Client Alert | US Public Company Advisory/Capital Markets/M&A

SEC Adopts Rule Amendments to Modernize Beneficial Ownership Reporting

On October 10, 2023, the Securities and Exchange Commission ("SEC") adopted amendments to modernize the rules governing beneficial ownership reporting under Sections 13(d) and 13(g)[1] of the Securities Exchange Act of 1934 ("Exchange Act"), which provide companies and markets visibility into the ownership of shares of public companies. The amendments, which were initially proposed in February 2022,[2] update Regulation 13D-G "to require market participants to provide more timely information on their positions to meet the needs of investors in today's financial markets" in part by:

- **accelerating the filing deadlines** for initial and amended Schedules 13D and 13G beneficial ownership reports;
- **clarifying that a person is required to disclose interests in *all* derivative securities** (including securities-based swaps) that use the issuer's equity security as a reference security; and
- **requiring the use of XML** for filing Schedules 13D and 13G.

The adopting release also provides guidance on:

- **the meaning of a Section 13(d)/(g) "group"** subject to beneficial ownership reporting obligations; and
- **including cash-settled derivative securities** within the coverage of the Sections 13(d) and 13(g) rules.

SEC Chair Gensler supported the adoption of these updates to "rules that first went into effect more than 50 years ago," stating that "[i]n our fast-paced markets, it shouldn't take 10 days for the public to learn about an attempt to change or influence control of a public company." He further stated that the amendments "update Schedules 13D and 13G reporting requirements for modern markets, ensure investors receive material information in a timely way, and reduce information asymmetries."[3]

Compliance Dates

The SEC adopted the following compliance dates:

[1] The final rule is available here. The fact sheet is available here and the SEC's press release is available here.

[2] The proposing release is available here. Our client alert on the proposed rules is available here.

[3] Commissioner Pearce dissented, arguing that "disparities in information and perspective are central to the functioning of our markets." In particular, she expressed concerned about the possibility of preventing an individual "who has worked hard to identify a mismanaged company and develop a strategy for improving it from getting adequately compensated for that work and the associated risk." Her dissent is available here.

Revised Schedule 13D Deadlines	90 days after publication in the Federal Register
Disclosure of Derivative Securities	
Revised Schedule 13G Deadlines	September 30, 2024
XML for Schedules 13D and 13G	December 18, 2024 (with voluntary compliance allowed starting December 18, 2023)

Background

Exchange Act Sections 13(d) and 13(g) and the related SEC rules require that an investor who beneficially owns more than five percent of a class of voting equity securities registered under Section 12 of the Exchange Act ("covered securities") report such beneficial ownership and certain changes in such ownership by publicly filing either a Schedule 13D or a Schedule 13G. The SEC adopted amendments to these requirements because of its view that changes in the financial markets and technology warrant a reassessment of the filing deadlines for Schedule 13D and 13G and other aspects of the beneficial ownership rules to meet the needs of today's investors and other market participants.

Rule Amendments

Accelerated Schedule 13D and 13G Filing Deadlines

The below chart summarizes the changes to the Schedule 13D and 13G filing deadlines, which include accelerated timelines and revised amendment triggers. The SEC shortened the current deadlines because it viewed them as based on outdated assumptions as to the time needed to prepare the filings and deliver them to the SEC, which came about prior to the advent of the internet and electronic filing. The SEC believes that the current delay in reporting this material information may contribute to information asymmetries harmful to public investors, as changes in technology and developments in the financial markets facilitate Schedule 13D or 13G filers' ability to rapidly acquire stock well in excess of the initial five percent threshold during the time leading up to the deadline.[4] The amendments also bring the Schedule 13D and 13G deadlines more in line with the Form 8-K reporting deadline for issuers (i.e., four business days after the trigger), the Form 4 reporting deadlines for officers, directors and beneficial owners of more than 10% of a class of covered securities (i.e., two business days after the trigger)[5] and/or the Form 13F filing deadlines (i.e., 45 days after calendar quarter-end for institutional investment managers that exercise investment discretion over at least $100 million in Section 13(f) securities).

[4] The SEC considers this to be the case not only for Schedule 13D filers, but also for Schedule 13G filers. The release also noted that "research indicates that at least some beneficial owners may improperly rely on Rule 13d-1(c) to file a Schedule 13G in lieu of a Schedule 13D to obscure their control purpose. Given this increased likelihood, as compared to QIIs and Exempt Investors, of Passive Investors ultimately having a control purpose with respect to an issuer, [the SEC] believe[s] it is appropriate to shorten their initial Schedule 13G filing deadline to five business days in order for that deadline to continue to mirror the initial Schedule 13D filing deadline. This is consistent with the [SEC's] decision to require Passive Investors to file their initial Schedule 13G in 10 days, the same deadline as Schedule 13D, when it adopted Rule 13d-1(c)."

[5] These deadlines are all still longer than the Form 144 filing deadline, which is the same day that the sale order triggering the Form 144 is placed. For more information, see our alert, "Reminder: Deadlines for Changes to Forms 4 and 5 Reporting and Electronic Filing of Form 144." Commenters also noted that many foreign jurisdictions require beneficial ownership disclosure on a shorter deadline than currently required under Regulation 13D-G.

Issue	Schedule 13D		Schedule 13G	
	Current	**Amended**	**Current**	**Amended**
Initial Filing Deadline	10 calendar days[6] after acquiring beneficial ownership of more than 5% or losing eligibility to file on Schedule 13G.[7]	Five business days[8] after acquiring beneficial ownership of more than 5% or losing eligibility to file on Schedule 13G.[9]	QIIs[10] & Exempt Investors:[11] 45 calendar days after calendar year-end in which beneficial ownership exceeds 5% (unless, in case of QII, beneficial ownership exceeds 10% prior to calendar **year-end**, in which case due within 10 calendar days after month-end in which such threshold is crossed). Passive Investors:[12] Within 10 calendar days after acquiring beneficial ownership of more than 5% or losing eligibility to file as a QII.	QIIs & Exempt Investors: 45 calendar days after calendar **quarter-end** in which beneficial ownership exceeds 5%.[13] QIIs: Five business days after month-end in which beneficial ownership exceeds 10%.[14] Passive Investors: Within five business days after acquiring beneficial ownership of more than 5%.[15]
Amendment Triggering Event	"Material change" in the facts set forth in the previous Schedule 13D (including acquisition/disposition of at least 1% of total outstanding).	Same.[16]	All Schedule 13G Filers: "Any change" (SEC acknowledged inherent materiality qualifier) in the information previously reported on Schedule 13G, on an annual basis. QIIs & Passive Investors: Upon exceeding 10% beneficial ownership or a 5% increase or	All Schedule 13G Filers: Any "material change" in the information previously reported on Schedule 13G (including acquisition/disposition of at least 1% of total outstanding).[17] QIIs & Passive Investors: Same.[18]

[6] For filing deadlines expressed in calendar days, if the deadline falls on a Federal holiday, a Saturday, or a Sunday, then the filing may be made on the next business day thereafter.

[7] Rules 13d-1(a), (e), (f), and (g).

[8] The newly-adopted amendments define "business day" for purposes of Regulation 13D-G to mean any day, other than Saturday, Sunday, or a Federal holiday, from 12:00 a.m. to 11:59 p.m. eastern time.

[9] For purposes of determining the filing deadline under the amendments, the Commission must receive the filing by the fifth business day *after* the date on which the initial Schedule 13D filing obligation arises—*i.e.*, the date on which a person acquires beneficial ownership of more than five percent of a covered class under Rule 13d-1(a) or the date on which a person loses eligibility to file on Schedule 13G—in order for the filing to be considered timely.

[10] **Qualified institutional investors ("QIIs")** are eligible to file Schedule 13G under Rule 13d-1(b), if they (i) have acquired the securities in the ordinary course of business, not with the purpose or effect of changing/influencing control of the issuer, and (ii) fit within an enumerated category of that rule (i.*e.*, (a) registered broker dealers, registered investment advisers, registered investment companies, certain banks, certain insurance companies, employee benefit plans, certain savings associations or certain church plans, (b) non-U.S. institutions that are the functional equivalent of any of the U.S. investor categories in (a), (c) groups made up exclusively of investors specified in (a) and/or (b), and (d) parent holding companies or control persons that do not, directly or indirectly through any non-"QII" affiliates, hold more than 1% of a class of equity securities giving rise to a Schedule 13G filing).

[11] **"Exempt investors"** are colloquially known as "pre-IPO investors" (though they encompass more than just investors who invested in the company before the IPO). Exempt investors do not qualify as QIIs or passive investors, but are eligible to file Schedule 13G under Rule 13d-1(d), if either (i) their beneficial ownership of five percent of the class of covered securities predates the issuer's initial public offering or other registration of the securities under Section 12 of the Exchange Act (a status colloquially labeled "pre-IPO owners") or (ii) they became five percent beneficial owners of such securities due to a reduction in the number of such securities outstanding. An "exempt investor" is required to file a Schedule 13D if it acquires additional Section-12 registered voting equity securities that, when added to all other acquisitions during any rolling 12-month period immediately preceding the most recent acquisition, aggregate to more than two percent of the class outstanding.

[12] **"Passive investors"** do not qualify as QIIs, but are eligible to file Schedule 13G under Rule 13d-1(c), if they (i) own less than 20% of the securities, and (ii) have not acquired the securities with any purpose, or with the effect, of changing or influencing the control of the issuer.

[13] Rules 13d-1(b) and (d).

[14] Rule 13d-1(b).

[15] Rule 13d-1(c).

[16] Rule 13d-2(a).

[17] Rule 13d-2(b).

[18] Rules 13d-2(c) and (d).

Issue	Schedule 13D		Schedule 13G	
	Current	Amended	Current	Amended
			decrease in beneficial ownership.	
Amendment Filing Deadline	"Promptly" after the triggering event.	Two business days after the triggering event.[19]	All Schedule 13G Filers: 45 calendar days after calendar year-end in which "any change" (SEC acknowledged inherent materiality qualifier) occurred from the prior filing. QIIs: 10 calendar days after month-end in which beneficial ownership exceeded 10% or there was, as of the month-end, a 5% increase or decrease in beneficial ownership. Passive Investors: "Promptly" after acquiring more than 10% beneficial ownership or, thereafter, increasing or decreasing beneficial ownership by 5%.	All Schedule 13G Filers: 45 calendar days after calendar quarter-end in which a "material change" occurred.[20] QIIs: Five business days after month-end in which beneficial ownership exceeds 10% or a 5% increase or decrease in beneficial ownership.[21] Passive Investors: Two business days after acquiring more than 10% beneficial ownership, thereafter, increasing or decreasing beneficial ownership by 5%.[22]
Filing "Cut-Off" Time	5:30 p.m. ET	10 p.m. ET[23]	5:30 p.m. ET	10 p.m. ET[24]

***Amendment Triggering Events**:* Schedule 13G filers must now amend for "any material change" to the information previously reported. The release states that the SEC is merely codifying its established view that Schedule 13G contains an implicit materiality standard for amendments and notes that the same standards currently used to assess a "material change" for purposes of Schedule 13D amendments will apply to the materiality determination for Schedule 13G purposes. For example, the existing rule in Rule 13d-2(a) that the acquisition or disposition of 1% or more of a class of securities is "material" also applies when considering Schedule 13G materiality. The SEC did not provide a safe harbor for *de minimis* changes in beneficial ownership.

Requirement to Disclose Interests in All Derivative Securities in Schedule 13D

The amendments revise Item 6 of Schedule 13D, which currently requires beneficial owners to "[d]escribe any contracts, arrangements, understandings or relationships (legal or otherwise) among the persons named in Item 2 [of Schedule 13D] and between such persons and any person with respect to any securities of the issuer," to expressly state that a person is required to disclose interests in *all* derivative securities that use the issuer's equity security as a reference security. Therefore, while cash-settled security-based swaps ("SBSs") do not count toward a person's "beneficial ownership," under the amended rules information concerning SBSs will be required to be disclosed in Item 6 of Schedule 13D, except in the circumstances covered by the SEC's guidance (as noted under "Inclusion of "Cash-Settled" Derivative Securities Within the Coverage of Section 13(d) Beneficial Ownership", below)

The release notes that investors may benefit from more complete disclosure of a Schedule 13D filer's economic interests in the relevant issuer, including economic interests via positions in cash-settled derivatives. For example, disclosure of any such cash-settled derivatives "may help investors evaluate whether their interests with respect

[19] Rule 13d-2(a).

[20] Rule 13d-

[21] Rule 13d-2(c).

[22] Rule 13d-2(d).

[23] Rule 13(a)(4) of Regulation S-T.

[24] Rule 13(a)(4) of Regulation S-T.

to the issuer's securities are aligned with the Schedule 13D filer's." Disclosure of this information is also consistent with other interests required to be disclosed under Item 6, such as, for example, "division of profits or loss."

Structured Data Requirements for Schedules 13D and 13G

To make it easier for investors and markets to access, compile and analyze information disclosed on Schedules 13D and 13G, the amendments require that these filings use a structured, machine-readable XML-based language. This requirement applies to all information disclosed on Schedules 13D and 13G (excluding exhibits).

Additional SEC Guidance

Inclusion of "Cash-Settled" Derivative Securities Within the Coverage of Section 13(d) Beneficial Ownership

Rule 13d-3 under the Exchange Act provides the method to determine whether a person is a "beneficial owner" for purposes of Section 13(d) and 13(g). Holders of cash-settled derivatives are generally not considered beneficial owners under the current Rule 13d-3, unless there are extraneous facts and circumstances (e.g., arrangements whereby such holders can direct the voting of the referenced securities).

In the adopting release, the SEC issued guidance on the applicability of existing Rule 13d-3 to cash-settled derivatives to illustrate how holders of cash-settled derivatives may be treated as beneficial owners. This is the same guidance that the SEC had published in its 2011 release regarding when security-based swaps may confer beneficial ownership under Rule 13d-3.[25] Specifically, although derivative securities settled exclusively in cash generally are designed to represent only an economic interest, under the following "discrete facts and circumstances," the holder of these securities may have voting or investment power or otherwise could be deemed to be a beneficial owner:

- ***Exclusive or shared voting or investment power:*** Under Rule 13d-3(a), to the extent a cash-based settled derivative security provides its holder, directly or indirectly, *with exclusive or shared voting or investment power*, within the meaning of that rule, over the reference covered class through a contractual term of the derivative security or otherwise, the holder of that derivative security may become a beneficial owner of the reference covered class.
- ***Scheme to evade Section 13(d) or 13(g):*** To the extent a cash-settled derivative security is acquired with the purpose or effect of divesting its holder of beneficial ownership of the reference covered class or preventing the vesting of that beneficial ownership as part of a plan or scheme to evade the reporting requirements of Section 13(d) or 13(g), the derivative security may be viewed as a contract, arrangement, or device within the meaning of those terms as used in Rule 13d-3(b). The holder of such cash-settled derivative security, therefore, may be deemed a beneficial owner under Rule 13d-3(b) in this context.
- ***Rights to acquire beneficial ownership:*** Under Rule 13d-3(d)(1), a person is deemed a beneficial owner of an equity security if the person (1) has a right to acquire beneficial ownership of the equity security within 60 days or (2) acquires the right to acquire beneficial ownership of the equity security with the purpose or effect of changing or influencing the control of the issuer of the security for which the right is exercisable, or in connection with or as a participant in any transaction having such purpose or effect, regardless of when the right is exercisable. This applies regardless of the origin of the right to acquire the equity security, including if the right originates in a derivative security that is nominally "cash-settled" or from an understanding in connection with that derivative security.[26]

Meaning of Section 13(d)/(g) Group

Under Sections 13(d)(3) and (g)(3) of the Exchange Act, "when two or more persons act as a…group for purposes of acquiring, holding, or disposing of securities of an issuer," the group is considered to be one filing person. If a

[25] *See* "Beneficial Ownership Reporting Requirements and Security-Based Swaps" (June 14, 2011), available here.

[26] In providing this additional guidance, the SEC rejected its previous proposal to require inclusion of cash-settled derivative securities if such person held the derivative with the purpose or effect of changing or influencing the control of the issuer.

group beneficially owns shares in excess of five percent of the class of covered securities, all members will be subject to Section 13(d) reporting requirements, even if any individual member beneficially owns less than five percent of such class. Whether two or more persons have formed a group depends on an analysis of all the relevant facts and circumstances and not solely on the presence or absence of an express agreement, as two or more persons may take concerted action or agree informally.

In the adopting release, the SEC provided guidance on the application of the current legal standard found in Section 13(d)(3) and Section 13(g)(3) to certain common types of shareholder engagement activities.[27] The guidance includes specific examples, in the form of "Questions and Answers," of when a group is and is *not* formed for Section 13 purposes. See **Appendix A** for the full text.

Tipper-Tippee "Groups." The guidance also clarifies that if an investor (in practice, usually an activist looking to induce a change in or strengthen its relationships among the issuer's voting base) shares non-public information about its upcoming Schedule 13D filing with another person, who then purchases the issuer's securities based on that information, the investor and any of those market participants that made purchases *could* potentially become subject to regulation as a group.

A Schedule 13D filing may affect the market for and the price of an issuer's securities, and therefore non-public information that a person will make a Schedule 13D filing in the near future can be material. By privately sharing this material information in advance of the public filing, the investor may incentivize the market participants who received the information to acquire shares before the filing is made. The final determination as to whether a group is formed between the investor and the other market participants will ultimately depend upon the facts and circumstances, including (1) whether the purpose of the investor's communication with the other market participants was to cause them to purchase the securities and (2) whether the market participants' purchases were made as a direct result of the information shared by the investor.

Post-Group-Formation Acquisitions by Group Members. The SEC also adopted amendments (not guidance) to provide that a Section 13(d)/(g) group will be deemed to have acquired beneficial ownership of covered securities if, any time after the group's formation, *any* member of the group becomes the beneficial owner of additional covered securities.[28] For instance, acquisitions by group members that collectively exceed two percent over a 12-month period would be attributable to the group, thereby resulting in the group becoming ineligible to file under Schedule 13G and triggering a Schedule 13D filing obligation for all group members. Therefore, acquisitions by group members that collectively exceed two percent over a 12-month period would be attributable to the group, thereby resulting in the group becoming ineligible to file under Schedule 13G and triggering a Schedule 13D filing obligation for all group members. The rules do not consider a Section 13(d)/(g) group to have "acquired" additional covered securities due only to an intragroup transfer (i.e., where one group member becomes the owner of additional covered securities sold to it by another group member).[29]

Practical Considerations

1. **Potential impact on shareholder activism/M&A:** The amendments could have implications for activist shareholders and the companies they target. Specifically, the shortened filing deadlines could make it more difficult for an activist investor to obtain a large enough position to provide it leverage before their accumulations would be made public. The changes could also increase the costs of acquiring shares, by condensing the demand for shares into a shorter purchasing period in order to make significant purchases before the required Schedule 13D filing, or by increasing the cost to acquire sufficient shares after the filing is made. Activist investors will also need to be mindful of the possibility of "tipping" another activist as to an upcoming Schedule 13D filing and being deemed a group if the other investors subsequently purchase shares. Further, activists or other holders who are "tippees" will similarly need to

[27] The SEC initially proposed rule amendments to clarify that forming a Section 13(d)/(g) group does not require an explicit agreement. However, the adopting release acknowledged that the proposed amendments *could have* resulted in a group being formed for purposes of Sections 13(d)(3) and 13(g)(3) absent some evidence of agreement, arrangement, understanding, or concerted action, which was not the Commission's intent.

[28] Rules 13d-5(b)(1)(ii) and (b)(2)(i).

[29] Rules 13d-5(b)(1)(iii) and 13d-5(b)(2)(ii).

be mindful of the possibility that purchasing shares after receiving a "tip" from another investor might cause them to be deemed a member of a group.

The changes could also impact potential acquirers who use a minority stake as a foothold in an acquisition strategy, starting as "passive investors" eligible to file on Schedule 13G which then switch to filing on Schedule 13D when they develop "control intent" with respect to the company. In that case, the new timeline reduces the amount of time they have to proceed from developing control intent to finalizing an acquisition before the required Schedule 13D filing to disclose their intent.

2. **Use caution when engaging in activities that could create a "group":** Under the new guidance, there could be an increased number of situations that could qualify as a group, and there should be care given to prior to sharing non-public information. While the SEC chose to issue guidance rather than adopt new rules to define "group" status, the discussion in the release indicates that the SEC is focused on this issue and that interactions between activist funds can still trigger group formation. The SEC may scrutinize "wolf packs" of activist investors working seemingly in unison to coordinate buying stock in a public company in order to leverage their aggregate stake to influence control of the company, while denying any coordination that would potentially create a "group", with the associated filing implications.

3. **Companies can better tailor their investor outreach**: Increased frequency of filings by QIIs and exempt investors will give companies the ability to see which investors are increasing their positions. This may allow the company to better prioritize their investor outreach programs to respond to this interest.

4. **Planning to enable faster initial reporting by Schedule 13D filers and passive investors:** The five-business day initial reporting deadline may be difficult to meet in certain instances, particularly with respect to Schedule 13D filings. It will be imperative that systems be in place to prevent exceeding reporting thresholds unless the responsible persons are alerted and the disclosures are ready to be prepared.

5. **The use of derivatives securities requires further analysis:** While the SEC guidance is consistent with market understanding on when cash-settled derivatives could be included in the beneficial ownership calculation, use of the derivatives securities are unequivocally required to be disclosed on Schedule 13D going forward.

6. **Updating processes to facilitate more frequent reporting:** QIIs, exempt investors and passive investors will need to update their compliance processes to evaluate whether there have been any "material changes" within 45 days of each quarter-end, including any acquisition or disposition of at least 1% of total outstanding. This will likely increase compliance costs and result in a significant increase in the number of required filings.

Appendix A

Set out below is the guidance provided by the SEC on the application of the current legal standard found in Section 13(d)(3) and 13(g)(3) to certain common types of shareholder engagement activities. Certain footnotes from the SEC's guidance have been removed for purposes of streamlining:

Question: Is a group formed when two or more shareholders communicate with each other regarding an issuer or its securities (including discussions that relate to improvement of the long-term performance of the issuer, changes in issuer practices, submissions or solicitations in support of a non-binding shareholder proposal, a joint engagement strategy (that is not control-related), or a "vote no" campaign against individual directors in uncontested elections) without taking any other actions?

Response: No. In our view, a discussion whether held in private, such as a meeting between two parties, or in a public forum, such as a conference that involves an independent and free exchange of ideas and views among shareholders, alone and without more, would not be sufficient to satisfy the "act as a . . . group" standard in Sections 13(d)(3) and 13(g)(3). Sections 13(d)(3) and 13(g)(3) were intended to prevent circumvention of the disclosures required by Schedules 13D and 13G, not to complicate shareholders' ability to independently and freely express their views and ideas to one another. The policy objectives ordinarily served by Schedule 13D or Schedule 13G filings would not be advanced by requiring disclosure that reports this or similar types of shareholder communications. Thus, an exchange of views and any other type of dialogue in oral or written form not involving an intent to engage in concerted actions or other agreement with respect to the acquisition, holding, or disposition of securities, standing alone, would not constitute an "act" undertaken for the purpose of "holding" securities of the issuer under Section 13(d)(3) or 13(g)(3).

Question: Is a group formed when two or more shareholders engage in discussions with an issuer's management, without taking any other actions?

Response: No. For the same reasons described above, we do not believe that two or more shareholders "act as a . . . group" for the purpose of "holding" a covered class within the meaning of those terms as they appear in Section 13(d)(3) or 13(g)(3) if they simply engage in a similar exchange of ideas and views, alone and without more, with an issuer's management.

Question: Is a group formed when shareholders jointly make recommendations to an issuer regarding the structure and composition of the issuer's board of directors where (1) no discussion of individual directors or board expansion occurs and (2) no commitments are made, or agreements or understandings are reached, among the shareholders regarding the potential withholding of their votes to approve, or voting against, management's director candidates if the issuer does not take steps to implement the shareholders' recommended actions?

Response: No. Where recommendations are made in the context of a discussion that does not involve an attempt to convince the board to take specific actions through a change in the existing board membership or bind the board to take action, we do not believe that the shareholders "act as a . . . group" for the purpose of "holding" securities of the covered class within the meaning of those terms as they appear in Sections 13(d)(3) or 13(g)(3). Rather, we view this engagement as the type of independent and free exchange of ideas between shareholders and issuers' management that does not implicate the policy concerns addressed by Section 13(d) or Section 13(g).

Question: Is a group formed if shareholders jointly submit a non-binding shareholder proposal to an issuer pursuant to Exchange Act Rule 14a-8 for presentation at a meeting of shareholders?

Response: No. The Rule 14a-8 shareholder proposal submission process is simply another means through which shareholders can express their views to an issuer's management and board and other shareholders. For purposes of group formation, we do not believe shareholders engaging in a free and independent exchange of

thoughts about a potential shareholder proposal, jointly submitting, or jointly presenting, a non-binding proposal to an issuer in accordance with Rule 14a-8 (or other means) should be treated differently from, for example, shareholders jointly meeting with an issuer's management without other indicia of group formation. Accordingly, where the proposal is non-binding, we do not believe that the shareholders "act as a . . . group" for the purpose of "holding" securities of the covered class within the meaning of those terms as they appear in Section 13(d)(3) or 13(g)(3). Assuming that the joint conduct has been limited to the creation, submission, and/or presentation of a non-binding proposal,[30] those statutory provisions would not result in the shareholders being treated as a group, and the shareholders' beneficial ownership would not be aggregated for purposes of determining whether the five percent threshold under Section 13(d)(1) or 13(g)(1) had been crossed.

Question: Would a conversation, email, phone contact, or meetings between a shareholder and an activist investor that is seeking support for its proposals to an issuer's board or management, without more, such as consenting or committing to a course of action,[31] constitute such coordination as would result in the shareholder and activist being deemed to form a group?

Response: No. Communications such as the types described, alone and without more, would not be sufficient to satisfy the "act as a . . . group" standard in Sections 13(d)(3) and 13(g)(3) as they are merely the exchange of views among shareholders about the issuer. This view is consistent with the Commission's previous statement that a shareholder who is a passive recipient of proxy soliciting activities, without more, would not be deemed a member of a group with persons conducting the solicitation. Activities that extend beyond these types of communications, which include joint or coordinated publication of soliciting materials with an activist investor might, however, be indicative of group formation, depending upon the facts and circumstances.

Question: Would an announcement or a communication by a shareholder of the shareholder's intention to vote in favor of an unaffiliated activist investor's director nominees, without more, constitute coordination sufficient to find that the shareholder and the activist investor formed a group?

Response: No. We do not view a shareholder's independently-determined act of exercising its voting rights, and any announcements or communications regarding its voting decision, without more, as indicia of group formation. This view is consistent with our general approach towards the exercise of the right of suffrage by a shareholder in other areas of the Federal securities laws. Shareholders, whether institutional or otherwise, are thus not engaging in conduct at risk of being deemed to give rise to group formation as a result of simply independently announcing or advising others—including the issuer—how they intend to vote and the reasons why.

Question: If a beneficial owner of a substantial block of a covered class that is or will be required to file a Schedule 13D intentionally communicates to other market participants (including investors) that such a filing will be made (to the extent this information is not yet public) with the purpose of causing such persons to make purchases in the same covered class, and one or more of the other market participants make purchases in the same covered class as a direct result of that communication, would the blockholder and any of those market participants that made purchases potentially become subject to regulation as a group?

Response: Yes. To the extent the information was shared by the blockholder with the purpose of causing others to make purchases in the same covered class and the purchases were made as a direct result of the blockholder's information, these activities raise the possibility that all of these beneficial owners are "act[ing] as" a "group for the purpose of acquiring" securities of the covered class within the meaning of Section 13(d)(3). Such purchases may implicate the need for public disclosure underlying Section 13(d)(3) and these purchases could

[30] The conclusion reflected in this example assumes the Rule 14a-8 or other non-binding shareholder proposal is submitted jointly and without "springing conditions" such as an arrangement, understanding, or agreement among the shareholders to vote against director candidates nominated by the issuer's management or other management proposals if the non-binding proposal is not included in the issuer's proxy statement or, if passed, not acted upon favorably by the issuer's board.

[31] Examples of the type of consents or commitments given in furtherance of a common purpose to acquire, hold (inclusive of voting), or dispose of securities of an issuer could include the granting of irrevocable proxies or the execution of written consents or voting agreements that demonstrate that the parties had an arrangement to act in concert.

potentially be deemed as having been undertaken by a "group" for the purpose of "acquiring" securities as specified under Section 13(d)(3). Given that a Schedule 13D filing may affect the market for and the price of an issuer's securities, non-public information that a person will make a Schedule 13D filing in the near future can be material. By privately sharing this material information in advance of the public filing deadline, the blockholder may incentivize the market participants who received the information to acquire shares before the filing is made. Such arrangements also raise investor protection concerns regarding perceived unfairness and trust in markets.[32] The final determination as to whether a group is formed between the blockholder and the other market participants will ultimately depend upon the facts and circumstances, including (1) whether the purpose of the blockholder's communication with the other market participants was to cause them to purchase the securities and (2) whether the market participants' purchases were made as a direct result of the information shared by the blockholder.

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[32] For example, any near-term gains made by these other investors attributable to information about the impending filing may cause uninformed shareholders who sell at prices reflective of the status quo to question the efficacy of existing regulatory framework. Even though the demand to acquire shares in the covered class may increase as a direct result of the blockholder's communications, and in turn increase the prices at which selling shareholders exit, such prices may be discounted in comparison to the price such shareholders would have realized had the information about the impending Schedule 13D filing been public. See, e.g. John C. Coffee, Jr. & Darius Palia, The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance, 41 J. CORP. L. 545, 596 (2016) (explaining that "the gains that activists make in trading on asymmetric information—before the Schedule 13D's filing—come at the expense of selling shareholders [and] represent[ ] another wealth transfer"). Consequently, this informational imbalance could, to the extent some perceive it to be unfair, diminish trust in markets. See, e.g., Georgy Chabakauri et al., Trading Ahead of Barbarians' Arrival at the Gate: Insider Trading on NonInside Information (Colum. Bus. Sch. Rsch. Paper, Jan. 2022), available at https://ssrn.com/abstract=4018057 (finding a significant concurrence between purchases of stock by insiders of the issuer and purchases by an activist in the 60 days, and particularly in the last 10 days, preceding a Schedule 13D filing).