

ALERTS

13(d) Reporting Windows to Be Revisited

July 19, 2021

On June 23, 2021, Gary Gensler, the newly appointed Chairman of the Securities and Exchange Commission (“SEC”), delivered remarks at London City Week, where he discussed, among other things, his desire for the SEC to foster increased “transparency” in the form of increased investor disclosure.[1]

Specifically, Chairman Gensler indicated that he has asked the staff of the SEC to consider accelerating reporting deadlines for shareholders beneficially owning more than 5% of the voting equity securities of a public company and who have a “control intent” (“13D Filers”) — noting that the current 10-day window is stale in light of the “rapidity” of current markets and technology — and to consider more “robust” disclosures surrounding security-based swaps in light of the March 2021 collapse of Archegos Capital, which held large concentrations of swaps.

Currently, Section 13(d) of the Securities Exchange Act of 1934 (“Exchange Act”) provides beneficial owners of more than 5% of the equities of public companies must report their ownership with the SEC. However, Section 13(d) also contemplates that the SEC may prescribe a “shorter time” through its own rulemaking “as necessary or appropriate in the public interest or for the protection of investors.” Based on Gensler’s remarks, it is highly possible that the SEC may propose a rule to shorten this 10-day window. The commission may also consider specifying the timing of amendments to Schedule 13Ds, which, under Rule 13d-2, must be amended “promptly.”

The 10-day window was originally adopted by Congress in 1967 during a period of frequent hostile tender offers from shareholders and as a

compromise to avoid “tipping the scales” in favor of management or acquirers after more onerous disclosure requirements were previously proposed. Records and subsequent case law indicate that Congress understood that, while takeover bids may have presented certain risks to some tendering shareholders, these bids could also serve a useful social function by creating shareholder value and that burdensome disclosures might unfairly favor an entrenched management team. This suggests that a 10-day window was never adopted as the fastest reasonable time period.

Though Chairman Gensler was unclear as to his intentions regarding security-based swaps, he did note that the disclosure rules around these instruments currently “aren’t as robust as they are in the rest of the market.” Possible changes could include reporting cash-settled swap positions in the beneficial ownership of 13D Filers. Typically, swaps and other derivatives must be reported under Item 6 of Schedule 13D for required 13D Filers.

Given that Chairman Gensler’s comments were informal and made during a conference, the probability and extent of any regulatory changes remain unclear. Each of Chairman Gensler’s comments echoes topics that have been percolating for years amidst interested parties — for instance, in 2015, finance and watchdog groups called on Congress to shorten the 10-day window for 13D Filers,[2] and in 2011, the SEC was petitioned to require increased disclosure of derivatives granting a “profit or share in any profit derived from any increase in the value of the subject security.”[3]

Though the SEC will almost undoubtedly provide a lengthy comment and review period before issuing any new final rule, along with a grace period after such a rule goes into effect, active fund managers should consider the broad implications of the Chairman’s comments as they seek to increase their stakes in public companies, either through equity stakes or increased economic exposure in the form of cash-settled swaps.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

[1] See Gensler, Gary, “Prepared remarks at London City Week,” SEC, (June 23, 2021), available here.

[2] Benoit, David, "Congress Asked to Act on Activist Investor Disclosures," Wall Street Journal (April 15, 2021), available here.

[3] See Wachtell, Lipton, Rosen & Katz, "Petition for Rulemaking Under Section 13 of the Securities Exchange Act of 1934," Letter To SEC (March 7, 2011), available here.

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