



Proposed Rule Changes to SEC Beneficial Ownership Reporting

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Editor's note: Eleazer Klein and Adriana Schwartz are partners and Clara Zylberg is special counsel at Schulte Roth & Zabel LLP. This post is based on their SRZ 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 Feb. 10, 2022, the Securities and Exchange Commission ("SEC") proposed amendments to the rules governing beneficial ownership reporting ("Proposal").¹ The Proposal seeks to:

- Tighten filing deadlines for Schedule 13D and Schedule 13G;
- Require inclusion of certain cash-settled derivative securities (other than cash settled swaps) in determining beneficial ownership for Schedule 13D filers and require disclosure of all cash settled derivative securities in Item 6 of Schedule 13D;
- Clarify when persons form a "group"; and
- Require that Schedules 13D and 13G be filed using a structured, machine-readable data language.

The following is an overview of the Proposal.

Initial Filing Deadlines

- *Schedule 13D.* The Proposal shortens the Schedule 13D filing deadline from 10 days to **5 days** following the acquisition of beneficial ownership of more than 5% or losing eligibility to file a Schedule 13G.
- *Institutional/Exempt Schedule 13G.* The Proposal requires an initial Schedule 13G filing for institutional investors and exempt investors by the **5th business day after month-end** in which their beneficial ownership exceeds 5% (in place of the current 45 days after the calendar-year-end in most circumstances).
- *Passive Schedule 13G.* The Proposal shortens the initial Schedule 13G filing deadline for passive investors from 10 days to **5 days** after acquiring beneficial ownership of more than 5%.

¹ "SEC Proposes Rule Amendments to Modernize Beneficial Ownership Reporting," *SEC Press Release*, Feb. 10, 2022, available [here](#).

Amendments

- *Schedule 13D*. The Proposal requires Schedule 13D amendments to be filed **one business day** following a material change (in place of the current “prompt” requirement).
- *Schedule 13G*. The Proposal requires amendments to Schedule 13G filings **within 5 business days after the month-end** of a **material change** (in place of the current 45 days after year-end if there is any change in the reported information). The Proposal also shortens the amendment requirement for exceeding 10% beneficial ownership and thereafter, increasing or decreasing beneficial ownership by more than 5%, from the current 10 days after month-end to **5 days** after crossing the relevant threshold for institutional investors and **one business day** for passive investors (in place of the current “prompt” requirement).

Filing Day Deadline

The Proposal extends the deadline for filings from the current 5:30 p.m. eastern time to **10 p.m. eastern time**.

Reporting of Cash-Settled Derivatives

Under the Proposal, the holder of a cash-settled derivative security (other than security-based swaps which disclosure is the subject of a separate rulemaking proposal from the SEC²), will be deemed to be the beneficial owner of the shares referenced by the derivative security if such holder would be a Schedule 13D filer, even absent an express right to direct the voting, acquisition or disposition of such shares.

Groups

- The Proposal expands the definition of a group for reporting purposes from an agreement to act together to also include, depending on the particular facts and circumstances, concerted actions by two or more persons for the purpose of acquiring, holding or disposing of securities of an issuer.
- Additionally, a group will exist where in advance of filing a Schedule 13D a filing person discloses to any other person that such filing will be made if the other person acquires securities subject to the Schedule 13D.
- The Proposal exempts certain actions taken by two or more persons from forming a group if those actions do not have the purpose or effect of changing or influencing the control of an issuer and are not made in connection with or as a participant in any transaction having such purpose or effect.
- Under the Proposal, no group is formed solely by virtue of an agreement governing the terms of a derivative security, provided that the agreement is a bona fide purchase and sale agreement entered into in the ordinary course of business and provided that such persons do not enter into the agreement with the purpose or effect of changing or

² “SEC Proposes Rules to Prevent Fraud in Connection With Security-Based Swaps Transactions, to Prevent Undue Influence over CCOs and to Require Reporting of Large Security-Based Swap Positions,” *SEC Press Release*, Dec. 15, 2021, available [here](#).

influencing control of the issuer, or in connection with or as a participant in any transaction having such purpose or effect.

Disclosure of Derivative Securities

The Proposal amends Item 6 of Schedule 13D to clarify that disclosure of all derivative securities that use the issuer's equity security as a reference security is required, including disclosure of cash-settled security-based swaps and other cash-settled derivatives.

Structured Data Requirement

The Proposal requires Schedules 13D and 13G to be filed using a structured, machine-readable data language.

Section 16

The proposed changes of the beneficial ownership and group formation rules discussed above will also apply when determining if a shareholder is subject to Section 16 as a greater than 10% beneficial owner or part of a group that is over 10%.