute legal advice. Further, the use of this site, and the sending or receipt of any information, does not create any attorney-client relationship between us. Therefore,

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- Securities & Corporate Governance

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