Schulte Roth & Zabel

Client Alert

SEC Staff Clarifies Interpretation Related to Filing Deadline for Schedules 13D and 13G

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The staff of the Division of Corporation Finance of the Securities and Exchange Commission (the "SEC") has withdrawn and reissued one of its Compliance and Disclosure Interpretations ("CDIs") relating to Sections 13(d) and 13(g) under the Securities Exchange Act of 1934 (the "Exchange Act"), making it clear that the 10-day filing deadline for Schedules 13D and 13G is measured beginning on the first day *after* the date of the qualifying acquisition. The SEC initially published its Section 13 CDIs on Sept. 14, 2009, in question-and-answer format.[1] In general, Section 13(d) requires beneficial owners of more than 5% of a voting equity security registered under Section 12 of the Exchange Act to report their beneficial ownership either on Schedule 13D or, if eligible, on a short form Schedule 13G within 10 days after the acquisition that crosses the 5% threshold.[2] As part of the Section 13 CDIs, Question 103.05 addressed the question of whether this 10-day period should be measured from the trade date or the settlement date of the acquisition that crosses the 5% threshold and stated that it is measured from the trade date.

The CDI then added a final sentence stating that "for purposes of calculating the 10 day time period, the trade date counts as day number one." This added sentence caused a great deal of confusion since Rule 13d-1(a) has been widely understood as stating that the day *following* the trade date counts as day number one for purposes of calculating the 10-day time period. Rule 13d-1(a) states that a Schedule 13D must be filed "within 10 days *after*" [emphasis added] the 5% beneficial ownership threshold is exceeded. The plain reading of the word "after" in the Rule would make counting the day the 5% threshold is crossed difficult to understand.[3]

Following the release of the Sept. 14th CDIs, Schulte Roth & Zabel attorneys had conversations with the SEC during which they expressed their concerns with the last sentence of Question 103.05.[4] These concerns were based on the reading of Rule 13d-1(a), the legislative history of Section 13(d) and certain SEC enforcement actions in which the SEC enforcement division calculated the 10-day period from the day after the trade date.[5]

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[1] *See* "Analysis of New SEC Interpretations of Exchange Act Sections 13(d) and 13(g)," SRZ Client Memorandum, Oct. 8, 2009, available at http://www.srz.com/100809_Analysis_of_New_SEC_Interpretations/. The CDIs can be viewed in their entirety at http://sec.gov/divisions/corpfin/guidance/reg13d-interp.htm.

[2] Beneficial ownership of a security, as defined in Rule 13d-3(a) of the Exchange Act, includes "any person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise has or shares" voting power and/or investment power with respect to such security. Voting power includes the power to vote, or to direct the voting of, a security, whereas investment power includes the power to dispose, or the power to direct the disposition, of a security.

[3] As an illustration, had the rule stated that a filing was required within one day after the acquisition, the interpretation in Question 103.05 would require the filing to be made on the day of the acquisition which, in addition to being impossible in many cases, would make the use of the word "after" meaningless.

[4] We understand that others may have contacted the SEC as well.

[5] *See, for example*, SEC Release No. 34-44384 (June 4, 2001).

On Nov. 16, 2009, the SEC withdrew Question 103.05 and replaced it with Question 103.10, which states that "for purposes of calculating the 10-day time period, the first calendar day *after* the trade date counts as day number one" [emphasis added].[6]

Question 103.10 can be viewed in its entirety at http://sec.gov/divisions/corpfin/guidance/reg13d-interp.htm.

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[6] *See* http://www.sec.gov/divisions/corpfin/cfnew.shtml.