



SEC Proposes Updates to Schedule 13D/G Reporting

Posted by Andrew Freedman, Olshan Frome Wolosky LLP, on Tuesday, February 15, 2022

Editor’s note: Andrew Freedman is partner at Olshan Frome Wolosky LLP. This post is based on his Olshan memorandum. Related research from the Program on Corporate Governance includes [The Law and Economics of Blockholder Disclosure](#) by Lucian Bebchuk and Robert J. Jackson Jr. (discussed on the Forum [here](#)); and [Pre-Disclosure Accumulations by Activist Investors: Evidence and Policy](#) by Lucian Bebchuk, Alon Brav, Robert J. Jackson Jr., and Wei Jiang.

On February 10, 2022, the Securities and Exchange Commission (“SEC”) published for comment proposed rules that would revise the current deadlines for Schedule 13D and Schedule 13G filings; amend Rule 13d-3 to deem holders of certain cash-settled derivative securities as beneficial owners of the reference security; clarify the SEC’s views on 13D “group” formation; and set 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.

The salient features of the proposed rules for our activist clients appear to be the following:

The rules, as proposed, would

- i. shorten 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%;
- ii. shorten 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;
- iii. shorten 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;
- iv. allow Schedules 13D and 13G to be filed up to 10pm est on a given business day, as opposed to the current 530pm est filing cut-off time for EDGAR.
- v. add 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 just 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);
- vi. add 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);

- vii. set 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;
- viii. set 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
- ix. amend 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.