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8011-01P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 232 and 240

[Release Nos. 33-11030; 34-94211; File No. S7-06-22]

RIN 3235-AM93

Modernization of Beneficial Ownership Reporting

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission ("Commission") is proposing to amend certain rules that govern beneficial ownership reporting. The proposed amendments would modernize the filing deadlines for initial and amended beneficial ownership reports filed on Schedules 13D and 13G. The proposed amendments also would deem holders of certain cash-settled derivative securities as beneficial owners of the reference equity securities and clarify the disclosure requirements of Schedule 13D with respect to derivative securities. In addition, the proposed amendments would clarify and affirm the operation of the regulation as applied to two or more persons that form a group under the Securities Exchange Act of 1934, and provide new exemptions to permit such persons to communicate and consult with each other, jointly engage issuers and execute certain transactions without being subject to regulation as a group. We also are proposing to amend provisions regarding the date on which Schedules 13D and 13G filings are deemed to have been made. Finally, we are proposing to require that Schedules 13D and 13G be filed using a structured, machine-readable data language.

DATES: Comments should be received on or before April 11, 2022.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's internet comment form (https://www.sec.gov/rules/submitcomments.htm); or

Paper comments:

- Send paper comments to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-06-22. To help the Commission process and review your comments more efficiently, please use only one method of submission. The Commission will post all submitted comments on its website (https://www.sec.gov/rules/proposed.shtml). Typically, comments also are available for website viewing and printing in the Commission's public reference room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Operating conditions may limit access to the Commission's public reference room. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information. You should submit only information that you wish to make publicly available.

Studies, memoranda or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on the Commission's website. To ensure direct electronic receipt of such notifications, sign up through the "Stay Connected" option at www.sec.gov to receive notifications by email.

FOR FURTHER INFORMATION CONTACT: Nicholas Panos, Senior Special Counsel, and Valian Afshar, Special Counsel, in the Office of Mergers and Acquisitions, Division of Corporation Finance, at (202) 551-3440, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are proposing amendments to 17 CFR 240.13d-1 ("Rule 13d-1"), 17 CFR 240.13d-2 ("Rule 13d-2"), 17 CFR 240.13d-3 ("Rule 13d-3"), 17 CFR 240.13d-5 ("Rule 13d-5"), 17 CFR 240.13d-6 ("Rule 13d-6") and 17 CFR 240.13d-101 ("Rule 13d-101"), under the Securities Exchange Act of 1934 [15 U.S.C. 78a *et seq*.] ("Exchange

Act").[1] We also are proposing amendments to 17 CFR 232.13 ("Rule 13 of Regulation S-T") and 17 CFR 232.201 ("Rule 201 of Regulation S-T") under 17 CFR part 232 ("Regulation S-T").[2]

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[1] Unless otherwise noted, when we refer to the Exchange Act, or any paragraph of the Exchange Act, we are referring to 15 U.S.C. 78a of the United States Code, at which the Exchange Act is codified, and when we refer to rules under the Exchange Act, or any paragraph of these rules, we are referring to title 17, part 240 of the Code of Federal Regulations [17 CFR part 240], in which these rules are published.

[2] Unless otherwise noted, when we refer to Regulation S-T, or any paragraph of the rules thereunder, we are referring to title 17, part 232 of the Code of Federal Regulations [17 CFR part 232], in which these rules are published.

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I. Introduction

We are proposing comprehensive changes to 17 CFR 240.13d-1 through 240.13d-102 ("Regulation 13D-G") and Regulation S-T to modernize the beneficial ownership reporting requirements and improve their operation and efficacy. Specifically, we are proposing to: (1) revise the current deadlines for Schedule 13D and Schedule 13G filings; (2) amend Rule 13d-3 to deem holders of certain cash-settled derivative securities as beneficial owners of the reference covered class; (3) align the text of Rule 13d-5, as applicable to two or more persons who act as a group, with the statutory language in Sections 13(d)(3) and (g)(3) of the Exchange Act; and (4) 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 with respect to the issuer's equity securities. We also are proposing certain related technical changes to Regulation S-T in connection with these proposed amendments. Finally, we are proposing to require that Schedules 13D and 13G be filed using a structured, machine-readable data language.

To address concerns that the current deadlines for Schedule 13D and Schedule 13G filings are creating information asymmetries in today's market, we are proposing to:

- Revise the Rule 13d-1(a) filing deadline for the initial Schedule 13D to five days[3] after the date on which a person acquires more than 5% of a covered class of equity securities;[4]
- Amend Rules 13d-1(e), (f) and (g) to shorten the filing deadline for the initial Schedule

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[3] Consistent with the current "10-day" deadline in Rule 13d-1(a), the proposed "five-day" deadline for filing the initial Schedule 13D would be measured in calendar days. If the last day of the initial Schedule 13D deadline falls on a Federal holiday, a Saturday or a Sunday, then such filing may be made on the next business day thereafter. 17 CFR 240.0-3 ("[I]f the last day on which [a filing] can be accepted as timely filed falls on a Saturday, Sunday or holiday, such [filing] may be [made] on the first business day following."). Any reference to "days" in either this release or any of our proposed amendments means "calendar days," and any reference to "business days" means "business days," as we are proposing to define that term. *See infra* note 5 for a discussion of our proposed definition of "business days."

[4] As used in this release, a "covered class" is a class of equity securities described in Section 13(d)(1) of the Exchange Act and Rule 13d-1(i) and generally means, with limited exception, a voting class of equity securities registered under Section 12 of the Exchange Act.

13D required to be filed by certain persons who forfeit their eligibility to report on Schedule 13G in lieu of Schedule 13D to five days after the event that causes the ineligibility;

- Revise the filing deadline under Rule 13d-2(a) for amendments to Schedule 13D to one business day[5] after the date on which a material change occurs;
- Amend Rules 13d-1(b) and (d) to shorten the deadline for the initial Schedule 13G filing for Qualified Institutional Investors ("QIIs")[6] and Exempt Investors[7] to within five business days after the last day of the month in which beneficial ownership first exceeds 5% of a covered class;
- Amend the deadline in Rule 13d-1(c), which permits Passive Investors[8] to file an initial Schedule 13G in lieu of Schedule 13D within 10 days after acquiring beneficial

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[5] The term "business day" is not defined in Section 13(d) or 13(g) or any rule of Regulation 13D-G. Accordingly, we are proposing to define "business day" for purposes of Regulation 13D-G to mean any day, other than Saturday, Sunday or a Federal holiday, from 6 a.m. to 10 p.m. eastern time.

[6] The institutional investors qualified to report on Schedule 13G, in lieu of Schedule 13D and in reliance upon Rule 13d-1(b), include a broker or dealer registered under Section 15(b) of the Exchange Act, a bank as defined in Section 3(a)(6) of the Exchange Act, an insurance company as defined in Section 3(a)(19) of the Exchange Act, an investment company registered under Section 8 of the Investment Company Act of 1940, an investment adviser registered under Section 203 of the Investment Advisers Act of 1940, a parent holding company or control person (if certain conditions are met), an employee benefit plan or pension fund that is subject to the provisions of the Employee Retirement Income Security Act of 1974, a savings association as defined in Section 3(b) of the Federal Deposit Insurance Act, a church plan that is excluded from the definition of an investment company under Section 3(c)(14) of the Investment Company Act of 1940, non-U.S. institutions that are the functional equivalent of any of the institutions listed in Rules 13d-1(b)(1)(ii)(A) through (I), so long as the non-U.S. institution is subject to a regulatory scheme that is substantially comparable to the regulatory scheme applicable to the equivalent U.S. institution, and related holding companies and groups (collectively, "Qualified Institutional Investors" or "QIIs"). 17 CFR 240.13d-1(b)(1)(ii).

[7] The term "Exempt Investor" as used in this release refers to persons holding beneficial ownership of more than 5% of a covered class at the end of the calendar year, but who have not made an acquisition of beneficial ownership subject to Section 13(d). For example, persons who acquire all their securities prior to the issuer registering the subject securities under the Exchange Act are not subject to Section 13(d) and persons who acquire not more than two percent of a covered class within a 12-month period are exempted from Section 13(d) by Section 13(d)(6)(B), but in both cases are subject to Section 13(g). Section 13(d)(6)(A) exempts acquisitions of subject securities acquired in a stock-for-stock exchange that is registered under the Securities Act of 1933.

[8] The term "Passive Investors" as used in this release refers to beneficial owners of more than 5% but less than 20% of a covered class who can certify under Item 10 of Schedule 13G that the subject securities were not acquired or held for the purpose or effect of changing or influencing the control of the issuer of such securities and were not acquired in connection with or as a participant in any transaction having such purpose or effect. These investors are ineligible to report beneficial ownership pursuant to Rules 13d-1(b) or (d) but are eligible to report beneficial ownership on Schedule 13G in reliance upon Rule 13d-1(c).

ownership of more than 5% of a covered class, to five days after the date of such an acquisition;

- Revise the filing deadlines required for amendments to Schedule 13G in Rule 13d-2(b) to five business days after the end of the month in which a reportable change occurs;
- Amend Rule 13d-2(c) to shorten the filing deadline for Schedule 13G amendments filed pursuant to that provision to five days after the date on which beneficial ownership first exceeds 10% of a covered class, and thereafter upon any deviation by more than 5% of the covered class, with these requirements applying if the thresholds were crossed at any time during a month; and
- Amend Rule 13d-2(d) to revise the filing deadline for Schedule 13G amendments filed pursuant to that provision from a "promptly" standard to one business day after the date on which beneficial ownership exceeds 10% of a covered class, and thereafter upon any deviation by more than 5% of the covered class.

In addition, instead of an amendment obligation arising for Schedule 13G filers upon the occurrence of "any change" in the facts previously reported regardless of the materiality of such change, we are proposing to revise Rule 13d-2(b) to require that an amendment to a Schedule 13G be filed only if a "material change" occurs. Further, we are proposing to amend Rule 13(a) of Regulation S-T to permit Schedules 13D and 13G, and any amendments thereto, that are submitted by direct transmission on or before 10 p.m. eastern time on a given business day to be deemed to have been filed on the same business day. This amendment would provide additional time for beneficial owners to prepare and submit their Schedule 13D or Schedule 13G filings.[9] The following table summarizes the changes we are proposing, as described more fully in Section II.A:

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[9] *See* Rule 13(a)(2) of Regulation S-T. We also are proposing to amend Rule 201(a) of Regulation S-T to make the temporary hardship exemption set forth in that rule—which applies to unanticipated technical difficulties preventing the timely preparation and submission of an electronic filing—unavailable to Schedules 13D and 13G, including any amendments thereto.

Issue	Current Schedule 13D	Proposed New Schedule 13D	Current Schedule 13G	Proposed New Schedule 13G
Initial Filing Deadline	Within 10 days after acquiring beneficial ownership of more than 5% or losing eligibility to file on Schedule 13G. Rules 13d-1(a), (e), (f) and (g).	Within five days after acquiring beneficial ownership of more than 5% or losing eligibility to file on Schedule 13G. Rules 13d-1(a), (e), (f) and (g).	QIIs & Exempt Investors: 45 days after calendar year-end in which beneficial ownership exceeds 5%. Rules 13d-1(b) and (d). Passive Investors: Within 10 days after acquiring beneficial ownership of more than 5%. Rule 13d-1(c).	QIIs & Exempt Investors: Five business days after month-end in which beneficial ownership exceeds 5%. Rules 13d-1(b) and (d). Passive Investors: Within five days after acquiring beneficial ownership of more than 5%. Rule 13d-1(c).
Amendment Triggering Event	Material change in the facts set forth in the previous Schedule 13D. Rule 13d-2(a).	No amendment proposed – material change in the facts set forth in the previous Schedule 13D). Rule 13d-2(a).	All Schedule 13G Filers: Any change in the information previously reported on Schedule 13G. Rule 13d-2(b). QIIs & Passive Investors: Upon exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership. Rules 13d-2(c) and (d).	All Schedule 13G Filers: Material change in the information previously reported on Schedule 13G. Rule 13d-2(b). QIIs & Passive Investors: No amendment proposed – upon exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership. Rules 13d-2(c) and (d).
Amendment Filing Deadline	Promptly after the triggering event. Rule 13d-2(a).	Within one business day after the triggering event. Rule 13d-2(a).	All Schedule 13G Filers: 45 days after calendar year-end in which any change occurred. Rule 13d-2(b). QIIs: 10 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. Rule 13d-2(c). Passive Investors: Promptly after exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership. Rule 13d-2(d).	All Schedule 13G Filers: Five business days after month-end in which a material change occurred. Rule 13d-2(b). QIIs: Five days after exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership. Rule 13d-2(c). Passive Investors: One business day after exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership. Rule 13d-2(d).
Filing "Cut-Off" Time	5:30 p.m. eastern time. Rule 13(a)(2) of Regulation S-T.	10 p.m. eastern time. Rule 13(a)(4) of Regulation S-T.	All Schedule 13G Filers: 5:30 p.m. eastern time. Rule 13(a)(2) of Regulation S-T.	All Schedule 13G Filers: 10 p.m. eastern time. Rule 13(a)(4) of Regulation S-T.

We also are proposing to add new paragraph (e) to Rule 13d-3 to deem holders of certain cash-settled derivative securities as beneficial owners of the reference covered class. Holders of derivative securities settled exclusively in cash do not have enforceable rights or any other entitlements with respect to the reference security under the terms of the agreement governing the derivative. Under certain circumstances described more fully below, however, holders of

such derivative securities may have both the incentive and ability to influence or control the issuer of the reference securities. Accordingly, the proposed amendment would "deem" holders of such derivative securities to beneficially own the reference securities just as if they held such securities directly.

The new means of determining who is a beneficial owner proposed in Rule 13d-3(e) would be applied separately from, and in addition to, Rules 13d-3(a) and (b), which provisions may, depending upon the facts and circumstances, apply independently from proposed Rule 13d-3(e) to persons who purchase or sell cash-settled derivatives. The application of proposed Rule 13d-3(e) 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. By contrast, security-based swaps, as defined by Exchange Act Section 3(a)(68) and the rules and regulations thereunder, would not be included among the derivative securities covered by proposed Rule 13d-3(e).

We are proposing amendments that would align the text of Rule 13d-5, as applicable to two or more persons who act as a group, with the statutory language in Sections 13(d)(3) and (g)(3) of the Exchange Act.[10] By conforming the rule text to Sections 13(d)(3) and 13(g)(3), the proposed amendments to Rule 13d-5 are intended to remove the potential implication that an express or implied agreement among group members is a necessary precondition to the formation of a group under those provisions of the Exchange Act and, by extension, Regulation 13D-G.[11] In connection with those proposed amendments, we also are proposing to add a new

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[10] *See* 15 U.S.C. 78m(d)(3) and (g)(3) ("When two or more persons act as a . . . group for the purpose of acquiring, holding, or disposing of securities of an issuer, such . . . group shall be deemed a 'person' for the purposes of this subsection."). The determination of whether two or more persons act as a group under these statutory provisions depends upon the particular facts and circumstances and may vary on a case-by-case basis.

[11] Further, to reinforce that Rule 13d-5, which is currently titled "Acquisition of securities," is intended to set forth the circumstances under which an acquisition is deemed to occur for purposes of Section 13(d)(1) and Rule 13d-1, we also propose to delete Rule 13d-5(b)(2)—which provides that, under certain conditions, a group shall not be deemed to have made an acquisition if persons take concerted action to make purchases in a covered class directly from an issuer—and to redesignate it as new Rule 13d-6(b). Rule 13d-6, titled "Exemption of certain acquisitions," exempts certain acquisitions from the scope of Section 13(d). Because Rule 13d-5(b)(2) operates as the equivalent of an exemption, moving Rule 13d-5(b)(2) to Rule 13d-6 would harmonize the subject matter of those rules.

provision in Rule 13d-5 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).

In addition, we are proposing amendments that would revise Rule 13d-6 to set forth additional exemptions from Sections 13(d) and (g). Specifically, new Rule 13d-6(c) would 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 with respect to the issuer's equity securities. New Rule 13d-6(d) would 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 with respect to the derivative's reference equity securities. These two exemptions are designed to provide greater certainty regarding the application of Sections 13(d)(3) and (g)(3), while ensuring that the proposed amendments to Rules 13d-3 and 13d-5 will not have a chilling effect on shareholder communications or engagement or impair certain financial institutions' capacity to execute strictly commercial transactions in the ordinary course of their business.

In addition, we are proposing amendments that would revise Schedule 13D to clarify the disclosure requirements with respect to derivative securities held by a person reporting on that schedule. Specifically, we are proposing to amend Item 6 to Schedule 13D, codified at Rule 13d-101, to remove any implication that a person is not required to disclose interests in all derivative securities that use a covered class as a reference security. This proposed amendment is intended to eliminate any ambiguity regarding the scope of the disclosure obligations of Item 6 of Schedule 13D as to derivative securities, including with respect to derivatives not originating with the issuer, such as cash-settled options not offered or sold by the issuer and security-based swaps.

Finally, we are proposing to require that Schedules 13D and 13G be filed using a structured, machine-readable data language. Specifically, we are proposing to require that all disclosures, including quantitative disclosures, textual narratives, and identification checkboxes, on Schedules 13D and 13G to be filed using an XML-based language to make it easier for investors and markets to access, compile and analyze information that is disclosed on Schedules 13D and 13G. Only the exhibits to Schedules 13D and 13G would remain unstructured.

We invite and encourage interested parties to submit comments on any aspect of the proposed rule amendments. When commenting, please include the reasoning in support of your position or recommendation and provide any supporting documentation or data.

II. Discussion of the Proposed Amendments

A. Proposed Amendments to Rules 13d-1 and 13d-2 and Rules 13 and 201 of Regulation S-T to Revise Filing Deadlines and Filing Date Assignment

We are proposing a series of amendments that would revise the deadlines for filing the initial and amended beneficial ownership reports on Schedules 13D and 13G and expanding the timeframe within a given business day in which such filings may be timely made. Specifically, we are proposing amendments to the following rules:

- Rule 13d-1(a) to shorten the filing deadline for the initial Schedule 13D;
- Rules 13d-1(e), (f), and (g) to shorten the filing deadlines for the initial Schedule 13D for certain persons who forfeit their eligibility to report on Schedule 13G in lieu of Schedule 13D;
- Rules 13d-1(b), (c), and (d) to shorten the filing deadlines for the initial Schedule 13G;
- Rules 13d-2(a) and (b) to revise the filing deadline for amendments to Schedule 13D and Schedule 13G, respectively, and to align the legal standard that dictates when amendments to Schedule 13G are required with the relevant statutory provision;
- Rules 13d-2(c) and (d) to revise the filing deadlines for certain other amendments to Schedule 13G; and

- Rules 13(a) and 201(a) of Regulation S-T to revise the time by which Schedule 13D and 13G filings, including amendments thereto, must be submitted on a given business day in order to be deemed to have been filed on the same business day and to make a temporary hardship exemption unavailable to those filings.

These proposed amendments are discussed in more detail below.

1. Rule 13d-1(a)

a. Background

Section 13(d)(1) of the Exchange Act requires a disclosure statement to be filed "within ten days after [an] acquisition [of more than 5% of a covered class] or within such shorter time as the Commission may establish by rule."[12] Consistent with this provision, Rule 13d-1(a) sets forth the 10-day filing deadline for the initial Schedule 13D.[13] Although the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act") amended Section 13(d)(1) to grant the Commission the authority to shorten the deadline for filing the initial Schedule 13D,[14] the 10-day deadline has not been updated since it was enacted more than 50 years ago.[15]

Technological advances since 1968, such as the ability to submit filings electronically through the Commission's Electronic Data Gathering, Analysis and Retrieval ("EDGAR") system and the use of modern information technology in today's financial markets, have led to calls for a reassessment of the 10-day initial filing deadline,[16] while others disagree that such

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[12] 15 U.S.C. 78m(d)(1).

[13] 17 CFR 240.13d-1(a) (requiring that a Schedule 13D be filed "within 10 days after the acquisition" of beneficial ownership of more than 5% of a covered class).

[14] Pub. L. 111-203, 124 Stat. 1900 929R(a)(1)(A) (2010).

[15] Section 13(d)(1) of the Exchange Act was enacted by the Ninetieth Congress in 1968 through the approval of Senate Bill 510.

[16] *See, e.g.*, Leo E. Strine, Jr., *Who Bleeds When the Wolves Bite? A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System*, 126 YALE L.J. 1870, 1895, 1960-61 (2017) (describing

advances warrant any change to the deadline.[17] For example, the Commission currently requires all Schedule 13D filings to be submitted electronically through its EDGAR system.[18] Mandated electronic submissions relieve filers of the need to arrange for delivery in-person or through the U.S. mails. Furthermore, given the advances in the information technologies used by market professionals today, less time is needed to compile the necessary data and prepare and transmit the Schedule 13D to the Commission than was required in 1968.

The 10-day filing deadline raises concerns that material information about potential change of control transactions is not being disseminated to the public in a manner that would be considered timely in today's financial markets. The delay in reporting this material information

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the "disclosure regime under Section 13 of the Securities Exchange Act" as "antiquated" and stating that "[i]t seems entirely clear to me that the idea of Section 13 was that an investor should come public as soon as reasonably possible after hitting the 5% threshold and that the reporting deadline was due to what it took to type up, proof, and deliver to Washington the required filing in 1968, when word processors and electronic filing with a button push did not exist"); David Benoit, *Congress Asked to Act on Activist Investor Disclosures*, THE WALL STREET JOURNAL (Apr. 15, 2015), https://www.wsj.com/articles/congress-asked-to-act-on-activist-investor-disclosures-1429107089 (noting that Citizens for Responsibility and Ethics in Washington, the Government Accountability Project and New Rules for Global Finance sent a letter to members of Congress requesting that the Schedule 13D filing deadline be shortened from 10 days to one day); Adam O. Emmerich et al., *Fair Markets and Fair Disclosure: Some Thoughts on the Law and Economics of Blockholder Disclosure, and the Use and Abuse of Shareholder Power*, 3 HARV. BUS. L. REV. 135, 143 (2013) (noting that the 10-day Schedule 13D filing deadline reflected "commercial and technological realities that existed in 1968, [which] would have included the time required to mail the Schedule 13D to the SEC's office"); letter from Wachtell, Lipton, Rosen & Katz to Elizabeth M. Murphy, Sec'y, U.S. Sec. & Exch. Comm'n (Mar. 7, 2011) ("Wachtell Petition") at 1-7, *available at* http://www.sec.gov/rules/petitions/2011/petn4-624.pdf (petitioning the Commission to propose amendments to the beneficial ownership reporting rules to, among other things, shorten the Schedule 13D filing deadline from 10 days to one business day).

[17] *See, e.g.*, Lucian A. Bebchuk et al., *Pre-Disclosure Accumulations by Activist Investors: Evidence and Policy*, 39 J. CORP. L. 1, 14-17 (2013) (noting that the authors "are not familiar . . . with any research establishing [the] claim" that technological developments and changes in the capital markets since 1968 have rendered the 10-day Schedule 13D filing deadline obsolete); Ronald Gilson and Jeffery Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 904 (2013) (explaining that shortening the deadline would "reduce the economic stake that an activist shareholder can accumulate before mandatory disclosure of its holding drives up the price of the target company's stock" which would cause the "activist sector [to] shrink, fewer firms [to] be identified as targets for strategic initiatives, and the activists [to] reduce costly campaign efforts"); Lucian A. Bebchuk and Robert J. Jackson Jr., *The Law and Economics of Blockholder Disclosure*, 2 HARV. BUS. L. REV. 39, 44-47 (2012) (noting that Schedule 13D's 10-day filing deadline "reflects a careful balance that Congress struck, after extensive debate, between the need to provide information to investors and the importance of preserving the governance benefits associated with outside blockholders").

[18] In mandating that all Schedules 13D and 13G be filed electronically, the Commission reasoned that such a transition was necessary to facilitate "more rapid dissemination of, and easier access to, financial and other material information . . . than under our current paper filing system" while also citing to "increased efficiencies in the filing process, which will significantly reduce the filing time required under traditional methods of paper delivery." *See* Rulemaking for EDGAR System, Release No. 34-35113 (Dec. 19, 1994) [59 FR 67752 (Dec. 30, 1994)]; Mandated EDGAR Filing for Foreign Issuers, Release No. 34-45922 (May 14, 2002) [67 FR 36678 (May 24, 2002)].

contributes to information asymmetries that could harm investors.[19] In enacting Section 13(d), including its original mandate of a 10-day filing deadline in 1968, Congress considered the need to strike an appropriate balance between, on the one hand, providing adequate disclosures to investors and, on the other hand, not unduly burdening those engaging in change of control transactions.[20] In 2010, Congress reassessed the 10-day deadline established in 1968 and subsequently amended Section 13(d) to authorize the Commission to shorten the 10-day deadline.[21] This grant of statutory authority by Congress to establish a shorter deadline clearly

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[19] *See, e.g.*, John C. Coffee, Jr. and Darius Palia, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance*, 41 J. CORP. L. 545, 597 (2016) ("[T]he gains that activists make in trading on asymmetric information--before the Schedule 13D's filing--come at the expense of selling shareholders. . . . Disclosure that is delayed ten days enables activists to profit from trading on asymmetric information over that period . . . ."); Adam O. Emmerich et al., *supra* note 17, at 142-46 ("[N]othing in the words or legislative history of the Williams Act suggests that the ten-day disclosure window established in 1968 was designed to allow activists to accumulate large stakes at discounted prices, unbeknownst to and to the detriment of counterparties and the market. To the contrary, the purpose of the Williams Act was to promptly arm market participants with information concerning potential changes in corporate control in order to allow them to make more informed investment decisions. The stealth accumulations at below-market prices . . . transfer value from public investors to activists . . . ."); Wachtell Petition, *supra* note 17, at 3 ("[T]he ten-day [Schedule 13D] reporting lag leaves a substantial gap after the reporting threshold has been crossed during which the market is deprived of material information and creates incentives for abusive tactics on the part of aggressive investor prior to making a filing."). *But see, e.g.*, Ronald J. Gilson and Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 907-09 (2013) ("A shareholder's decision to sell results either from liquidity needs or the shareholder's reservation price for the security in question. Any asymmetry of information involved in the transaction arises from the activist's private information about its own intentions, which may include a forecast as to the likely target firm response. Why does the selling shareholder have an entitlement to share in the value of information created by the analysis of other investors?"); Lucian A. Bebchuk et al., *supra* note 17, at 17-19 (contending that shortening the Schedule 13D filing deadline "would carry significant costs for public-company shareholders" because "requiring activist investors to disclose their ownership in public companies more quickly will reduce these investors' returns--thereby reducing the incidence and magnitude of outside blockholdings in large public companies"); Lucian A. Bebchuk and Robert J. Jackson Jr., *supra* note 17, at 47-51 (describing the "substantial body of empirical evidence that is consistent with the view that outside blockholders improve corporate governance and benefit public investors" and noting that shortening the Schedule 13D filing deadline could "reduce the returns to outside shareholders considering acquiring a block and, in turn, . . . result in a reduction in the incidence and size of outside blocks").

[20] *See, e.g.*, Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearing on S. 510 Before the Subcomm. on Securities of the S. Comm. on Banking and Currency, 90th Cong. 1 (1967) (statement of Manuel F. Cohen, Chairman, Securities and Exchange Commission) ("It must be emphasized again that in establishing requirements which will make this important information available to stockholders, we must be careful not to tip the scales to favor either incumbent management or those who would seek to oust them. We believe that the provisions of the present bill . . . reflect an appropriate balance among competing interests which, at the same time, will fulfill the need of public stockholders to be fully informed about the control and potential control of the company in which they have invested."); H.R. Rep. No. 1711, at 4 (1968) ("The bill avoids tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid. It is designed to require full and fair disclosure for the benefit of investors while at the same time providing the offeror and management equal opportunity to fairly present their case."); S. Rep. No. 550, at 3 (1968) (same); *see also infra* note 35 and accompanying text.

[21] *See supra* note 14 and accompanying text.

indicates that the current 10-day deadline is not immutable and that the Commission is empowered to shorten that deadline to address the needs of today's investors and other market participants, particularly in light of the technological advancements and other developments in the financial markets that have occurred since 1968.[22] In reassessing whether or not the current 10-day deadline still serves the primary purposes of Section 13(d), which are to provide information to the public and the subject issuer about accumulations of a covered class by persons who had the potential to change or influence control of such issuer[23] and to regulate rapid accumulations of beneficial ownership that occurred within a short period of time,[24] we have determined that an amendment to Rule 13d-1(a) is needed to adequately support those regulatory objectives.

b. Proposed Amendments

We believe the 10-day filing deadline for the initial Schedule 13D filing should be revised in light of advances in technology and developments in the financial markets. Our proposal to shorten the initial filing deadline for Schedule 13D is consistent with previous Congressional and Commission efforts to accelerate public disclosures of material information to

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[22] At the same time, however, we recognize significant state law changes have occurred since the enactment of the Williams Act that have resulted in legal impediments being imposed upon blockholders in the market for corporate control. *See* Lucian A. Bebchuk and Robert J. Jackson Jr. *supra* note 17, at n.54 and accompanying text. These state law impediments have decreased the incidence of hostile takeover bids and, as a result, "active outside blockholders filing a Schedule 13D are commonly not expected to seek to acquire control, but rather to monitor and engage with management and fellow shareholders." *Id.* at 56.

[23] *See* Reporting of Beneficial Ownership in Publicly-Held Companies, Release No. 34-26598 (Mar. 14, 1989) [54 FR 10552 at text accompanying n.20 (Mar. 14, 1989)] ("Section 13(d) was intended to provide information to the public and the subject company about accumulations of its equity securities in the hands of persons who then would have the potential to change or influence control of the issuer.") (citing S. Rep. No. 550, 90th Cong., 1st Sess. 7 (1967); H.R. Rep. No. 1711, 90th Cong., 2nd Sess. 8 (1968); Hearings on S. 510 before the Subcomm. on Securities of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. (1967)).

[24] H.R. Rep. No. 90-1711 (1968) ("The purpose of section 13(d) is to require disclosure of information by persons who have acquired a substantial interest, or increased their interest in the equity securities of a company by a substantial amount, within a relatively short period of time."); *see also* Filing and Disclosure Requirements Relating to Beneficial Ownership, Release No. 34-17353 (Dec. 4, 1980) [45 FR 81556 at text accompanying n.5 (Dec. 11, 1980)] ("The legislative history of [Section 13(d)] indicates that it was intended to provide information to the public and the affected issuer about rapid accumulations of its equity securities by persons who would then have the potential to change or influence control of the issuer.") (citing S. Rep. No. 550, 90th Cong., 1st Sess. 7 (1967); Hearings on S.510 before the Subcomm. on Securities of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. (1967)).

the market.[25] For example, when the Commission accelerated the deadlines for issuers to submit their periodic reports, it reasoned that "[s]ignificant technological advances over the last three decades have both increased the market's demand for more timely corporate disclosure and the ability of companies to capture, process and disseminate this information."[26]

The Commission has long recognized the benefits of more expedient reporting, stating, for example, that "a lengthy delay before . . . information becomes available makes the information less valuable to investors."[27] Nonetheless, the deadline for filing an initial Schedule 13D has remained unchanged for over 50 years.[28] We continue to appreciate the need for a

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[25] For example, the Sarbanes-Oxley Act of 2002 amended Section 16(a) to require that change of beneficial ownership reports under Section 16(a) of Exchange Act be filed by officers, directors and beneficial owners of more than 10% of a covered class "before the end of the second business day following the day on which the subject transaction has been executed." On August 27, 2002, the Commission adopted amendments to implement the accelerated deadline for Form 4 filings. *See* Ownership Reports and Trading by Officers, Directors and Principal Security Holders, Release No. 34-46421 (Aug. 27, 2002) [67 FR 56461 (Sept. 3, 2002)]. On March 16, 2004, the Commission amended Form 8-K to generally require that such filings be made within four business days of a triggering event. In adopting the accelerated timeline, the Commission explained the amended requirement "should enhance investor confidence in the financial markets." Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date, Release No. 34-49424 (Mar. 16, 2004) [69 FR 15593 at 15611 (Mar. 25, 2004)]. The Commission further explained that "[t]he requirement of enhanced, timely disclosure should raise investors' expectations regarding the amount and timing of information that reporting companies must make available to the public" and that "[c]onfidence in the expectation of such enhanced disclosure should provide more certainty to those investors that they are making investment decisions in a more transparent market, which should reduce market volatility as a result of uncertainty of the availability of accurate timely information about public companies." *Id.*

[26] Acceleration of Periodic Report Filing Dates and Disclosure Concerning Website Access to Reports, Release No. 34-46464 (Sept. 5, 2002) [67 FR 58479 (Sept. 16, 2002)]. We recognize that these accelerated deadlines applied to periodic filings made by issuers, whereas Sections 13(d) and (g) relate to filings made by investors. We also recognize that the acceleration of these deadlines was prompted, in part, by Section 409 of the Sarbanes-Oxley Act of 2002, which "added Section 13(l) of the Exchange Act . . . [to] require[] disclosure on a *rapid and current* basis of such additional information concerning material changes in the financial condition or operations of the issuer," *id.* at n.15 and accompanying text (emphasis added), whereas no such "rapid and current" language exists in Sections 13(d) and 13(g). Nonetheless, the technological advances that have increased both the market's demand for more timely disclosure and the ability of issuers to file more rapidly are equally applicable to the information disclosed on Schedule 13D and available to investors making Schedule 13D filings. For example, Congress recognized the market's demand for more timely disclosure of non-issuer filings by accelerating deadline for Section 16 filings in the Sarbanes-Oxley Act. *See supra* note 25. As such, we believe that these technological advances also support accelerating the initial Schedule 13D filing deadline.

[27] *Id.*; *see also* H.R. Rep. 90-550 (1967) ("The persons seeking control, however, have information about themselves and about their plans which, if known to investors, might substantially change the assumptions on which the market price is based. The bill is designed to make relevant facts known so that shareholders have a fair opportunity to make their decision.").

[28] Although the initial Schedule 13D deadline has not been changed, the idea of shortening the deadline for beneficial ownership reports has been previously recommended. For example, then-Chairman David S. Ruder recommended to Congress that the filing deadline for an initial beneficial ownership report be reduced from ten days to five business days and that the filing person be prohibited from acquiring additional securities until the filing was

balance to be struck between the requirement that material information be timely disseminated and the competing interest that undue burdens not be imposed in the change of control context.[29] We recognize the chilling effect that a shortening of the initial Schedule 13D filing deadline could have on a shareholder's ability and incentive to effect changes at companies that may benefit all shareholders, particularly where the shortened deadline may increase the costs and reduce the incentives for those shareholders attempting such change of control efforts.[30] We do not believe, however, that a shortening of the deadline would unduly disrupt that balance, as many Schedule 13D filers currently do not avail themselves of the full 10-day filing period.[31] In recognition of the need to strike the appropriate balance between these interests, however, we also solicit public comment on this point in Section III.F below.

As noted above, Rule 13d-1(a) currently requires the initial Schedule 13D to be filed within 10 days after the date on which a person acquires beneficial ownership of more than 5% of a covered class.[32] We are proposing to amend Rule 13d-1(a) to require a Schedule 13D to be

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made. *See* Statement of David S. Ruder, Chairman of the Securities and Exchange Commission, Before the House Subcommittee on Telecommunications and Finance, Sept. 17, 1987; Statement of Charles C. Cox, Acting Chairman of the Securities and Exchange Commission, Before the Senate Committee on Banking, Housing and Urban Affairs, June 23, 1987 ("[The] Commission could also support legislation to require that a Schedule 13D be filed within five business days of crossing the 5 percent threshold, and that a prohibition on further purchases be imposed until the filing requirement is satisfied.").

[29] *See supra* note 20 and accompanying text; *see also* 113 CONG. REC. 24,664 (1967) (noting that "takeover bids should not be discouraged, since they often serve a useful purpose by providing a check on entrenched but inefficient management") (statement of Sen. Harrison A. Williams, Jr.).

[30] Academic research indicates that large blockholders may improve the share price and the corporate governance of the companies in which they invest, and these benefits are enjoyed by all of the company's shareholders. *See infra* Section III.C.b.i. This research also suggests that if the initial Schedule 13D filing deadline is shortened, it could reduce the profitability of such investments to large blockholders, making them less inclined to make those investments or engage with the companies in ways that produce such share price and corporate governance benefits. *Id.*

[31] *See infra* notes 203-205 and accompanying text (noting that 22.97% of the initial Schedule 13D filings in the data set were filed on the 10th day).

[32] Failure to comply with this deadline, as well as other deadlines for beneficial ownership filings, could lead to significant penalties. Under Section 21 of the Exchange Act, the Commission has the authority to investigate and enforce violations of Section 13(d)(1) and Rule 13d-1(a), and may seek to impose various remedies for late filings, such as injunctive relief, cease-and-desist orders or civil monetary penalties. The Commission also may assert and refer criminal violations for prosecutions under Section 32(a) of the Exchange Act. Importantly, no state of mind requirement exists for violations of Section 13(d)(1) and corresponding Rule 13d-1(a). *See SEC v. Levy*, 706 F.

filed within five days after the date of such acquisition. For purposes of determining the filing deadline under this proposed amendment, the Commission must receive the filing on the fifth day *after* the date of the acquisition in order for the filing to be considered timely. Under the current rules, the Commission would have to receive that filing on or before 5:30 p.m. eastern time on the due date.[33] As described in Section II.A.6 below, however, we also are proposing to extend that cut-off time to 10 p.m. eastern time for Schedule 13D and 13G filings, including amendments thereto.[34]

In proposing to establish new timeframes for filing reports, we are mindful of the need to balance the market's demand for timely information against the administrative burden placed upon a filer to adequately and accurately prepare that information. We also recognize that when enacting Section 13(d)(1), Congress considered the interests of both issuers of securities and the large shareholders who sought to exert influence or control over issuers, and took an even-handed approach.[35] The proposed five-day deadline reflects our attempt to maintain that balance

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Supp. 61, 63-69 (D.D.C. 1989) (holding a defendant liable notwithstanding the defendant's assertion that his attorney "misinformed defendant about his obligation to disclose" information on Schedule 13D because scienter is not an element of such violations). In addition, a Schedule 13D filing obligation is not dependent on the investor intending to gain control of the company, but instead is based on a numerical beneficial ownership threshold. *See SEC v. Savoy Indus., Inc.*, 587 F.2d 1149, 1167 (D.C. Cir. 1978) ("Indeed, the plain language of section 13(d)(1) gives no hint that intentional conduct need be found, but rather, appears to place a simple and affirmative duty of reporting on certain persons. The legislative history confirms that Congress was concerned with providing disclosure to investors, and not merely with protecting them from fraudulent conduct."); *see also Oppenheimer & Co., Inc.*, 47 SEC 286, 1980 WL 26901, at *1-2 (May 19, 1980) ("We have previously held that the failure to make a required report, even though inadvertent, constitutes a willful violation.").

[33] See Rule 13 of Regulation S-T, titled "Date of filing; adjustment of filing date." 17 CFR 232.13. Rule 13(a)(2) provides that "all filings submitted by direct transmission commencing on or before 5:30 p.m. [eastern time] shall be deemed filed on the same business day, and all filings submitted by direct transmission commencing after 5:30 p.m. [eastern time] shall be deemed filed as of the next business day." *Id.*

[34] *See infra* Section II.A.6.

[35] In discussing the Williams Act, one Senator stated that "the committee has carefully weighed both the advantages and disadvantages to the public of the cash tender offer. We have taken extreme care to avoid tipping the scales either in favor of management or in favor of the person making the takeover bids. S. 510 is designed solely to require full and fair disclosure for the benefit of investors." 113 CONG. REC. S12557 (daily ed. Aug. 30, 1967) (statement of Sen. Harrison A. Williams, Jr.). The Senator further stated that "[t]he bill will at the same time provide the offeror and management with equal opportunity to present their case." *Id.*; *see also* Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearing on S. 510 Before the Subcomm. on Securities of the S. Comm. on Banking and Currency, 90th Cong. 1 (1967) (statement of Manuel F. Cohen, Chairman, Securities and Exchange Commission) ("But the principal point is that we are not concerned with assisting or hurting either side. We are concerned with the investor who today is just a pawn in a form of industrial warfare.").

and similarly undertake an even-handed approach, especially when compared with considerably shorter initial filing deadlines some parties have recommended.[36] However, in light of the technological advances and the rapid pace with which trading activities and large accumulations of beneficial ownership can occur in the financial markets today as compared to when the deadline was enacted in 1968, we are concerned that the current delay in reporting market-moving information on Schedule 13D raises investor protection concerns.[37] Under current Rule 13d-1(a), large shareholders may acquire more shares without contemporaneously disclosing their beneficial ownership during the 10-day period that follows the date that a Schedule 13D filing obligation arises. Although the 10-day period may facilitate opportunities for certain shareholders to acquire stakes large enough to incentivize them to engage in corporate activism that could benefit all shareholders,[38] the informational imbalance between a buyer and seller during that period may result in transactions being consummated based on mispriced securities.[39]

Congress enacted Section 13(d) as a means of requiring timely disclosures needed for informed investment decisions that ultimately could contribute to the accurate valuation of securities.[40] The proposed shortening of the initial Schedule 13D filing deadline is consistent

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[36] *See, e.g.*, *supra* note 17.

[37] The Commission has long recognized that additional purchases made after a filing obligation arises under Section 13(d)(1) and corresponding Rule 13d-1(a) constitutes a "disclosure gap [that] may deprive security holders of a fair opportunity to adjust their evaluation of the securities of a company with respect to [a] potential change in control . . . ." Report of the Securities and Exchange Commission on Beneficial Ownership Reporting Requirements pursuant to Section 13(h) of the Securities Exchange Act of 1934 (June 27, 1980); *see also* supra note 17. Following a review of the effectiveness of Section 13(d) conducted more than four decades ago, the Commission evaluated the then "increasingly prevalent practice of [large blockholders] acquiring additional securities of [a covered] class during the 10-day period after the acquisition which results in the beneficial ownership of more than 5 percent and before the disclosure statement is required to be, and normally is, filed . . . ." Securities and Exchange Commission Report on Tender Offer Laws, Printed for the use of the Committee on Banking, Housing and Urban Affairs – United States Senate (Mar. 1980). The Commission provided multiple illustrative examples in which "the existing notification system often does not provide shareholders with relevant information in a timely manner." *Id.*

[38] *See supra* notes 17 and 19.

[39] HR. Rep. 90-1711 (1968) ("But where no information is available about persons seeking control, or their plans, the shareholder is forced to make a decision on the basis of a market price which reflects evaluation of the company based on the assumption that the present management and its policies will continue.").

[40] *See GAF Corp. v. Milstein*, 453 F.2d 709, 717 (2d. Cir. 1971), *cert. denied*, 406 U.S. 910 (1972) (noting that without prompt disclosure, "investors cannot assess the potential for changes in corporate control and adequately evaluate the company's worth").

with those legislative objectives while holding the potential to benefit investors and improve the efficiency of U.S. capital markets. Market-moving information, such as the accumulation of a significant equity stake,[41] would be made available more quickly, improving opportunities for more efficient and more accurate price discovery.[42] In addition to more closely aligning the initial Schedule 13D filing deadline with the reporting deadline on Form 8-K for issuers and Form 4 for officers, directors and beneficial owners of more than 10% of a covered class, a shorter filing deadline for the initial Schedule 13D also would be consistent with the filing deadlines for similar beneficial ownership reports in foreign jurisdictions.[43] The increase in transparency and corresponding assurance given to investors that transactions are not being made based on mispriced securities caused by a prolonged lag in the dissemination of market-moving information should increase investor confidence. By increasing the certainty offered to shareholders that their trades are not being made on the basis of incomplete or outdated information, the proposed amendment to Rule 13d-1(a) could in turn enhance market efficiency

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[41] The materiality of such information is supported by academic literature indicating that economically significant price changes occur in response to news about changes in corporate control, including the filing of a Schedule 13D. *See infra* note 215 and accompanying text.

[42] *See* Takeover Bids: Hearing on H.R. 14475 and S. 510 Before the H. Subcomm. on Commerce and Finance of the H. Comm. on Interstate and Foreign Commerce, 90th Cong. 10 (1968) (statement of Manuel F. Cohen, Chairman, Securities and Exchange Commission) ("Now it is argued by some that the basic factor which influences shareholders to accept a tender offer is the adequacy of the price. But, I might ask, how can an investor evaluate the adequacy of the price if he cannot assess the possible impact of a change in control? Certainly without such information he cannot judge its adequacy by the current or recent market price. That price presumably reflects the assumption that the company's present business, control and management will continue. If that assumption is changed, is it not likely that the market price might change?"). The potential gains in market efficiency and price discovery that could be achieved with a shorter initial reporting deadline, however, could be offset by the costs imposed upon shareholders who seek to influence or change management. *See supra* note 38 and accompanying text.

[43] For example, Australia requires disclosure of any position of 5% or more within two business days if any transaction affects or is likely to affect control or potential control of the issuer. *See* Corporations Act 2001 (Cth) sec. 671B (Austl.). The United Kingdom imposes a two-trading-day deadline for disclosure of acquisitions in excess of 3% of an issuer's securities. *See* Disclosure Rules and Transparency Rules, Ch. 5 (U.K.). Germany requires a report "immediately," but in no event later than four days after crossing the acquisition threshold. *See* Securities Trading Act, Sept. 9, 1998, BGBL. I at 2708, as amended, pt. 5 (Ger.). Hong Kong securities laws require a report within three business days of the acquisition of a "notifiable interest" under the law. *See* Part XV of the Securities and Futures Ordinance (promulgated by the Securities and Futures Commission, effective Apr. 1, 2003) (H.K.). This comparative analysis suggests that a shortened deadline is workable based on the experience of these foreign jurisdictions. We note, however, that this comparative analysis may be imperfect given the relevant differences in the legal systems in the U.S. and these foreign jurisdictions, including anti-takeover devices that are legal under certain states' corporate laws (*e.g.*, low-threshold poison pills that are permitted under Delaware law) that may not be legal in these foreign jurisdictions.

and liquidity.

Request for Comment

1. Should we amend Rule 13d-1(a) as proposed?
2. How has the market for corporate control changed since the enactment of the Williams Act? To the extent those changes are significant, how should we consider them in our analysis of shortening the reporting window?
3. Should we amend Rule 13d-1(a), but have the initial Schedule 13D due within a different number of days than proposed (*e.g.*, five business days rather than five days) after the date of acquisition? Should we use business days instead of days for purposes of the Rule 13d-1(a) deadline for the initial Schedule 13D filing?
4. Rather than shorten the deadline under Rule 13d-1(a) in all instances, should we offer a tiered approach, such as maintaining the 10-day deadline for acquisitions of greater than 5% but no more than 10% while instituting a shorter deadline if beneficial ownership exceeds 10%? Should a person who "stands still" (*i.e.*, chooses to make no further acquisitions of beneficial ownership) after crossing the 5% threshold be subject to a longer filing deadline than those persons who continue to make acquisitions after crossing the 5% threshold? If so, how much extra time to file should such person be given? In addition, if a tiered deadline is recommended, should any limit be placed upon the amount that can be acquired during the day on which the 5% threshold is crossed? If any acquisition limits should be imposed on the day the 5% threshold is crossed under a scenario where we move to adopt tiered deadlines, what should be the maximum amount that a person could acquire and still be eligible for an extended filing deadline?
5. Should the deadline for the initial Schedule 13D filing vary based on a particular characteristic of the issuer (such as its market capitalization or trading volume)? If so, please explain the justification for why the deadline for reporting beneficial ownership in certain types of issuers should be either shorter or longer based on any such characteristic.

6. Would the costs associated with preparing and filing an initial Schedule 13D within the proposed five-day deadline substantially differ from current costs of filing, and if so, why?
7. Would the proposed amendments improve price discovery of a covered class, and, in turn, reinforce investors' confidence in the integrity of the capital markets?
8. Are there costs other than routine filing and preparation costs that we should consider in setting the initial Schedule 13D filing deadline, and if so, what are those costs and can they be quantified? For example, would shortening the deadline necessarily limit the amount of a covered class that a beneficial owner could acquire before the initial Schedule 13D filing is due? If so, please identify such limit or limitations. To the extent that any limit or limitations exist on the amount of beneficial ownership in a covered class that can be acquired on the same day on which the 5% reporting threshold is crossed, how would any such limit or limitations impose actual or anticipated costs upon shareholders in the covered class, including those who would be acquiring reportable positions for the first time?
9. Other than administrative burden or liquidity concerns, what other potential drawbacks should be considered in setting a new filing deadline? For example, would there be observable decreases in shareholder activism?
10. As a means of offsetting any incremental cost increases associated with the proposed change, should we amend Schedule 13D, codified at Rule 13d-101, to include pre-populated disclosure fields under each line item disclosure requirement that reduce the amount of narrative that the filer would be required to prepare and review? For example, rather than requiring filers to describe any plans or proposals that would result in the issuer undertaking an extraordinary transaction (*e.g.*, a sale or transfer of a material amount of assets of the issuer or any of its subsidiaries), such a transaction type would be listed along with a box that could be "checked" by the filer to indicate the existence of any plan or proposal for the issuer to engage in such a transaction.

11. Have any change of control transactions followed large accumulations of beneficial ownership that occurred after the 5% threshold was crossed but before the initial Schedule 13D was filed, and if so, what were those transactions?
12. Is there evidence of shareholder harm that occurred as a result of purchases made by a large shareholder after the 5% threshold was crossed but before the Schedule 13D was filed? If so, please describe the impact of such accumulations (including any quantifiable harms).
13. Have any corporate actions been prevented from occurring, or been forced to occur, as a result of the current 10-day filing deadline for an initial Schedule 13D? If so, what were those instances and how did the delay in reporting interfere with or otherwise impact the normal operation of the corporation? For example, were any issuers coerced or pressured to execute a settlement agreement or undertake a buyback of their securities as a direct consequence of the initially undisclosed amount of a covered class acquired once the 5% threshold was crossed? Aside from transactions that occur based upon an imbalance of information, are there any other specific difficulties that arise from information asymmetries in the days leading up to a Schedule 13D filing?
14. Shares purchased during the 10-day window in advance of a Schedule 13D filing are purchased from shareholders who already have made the decision to exit or reduce their investment. It is possible that some or all of those shareholders would have sold their shares regardless of whether a Schedule 13D had been filed earlier. Is there evidence that a Schedule 13D filing impacts the liquidity of an issuer's shares or otherwise indicates that a Schedule 13D filing impacts shareholders' decisions to sell their shares?

2. Rules 13d-1(e), (f), and (g)

a. Background

Rules 13d-1(e), (f), and (g) were adopted in 1998.[44] Those rules are designed to ensure that initial Schedule 13D filing obligations are identical, regardless of whether the beneficial owners were previously eligible to file a Schedule 13G in lieu of the Schedule 13D. Specifically, Rules 13d-1(e), (f), and (g) set forth the initial Schedule 13D filing obligations for investors who are no longer eligible to rely upon Rule 13d-1(b)[45] or (c).[46] Rules 13d-1(b) and (c) permit investors to file a comparatively abbreviated Schedule 13G in lieu of the longer-form Schedule 13D and to have more time to make amended filings.

Rule 13d-1(e) applies to persons who have been filing a Schedule 13G in lieu of Schedule 13D in reliance upon either Rule 13d-1(b) or (c). Rules 13d-1(b) and (c) both provide that a person may not rely on those provisions if he or she beneficially owns the relevant equity securities with the purpose or effect of changing or influencing the control of the issuer. Institutional and non-institutional beneficial owners who are unable to certify that they do not hold beneficial ownership with the intent to change or influence control of the issuer or in connection with any transaction that would have such purpose or effect, as described more fully under Item 10 of Schedule 13G, or certain institutional investors that also acquire or hold beneficial ownership outside of the ordinary course of business are considered to have, for purposes of this release, a "disqualifying purpose or effect."[47] Rule 13d-1(e)(1) currently requires that such persons file their initial Schedule 13D within 10 days of losing their Schedule

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[44] Amendments to Beneficial Ownership Reporting Requirements, Release No. 34-39538 (Jan. 12, 1998) [63 FR 2854 (Jan. 16, 1998)].

[45] 17 CFR 240.13d-1(b).

[46] 17 CFR 240.13d-1(c).

[47] Whether investors are engaged in activity with the purpose or effect of changing or influencing control of an issuer, and thus holding beneficial ownership with a disqualifying purpose or effect, ordinarily is a determination that would be based upon the specific facts and circumstances. For that reason, the Commission has not provided extensive guidance on this issue. The Commission has previously opined that most solicitations in support of a proposal specifically calling for a change of control of the company (*e.g.*, a proposal to seek a buyer for the company or a contested election of directors or a sale of a significant amount of assets or a restructuring of a corporation) would clearly have that purpose and effect. For a more expansive discussion of the Commission's reasoning and factors to consider when making this determination, see Amendments to Beneficial Ownership Reporting Requirements, Release No. 34-39538 (Jan. 12, 1998) [63 FR 2854 (Jan. 16, 1998)].

13G eligibility because they beneficially own a covered class with a disqualifying purpose or effect.

Similarly, Rule 13d-1(f) applies to persons who have been filing a Schedule 13G in lieu of Schedule 13D in reliance on Rule 13d-1(c). Rule 13d-1(c) provides that persons may not rely on that provision if they beneficially own 20% or more of a covered class. Rule 13d-1(f)(1) currently requires that such persons file their initial Schedule 13D within 10 days of losing their Schedule 13G eligibility because they beneficially own 20% or more of a covered class.

Finally, Rule 13d-1(g) applies to persons who have been filing a Schedule 13G in lieu of Schedule 13D in reliance upon Rule 13d-1(b). Only QIIs may rely on Rule 13d-1(b). Further, in order to rely on Rule 13d-1(b), a QII must beneficially own the relevant equity securities in the ordinary course of its business. Rule 13d-1(g) currently requires that such persons either file their initial Schedule 13D or amend their Schedule 13G to indicate that they are now relying on Rule 13d-1(c) (assuming they are eligible to rely on that rule) within 10 days of losing their Schedule 13G eligibility under Rule 13d-1(b) because they either no longer are a QII or no longer beneficially own the relevant equity securities in the ordinary course of their business.

Rules 13d-1(e), (f), and (g) operate as regulatory safeguards that reestablish the application of Rule 13d-1(a) to beneficial owners who previously relied on Rule 13d-1(b) or (c) to indefinitely suspend application of Rule 13d-1(a) and its attendant 10-day initial Schedule 13D filing deadline. Under Rules 13d-1(e), (f), and (g), beneficial owners "shall immediately become subject to" Rules 13d-1(a) and 13d-2(a), which provisions are reinstated anew with respect to those persons the moment they become ineligible to rely upon Rules 13d-1(b) and (c). Due to the importance of Schedule 13D's disclosure requirements and the regulatory purposes served by the timely dissemination of that material information, we have preliminarily concluded that no compelling reason exists to treat persons who become ineligible to file on Schedule 13G differently from persons who initially have no option other than to file on Schedule 13D.

b. Proposed Amendments

For largely the same reasons that we are proposing to amend Rule 13d-1(a) to shorten the initial Schedule 13D filing deadline thereunder, we also are proposing to amend the initial Schedule 13D filing deadline under Rules 13d-1(e)(1), (f)(1), and (g). Specifically, we are proposing to make conforming revisions to Rules 13d-1(e), (f), and (g) so that the Schedule 13D required to be filed by persons who initially elected to report beneficial ownership on Schedule 13G but subsequently lost their eligibility are treated no differently from persons who make a Schedule 13D their initial filing. Accordingly, we propose to amend Rules 13d-1(e), (f), and (g) to make the required Schedule 13D—or, in the case of Rule 13d-1(g), the amendment to Schedule 13G indicating that the filer is now relying on Rule 13d-1(c), if applicable—due no later than five days after the date on which the person became ineligible to report on Schedule 13G.

Request for Comment

15. Given the proposed amendment to Rule 13d-1(a), should we make conforming changes to Rules 13d-1(e), (f), and (g) as proposed?
16. Should we amend Rules 13d-1(e), (f), and (g) but have the initial Schedule 13D due within a different number of days than proposed (*e.g.*, five business days rather than five days)? Should we use business days instead of days for purposes of the deadlines in Rules 13d-1(e), (f), and (g)?
17. Are there any reasons why Schedule 13G filers submitting an initial Schedule 13D pursuant to Rules 13d-1(e), (f), and (g) should be required to file on a different timetable from those investors who file an initial Schedule 13D pursuant to the deadline in the proposed amendment to Rule 13d-1(a)?
18. Rather than make conforming changes to Rules 13d-1(e), (f), and (g), should the Commission rescind Schedule 13G and rely on Section 13(g)(5) of the Exchange Act to consolidate beneficial ownership reporting on a single form, Schedule 13D, with different

disclosure requirements applicable to beneficial owners who can certify that they did not acquire and do not hold the beneficial ownership with a disqualifying purpose or effect?

19. With respect to the proposed amendment to Rule 13d-1(g), if a filer who is no longer eligible to rely on Rule 13d-1(b) may instead rely on Rule 13d-1(c), should the deadline for filing an amended Schedule 13G in this instance differ from the deadline for filing an initial Schedule 13D pursuant to Rule 13d-1(g) given that the filer would continue to be able to certify that it does not hold beneficial ownership with a disqualifying purpose or effect? Would five business days after the month-end in which such change occurred be appropriate and consistent with our proposed change to Rule 13d-2(b)?

3. Rules 13d-1(b), (c), and (d)

a. Background

Section 13(g) was added to the Exchange Act in 1977.[48] Congress enacted Section 13(g) to address the absence of beneficial ownership reporting by persons who had accumulated large amounts of stock in a public issuer but who were not required to file a beneficial ownership report under Section 13(d).[49] Section 13(g) was intended to "supplement the current statutory scheme by providing legislative authority for certain additional disclosure requirements that in some cases could not be imposed administratively."[50] Beneficial owners who currently report on Schedule 13G pursuant to Section 13(g) and corresponding Rule 13d-1(d) are not subject to Section 13(d) because they either made an exempt acquisition or an acquisition otherwise not covered by the statute. Section 13(d), in contrast to Section 13(g), applies only to beneficial owners who make non-exempt acquisitions of more than 5% of a covered class. Section 13(g) was intended to close this gap.

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[48] Domestic and Foreign Investment Improved Disclosure Act of 1977, Pub. L. 95-214, sec. 203, 91. Stat. 1494.

[49] S. Rep. No. 114, 95th Cong. 1st Sess. 13 (1977).

[50] S. Rep. No. 95-114, at 13 (1977), reprinted in 1977 U.S. Code Cong. & Admin. News. 4098, 4111.

In response to the enactment of Section 13(g), the Commission adopted Schedule 13G to serve two purposes: (1) provide an optional short form disclosure statement for certain persons subject to Section 13(d); and (2) provide a mandatory disclosure statement for persons subject to Section 13(g).[51] Together with Section 13(d), Section 13(g) was intended to provide a "comprehensive disclosure system of corporate ownership" applicable to all persons who are the beneficial owners of more than 5% of a covered class.[52]

The deadline for the initial Schedule 13G filing depends on whether the person is a QII, Exempt Investor or Passive Investor. Rule 13d-1(b) currently provides that a QII must file an initial Schedule 13G only if such QII beneficially owns more than 5% of a covered class at the end of a calendar year.[53] A person relying upon Rule 13d-1(b) is obligated under current Rule 13d-1(b)(2) to file a Schedule 13G "within 45 days after the end of the calendar year in which the person became obligated" to report beneficial ownership. If the QII beneficially owns more than 10% of a covered class as of the last day of any month, then the initial Schedule 13G must be filed within 10 days after the end of that month. A QII relying on Rule 13d-1(b), therefore, may have beneficial ownership in excess of 5% during the calendar year without incurring a filing obligation unless the QII beneficially owns more than 10% of a covered class at the end of any month during the calendar year.

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[51] Filing and Disclosure Requirements Relating to Beneficial Ownership, Release No. 34-14692 (Apr. 21, 1978) [43 FR 18484 (Apr. 28, 1978)].

[52] *Id*. at 18486; *see also* Senate Report No. 114, 95th Cong. lst Sess. 14 (1977).

[53] First adopted as Rule 13d-5 in 1977 and subsequently redesignated as Rule 13d-1(b)(1) in 1978, the predecessor to current Rule 13d-1(b)(2) established that an institution eligible to report on the newly adopted Schedule 13G had until 45 days after the end of the calendar year to report beneficial ownership to the extent the amount held exceeded 5% at the end of the last day of the calendar year. *See* Filing and Disclosure Requirements Relating to Beneficial Ownership, Release No. 34-14692 (Apr. 21, 1978) [43 FR 18484 at 18486 (Apr. 28, 1978)] (explaining that "the first provision in new Rule 13d-1(b) has been added to make clear that the obligation to file a Schedule 13G need be determined only on the last day of the calendar year" and that "filing [a] Schedule 13G to disclose a beneficial ownership interest of more than five but not more than ten percent will be required forty-five days after the end of the calendar year"); *see also* Adoption of Beneficial Ownership Disclosure Requirements, Release No. 34-13291 (Feb. 24, 1977) [42 FR 12342 (Mar. 3, 1977)] (describing the Commission's adoption of new Rule 13d-5 and related new Form 13D-5, which permitted brokers, dealers, banks, investment companies, investment advisers, and employee benefit plans to utilize an abbreviated disclosure notice).

Rule 13d-1(d),[54] as with Rule 13d-1(b), imposes an initial Schedule 13G filing deadline of 45 days after the end of the calendar year, but only for investors who have become beneficial owners without having made an acquisition recognized under Section 13(d)(1). Given that these investors did not make the requisite acquisition that would have subjected them to Section 13(d), the Commission has previously referred to this type of beneficial owner as an "Exempt Investor." Unlike the QIIs and Passive Investors—discussed below, in the context of Rule 13d-1(c)—who file a Schedule 13G in lieu of Schedule 13D and at all times remain subject to Section 13(d), Exempt Investors are subject to Section 13(g) at the time their initial filing obligation arises. Exempt Investors reporting pursuant to Rule 13d-1(d) today may include persons such as founders of companies and early investors in an issuer's class of equity securities who made their acquisition before the class was registered under Section 12 of the Exchange Act.[55] These beneficial owners may continue to influence or control the issuer. Accordingly, the Commission has emphasized that the disclosures required under Section 13(g) are obtained in connection with the overall regulatory purposes served by Section 13(d).[56]

Finally, Rule 13d-1(c) was adopted by the Commission on January 12, 1998.[57] The rulemaking created a new class of investor, commonly referred to as "Passive Investors," eligible

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[54] 17 CFR 240.13d-1(d).

[55] The Commission has explained that certain "persons who are not required to file under Rule 13d-1(a) . . . would be required to file a Schedule 13G pursuant to the amendments herein proposed." Filing and Disclosure Requirements Relating to Beneficial Ownership, Release No. 34-14693 (Apr. 21, 1978) [43 FR 18501 at 18502 (Apr. 28, 1978)]. Such persons may include "persons who acquired not more than two percent of a class of securities within a twelve month period, who are exempt from Rule 13d-1(a) by Section 13(d)(6)(B)." *Id.* The Commission also stated that "Regulation 13D-G . . . would require any person 'otherwise' not required to report pursuant to Section 13(d), but who is a beneficial owner of more than five percent of a specified class of equity securities to report on Schedule 13G." *Id.*

[56] Filing and Disclosure Requirements Relating to Beneficial Ownership, Release No. 34-14692 (Apr. 21, 1978) [43 FR 18484 at 18486 (Apr. 28, 1978)] (stating that "the enactment of [S]ection 13(g) has rendered moot the issue of whether obtaining" disclosure from institutional investors in the ordinary course of their business and without any control intent "under [S]ection 13(d)(5) is within the primary purpose of [S]ection 13(d)"). The Commission also emphasized "the importance of disclosing to the public the location of rapidly accumulated blocks of stock, even though they have been acquired not with the purpose or with the effect of changing or influencing control" as a predicate for its position. *Id.*

[57] Amendments to Beneficial Ownership Reporting Requirements, Release No. 34-39538 (Jan. 12, 1998) [63 FR 2854 (Jan. 16, 1998)].

to report on a Schedule 13G in lieu of the Schedule 13D that is otherwise required to be filed given that the person has made an acquisition subject to Section 13(d). Passive Investors are required under current Rule 13d-1(c) to file a Schedule 13G within 10 days after acquiring beneficial ownership of more than 5% of a covered class. Passive Investors electing to report on Schedule 13G in lieu of Schedule 13D are required under current Rule 13d-1(c) to file within 10 days after acquiring beneficial ownership of more than 5% of a covered class. A person is only eligible to file on Schedule 13G under Rule 13d-1(c) if such person is not seeking to acquire or influence control of an issuer and beneficially owns less than 20% of a covered class. Persons unable or unwilling to certify under Item 10 of Schedule 13G that they do not have a disqualifying purpose or effect because, for example, the possibility exists that they may seek to exercise or influence control, are ineligible to file a Schedule 13G and must instead file a Schedule 13D.

b. Proposed Amendments

We believe that the current initial Schedule 13G filing deadlines for all three types of Schedule 13G filers warrant reassessment. The current initial Schedule 13G filing deadlines' length and manner of applicability to QIIs and Exempt Investors together could, in certain circumstances, frustrate the purposes of Section 13(d) and Section 13(g). Investors reporting pursuant to current Rules 13d-1(b) and (d) may avoid beneficial ownership reporting by selling down their positions before the end of the calendar year, and, in the case of QIIs, selling down before the end of a month if ownership exceeds 10%. Amendments to the filing deadlines for initial Schedule 13G submissions required to be made by QIIs and Exempt Investors may therefore be needed to improve transparency consistent with the intent of Congress when enacting Section 13(d) and Section 13(g). The existing deadlines and manner of applicability not only could give rise to a gap in reporting for persons who possess the potential to change control of an issuer—or, in the case of Exempt Investors, may already control an issuer—but also risk

devaluing the importance of the disclosures when made, if made at all.[58] The very gap in reporting that Congress sought to close by enacting Section 13(g) may now be effectively just as wide given that large, undisclosed accumulations could be occurring and may be reported considerably later than is useful to investors and the market, if reported at all.[59]

In addition, at the time Rule 13d-1(c) was first adopted, Passive Investors may not have had reasonable access to advanced technologies to make more immediate filings possible. Consistent with our justification for proposing to shorten the initial Schedule 13D filing deadline under Rule 13d-1(a), we believe Passive Investors today not only have gained valuable experience complying with these reporting provisions, but also have ready access to the necessary filing technology. As such, while the 10-day filing deadline in Rule 13d-1(c) may have been appropriate in 1998, technological advancements in the intervening two decades, as well as our proposed amendment to the analogous filing deadline in Rule 13d-1(a), support a reconsideration and recalibration of that deadline.

Accordingly, we propose to amend Rules 13d-1(b) and (d) to shorten the filing deadline for the initial Schedule 13G to be filed by QIIs and Exempt Investors to five business days[60] after

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[58] *See infra* note 221 and accompanying text (noting the importance to the market of information regarding beneficial ownership, regardless whether it is disclosed on Schedule 13D or 13G, based on evidence that the initial filing of Schedule 13G, like that of Schedule 13D, generates a positive stock price reaction, albeit smaller in magnitude).

[59] *See, e.g.*, Kristin Giglia, *A Little Letter, a Big Difference: An Empirical Inquiry into Possible Misuse of Schedule 13G/13D Filings*, 116 COLUM. L. REV. 105, 115-16 (2015) (explaining that the availability of Schedule 13G may allow investors to "intentionally structure their acquisition strategies to exploit the gaps created by the current reporting regime, to their own short-term benefit and to the overall detriment of market transparency and investor confidence" (internal quotations omitted)); In the Matter of Perry Corp., Release No. 34-60351 (July 21, 2009) (illustrating how an institutional investor improperly relied upon Rule 13d-1(b) to defer reporting its beneficial ownership of nearly 10% of a covered class). QIIs in particular may be able to amass sizeable amounts of beneficial ownership without reporting such positions. Rule 13d-1(b)(2) provides in relevant part that "it shall not be necessary to file a Schedule 13G unless the percentage of [a covered class] beneficially owned as of the end of the calendar year is more than five percent." As such, a QII may beneficially own in excess of 5% of a covered class for the entire year, sell down its position to 5% or below on the last day of the calendar year and bypass having to report at all under the current regulatory framework assuming that its beneficial ownership continues to be held in the ordinary course of business, without a disqualifying purpose or effect, and does not exceed 10% of a covered class.

[60] Our proposed definition of "business day" would be consistent with how that term is defined under other rule provisions adopted under the Exchange Act, such as 17 CFR 240.14d-1 ("Rule 14d-1(g)(3)"), which defines the term "business day" to mean "any day, other than Saturday, Sunday or a Federal holiday, and shall consist of the

the end of the month in which beneficial ownership exceeds 5% of a covered class. The proposed acceleration of these deadlines is expected to result in more timely disclosures while minimizing any additional burdens. We believe that these investors should already have well-established compliance systems in place to monitor Schedule 13G ownership levels to determine whether filing obligations have been triggered. For example, compliance operations at QIIs currently need to monitor beneficial ownership levels at least on a monthly basis in case their holdings exceed more than 10% at the end of the month and trigger an initial Schedule 13G filing pursuant to Rule 13d-1(b)(2). Similarly, Exempt Investors already need to monitor the level of their beneficial ownership continuously or periodically to ensure that the amount of their beneficial ownership does not unintentionally exceed 2% in a 12-month period and trigger application of Section 13(d).[61]

Given the proposal to shorten the initial reporting deadline to five business days after the end of the month, the current provision of Rule 13d-1(b)(2) that operates to accelerate that initial filing deadline if beneficial ownership exceeds 10% at the end of any month would be unnecessary in light of Rule 13d-2(c)'s overlapping Schedule 13G amendment requirement.[62] Accordingly, we propose to further amend Rule 13d-1(b)(2) to delete the language that imposes an initial reporting obligation on QIIs after exceeding 10% of a covered class.

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time period from 12:01 a.m. through 12:00 midnight Eastern time." Unlike Rule 14d-1(g), which defines the term for purposes of Regulations 14D and 14E, the proposed amendments to Rules 13d-1 and 13d-2 that use the term "business day" are indifferent as to whether or not the date of the event that triggers a Schedule 13D or Schedule 13G filing obligation falls on a Saturday, Sunday or Federal holiday versus a business day. For example, under the proposed amendments to Rules 13d-1(b) and (d), the initial Schedule 13G would be due the fifth business day after the last day of the month in which beneficial ownership exceeds 5% of a covered class. In addition, as stated at the outset of Regulation 13D-G, Regulation S-T governs the preparation and submissions of filings in electronic format and should be read in conjunction with the rules contained within Regulation 13D-G, including Rules 13d-1 and 13d-2.

[61] Exempt Investors can jeopardize their eligibility to report on Schedule 13G by voluntarily or involuntarily making an acquisition, or acquisitions, by purchase or otherwise as determined under Rule 13d-5(a), that exceed(s) 2% of a covered class in a consecutive 12-month period and thus render unavailable the Section 13(d)(6)(B) exemption.

[62] Specifically, current Rule 13d-2(c) would still require QIIs to file an amendment to their Schedule 13G within 10 days after the end of the first month in which their beneficial ownership exceeds 10% of a covered class, calculated as of the last day of the month. If the proposed amendment to Rule 13d-2(c) is adopted, however, QIIs would be required to make such disclosure within five days after the date on which the person's direct or indirect beneficial ownership exceeds 10%.

We also are proposing to amend the filing deadline in Rule 13d-1(c) to five days after the date the person becomes obligated to file an initial Schedule 13G and amendment thereto, respectively, under those two provisions. We believe it is appropriate to amend the initial Schedule 13G filing deadline in Rule 13d-1(c) to match the proposed initial Schedule 13D filing deadline in Rule 13d-1(a) in order to maintain the historical regulatory consistency between the deadlines in Rules 13d-1(c) and (a) and to facilitate the overall goal of increasing transparency in beneficial ownership.

Request for Comment

20. Should we amend Rules 13d-1(b), (c), and (d) as proposed?
21. Should we amend Rules 13d-1(b) and (d) but require a different deadline for an initial Schedule 13G filing than we proposed? For example, should we require a shorter or longer deadline than our proposed deadline of within five business days after the end of the month in which beneficial ownership exceeded 5% in a covered class? Alternatively, should the deadline be expressed in days rather than business days to conform to the proposed deadlines in Rules 13d-1(a), (e), (f), and (g)?
22. Do costs other than routine filing and preparation costs exist that we should consider in setting the initial Schedule 13G filing deadlines? If any such costs exist, please identify and quantify to the extent practicable. For example, would shorter deadlines inhibit beneficial owners' opportunities to verify the number of outstanding securities of a covered class for purposes of determining whether their beneficial ownership exceeds 5%? Such verification could include any internal processes that a beneficial owner may have in place to independently corroborate the accuracy of the number of shares disclosed in an

issuer's most recent annual, quarterly or current report notwithstanding the absence of such an affirmative obligation under Rule 13d-1(j).[63]

23. Our proposed amendment to Rule 13d-1(b)(2) would only require QIIs to determine the amount of their beneficial ownership as of the last day of a month for purposes of their initial Schedule 13G filing obligation under that rule. Should QIIs be required to determine the amount of their beneficial ownership as of *any* day during a month rather than only as of the *last* day of a month, and if so, what practical challenges or other burdens are associated with monitoring the level of beneficial ownership on a daily basis?
24. Should we treat the initial Schedule 13G reporting deadline applicable to QIIs differently from the deadline applicable to Exempt Investors, and if so, why? For example, would any "front running" concerns exist with the proposed amendments for reporting deadlines applicable to QIIs?
25. Section 13(g)(5) requires the Commission to "achieve centralized reporting of information regarding ownership" and "avoid unnecessarily duplicative reporting." As a means of pursuing these goals, should the Commission eliminate Schedule 13G and consolidate beneficial ownership reporting into one form, Schedule 13D? Under this alternative, beneficial owners that previously would have been eligible to report on Schedule 13G could, for example, be required to satisfy less burdensome disclosure requirements on a new, consolidated form.
26. Although Passive Investors certify that they did not acquire and do not hold beneficial ownership with a disqualifying purpose or effect, they are currently required to file their initial Schedule 13G by the same deadline as Schedule 13D filers. If we adopt our proposed amendment to the initial Schedule 13D filing deadline under Rule 13d-1(a), are

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[63] Rule 13d-1(j) provides that a beneficial owner may rely upon information in an issuer's most recent periodic or current report unless the beneficial owner knows or has reason to believe that the information contained in the report is inaccurate. 17 CFR 240.13d-1(j).

there any reasons why we should not make a corresponding change to the initial Schedule 13G filing deadline under Rule 13d-1(c) given that the same technological advancements equally enable Passive Investors to make a Schedule 13G filing on an accelerated basis?

4. Rules 13d-2(a) and (b)

a. Background

Section 13(d)(2) requires that an amendment must be filed to the statement required under Section 13(d)(1) if any material change occurs in the facts set forth in the statement filed, but does not identify a specific deadline by which such amendment must be filed. Instead, Rule 13d-2(a) provides, as its predecessor Rule 13d-2 did when first adopted in 1968,[64] that such amendment must be filed with the Commission "promptly."[65] The initial adopting release did not provide an explanation as to why "promptly," as opposed to a specified deadline, was chosen. As a factual matter, the "promptly" standard may, under certain conditions, allow for more time to report a complex disclosure issue or material development based on an involuntary change in circumstances that nevertheless triggers an amendment obligation. The obligation to file an amendment under current Rule 13d-2(a) is not limited to acquisitions. Instead, changes in the disclosure narrative that are material also have to be reported in an amendment, as do material changes in the level of beneficial ownership caused by an involuntary change in circumstances, such as a reduction in the amount of beneficial ownership caused solely by an increase in the number of shares outstanding.[66]

Section 13(g)(2) requires that an amendment be filed to the statement required under Section 13(g)(1) if any material change occurs in the facts set forth in the statement filed, but like Section 13(d)(2), does not identify a deadline by which such amendment must be filed. Rule

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[64] Acquisitions, Tender Offers, and Solicitations, Release No. 34-8370 (July 30, 1968) [33 FR 11015 (Aug. 2, 1968)].

[65] 17 CFR 240.13d-2(a).

[66] *See id.* (requiring an amendment "[i]f any material change occurs in the facts set forth in the Schedule 13D" including "any material increase or decrease in the percentage of the class beneficially owned").

13d-2(b), however, does specify a deadline and provides that for all persons who report beneficial ownership on Schedule 13G, an amendment shall be filed "within forty-five days after the end of each calendar year if, as of the end of the calendar year, there are any changes in the information reported in the previous filing on that Schedule [13G]."

b. Proposed Amendments

We propose to amend Rule 13d-2(a) to require that all amendments to Schedule 13D be filed within one business day after the material change that triggers the amendment obligation. This change from the current "promptly" standard would establish a specified filing deadline, remove any uncertainty as to the date on which an amendment is due and help ensure that beneficial owners amend their filings in a more uniform and consistent manner. In light of the technological advances discussed in Section II.A.1 above, and for many of the same reasons we are proposing to shorten the initial Schedule 13D filing deadline, we do not believe that requiring Schedule 13D amendments to be filed within one business day after the date on which a material change occurs will place those filers at a disadvantage.[67] Further, because an amendment to a Schedule 13D only requires that the material change be reported and not a complete set of new narrative responses to each of the disclosure form's individual line items,[68] those amendments should present a lower administrative burden than the initial Schedule 13D filing.

We also are proposing to amend Rule 13d-2(b) to require a Schedule 13G to be amended within five business days of the end of the month in which a material change occurs in the information previously reported. Accelerating the deadline for amendments from the current standard of 45 days after the end of the calendar year would help ensure that the information

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[67] Our proposed amendment also would be consistent with the Commission's existing view that, under the current "promptly" standard in Rule 13d-2(a), "[a]ny delay beyond the date the filing reasonably can be filed may not be prompt" and that an amendment to a Schedule 13D reasonably could be filed in as little as one day following the material change. *In re Cooper Laboratories*, Release No. 34-22171 (June 26, 1985).

[68] Under Rule 13d-2(a), the Schedule 13D filer only has an obligation to "file or cause to be filed with the Commission an amendment disclosing that [material] change." See also 17 CFR 240.12b-15, titled "Amendments," which explains that "[a]mendments filed pursuant to this section must set forth the complete text of each item as amended."

reported is timely and useful. In addition, this proposed deadline would be consistent with the proposed five business day deadline from the end of the month applicable to QIIs' and Exempt Investors' initial Schedule 13G filing obligations arising under Rules 13d-1(b) and (d). To partially mitigate the time pressures resulting from the reduction of the current 45-day deadline and the need to meet these new deadlines, if adopted, we have proposed a "business day" standard in specifying the date on which the Schedule 13G filing would be due after an event that triggers a reporting obligation.[69]

We further believe the text of Rule 13d-2(b) regarding the legal standard that triggers an amendment obligation should be conformed to the statutory language. Sections 13(d)(2) and 13(g)(2) require such an amendment if a "material change" occurs to the facts in the statement previously filed. Unlike Sections 13(d)(2) and 13(g)(2), Rule 13d-2(b) does not include an express materiality qualifier for Schedule 13G amendments and simply requires an amendment for "any change." At the time Rule 13d-2(b) was adopted, however, the Commission stated that there is a materiality standard inherent in the provisions governing Schedule 13G filings. This inherent materiality standard is based on the fact that any disclosure provided by a Schedule 13G filer, in light of the infrequency of the reports and comparatively minimal statements required to be made, is effectively material.[70] Our proposed change would, therefore, merely codify this view in the text of Rule 13d-2(b). As such, we are proposing to amend Rule 13d-2(b) to substitute the term "material" in place of the term "any" to serve as the standard for determining the type of change that will trigger an amendment obligation under Rule 13d-2(b).

Request for Comment

27. Should we amend Rules 13d-2(a) and (b) as proposed?

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[69] For a discussion of our proposed definition of "business day" for purposes of Regulation 13D-G, see *supra* note 5.

[70] Filing and Disclosure Requirements Relating to Beneficial Ownership, Release No. 34-14692 (Apr. 21, 1978) [43 FR 18484 at 18489 (Apr. 28, 1978)] (stating the Commission's belief that because "the information required by Schedule 13G has been reduced to the minimum necessary to satisfy the statutory purpose, . . . a materiality standard is inherent in those requirements" and "it is unnecessary to further minimize it by the insertion of an express materiality standard").

28. Should we amend the filing deadlines contained within Rules 13d-2(a) and (b) but specify filing deadlines other than the ones which have been proposed? For example, should we specify a filing deadline of two or three business days from the date of a material change for Schedule 13D amendments and 10 or 15 business days from the end of the month in which a material change occurs for Schedule 13G amendments? Instead of using "business day" as the standard for calculating these filing deadlines, should we instead use a certain number of days as we have proposed for revisions to Rules 13d-1(a), (c), (e)(1), (f)(1), and (g) and 13d-2(c)? Should all reporting deadlines for Schedule 13D and Schedule 13G filings be uniformly expressed in days, the standard in use now, or should we express the filing deadlines uniformly in terms of business days?
29. Will the costs associated with preparing and filing an amended Schedule 13D or Schedule 13G within the proposed deadlines substantially differ from those costs now, and if so, why?
30. Should we amend the filing deadline in Rule 13d-2(b) as proposed but instead retain the rule text that requires a Schedule 13G amendment to be filed if "any change" exists in the information previously reported, rather than a "material change," as proposed? Under this alternative, the changes reported would continue to be viewed as material disclosures given their inherent materiality as the Commission described in the release adopting Rule 13d-2(b).[71]

5. Rules 13d-2(c) and (d)

a. Background

Rule 13d-2(c) governs the amendment obligation for QIIs whose beneficial ownership exceeds 10% of a covered class. Under Rule 13d-2(c), QIIs are required to file an amendment to their Schedule 13G within 10 days after the end of the first month in which their beneficial

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[71] *See supra* note 70 and accompanying text.

ownership exceeds 10% of a covered class, calculated as of the last day of the month. Once across the 10% threshold, QIIs are further required under current Rule 13d-2(c) to file additional amendments 10 days after the first month in which they increase or decrease their beneficial ownership by more than 5% of the covered class, calculated as of the last day of the month.

Rule 13d-2(d) governs the amendment obligation for Passive Investors whose beneficial ownership exceeds 10% of a covered class. Under current Rule 13d-2(d), Passive Investors are required to "promptly" file an amendment to their Schedule 13G upon acquiring greater than 10% of a covered class. Once across the 10% threshold, Passive Investors are further required under current Rule 13d-2(d) to file additional amendments "promptly" if they increase or decrease their beneficial ownership by more than 5% of the covered class.

The amendment obligations arising under Rules 13d-2(c) and (d) are in addition to the requirement in Rule 13d-2(b) that a Schedule 13G be amended within 45 days after each calendar year end if, as of the end of the calendar year, any changes occur to the information previously reported on the Schedule 13G. As such, Rules 13d-2(c) and (d) supplement the amendment obligation under Rule 13d-2(b), which only arises if the person's beneficial ownership exceeds 5% of a covered class at the end of a calendar year. To comply with Rules 13d-2(c) and (d), QIIs and Passive Investors, depending on their beneficial ownership levels, may have to amend their Schedule 13G filings more frequently and do so throughout the year.

b. Proposed Amendments

In connection with our proposed amendment to Rule 13d-2(b), we are proposing to amend Rule 13d-2(c) to require that QIIs file an amendment to their Schedule 13G within five days after the date on which their beneficial ownership exceeds 10% of a covered class, rather than the current requirement of 10 days after the end of the month. Similarly, once across the 10% threshold, QIIs would be required to file additional amendments five days after the date on which they increase or decrease their beneficial ownership by more than 5% of the covered class, rather than the current requirement of 10 days after the end of the month. These amendments,

when considered in the context of our proposed amendment to Rule 13d-2(b), preserve the utility of Rule 13d-2(c) as a provision that provides the market with earlier notice of QIIs' beneficial ownership exceeding 10% of a covered class and, thereafter, upon their beneficial ownership of the covered class increasing or decreasing by more than 5%. We believe the imposition of such an accelerated deadline is appropriate in the context of our proposed amendment to Rule 13d-2(c) because the high thresholds in that rule—10% beneficial ownership of a covered class and any subsequent 5% increase or decrease in beneficial ownership—warrant that the amendment be rapidly disseminated to the market. Consistent with our rationale for proposing to shorten the other deadlines, we believe QIIs have access to the same technology as other Schedule 13D and 13G filers to satisfy this deadline, especially given the size and sophistication of the persons eligible to file as QIIs.

We also are proposing to amend Rule 13d-2(d) to change the amendment filing deadline from the current "promptly" standard to one business day after the date on which an amendment obligation arises. We are proposing to amend the "promptly" standard used in Rule 13d-2(d) for substantially the same reasons we are proposing to shorten the filing deadline for the initial Schedule 13G[72] and change the filing deadline for Schedule 13D amendments.[73]

Request for Comment

31. Should we amend the filing deadlines in Rules 13d-2(c) and (d) as proposed?
32. Should we amend the filing deadlines in Rules 13d-2(c) and (d) but specify filing deadlines other than those we have proposed? For example, should the deadline in Rule 13d-2(c) be expressed in business days rather than days (and vice versa for the deadline in Rule 13d-2(d))?

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[72] *See supra* Section II.A.3.

[73] *See supra* Section II.A.4.

33. If we adopt our proposed amendment to Rule 13d-2(b), should we retain Rule 13d-2(c)'s amendment obligation for QIIs as proposed? Or does the proposed shortened filing deadline in Rule 13d-2(b) obviate the need for Rule 13d-2(c)'s additional amendment obligation, even with the proposed shorter filing deadline?

34. Should the amendment filing deadline applicable to Passive Investors differ from the amendment filing deadline applicable to QIIs and Exempt Investors, as well as persons who must make their initial filing on Schedule 13D? If so, why?

6. Rules 13(a)(4) and 201(a) of Regulation S-T

a. Background

Regulation 13D-G states that Schedules 13D and 13G should be prepared in accordance with Regulation S-T, which governs the preparation and submission of documents filed electronically on the Commission's EDGAR system. In accordance with 17 CFR 232.12, EDGAR accepts electronic submissions Monday through Friday, except Federal holidays, from 6 a.m. to 10 p.m. eastern time.[74] Under Rule 13(a)(2) of Regulation S-T, however, most filings not accepted by 5:30 p.m. will not be credited with having been received by the Commission on that business day.[75] Instead, filings accepted after 5:30 p.m. but on or before 10 p.m. will be reflected on EDGAR as having been received on the *next* business day.[76] Rule 13(a)(4) of Regulation S-T, however, sets forth certain exceptions from that 5:30 p.m. "cut-off" time. Specifically, it provides that certain filings—namely, Forms 3, 4 and 5 and Schedule 14N—"submitted by direct transmission on or before 10 p.m. [eastern time] shall be deemed filed on the same business

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[74] 17 CFR 232.12(a). When we refer to "eastern time" in this release, we mean eastern standard time or eastern daylight saving time, whichever is currently in effect.

[75] 17 CFR 232.13(a)(2).

[76] *Id.*

day."[77] Rule 13(a)(4), therefore, effectively extends the "cut-off" time for these filings from 5:30 p.m. to 10 p.m.

In addition, Rule 201 of Regulation S-T and 17 CFR 232.202 ("Rule 202 of Regulation S-T") address hardship exemptions from EDGAR filing requirements, and Rule 13(b) of Regulation S-T addresses the related issue of filing date adjustments. A filer may obtain a temporary hardship exemption under Rule 201 of Regulation S-T if it experiences unanticipated technical difficulties that prevent the timely submission of an electronic filing by submitting a properly formatted paper copy of the filing under cover of Form TH.[78] Alternatively, instead of pursuing a hardship exemption, a filer may request a filing date adjustment under Rule 13(b) of Regulation S-T. This rule addresses circumstances in which a filer attempts in good faith to file a document with the Commission in a timely manner, but the filing is delayed due to technical difficulties beyond the filer's control.[79] In those instances, the filer may request a filing date adjustment.[80] The staff may grant the request if it appears that the adjustment is appropriate and consistent with the public interest and the protection of investors.[81]

b. Proposed Amendments

We recognize the administrative challenges that could arise if we accelerate the Schedules 13D and 13G filing deadlines. Specifically, Schedule 13D and 13G filers would be required to prepare their filings in a more compressed timeframe while maintaining the accuracy and completeness of the information set forth in those filings. These challenges would be more acute for filers located in different time zones whose business hours do not overlap with the Commission's. In addition, institutional filers with more complex business organizations,

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[77] 17 CFR 232.13(a)(4). Rule 13(a)(3) also provides the same accommodation for registration statements or any post-effective amendment thereto filed pursuant to Rule 462(b). *See* 17 CFR 232.13(a)(3).

[78] 17 CFR 232.201(a).

[79] 17 CFR 232.13(b).

[80] *Id.*

[81] *Id.*

including those with sub-advisory relationships common in the investment management industry, may have difficulty assembling all of the required data within the timeframe that will be necessary in order to comply with the proposed filing deadlines. We also recognize that if the proposed changes to those reporting deadlines are implemented, under the current rules, a Schedule 13D or 13G must be filed on and accepted by EDGAR by no later than 5:30 p.m. on a business day on which such a report would be due in order to have the submission be considered timely. We propose, therefore, to amend Rule 13(a)(4) of Regulation S-T to provide that any Schedule 13D or Schedule 13G, including any amendments thereto, submitted by direct transmission on or before 10 p.m. eastern time on a given business day will be deemed filed on the same business day.[82] Conversely, any Schedule 13D or 13G submission not accepted by 10 p.m. on its due date will be assigned a filing date of the next business day, and for purposes of compliance with the applicable reporting requirements, would be considered late.[83] Given the accelerated filing deadlines we propose for Schedule 13D and 13G filings, we anticipate the proposed extension in the "cut-off" time would ease filers' administrative burdens, including those located in different time zones, by giving them an additional four and a half hours during which they could timely file their Schedules 13D and 13G.

We also propose to amend Rule 201(a) of Regulation S-T to remove the opportunity for a Schedule 13D or 13G filer to pursue a temporary hardship exemption under that rule. This

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[82] Notwithstanding the proposed extension of the time period in which accepted Schedule 13D and 13G filings may be made and still be considered timely, filer support hours would not be extended. Filer support would continue to remain available only until 6 p.m. eastern time as is currently the case notwithstanding EDGAR's availability for the submission of Section 16 filings through 10 p.m.

[83] Once transmitted, a Schedule 13D or 13G submission will be automatically processed by EDGAR and, if accepted by EDGAR, immediately disseminated to the public. While filings will receive an accession number upon transmission, the accession number only confirms receipt of the submission, not that it was actually accepted by EDGAR. Transmission without acceptance does not constitute an official filing. Under 17 CFR 232.11, an "official filing" means any filing that is received and accepted by the Commission. At present, a transmission that has commenced on a given business day will only receive that business day's filing date if "accepted" at or before 5:30 p.m., meaning that it has successfully passed an acceptance review. An official filing has not been made unless and until the filer receives an acceptance message that includes a filing date. Accordingly, the filer is responsible for ensuring a transmission commences early enough in the business day to correct any errors in the transmittal process so that time-sensitive filings can be accepted by the applicable deadline.

proposed treatment is consistent with our treatment of Forms 3, 4, and 5, each of which has a 10 p.m. "cut-off" time under Rule 13(a)(4) of Regulation S-T and is ineligible for a temporary hardship exemption under Rule 201(a) of Regulation S-T. We are proposing to amend Rule 201(a) of Regulation S-T to make temporary hardship exemptions unavailable to filers of Schedules 13D and 13G because of: the relative ease of using the EDGAR on-line filing system; the proposed extended 10 p.m. eastern time filing deadline; the limited value to the public of paper filings; and the availability of a filing date adjustment under the same circumstances as a temporary hardship exemption would have been available but for the proposed amendment.[84]

Request for Comment

35. Should we amend Rule 13(a)(4) of Regulation S-T as proposed to extend the "cut-off" times for Schedule 13D or 13G filings, including any amendments thereto, to 10 p.m. eastern time?
36. If we amend Rule 13(a)(4) of Regulation S-T as proposed, should we also extend EDGAR filer support hours beyond 6 p.m. eastern time?
37. Would the proposed amendment to Rule 13(a)(4) of Regulation S-T be appropriate in light of the proposed accelerated filing deadlines applicable to persons who are required to make Schedule 13D and 13G filings, or do reasons exist to distinguish these filers from those who file Section 16 reports or Schedule 14N?

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[84] Filing date adjustments, as would have been true of temporary hardship exemptions, should be few in number given the relative ease with which filings are now made through EDGAR and the strong public interest in timely and readily available disclosures provided by Schedules 13D and 13G. As is also the case with other forms required to be filed on EDGAR, our filing desk would not accept in paper format any Schedule 13D or 13G filings except in the highly unlikely event that the filing satisfies the requirements for a continuing hardship exemption under Rule 202 of Regulation S-T. Filing date adjustments may, however, be made if a filer is unable to submit its Schedule 13D or 13G as a result of an EDGAR outage. In such circumstances, if a filer attempts in good faith to file its Schedule 13D or 13G in a timely manner but is delayed because of an EDGAR outage, that filer may request a filing date adjustment under Rule 13(b) of Regulation S-T on the grounds that such outage constitutes technical difficulties beyond the filer's control. 17 CFR 232.13(b). Alternatively, the Commission may, under 17 CFR 232.15(a)(3), correct the filing date of a Schedule 13D or 13G filing if it determines that such filing has not been processed by EDGAR or was processed incorrectly by EDGAR.

38. Does the importance of the information required to be reported within a Schedule 13D or 13G justify a continuation of the requirement that these forms be filed by 5:30 p.m. on the due date, the same deadline as almost all other Commission filings?
39. Should we amend Rule 201 of Regulation S-T as proposed?
40. Are there reasons to permit filers of Schedules 13D and 13G to continue to petition the Commission for a temporary hardship exemption under Rule 201 of Regulation S-T, especially if we were to adopt the proposed amendment to Rule 13(a)(4) of Regulation S-T to extend the "cut-off" times for Schedules 13D and 13G?
41. If we do not adopt some or all of our proposed amendments to the filing deadlines applicable to beneficial owners who make Schedule 13D and Schedule 13G filings, should we still adopt the proposed amendments to Rules 13 and 201 of Regulation S-T?

B. Proposed Amendment to Rule 13d-3 to Regulate the Use of Cash-Settled Derivative Securities

We are proposing to amend Rule 13d-3 to deem holders of certain cash-settled derivative securities to be the beneficial owners of the reference covered class. Specifically, we are proposing to add new paragraph (e) to Rule 13d-3. As discussed in more detail below, in addition to setting forth the circumstances under which a holder of a cash-settled derivative security will be deemed the beneficial owner of the reference equity securities, proposed Rule 13d-3(e) also includes provisions describing how to calculate the number of reference equity securities that a holder of a cash-settled derivative will be deemed to beneficially own.

1. Background

Neither Section 3(a) nor Section 13(d) of the Exchange Act define the term "beneficial owner" or "beneficial ownership." Regulation 13D-G similarly does not expressly define those terms. To provide clarity, the Commission adopted Rule 13d-3, which provides standards for the

purpose of determining whether a person is a beneficial owner subject to Section 13(d).[85] For example, Rule 13d-3(a) provides that a person who directly or indirectly has or shares voting or investment power is a beneficial owner. The Commission also recognized the importance of accounting for contingent interests in equity securities arising from investor use of derivatives, such as options, warrants or rights. The Commission therefore chose to include holders of certain derivatives as beneficial owners under Rule 13d-3: those derivatives that would be settled "in-kind" or otherwise convey a right to acquire a covered class.[86] Specifically, under Rule 13d-3(d)(1), a person is "deemed" a beneficial owner of a covered class if that person holds a right to acquire the covered class—for example, through the exercise of an option or warrant or conversion of a security—that is exercisable or convertible within 60 days. Similarly, under Rule 13d-3(d)(1), if a right has been acquired for the purpose or with the effect of changing or influencing control of the issuer of securities, that person is treated as a beneficial owner of the underlying class of equity securities regardless of when that right may be exercisable, exchangeable or convertible. At the same time, however, holding derivatives that, by their terms, entitle the holder to nothing more than economic exposure to a covered class historically has not been considered sufficient to constitute beneficial ownership.[87]

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[85] Adoption of Beneficial Ownership Disclosure Requirements, Release No. 34-13291 (Feb. 24, 1977) [42 FR 12342 (Mar. 3, 1977)]. The Commission emphasized that "[a]n analysis of all relevant facts and circumstances in a particular situation is essential in order to identify each person possessing the requisite voting power or investment power." *Id.* at 12344.

[86] Acquisitions, Tender Offers, and Solicitations, Release No. 34-8392 (Aug. 30, 1968) [33 FR 14109 (Sept. 18, 1968)].

[87] Commission Guidance on the Application of Certain Provisions of the Securities Act of 1933, the Securities Exchange Act of 1934, and Rules thereunder to Trading in Security Futures Products, Release No. 34-46101 (June 21, 2002) [67 FR 43234 (June 27, 2002)] (stating the interpretive view that economic exposure through cash-settled securities futures does not confer beneficial ownership); Adoption of Beneficial Ownership Disclosure Requirements, Release No. 34-13291 (Feb. 24, 1977) [42 FR 12342 at 12348 (Mar. 3, 1977)] (indicating that amended Rule 13d-3 "does not expressly encompass those proposals relative to economic interests – such as the right to receive or the power to direct the receipt of dividends from, or the proceeds from the sale of securities"); Filing and Disclosure Requirements Relating to Beneficial Ownership, Release No. 34-14692 (Apr. 21, 1978) [43 FR 18484 at 18493 (Apr. 28, 1978)] (stating that "traditional economic benefits – i.e., the right to receive dividends or sale proceeds – are not included as criteria for defining beneficial ownership").

Over the years, commenters have raised concerns about the fact that current Rule 13d-3 fails to explicitly address the circumstances in which an investor in a cash-settled derivative may influence or control an issuer by pressuring a counterparty to make certain decisions regarding the voting and disposition of substantial blocks of securities.[88] An investor in a cash-settled derivative may be positioned, by virtue of its commercial relationship with a counterparty, to acquire any reference securities that the counterparty may acquire to hedge the economic risk of that transaction, including any obligations that may arise in connection with settlement.[89] Entry into the agreement governing the derivative may, therefore, result in a rapid accumulation of a covered class by a counterparty similar to the types of accumulations that prompted Congress to enact Section 13(d). In addition, if institutional counterparties hold sizable positions of reference securities with a view toward future sales to holders of cash-settled derivative securities, a regulatory concern arises under Rule 13d-3(b).[90] For example, if an arrangement or understanding exists outside of the terms of a derivative instrument that enables an investor to acquire the reference securities from a counterparty, the reference securities could be viewed as having been impermissibly "parked" with the counterparty on behalf of the derivative holder.[91]

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[88] *See, e.g.*, Maria Lucia Passador, *The Woeful Inadequacy of Section 13(d): Time for a Paradigm Shift?*, 13 VA. L. & BUS. REV. 279, 296-99 (2019) ("[I]n the recent past, cash-settled equity derivatives--mainly call and security-based options--were frequently used not only with a speculative and hedging purpose, but also with the immediate, explicit, and specific aim of silently accumulating a leading (or even control) position in public companies."); Wachtell Petition, *supra* note 17, at 8 ("Even in the absence of voting or dispositive power, participants in large hedging transactions gain influence in a number of ways. . . . [V]oting of the shares may be subject to counterparty influence or control, either directly or because the counterparty is motivated to vote the hedged shares in a way that will please the investor and induce them to continue to transact with such counterparty. . . . Even those derivatives that are characterized as 'cash-settled' may ultimately be settled in kind, creating further market pressure as the participants need to acquire shares for such settlement.").

[89] *See infra* Section III.C.2.a.

[90] Rule 13d-3(b) deems persons to be the beneficial owners of a covered class if they have used an arrangement that otherwise prevented the vesting of beneficial ownership as part of a plan or scheme to evade Section 13(d) or 13(g). 17 CFR 240.13d-3(b).

[91] The Commission has pursued beneficial ownership reporting violations at least twice based on the unreported "parking" of equity securities with another party where such securities are essentially held in reserve for the benefit of the party with the intention to control or ultimately acquire them. *See SEC v. First City Financial Corp.*, 890 F.2d 1215 (D.C. Cir. 1989). In that case, the Commission charged First City Financial Corp. with using a parking arrangement with Bear, Stearns Cos. to avoid filing a Schedule l3D. After First City had acquired 4.9 percent of the

The use of cash-settled derivative securities in the change of control context also may serve as a catalyst for related acquisitions of beneficial ownership by institutional counterparties that ultimately could contribute to a shift in corporate control.[92] The Commission previously determined that the "concentration of voting power in a single block and its transferability are material information to the market."[93] Holders of cash-settled derivatives also may have incentives to influence or control outcomes at the issuer of the reference security just as they would if they directly owned the reference security outright. Although holders of derivatives settled exclusively in cash ordinarily would lack the express legal power under the terms of such instruments to direct the voting or disposition of a covered class, such holders may possess economic power that can be used to produce desired outcomes through engagement with a counterparty or the issuer of the reference security and potentially could impact the stock price.[94] An unwinding of agreements governing cash-settled derivatives also could adversely impact the stock price of an issuer, just as if the holder of the cash-settled derivative held the stock directly, instead of the counterparty, and sold sizable blocks of such shares. Consequently, counterparty dispositions of reference securities at the conclusion of a cash-settled derivative agreement, should they occur all together or involve high concentrations of beneficial ownership, may impair the orderly operation and efficiency of our capital markets. In the event of a default,

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stock of Ashland Oil, Inc., Bear Stearns agreed to acquire stock on behalf of First City and to sell the stock to First City once a sizable position was obtained. The district court concluded that First City deliberately attempted to circumvent the law. *See SEC v. First City Fin. Corp.*, 688 F. Supp. 705 (D.D.C. 1988); *see also SEC v. Boyd L. Jefferies*, Lit. Rel. No. 11370 (Mar. 19, 1987).

[92] Filing and Disclosure Requirements Relating to Beneficial Ownership, Release No. 34-14692 (Apr. 21, 1978) [43 FR 18484 at 18486 (Apr. 28, 1978)] (explaining that the need for disclosure had been recently underscored by the pivotal role played by investment managers holding large blocks of stock in surprise tender offers).

[93] *See* Reporting of Beneficial Ownership in Publicly-Held Companies, Release No. 34-26598 (Mar. 6, 1989) [54 FR 10552 (Mar. 6, 1989)].

[94] *See supra* note 88; *see also* Theodore N. Mirvis et al., *Beneficial Ownership of Equity Derivatives and Short Positions--A Modest Proposal to Bring the 13D Reporting System into the 21st Century*, WACHTELL, LIPTON, ROSEN & KATZ (Mar. 3, 2008) at 2-3, *available at* http://www.wlrk.com/webdocs/wlrknew/WLRKMemos/WLRK/WLRK.15395.08.pdf (noting that derivative securities "often have substantial effects on the securities and issuers involved" and that "[t]he counterparties to these arrangements will often hedge their positions by buying or selling the underlying securities, which may have material effects in the trading of the relevant security").

these derivative positions could not only adversely impact counterparties, but also issuers of reference securities, the markets and other market participants. At a minimum, greater transparency could influence counterparties' risk management decisions. Proposed Rule 13d-3(e) is thus designed to make information available about any large positions in cash-settled derivative securities and, by implication, the related reference securities. Under specified conditions, if holders of cash-settled derivatives were deemed beneficial owners of the reference securities in combination with the other amendments proposed in this release, the resulting disclosures could alert issuers and the market to the possibility of rapid accumulations of, and high concentrations in, a covered class.[95]

By extending Rule 13d-3 to include certain persons who purchase cash-settled equity-based derivatives, investors, issuers and other market participants should have greater transparency regarding persons with significant interests in an issuer's equity securities and potential control intent. In particular, the proposed amendment to Rule 13d-3 could address concerns that financial product innovation has outpaced the reach of a rule provision first adopted by the Commission in 1968. Cash-settled derivatives imitate the economic performance of a direct investment in an issuer's equity securities and, in turn, may economically empower the holders of such derivatives to influence the issuer or the price of its securities.[96] Under current Rule 13d-3, however, the holder of the cash-settled derivative generally is not subject to beneficial ownership reporting obligations. Given such person's potential to influence or change control of the issuer, we are proposing an amendment that would, in specified circumstances, deem the holder of a cash-settled derivative security to be the beneficial owner of the reference security. For the reasons set forth above and as explained more fully below, we believe such an

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[95] Section 13(d) was intended to "alert the market place to every large, rapid aggregation or accumulation of securities, regardless of technique employed, which might represent a potential shift in corporate control." *GAF Corp. v. Milstein*, 453 F.2d 709, 717 (2d. Cir. 1971), cert denied, 406 U.S. 910 (1972).

[96] *See supra* note 88.

amendment is necessary for the protection of investors and appropriate in order to achieve the purpose of Section 13(d). We also believe that requiring reporting based wholly or partly upon the holding of such positions would be in the public interest.

2. Proposed Amendment

As noted above, we are proposing to amend Rule 13d-3 to add new paragraph (e). Like Rules 13d-3(b) and (d)(1), proposed Rule 13d-3(e) would provide that holders of certain cash-settled derivative securities will be "deemed" a beneficial owner of the reference securities in a covered class.[97] Specifically, proposed Rule 13d-3(e)(1) would provide that a holder of a cash-settled derivative security[98] shall be deemed the beneficial owner of equity securities in the covered class referenced by the derivative security if such person holds the derivative security with the purpose or effect of changing or influencing the control of the issuer of such class of equity securities, or in connection with or as a participant in any transaction having such purpose or effect.[99] As discussed in more detail below, the concept "purpose or effect of changing or

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[97] It is possible under our current regulatory framework that a holder of a cash-settled derivative security could be deemed the beneficial owner of the reference securities under Rule 13d-3(b) by virtue of their counterparty relationships if such relationships constitute "a plan or scheme to evade the reporting requirements of section 13(d) or (g)." 17 CFR 240.13d-3(b). Application of that rule, however, would require an examination of the facts and circumstances surrounding the relationship between the holder of a cash-settled derivative security and its counterparty, the intentions of the parties with respect to such relationship and the effect of such relationship on the holder's beneficial ownership of the reference securities. *Id.* By contrast, proposed Rule 13d-3(e) would require a comparatively less extensive and more streamlined inquiry in order for a holder of a cash-settled derivative security to be deemed the beneficial owner of the reference securities, focusing predominantly on whether the derivative security is held with the purpose or effect of changing or influencing the control of the issuer of the reference securities.

[98] For purposes of proposed Rule 13d-3(e), the term "derivative security" would have the meaning set forth in 17 CFR 240.16a-1(c) ("Rule 16a-1(c)"). *See* Rule 16a-1(c) (defining "derivative securities" as including certain rights, such as options, warrants, convertible securities, stock appreciation rights or similar rights "with an exercise or conversion privilege at a price related to an equity security, or similar securities with a value derived from the value of an equity security," excluding certain enumerated rights, obligations, interests and options). As discussed *infra* notes 110-114 and the accompanying text, however, for purposes of proposed Rule 13d-3(e), the term "derivative security" does not include security-based swaps, as defined in Section 3(a)(68) of the Exchange Act and the rules and regulations thereunder.

[99] The provision at 17 CFR 240.12b-2 ("Rule 12b-2 of Regulation 12B") defines the term "control" to mean "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." The provision at 17 CFR 240.12b-1 sets forth the scope of Regulation 12B, and provides that all rules contained in Regulation 12B "shall govern . . . all reports filed pursuant to section[ ] 13."

influencing the control of the issuer" is a familiar one under Regulation 13D-G,[100] both in the context of determining whether a person is a beneficial owner under Rule 13d-3[101] and for purposes of determining whether a beneficial owner is eligible to report on Schedule 13G in lieu of Schedule 13D under Rule 13d-1.[102] As such, we believe that use of this phrase in proposed Rule 13d-3(e) would ease the administrative burdens associated with application of this proposed provision.

Persons who acquire and hold cash-settled derivative securities with the purpose or effect of changing or influencing control of the issuer may seek to use their position to influence the voting, acquisition or disposition of any shares the counterparty may have acquired in a hedge, proprietary investment or otherwise. Moreover, the economic realities of the counterparty relationship mean that, even absent an express right to direct the voting, acquisition or disposition of such shares, the holders of cash-settled derivative securities could be well-positioned to pursue a change in control. The derivative holder's counterparty may have a business relationship to develop and protect, and thus may ultimately cast votes in accordance with the preference of the derivative holder. Even if any counterparty shares are not voted, the derivative holder's probability of success in exerting influence or control over the issuer of the reference security may increase given that any voting power the derivative holder held would be magnified by minimizing the number of shares that potentially could be voted against its plans or proposals. Similarly, while the terms of the derivative instrument may only provide for settlement in cash, these types of derivative holders could remain in a position to acquire any

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[100] *See, e.g.*, 17 CFR 240.13d-102. Under Item 10 of Schedule 13G, QIIs and Passive Investors must certify that the "securities . . . were not acquired and are not held for the purpose of or with the effect of changing or influencing the control of the issuer." *Id.*

[101] *See* 17 CFR 240.13d-3(d)(1)(i) (providing that "any person who acquires a security or power specified in paragraph[] (d)(1)(i) . . . with the purpose or effect of changing or influencing the control of the issuer, or in connection with or as a participant in any transaction having such purpose or effect" shall be deemed a beneficial owner immediately upon such acquisition).

[102] *See* 17 CFR 240.13d-1(b)(1)(i), (c)(1) and (e)(1)(i). In addition to these provisions, Rules 13d-3(b) and 13d-5(b)(2)(ii) also incorporate a "purpose or effect" standard.

reference securities that the counterparty may acquire to hedge the economic risk of that transaction. In recognition that an investment in a cash-settled derivative instrument could be converted into direct holdings of the reference security via an amendment to the instrument or otherwise, persons who use cash-settled derivatives also may present these economic positions to an issuer or its shareholders as a basis on which they should engage with them.[103] These persons, therefore, hold their cash-settled derivative securities in a manner that implicates the policies underlying Section 13(d).[104]

Proposing that application of Rule 13d-3(e) be conditioned on a person holding the derivative security with the purpose or effect of changing or influencing the control of the issuer of such class of equity securities, or in connection with or as a participant in any transaction having such purpose or effect is consistent with other provisions of our beneficial ownership rules. Rule 13d-3(d)(1) contains this same condition. Specifically, Rule 13d-3(d)(1) provides that if a right has been acquired for the purpose or with the effect of changing or influencing control of the issuer of securities, the holder of that right is immediately treated as a beneficial owner of the underlying class of equity securities regardless of when that right may be exercisable, exchangeable or convertible. In such instances, the holder of such a right would not be entitled to voting or investment power over the underlying security for a substantial period of time that may extend far beyond 60 days. Nonetheless, the Commission believed it appropriate to immediately deem these persons to be the beneficial owners of such underlying securities because it recognized that such a right, when acquired for the purpose or with the effect of changing or influencing control, can be used to influence the control of the issuer even before the

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[103] *See infra* note 263 and accompanying text.

[104] *See* Filing and Disclosure Requirements Relating to Beneficial Ownership, Release No. 34-14692 (Apr. 21, 1978) [43 FR 18484 at 18484 (Apr. 28, 1978)] (noting that Section 13(d)'s legislative history indicates that the purpose of that section is "to provide information to the public and the affected issuer about rapid accumulations of its equity securities" by "persons who would then have the potential to change or influence control of the issuer").

right is exercisable.[105] We recognize that cash-settled derivative securities differ from the rights covered under Rule 13d-3(d)(1) in that they ordinarily do not entitle their holders to acquire the reference securities. To the extent such derivative security is held with the purpose or effect of changing or influencing the control of the issuer, however, we believe that the potential for a holder of a cash-settled derivative security to exert influence on a counterparty that may directly hold the reference securities implicates the same concerns that the Commission articulated in adopting Rule 13d-3(d)(1). Thus, we believe that deeming such holders to be beneficial owners of the reference securities would be consistent with the Commission's longstanding view of the right to acquire beneficial ownership as described in Rule 13d-3(d)(1).

In addition, as with the treatment of in-kind-settled derivative securities under Rule 13d-3(d)(1)(i), proposed paragraph (e)(1) also would include a provision stating that any securities that are not outstanding but are referenced by the relevant cash-settled derivative security will be deemed to be outstanding for the purpose of calculating the percentage of the relevant covered class beneficially owned by the holder of the derivative security. Those reference securities, however, will not be deemed to be outstanding for the purpose of any other person's calculation of the percentage of the covered class it beneficially owns.

The disclosures that would be made in a Schedule 13D as a result of treating holders of cash-settled derivative securities as beneficial owners would provide needed transparency regarding the potential to influence or control the issuer of the reference security. If cash-settled derivative holders with an intent to influence or control the issuer become Schedule 13D filers based on their economic exposure to the reference security as a result of the proposed amendment to Rule 13d-3, then their plans or proposals would become publicly available. At

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[105] *Id.* at 18490 (stating that "the acquisition of [such a right] offers a distinct possibility for actions which are for the purpose or with the effect of changing or influencing control" including, for example, "obtaining an interest in a block of securities large enough to influence control, or in coupling an option with an agreement concerning the composition of the board of directors").

present, such intentions remain undisclosed unless the person is determined to be a beneficial owner under Rule 13d-3 on other grounds.

Proposed paragraph (e)(2) of Rule 13d-3 would set forth the formula for calculating the number of equity securities that a holder of a cash-settled derivative will be deemed to beneficially own pursuant to paragraph (e)(1). This provision is necessary because derivatives may not always have a perfect "one-to-one" relationship to the reference security. Instead, the value of the derivative security, although based on the value of a reference security, may change at a multiple or fraction to any change in value of the reference security, particularly in the case of a security option. This difference in the amount by which the value of a derivative security changes as compared to the amount by which the value of the reference security changes is referred to as the "delta." For example, a $1 change in the value of the reference security may result in a $2 change in the value of the derivative security. In that case, the delta of the derivative security would be equal to two. If the delta of a derivative security is equal to one, then the value of the derivative security perfectly tracks the changes in value of the reference security. Calculation of beneficial ownership pursuant to a derivative security is easier in these circumstances because of the perfect one-to-one relationship between the derivative security and the reference security.

Proposed paragraph (e)(2) applies these concepts for purposes of determining the number of securities that a holder of a cash-settled derivative will be deemed to beneficially own pursuant to paragraph (e)(1). Proposed paragraph (e)(2)(ii) of Rule 13d-3 defines "delta" to mean, with respect to a derivative security, the ratio that that is obtained by comparing (x) the change in the value of the derivative security to (y) the change in the value of the reference equity security. Proposed paragraph (e)(2)(i) provides that the number of securities that a holder of such derivative security will be deemed to beneficially own pursuant to paragraph (e)(1) will be the larger of two calculations, set forth in proposed paragraphs (e)(2)(i)(A) and (B), in each case as applicable. If applicable, proposed paragraph (e)(2)(i)(A) would calculate the number of

securities as the product of (x) the number of securities by reference to which the amount payable under the derivative security is determined multiplied by (y) the delta of the derivative security.[106] Proposed paragraph (e)(2)(i)(B), if applicable, would calculate the number of securities by (x) dividing the notional amount of the derivative security by the most recent closing market price of the reference equity security, and then (y) multiplying such quotient by the delta of the derivative security.[107]

Proposed paragraph (e)(2)(i)(A) would be applicable if the agreement governing the terms of the derivative security provides a way to calculate the number of reference securities on which the amount payable pursuant to that security is based. Proposed paragraph (e)(2)(i)(B) would be applicable if the agreement governing the terms of the derivative security does not provide such a methodology for determining the applicable number of reference securities. Thus, there will be some derivative securities to which proposed paragraph (e)(2)(i)(A) will be inapplicable (*i.e.*, those derivative securities for which the agreement does not provide a way to calculate the number of reference securities on which the amount payable pursuant to that security is based). On the other hand, proposed paragraph (e)(2)(i)(B) will be applicable to all derivative securities (*i.e.*, because the calculation set forth in that paragraph can be performed regardless of whether the agreement governing the terms of the derivative security provides a methodology for determining the applicable number of reference securities). As such, to address those scenarios in which both paragraphs (e)(2)(i)(A) and (B) apply, paragraph (e)(2)(i) provides

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[106] As an illustration of the application of this proposed rule, a holder of a derivative security with a delta equal to one that references 100 shares of a covered class of common stock would be deemed to beneficially own 100 shares of such covered class. If, however, that derivative security had a delta equal to two, then such holder would be deemed to beneficially own 200 shares of such covered class, calculated as (x) the 100 shares of common stock referenced by the derivative security multiplied by (y) the derivative security's delta of two.

[107] As an illustration of the application of this proposed rule, if a person holds a derivative security with a notional amount of $100 and a delta equal to one that references a covered class of common stock with a most recent closing market price of $10 per share, then that person would be deemed to beneficially own 10 shares of such covered class. If, however, that same derivative security had a delta equal to two, then such person would be deemed to beneficially own 20 shares of such covered class, calculated as (x) the quotient obtained by dividing the $100 notional amount of the derivative security by the $10 per share most recent closing market price, (y) multiplied by the derivative security's delta of two.

that the number of securities that a holder of a derivative security will be deemed to beneficially own pursuant to paragraph (e)(1) will be the larger of the two amounts yielded by those paragraphs.

The proposed amendment to Rule 13d-3 also includes three notes to paragraph (e)(2). The first note provides that, for purposes of determining the number of equity securities that a holder of a cash-settled derivative security will be deemed to beneficially own, only long positions in derivative securities should be counted. Short positions, whether held directly against a covered class or synthetically through a cash-settled derivative security, should not be netted against long positions or otherwise taken into account.[108] The second note provides that, when calculating the number of securities that a holder of such derivative security will be deemed to beneficially own pursuant to paragraph (e)(1), the calculation in paragraph (e)(2)(i)(B) should be performed on a daily basis. Similarly, the third note provides that if a derivative security does not have a fixed delta (*i.e.*, if the delta is variable and changes over the term of the derivative security), then a person who holds such derivative security should calculate the delta on a daily basis, for purposes of determining the number of equity securities that such person will be deemed to beneficially own, based on the closing market price of the reference equity security on that day. Although we recognize that such daily calculations may impose administrative burdens on holders of derivative securities, this approach will help to

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[108] "Short positions," such as those within the meaning of the term as defined in 17 CFR 240. 14e-4(a)(1)(ii) ("Rule 14e-4(a)(1)(ii)"), are not treated as beneficial ownership under current Rule 13d-3. In addition, Section 13(d)(1) applies to persons who "acquire" beneficial ownership, and the aggregate amount of beneficial ownership held, as determined under Rule 13d-3(c), including certain contingent interests in a covered class, is required to be reported. As such, a beneficial owner subject to Section 13(d) or 13(g) reports its capacity to vote or dispose of a covered class whether through power it directly or indirectly holds or is deemed to hold under Rule 13d-3(d) by virtue of its contingent interest. The regulatory framework, therefore, only applies to persons who hold the equivalent of a "long position" within the meaning of the term as defined in Rule 14e-4(a)(1)(i). Persons who hold "short positions" have no such capacity to vote or dispose of a covered class and thus are beyond the scope of Sections 13(d) and 13(g) and Regulation 13D-G with the exception that a beneficial owner that otherwise must report on Schedule 13D may incur disclosure obligations with respect to any short sale activity, such as those arising under Item 6 of Schedule 13D. *See* 17 CFR 240.13d-101 (requiring disclosure of "any contracts . . . with respect to . . . any securities of the issuer"). A beneficial owner is not required to report its "net long position" within the meaning of such term as defined in Rule 14e-4(a)(1), and we are not currently proposing any changes in this regard.

ensure the accuracy of beneficial ownership reporting and is consistent with the approach taken by at least one foreign jurisdiction.[109]

Finally, proposed Rule 13d-3(e) would exclude from its purview security-based swaps, as defined in Section 3(a)(68) of the Exchange Act and the rules and regulations thereunder.[110] In a separate rulemaking, the Commission has proposed to require disclosure of security-based swap positions.[111] Specifically, proposed 17 CFR 240.10B-1 ("Rule 10B-1") would require public reporting on Schedule 10B of, among other things: (1) certain large positions in security-based swaps; (2) positions in any security or loan underlying the security-based swap position; and (3) any other instrument relating to the underlying security or loan or group or index of securities or loans.[112] As described in more detail in the related proposing release, proposed Rule 10B-1 would include specific quantitative thresholds for when public reporting is required and include a schedule of all of the information that must be reported.[113] We believe that the position disclosures with respect to cash-settled security-based swaps required under our proposed Rule 10B-1, if adopted, would provide sufficient information regarding holdings of security-based swaps such that additional regulation under Regulation 13D-G at this time would be

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[109] *See* DTR 5.3.3C, Recital 7 (Jan. 1, 2021), *available at* https://www.handbook.fca.org.uk/handbook/DTR/5/?view=chapter ("In order to ensure that information about the total number of voting rights accessible to the investor is as accurate as possible, delta should be calculated daily taking into account the last closing price of the underlying share.").

[110] Proposed Rule 13d-3(e) is not subject to Exchange Act Section 13(o). Section 13(o) provides that a person shall be "deemed" a beneficial owner of an equity security based on the purchase or sale of a security-based swap "only to the extent that the Commission determines after consultation with the prudential regulators and the Secretary of the Treasury, that the purchase or sale of the security-based swap, or class of security-based swap, provides incidents of ownership comparable to direct ownership of the equity security, and that it is necessary to achieve the purposes of this section that the purchase or sale of the security-based swaps, or class of security-based swap, be deemed the acquisition of beneficial ownership of the equity security." Section 13(o) applies to security-based swaps and does not apply to other types of derivative securities. Because proposed Rule 13d-3(e) does not cover security-based swaps, Section 13(o) is inapplicable to the proposed requirement.

[111] Prohibition Against Fraud, Manipulation, or Deception in Connection with Security-Based Swaps; Prohibition against Undue Influence over Chief Compliance Officers; Position Reporting of Large Security-Based Swap Positions, Release No. 34-93784 (Dec. 15, 2021) [87 FR 6652 (Feb. 4, 2022)].

[112] *Id.* at 6657.

[113] *Id.* For example, a person would be required to file a Schedule 10B once the "Security-Based Swap Equivalent Position" (as described in the proposing release for Rule 10B-1 [87 FR 6652 (Feb. 4, 2022)]) represents more than 5% of a class of equity securities. *Id.* at n.138 and accompanying text.

unnecessarily duplicative.[114] Further, to the extent that investors seek to use cash-settled derivatives other than security-based swaps in order to bypass the disclosures that Rule 10B-1 would require, Rule 13d-3(e), if adopted, would help prevent the exploitation of any regulatory gap between Schedule 10B and Schedule 13D that might otherwise exist.

Request for Comment

42. Should we amend Rule 13d-3 as proposed to deem persons who acquire or hold cash-settled derivative securities with the purpose or effect of changing or influencing the control of the issuer, or in connection with or as a participant in any transaction having such purpose or effect, as beneficial owners? Would the proposed rule sufficiently reduce the opportunities for persons to utilize cash-settled derivative securities to evade reporting under Section 13(d)?
43. Would the circumstances in which a holder acquires or holds a cash-settled derivative security with the purpose or effect of changing or influencing the control of the issuer be reasonably determinable? Should we provide further guidance on this point? Rather than amending Rule 13d-3 to deem as beneficial owners persons who acquire or hold cash-settled derivative securities with the purpose or effect of changing or influencing the control of the issuer, should we incorporate standards for establishing when a person becomes a beneficial owner that are more objectively determinable? For example, should we identify more specific indicia such as any of the plans described in Item 4 of Schedule 13D?
44. Can a cash-settled derivative be used to influence or change the control of an issuer? If so, please explain how the terms of the derivative security or the derivative investor's

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[114] *But see* Beneficial Ownership Reporting Requirements and Security-Based Swaps, Release No. 34-64628 (June 8, 2011) [76 FR 34579 (June 14, 2011)] (readopting without change the relevant portions of Rules 13d-3 and 16a-1 to preserve the application of those rules to persons who purchased or sold security-based swaps after the effective date of Section 13(o) by making the determinations required by Section 13(o) after consultation with prudential regulators and the Secretary of the Treasury).

relationship with a counterparty can effectuate that influence or change in control. For example, are cash-settled derivative contracts executed on a scale large enough to impact the voting by counterparties and thus the margins of victory on proposals put forth by the issuer of a covered class for shareholder approval?

45. Instead of treating holders of cash-settled derivative securities as beneficial owners, should we instead amend Schedule 13D and Schedule 13G to expressly include more comprehensive line item disclosure requirements concerning the use of cash-settled derivative securities? For example, should Item 6 of Schedule 13D be further revised to ask for a full description of any cash-settled derivative's material terms, and Item 7 of Schedule 13D be revised to explicitly require the filing of cash-settled derivative instruments as an exhibit?

46. Regardless of whether proposed Rule 13d-3(e) is adopted, should the Commission increase the 60-day time period specified in Rule 13d-3(d)(1) so that persons who hold contingent interests in a covered class will be deemed beneficial owners earlier? If so, would 90, 120, 180 or some greater number of days serve as the optimal date by which to deem persons who hold such interests, such as derivative holders, as beneficial owners?

47. For purposes of proposed Rule 13d-3(e), the term "derivative security" would have the meaning set forth in Rule 16a-1(c), excluding security-based swaps. Are there other types of derivatives (other than security-based swaps) that should be included within the purview of proposed Rule 13d-3(e) that are not included in the scope of the term "derivative securities," as defined in Rule 16a-1(c)? For purposes of Rule 13d-3(e), should rights with an exercise or conversion privilege at a price that is not fixed, which Rule 16a-1(c)(6) excludes from the term "derivative securities" in Rule 16a-1(c), be included?

48. Is our proposed inclusion of the concept of "delta" in Rule 13d-3(e) appropriate? If so, are the proposed application and definition of "delta" in Rules 13d-3(e)(2)(i) and (ii),

respectively, appropriate for purposes of determining the number of equity securities that a holder of a cash-settled derivative security is deemed to beneficially own?

49. For securities where the "delta," as we propose to define it, is not equal to 1, is our proposed calculation of the number of securities beneficially owned appropriate? Should the calculation be performed in another way? For example, should the calculation be limited to the number of reference securities contemplated by the instrument?

50. Should we include the three proposed notes to Rule 13d-3(e)(2)? Should only long positions in derivative securities be counted for purposes of determining the number of equity securities that a holder of a cash-settled derivative security will be deemed to beneficially own, as proposed? As an alternative to proposed Note 1 to Rule 13d-3(e)(2), should short positions in cash-settled derivative securities be netted against long positions or otherwise taken into account for purposes of determining the number of equity securities that a holder of a cash-settled derivative security will be deemed to beneficially own? If not, how should they be taken into account? For purposes of Notes 2 and 3 to Rule 13d-3(e)(2), is "daily," as proposed, the appropriate frequency, or should those calculations be performed with a different frequency (*e.g.*, on a weekly or monthly basis)? Is the proposed daily frequency of these calculations unduly burdensome on holders of cash-settled derivative securities? Other than the frequency with which the calculation must be performed, are there other difficulties associated with these calculations that would also make them burdensome?

51. For purposes of the calculations in Rule 13d-3(e)(2)(i)(B) and Note 3 to Rule 13d-3(e)(2), is the closing market price of the reference equity security, as proposed, the appropriate basis for those calculations, or is there a different basis that is more appropriate (*e.g.*, the volume-weighted average trading price of the reference equity security throughout a given day)?

52. Could the daily calculation requirements in proposed Notes 2 and 3 to Rule 13d-3(e)(2) result in situations in which a person's beneficial ownership does not exceed 5% of a covered class at the time that person acquires a derivative security, but then exceeds 5% at a later time solely by virtue of the fact that the closing market price of the reference equity security or the delta of the derivative security, as applicable, has changed (*i.e.*, not as a result of any further acquisitions)? If so, would it be appropriate to subject that person to the obligations of the beneficial ownership reporting regime under such circumstances?
53. Would proposed Rule 10B-1 provide sufficient information regarding holdings of cash-settled security-based swaps such that beneficial ownership reporting of cash-settled security-based swaps under Regulation 13D-G is unnecessary, or should beneficial ownership derived from cash-settled security-based swaps be included under Regulation 13D-G? If the information regarding holdings of cash-settled security-based swaps that would be required pursuant to proposed Rule 10B-1 were not available, would there be a need for the beneficial ownership derived from cash-settled security-based swaps to be included under Regulation 13D-G?

C. Proposed Amendments to Rule 13d-5 to Affirm Its Application and Operation

We are proposing a series of amendments to Rule 13d-5 to clarify and affirm its application to two or more persons who "act as" a group under Sections 13(d)(3) and (g)(3) of the Exchange Act. Specifically, we are proposing to amend Rule 13d-5 to:

- Change the title of the rule from "Acquisition of securities" to "Acquisition of beneficial ownership" to more accurately reflect the purpose, application and operation of the rule and ensure its consistency with Section 13(d)(1);
- Revise Rule 13d-5(a) to conform the text to the new title and Section 13(d);
- Redesignate paragraph (b)(1) as paragraph (b)(1)(i) and revise it to remove the potential implication that it sets forth the exclusive legal standard for group formation under Section 13(d)(3) or 13(g)(3);

- Add new paragraph (b)(1)(ii) to specify 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, those persons shall be deemed to have formed a group within the meaning of Section 13(d)(3);
- Add new paragraph (b)(1)(iii) to specify that a group subject to reporting obligations under Section 13(d) shall be deemed to acquire any additional equity securities acquired by a member of the group after the date of the group's formation;
- Add new paragraph (b)(1)(iv) to carve out from paragraph (b)(1)(iii) any intra-group transfers of equity securities;
- Add new paragraph (b)(2)(i) to specify that when two or more persons "act as" a group under Section 13(g)(3) of the Act, the group shall be deemed to have become the beneficial owner, for purposes of Sections 13(g)(1) and (2) of the Act, of the beneficial ownership held by its members;
- Add new paragraph (b)(2)(ii) to specify that a group regulated under Section 13(g) shall be deemed to acquire any additional equity securities acquired by a member of the group after the date of the group's formation; and
- Add new paragraph (b)(2)(iii) to carve out from paragraph (b)(2)(ii) any intra-group transfers of equity securities.

In addition, the proposed amendments would redesignate current Rule 13d-5(b)(2) as new Rule 13d-6(b). This change is discussed both in this section and in Section II.D, which describes our proposed amendments to Rule 13d-6.

1. Background

Sections 13(d)(3) and 13(g)(3) are identical, and each of these two provisions provides that "[w]hen two or more persons act as a . . . group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a 'person.'" Neither of these two provisions defines the term "group." The determination of whether coordinated

efforts among two or more persons constitutes a group subject to regulation as a single "person" under these two statutory provisions is a question of fact. Congress enacted these provisions based on two practical considerations. First, Sections 13(d)(1) and 13(g)(1), by their terms, apply to, and impose filing obligations upon, a single "person." Second, Congress recognized the need to protect against the evasion of disclosure requirements by persons who collectively sought to change or influence control of an issuer yet who each acquired and held an amount of beneficial ownership at or just below the reporting threshold.[115]

Congress sought to address this problem of coordinated circumvention by "deeming" two or more persons to be one person for purposes of Sections 13(d) and 13(g). Based on the statutory treatment of two or more persons as if they were one person when they "act as" a group for at least one of the three purposes specified in the statutory provisions (*i.e.*, acquiring, holding or disposing of securities of an issuer), the beneficial ownership collectively held by the group members is imputed to the group. To the extent the aggregate amount of beneficial ownership exceeds 5% of a covered class, the group may be required to file a beneficial ownership report.

In these situations, a fundamental question arises as to whether the group is subject to Section 13(d) or Section 13(g). The determination of which statutory provision applies to a group depends on whether a non-exempt acquisition of beneficial ownership has been made that can be imputed to the group, and, when on its own or added to any other beneficial ownership held by the group, results in beneficial ownership exceeding 5% of the covered class. If such an acquisition occurs, the group is subject to regulation under Section 13(d).[116] To the extent no

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[115] Section 13(d)(3) was enacted to prevent "easy avoidance of section 13(d)'s disclosure requirements by a group of investors acting together in their acquisition or holding of securities." Senate Report No. 550, 90th Congress, 1st Session 8 (1967); House Report No. 1711, 90th Congress, 2d Session 8-9 (1968); *see also* 113 Cong. Record Proceedings and Debates of the 90th Congress; Bill–S. 510 (Jan. 18, 1967) (noting that the specific provision applicable to groups was added to "close the loophole that now exists which allows a syndicate, where no member owns more than 10 percent, to escape the reporting requirements of the Securities Exchange Act").

[116] The operative term "after acquiring" in Section 13(d)(1) makes the application of Section 13(d) contingent upon the existence of an acquisition. Determining that an acquisition has occurred is thus necessary to establish the application of Section 13(d).

such acquisition attributable to the group has occurred, but the collective amount of beneficial ownership held by the group members exceeds 5% of a covered class at the end of a calendar year, the group is subject to Section 13(g).

Congress did not define the term "acquisition." When the Commission proposed the predecessor to the current Rule 13d-5(a),[117] it made clear that purchases would not be the exclusive means of making an acquisition and deemed "certain persons who become beneficial owners of securities to have acquired such securities," even if such person "had not intended, and had taken no action, to become a beneficial owner."[118] The Commission also adopted Rule 13d-5(b) to address situations in which the factual record does not establish the existence of an acquisition attributable to a group. Following Rule 13d-5(b)'s adoption, an acquisition by a group could thus be "deemed" to occur even in the absence of an associated market-based purchase or other transaction, as could be the case when a group is formed for the exclusive purpose of voting.[119] Given that the acquisition which triggers the reporting obligation must be

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[117] The predecessor rule, Rule 13d-6, was redesignated Rule 13d-5 in 1978. Filing and Disclosure Requirements Relating to Beneficial Ownership, Release No. 34-14692 (Apr. 21, 1978) [43 FR 18484 (Apr. 28, 1978)]. Unless otherwise noted, references to Rule 13d-5 in this section of the release also refer to the predecessor Rule 13d-6.

[118] Various Proposals Relating to Beneficial Owners and Holders of Record of Voting Securities, Release No. 34-11616 (Aug. 25, 1975) [40 FR 42212 (Sept. 11, 1975)]; *see also* Adoption of Beneficial Ownership Disclosure Requirements, Release No. 34-13291 (Feb. 24, 1977) [42 FR 12342 at 12345 (Mar. 3, 1977)] (explaining that "[d]onees, executors, trustees and legatees who become beneficial owners will be 'deemed' to have acquired such securities, even though such persons had not so intended and had taken no action to become beneficial owners").

[119] *See* Adoption of Beneficial Ownership Disclosure Requirements, Release No. 34-13291 (Feb. 24, 1977) [42 FR 12342 (Mar. 3, 1977)] (adopting Rule 13d-6(b), the predecessor to current Rule 13d-5(b)); Filing and Disclosure Requirements Relating to Beneficial Ownership, Release No. 34-14692 (Apr. 21, 1978) [43 FR 18484 (Apr. 28, 1978)] (redesignating Rule 13d-6(b) as current Rule 13d-5(b)). In proposing Rule 13d-6(b), the Commission was acting partly in response to an appellate court ruling issued in connection with private litigation. The appellate court found that it was unnecessary "for a group to acquire additional securities if their combined holdings, upon formation of the group, were more than five percent of the class" for purpose of Section 13(d). *See GAF Corp. v. Milstein*, 453 F. 2d 709 (2d Cir. 1971), *cert. denied* 400 U.S. 910 (1972). The Milstein group was an informal arrangement in which the individual members were not bound to vote their shares as would be the case if participating in a stock pool. The alleged group also never had an enforceable right to vote. GAF Corporation asserted that certain acts should be considered evidence of a conspiracy, but the evidence did not show any additional purchases. The Second Circuit Court of Appeals held that formation of a group of shareholders alone, where their aggregate holdings exceed 10% of a particular class of securities, and where no further acquisitions are intended by the membership of the group, still required compliance with Section 13(d). In so holding, the Second Circuit refused to follow the ruling in *Bath Industries, Inc. v. Blot*, 427 F.2d 97 (7th Cir. 1970) where the Seventh Circuit held that a group owning in excess of 10% of a class of securities must file only when further acquisitions were contemplated. Recognizing that informal associations could be subjected to reporting obligations upon mere

made by a single person, acquisitions occurring before the date of group formation are not considered "acquisitions" of beneficial ownership that could trigger a filing obligation. The requisite acquisition needed to satisfy the statutory element "after acquiring," therefore, must occur contemporaneously with, or subsequent to, group formation. Without evidence that an acquisition attributable to the group has occurred, the filing deadline for a Schedule 13D also cannot be established under Section 13(d)(1) and corresponding Rule 13d-1(a). To address this concern, the Commission proposed that an acquisition was "deemed" to occur if two or more persons agreed to act together for purposes of acquiring, holding or disposing of any securities of the issuer. In adopting Rule 13d-5, the Commission explained it was "defining acquisition" and that the new provision "deems the formation of certain groups of persons for the purpose of acquiring, holding or disposing of securities to be an acquisition which may trigger the reporting requirements of section 13(d), even though the group has not made any purchase or other acquisition subsequent to its formation."[120] The new rule therefore provided the Commission with a mechanism by which it could attribute an acquisition to the group for purposes of not only satisfying the "after acquiring" element of Section 13(d)(1), but also designating a date of "acquisition" needed to commence the 10-day filing deadline for the initial Schedule 13D.[121]

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formation, the Seventh Circuit adopted an "additional purchase" rule. Even identification of the precise date of the alleged group formation as the Second Circuit instructed the district court to find upon remand, however, would not then have determined whether an acquisition occurred that subjected the group to regulation under Section 13(d) or the latest date by which the Schedule 13D could have been timely filed.

[120] Adoption of Beneficial Ownership Reporting Requirements, Release No. 34-13291 (Feb. 24, 1977) [42 FR 12342 (Mar. 3, 1977)].

[121] While the adopting release for Rule 13d-6(b) acknowledges the Commission was providing "more objective standards" to help determine the reporting obligation of groups under Section 13(d), it qualified such statement by indicating that the standards were being provided only for "certain purposes" rather than in every instance. Adoption of Beneficial Ownership Reporting Requirements, Release No. 34-13291 (Feb. 24, 1977) [42 FR 12342 at 12342 (Mar. 3, 1977)]. The Commission's regulatory objective should be read in the context of the overall impetus for the initial 1975 rule proposal, which did not propose to define the term "group." The Commission further explained at adoption of Rule 13d-6(b) in 1977 that it had previously published, on August 25, 1975, its "Proposals Relating to Disclosure of Beneficial Owners and Holders of Record of Voting Securities." As set forth therein, the Commission's 1975 ownership proposals, if adopted, would have "deemed certain persons, including members of a group, who become beneficial owners of securities through non-purchase transactions to have 'acquired' such securities." *Id.* at 12343.

Given that the term "group" is not defined under Sections 13(d)(3) and 13(g)(3), investors, issuers and courts historically have considered the circumstances under which two or more persons must operate in order to be found to have formed a group.[122] Notwithstanding that the regulatory framework does not require proof of an agreement between two or more persons as a prerequisite to establishing the existence of a group, some courts, in assessing group formation, consider an agreement among group members to be a necessary element.[123]

In rendering opinions regarding group formation, some courts have suggested that a group can only be formed if an agreement exists among its purported members.[124] These cases appear to reflect such courts' attempts to find a workable means of administering the Section 13(d) regulatory framework and making related determinations about when a group may be found to exist under the statute. In addition, some courts have construed the language of Rule

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[122] In Sections 13(d)(3) and 13(g)(3), Congress identified, but did not define, four associations through which collective action may be taken by two or more persons that potentially could subject them to regulation under Sections 13(d) and 13(g) as a single person. In specifying "partnership, limited partnership, syndicate," Congress expressly referenced three types of groupings of persons that, like the term "group," are similarly undefined. To the extent two or more persons could not be found to have "act[ed] as a partnership, limited partnership [or] syndicate," such persons still could be found under the statutes to be jointly operating as any "other group." The reference to "group," therefore, is simply designed to serve as a general classification inclusive of the three specific, named types of associations, and when combined with the term "other," renders the term "other group" but one of four types of associations identified by Congress which are susceptible to being regulated as a single person under Section 13(d) or 13(g).

[123] For example, in *CSX Corporation v. Children's Inv. Fund Mgmt. (UK) LLP*, 562 F. Supp. 2d 511 (S.D.N.Y. 2008), the district court referred to a "requisite agreement" when offering an analytical framework to be applied in assessing whether or not a group had been formed, and cited to *Hallwood Realty Partners, L.P. v. Gotham Partners, L.P.*, 95 F. Supp. 2d 169, 176 (S.D.N.Y 2000), *aff'd*, 286 F.3d 613 in support of this proposition.

[124] One early court decision that predates the adoption of Rule 13d-5(b) found that a group had been formed earlier than reported and opined that "absent an agreement between [the defendants] a 'group' would not exist." *Corenco Corp. v. Schiavone & Sons, Inc.*, 488 F.2d 207, 217 (2d Cir. 1973). Similarly, another court decision cited the necessity of "sift[ing] through the record to determine whether there [was] sufficient direct or circumstantial evidence to support the inference of a formal or informal understanding." *Wellman v. Dickinson*, 682 F.2d 355, 363 (2d Cir. 1979), cert. denied sub. nom. *Dickinson v. SEC*, 460 U.S. 1069 (1983). The court ultimately determined that "direct and circumstantial evidence supports [its] finding of an agreement between" the alleged group members. *Id.* In another decision, the court reasoned that it was "not compelled to play ostrich in the face of the strong circumstantial evidence demonstrating the existence of an agreement among [the defendants] . . . . It would require a degree of naivete unbecoming to this Court to believe that the various activities of defendants were not the product of an agreement among the group but, rather, were merely coincidences." *Champion Parts Rebuilders, Inc. v Cormier Corp.*, 661 F. Supp. 825, 850 (N.D.Ill. 1987) (citations omitted). The court based its factual finding that an agreement existed on evidence indicating: (a) a common plan and goal; (b) a pattern of parallel and continued purchases over a relatively short and essentially concurrent time period; (c) correlation of defendants' activities and intercommunications, largely through their common agent; and (d) claims of shareholder support at the meeting with the corporation. *Id.*

13d-5(b)(1), which provides that a group is formed if an agreement to act together has been reached for one of four purposes, as governing group formation in every instance as opposed to discrete instances.[125] These decisions suggest that a plaintiff must prove, and by extension, a court must affirm, the presence of an agreement for purposes of satisfying the legal standards in Rule 13d-5(b)(1).

2. The Commission's View of Group Formation

Under a plain reading of Sections 13(d)(3) and 13(g)(3), an agreement is not a necessary element of group formation. The text of Rule 13d-5(b), along with the title of Rule 13d-5, also does not indicate that Rule 13d-5(b) was intended to serve as the exclusive definition of the term "group." Rule 13d-5(b) provides a standard applicable only for purposes of deeming an acquisition to have occurred where none otherwise exists. Therefore, the Commission is not required to invoke Rule 13d-5, and by extension, first establish that group members have an agreement to act together as a precondition to asserting that a group exists. Accordingly, the Commission is not precluded from imputing acquisitions to the group through other means, such as physical evidence or reliance upon Rule 13d-5(a), which provides that a person (including a group) is deemed to have acquired beneficial ownership when it becomes a beneficial owner by purchase or otherwise. The existence of an agreement between two or more persons to act together for at least one of the four purposes specified in the rule text is thus a sufficient, but not a necessary, condition for group formation.

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[125] For example, the Second Circuit, finding that the district court in the above mentioned *CSX Corporation* matter did not make sufficient findings to permit appellate review of a group violation of Section 13(d), stated: "on remand the District Court will have to make findings as to whether the Defendants formed a group for the purpose of 'acquiring, holding, voting or disposing,' 17 CFR 240.13d-5(b)(1) of [an issuer's] shares owned outright." *CSX Corp. v. Children's Inv. Fund Mgmt.*, 2011 WL 2750913, at *4 (2d Cir. July 18, 2011). An earlier Second Circuit opinion stated, "the key inquiry in the present case is whether [the defendants] 'agreed to act together for the purpose of acquiring, holding, voting or disposing of' [an issuer's] common stock. 17 CFR 240.13d-5(b)(1)." *Morales v. Quintel Ent., Inc.*, 249 F.3d I 15 (2d Cir. 2001). In a ruling that concluded the evidence did not establish the existence of a group, a district court, which acknowledged Rule 13d-5(b) when outlining the applicable regulatory framework, found that the plaintiff's complaint "d[id] not sufficiently allege an agreed-upon common purpose." *Roth v. Jennings*, 2006 U.S. Dist. LEXIS 4266, 2006 WL 278135 at *5 (S.D.N.Y. Feb. 2, 2006). On appeal, however, the Second Circuit criticized the district court for ascribing undue weight to the defendants' use of a disclaimer in public filings that they were not a group and found that the district court consequently "gave no recognition to the terms of §13(d)(3) and Rule 13d-5(b)(1)." *Roth v. Jennings*, 489 F.3d 499, 512 (2d Cir. 2007).

Interpreting Rule 13d-5(b) as the exclusive definition of a group also would run counter to the purpose and otherwise impede application of Sections 13(d) and 13(g).[126] Rule 13d-5(b) applies only when the aggregate amount of beneficial ownership held by group members exceeds 5% of a covered class on the date on which the group members enter into an agreement. If the beneficial ownership is 5% or less of a covered class on that date, or the ownership held is not in a covered class because Section 12 registration is not yet effective or otherwise, no statutory coverage exists and Regulation 13D-G does not apply. Consequently, if Rule 13d-5(b) were administered as the exclusive definition of group, there would be no requirement for such groups to report their holdings after their beneficial ownership exceeded 5% of a covered class, even if such groups were to make considerable post-formation acquisitions and ultimately take control of an issuer. Such a reading of Rule 13d-5(b) would produce the equivalent of an exemption from Section 13(d) for a person (*i.e.*, the group) that otherwise may make future non-exempt acquisitions that would result in the beneficial ownership attributable to the group exceeding 5% of a covered class. There is no indication that this was the Commission's intention when it adopted Rule 13d-5(b).[127]

Furthermore, there is no indication that Congress intended for the analysis of whether or not a group had formed to be dependent upon the existence of an express or implied agreement among two or more persons.[128] Sections 13(d)(3) and 13(g)(3) are devoid of any reference to the

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[126] For example, if the Commission were to construe Rule 13d-5(b)(1) as the exclusive definition of the term "group," and thus make an "agreement" a necessary element, that would directly conflict with the statutory language and narrow the circumstances in which Sections 13(d) and 13(g) could apply.

[127] When proposing Rule 13d-5(b), the Commission neither framed the rule as a proposed definition of "group" nor solicited comment on the sufficiency or any limitations of any such definition. Moreover, the proposed rule text was devoid of any reference to the term "group." *See* Disclosure of Corporate Ownership, Release No. 34-11616 (Aug. 25, 1975) [40 FR 42212 (Sept. 11, 1975)].

[128] According to the legislative history, members of Congress contemplated that the beneficial ownership reporting threshold—which was first enacted as more than 10% of a covered class, but currently is 5% of a covered class—could be bypassed by two or more persons acting in concert in furtherance of a common purpose or goal with each person individually holding an unreportable level of beneficial ownership. Both the House and Senate Reports accompanying the bill reflect an effort to prevent circumvention of the reporting threshold in this situation with the inclusion of the provision that became Section 13(d)(3). Those reports stated that Section 13(d)(3) "would prevent a

term "agree" or "agreement." The use of "any," "understanding," "relationship" and "arrangement" in the associated regulatory text of Rule 13d-3(a) also points to a recognition that concerted action need not be formalized in an agreement or otherwise expressed.[129] Section 13(d)(3), given the operative "act as" standard, encompasses not only agreements in the classic contractual "offer" and "acceptance" sense of the term[130] but also pooling arrangements, whether formal or informal, written or unwritten.[131] Congress neither added a state of mind element into Sections 13(d)(3) and 13(g)(3) nor specified that two or more persons must "act as" a group pursuant to an agreement. If the term "agreement" were read into Sections 13(d)(3) and 13(g)(3) as if it were an unintentionally omitted term, application of Section 13(d) or 13(g) also would be limited to only a subset of persons who otherwise "act as a group" within the meaning of Sections 13(d)(3) and 13(g)(3) instead of all persons who act as a group as expressly mandated.

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group of persons [w]ho seek to pool their voting or other interests in the securities of an issuer from evading the provisions of the statute because no one individual owns more than 10 percent of the securities." S. Rep. No. 550, 90th Cong., 1st Sess. 8 (1967); H.R. Rep. No. 1711, 90th Cong. 2d Sess. 8-9 (1968), Reprinted in (1968) U.S. Code Cong. & Admin. News. 2811, 2818. The reports further stated that "[t]he group would be deemed to have become the beneficial owner, directly or indirectly, of more than 10 percent of a class of securities at the time [t]hey agreed to act in concert." *Id.* As such, the reports noted that Section 13(d)(3) "is designed to obtain full disclosure of the identity of any person or group obtaining the benefits of ownership [b]y reason of any contract, understanding, relationship, agreement or other arrangement." *Id.*

[129] Congress sought to make visible surreptitious purchases executed by persons or entities that were not only not incorporated, but also operating without a formal alliance. The legislation was thus drafted to capture "informal associations" that otherwise were not subject to having their joint activities disclosed. *See* Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearing on S. 510 Before the Subcomm. on Securities of the S. Comm. on Banking and Currency, 90th Cong. 1 (1967). Because a group is deemed a single "person" once the standards of Section 13(d)(3) or 13(g)(3) have been met, that "person" may be considered a beneficial owner under Rule 13d-3(a) regardless of the absence of any contract or agreement.

[130] Section 13(d)(3) was "designed to obtain full disclosure of the identity of any . . . group obtaining the benefits of ownership of securities by reason of any contract, understanding, relationship, agreement or other arrangement." S. Rep. No. 550, 90th Cong., 1st Sess. 8 (1967); H.R. Rep. No. 1711, 90th Cong. 2d Sess. 8-9 (1968), Reprinted in (1968) U.S. Code Cong. & Admin. News. 2811, 2818. During a hearing, an individual testifying before the Senate (who was a member of a corporation's management) observed that in the then-unregulated market of takeovers for corporate control, "it [was] possible . . . for a group of people who [were] informally associated to each acquire less than 10 percent of the stock without having to report their acquisitions even though they have more than 10 percent as a group." Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearing on S. 510 Before the Subcomm. on Securities of the S. Comm. on Banking and Currency, 90th Cong. 1 (1967) (statement of Herbert F. Kahler, Secretary and General Counsel, International Silver Co.).

[131] Some courts and the Commission have not superimposed the term "agreement" into the legal standards governing the reporting of beneficial ownership by groups. *See SEC v. Levy*, 706 F. Supp. 61 (D.D.C. 1989) ("In order to find that a 'group' exists under Section 13(d)(3), a court must find that two or more people have formed a combination in support of a common objective."); *see also* In the Matter of John A. Carley, Release No. 34-50695 (Nov. 18, 2004) ("A group need not be formally organized, nor memorialize its intentions in writing. . . . All that is required is that its members combine in furtherance of a common objective.").

Whether or not a group exists is dependent upon the facts and circumstances.[132] Recognizing that two or more persons may take concerted action informally and without memorializing their intentions in writing, the Commission has relied upon circumstantial evidence instead of an agreement to establish that two or more persons combined in furtherance of a common objective.[133] A contrary approach or interpretation would elevate form over substance and make the regulation of groups in the beneficial ownership context wholly dependent upon evidence proving the existence of an agreement. The purpose of the statute would be frustrated, and a burden not intended by Congress would be placed upon any party alleging the existence of a group, including the Commission.[134]

The absence of a need to prove that a group made an acquisition for purposes of reporting under Section 13(g), in itself, supports our view that the existence of a group is not dependent upon application of Rule 13d-5(b), and by extension, whether such persons had an agreement. The absence of the "after acquiring" element in Section 13(g)(1) supports the view that groups may be subject to reporting obligations under Section 13(d), just as they are under Section 13(g), without reference to Rule 13d-5(b). No regulatory purpose would be served by concluding that an agreement among members is a prerequisite to the imposition of a reporting obligation under Section 13(d)(1) but not Section 13(g)(1). Under the current regulatory framework, if an agreement does not exist or cannot be proven, and no acquisitions can otherwise be imputed to

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[132] Group activity may be demonstrated by circumstantial evidence, *SEC v. Savoy*, 587 F.2d 1149 at 1162, such as: (1) the presence of a common plan or goal, *Fin. Gen. Bankshares, Inc. v. Lance*, 1978 WL 1082, at *9 (D.D.C. 1978); (2) "considerable dissatisfaction" with certain officers and a "desire to reduce" those officers' role in company management, *Id.* at *10; (3) strategy meetings with, among others, attorneys, *Levy*, 706 F. Supp. at 70; (4) a pattern of coordinated stock purchases, *Hallwood Realty Partners, LP v. Gotham Partners, LP*, 286 F.3d 613, 618 (2d Cir. 2002); (5) the solicitation of others to join the group, *Wellman*, 682 F.2d at 363-364; and (6) the existence of communications between and among group members. *Gen. Aircraft Corp. v. Lampert*, 556 F.2d 90, 95 (1st Cir. 1977).

[133] *SEC v. Levy*, 706 F. Supp. 61, 69 (D.D.C. 1989); *see also* In the Matter of John Joslyn, Joseph Marsh, P. David Lucas, Steven Sybesma, Stanley Thomas and Jon Thompson, Release No. 34-50588 (Oct. 26, 2004).

[134] *See Bath Industries, Inc. v. Blot*, 427 F.2d 97, 110 (7th Cir. 1970).

the group, Section 13(g) will still apply to require reporting by the group if the collective amount of beneficial ownership held by the group members exceeds 5% at the end of the calendar year.

3. Proposed Amendments

a. Proposed Rules 13d-5(b)(1)(i) and (b)(2)(i)

Our proposal would amend Rule 13d-5 to track the statutory text of Sections 13(d)(3) and (g)(3) and specify that two or more persons who "act as" a group for purposes of acquiring, holding or disposing securities are treated as a group. Specifically, Rule 13d-5(b)(1) would be redesignated as Rule 13d-5(b)(1)(i) and would be revised to, among other things, remove the reference to an agreement between two or more persons and instead indicate that when two or more persons act as a group under Section 13(d)(3), the group will be deemed to have acquired beneficial ownership of all of the equity securities of a covered class beneficially owned by each of the group's members as of the date on which the group is formed. In addition, proposed new Rule 13d-5(b)(2)(i) would contain nearly identical language, with conforming changes to address circumstances in which two or more persons act as a group under Section 13(g)(3) and the group is deemed to become the beneficial owner of all of the equity securities of a covered class beneficially owned by each of the group's members as of the date on which the group is formed.

These amendments would make clear that the determination as to whether two or more persons are acting as a group does not depend solely on the presence of an express agreement and that, 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 are sufficient to constitute the formation of a group.[135] By revising Rule 13d-5(b) as we propose, we intend to eliminate any potential for the rule to be misconstrued and consequently used as a basis to narrow the application of Sections 13(d)(3) and 13(g)(3) to: (1) two or more persons who first

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[135] The Commission, in adopting Rule 13d-5(b)(1), indicated that it viewed the term "holding" as subsuming the term "voting," but nevertheless expressly referenced the term "voting" for the avoidance of doubt. *See* Filing and Disclosure Requirements Relating to Beneficial Ownership, Release No. 34-14692 (Apr. 21, 1978) [43 FR 18484 at 18492 (Apr. 28, 1978)].

"agree" to act as a group, instead of two or more persons who "act as" a group as expressly codified in these statutory provisions; and then (2) only an additional subset of those such groups whose beneficial ownership exceeds 5% on the date of an agreement.

b. Proposed Rule 13d-5(b)(1)(ii)

In addition, given that a Schedule 13D filing may affect the market for an issuer's securities, information that a person will make a Schedule 13D filing in the near future can be material.[136] Under certain circumstances, the person that incurs or will incur such a filing obligation may be incentivized to share that information with other investors. For example, a large blockholder may be planning to commence a future campaign to challenge or unseat directors serving on the board of the issuer of the covered class and seek support of its still undisclosed plan.[137] By privately sharing this material information (*i.e.*, the fact that the blockholder is or will be required to make a Schedule 13D filing) in advance of the public filing deadline with a goal of inducing a change in the voting electorate or strengthening a relationship, the blockholder may engender support of, and improve the likelihood of success regarding, any future changes proposed to the issuer. Similarly, by sharing such material information with other investors positioned to act on the information, the blockholder may incentivize those investors to acquire shares in the covered class before such filing is made.[138] Such incentive would be based on the other investors' expectation of an increase in the price of the covered class once the

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[136] *See* Alon Brav, Wei Jiang, Frank Partnoy and Randall S. Thomas, *Hedge Fund Activism, Corporate Governance and Firm Performance*, 61 J. FIN. 1729 (2008) (finding on average an abnormal short-term return of 7% over the window surrounding a Schedule 13D filing); Marco Brecht, Julian Franks, Jeremy Grant and Hammes F. Wagner, *The Returns to Hedge Fund Activism: An International Study*, CENTER FOR ECONOMIC POLICY RESEARCH DISCUSSION Paper No. 10507 (Mar. 15, 2015).

[137] *See, e.g.*, Susan Pulliam, Juliet Chung, David Benoit and Rob Barry, *Activist Investors Often Leak Their Plans to a Favored Few*, THE WALL STREET JOURNAL (Mar. 26, 2014), https://www.wsj.com/articles/SB10001424052702304888404579381250791474792 ("Activists, who push for broad changes at companies or try to move prices with their arguments, sometimes provide word of their campaigns to a favored few fellow investors days or weeks before they announce a big trade, which typically jolts the stock higher or lower.").

[138] The Commission expresses no opinion as to whether or not such a blockholder owes a fiduciary duty to other shareholders in the covered class.

market reacts to the Schedule 13D filing.

These activities raise a question as to whether those investors "act as" a "group for the purpose of acquiring" the covered class within the meaning of Section 13(d)(3).[139] They also raise investor protection concerns. For example, any near-term gains made by these other investors attributable to this asymmetric information may come at the expense of uninformed shareholders who sell at prices reflective of the *status quo*.[140] 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 such selling shareholders exit, such prices may be discounted in comparison to the price selling shareholders would have achieved had the information about the impending Schedule 13D filing been public. Consequently, this informational imbalance may result in opportunistic purchases benefitting a favored few.[141]

To provide clarity on this issue, enhance investor confidence and promote accurate price discovery in the capital markets, we are proposing to amend Rule 13d-5 to include a provision, which would be codified in paragraph (b)(1)(ii), that states that a person who shares information about an upcoming Schedule 13D filing that such person will be required to make, to the extent this information is not yet public and communicated with the purpose of causing others to make purchases, and a person who subsequently purchases the issuer's securities based on this information will be deemed to have a formed a group within the meaning of Section 13(d)(3). Proposed Rule 13d-5(b)(1)(ii) further provides that the group formed on the basis of such concerted action will be deemed to acquire beneficial ownership in the covered class. This acquisition by the group, which occurs by operation of Rule 13d-5(b)(1)(ii), would trigger

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[139] This question arises regardless of whether such other investors would be independently subject to, and thus incur a stand-alone reporting obligation under, Section 13(d)(1). Under Section 13(d)(3), however, two or more persons may be treated as a single person only if the beneficial ownership collectively held exceeds 5% of the covered class.

[140] *See infra* Sections III.A and III.C.3.

[141] *See* Lucian Bebchuk, Alon Brav, and Wei Jiang, *The Long-Term Effects of Hedge Fund Activism*, 115 COLUM. L. REV. 1085 (2015). The authors find an approximately 6% average abnormal return during the 20-day window before and after a Schedule 13D filing.

application of Section 13(d)(1), and in turn, establish the filing deadline for the group's disclosure statement on Schedule 13D. The proposed amendment would thus help ensure that appropriate disclosures under Section 13(d) are made in these and similar circumstances.[142]

We believe this proposed rule change is consistent with the purpose of Section 13(d). Section 13(d)(3) was designed to prevent circumvention of Section 13(d). As noted above, under Section 13(d)(3), a group may become subject to regulation even in the absence of any express or implied agreement to act together for the purpose of acquiring a covered class. For example, if a large blockholder shares non-public information about its anticipated obligation to file a Schedule 13D, as would be the case if a tipper were to share its intention to accumulate a stake that would trigger such a filing obligation, and the person who receives such information subsequently makes a purchase based on that information, such information-sharing and purchasing activity is sufficient to satisfy the statutory standards within Section 13(d)(3) to the extent the information was shared with the purpose of causing such additional purchases to be made. While the final determination as to whether two or more persons "act as" a group for this purpose ultimately will depend upon the specific facts and circumstances, the advantages inherent to this mutually beneficial relationship between the tipper and the tippee are self-evident. The large blockholder would have shared non-public, potentially market-moving information concerning an impending Schedule 13D filing obligation. The blockholder benefits by virtue of the subsequent acquisition of shares by the other investors, which may support or contribute to an increase in the value of the blockholder's investment in the covered class. In addition, the blockholder meaningfully contributes to a relationship, and creates the potential for

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[142] Proposed Rule 13d-5(b)(1)(ii), if adopted, would provide that the conduct specified in the rule is sufficient to find that a group had been formed under Section 13(d)(3) and, at the same time, deem that group to have made the acquisition necessary to trigger application of Section 13(d)(1). The proposed rule would serve as an additional, not exclusive, means of establishing that the tipper and tippee formed a group that made an acquisition subject to Section 13(d). The proposed rule would not supersede or replace the existing regulatory provisions under which the tipper-tippee could become subject to Section 13(d). Thus, the Commission would not need to invoke Rule 13d-5(b)(1)(ii) when seeking to enforce violations in the context of every tipper-tippee relationship, but instead could assert other bases for finding that two or more such persons acted as a group for the purpose of acquiring a covered class.

reciprocal behavior. Such reciprocity could, in turn, prompt additional concerted action that will further implicate the statute.[143] Those investors, acting on the information shared by the blockholder, also benefit by capitalizing on an opportunity to acquire the covered class at a comparative "discount" relative to the price they presumably would have paid had more timely public disclosure of the sensitive information in their possession been made. Consequently, in our view, the tipping arrangement described above falls within the scope of activity Congress sought to regulate when it enacted Section 13(d)(3).

Under proposed Rule 13d-5(b)(1)(ii), the group will be deemed to have acquired beneficial ownership of the securities of any market participant with whom the large blockholder has communicated material information regarding its impending filing obligation on the earliest date on which the acquisition by the recipient (or recipients, as the case may be) of the material information occurs.[144] The existence of this acquisition will not alter the blockholder's initial filing obligation in respect of its acquisition of beneficial ownership in excess of 5% of the covered class. Rather, that person will now be obligated to acknowledge the existence of the group under Item 2 of the cover page of Schedule 13D, and provide any other required disclosures as a group member. If other group members make purchases later than the first date on which the blockholder is deemed to have formed a group with another person, proposed Rule 13d-5(b)(1)(iii), discussed below, would operate to deem the group to have acquired any additional shares acquired by any such persons who are considered group members after the date of group formation. Under Rule 13d-1(k), group members have the option of jointly filing a

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[143] *See* John C. Coffee, Jr. and Darius Palia, *supra* note 19, at 596 and n.173 (explaining that "norms of reciprocity characterize many areas of commercial life" and "[f]or prudential reasons, hedge funds may prefer to share the gains among themselves by using an organizational structure that unites a number of funds into a loosely knit organization (i.e., the 'wolf pack') that may acquire 25% or more of the target" and noting that "[a]lthough the lead hedge fund does not fully capture all the gains obtainable in the transaction it leads, it reduces its risk and may receive reciprocal treatment from other hedge funds that later invite it to join it to their 'wolf packs'").

[144] The term "market participant" is used in this release to refer to any investor in or trader of a covered class, as determined in this release. The term has been used in order to account for the foreseeable possibility that a large blockholder may need to consult with persons who are not investors or traders, such as outside counsel, broker dealers, filing agents and others in connection with having to make its initial Schedule 13D filing.

single Schedule 13D or, alternatively, independently filing a Schedule 13D that identifies all members of the group.

No term within proposed Rule 13d-5(b)(1)(ii) prohibits the blockholder from making additional purchases in the covered class or communicating the existence of the filing obligation to other shareholders. As such, the large blockholder and the other investors are free to acquire a larger position in the covered class during the period that remains before the required beneficial ownership report discloses the existence of the group. While the impact of the proposed rule may reduce the number of members within, and beneficial ownership initially held by, a group formed under the described tipping arrangement, or eliminate the practice altogether, we believe the proposed rule is appropriate in light of the possibility for coordinated acquisitions without compliance with Section 13(d). We believe that adding a provision directly addressing the tipping arrangement described above would advance the policy purposes of Section 13(d).

c. Proposed Rules 13d-5(b)(1)(iii) and (b)(2)(ii)

Groups may form at a time when a class of equity securities is not yet registered under Section 12 or the aggregate beneficial ownership held by the membership in the group on the date of its formation is 5% or below of a covered class. Expressly capturing post-formation acquisitions of beneficial ownership by group members therefore can become important for purposes of: assessing whether a group intentionally tried to evade the reporting process; determining whether an amendment was due for a pre-existing Schedule 13D filing; and evaluating the availability of the Section 13(d)(6)(B) exemption. For example, imputing post-formation acquisitions to a group by rule would make clear that acquisitions by group members that collectively exceed the 2% exemptive threshold over a 12-month period are attributable to the group, thereby resulting in the group becoming ineligible to report pursuant to Section 13(g) and triggering a filing obligation under Section 13(d).[145] The 12-month measurement period

[145] Section 13(d)(6)(B) takes into account all acquisitions that occurred during the preceding twelve months.

therefore extends into the time period where a beneficial owner, including a group, held an amount of beneficial ownership below the statutory threshold or where the group formed on a date when the class of equity was not registered under Section 12.[146]

Absent an express provision that would treat post-formation acquisitions of beneficial ownership by group members as acquisitions by the group, the Commission or other affected parties must prove the acquisition is attributable to the group. For example, if the Commission invoked Rule 13d-5(a), it would have to establish that the group "became" a beneficial owner of more shares and thus made an acquisition within the meaning of that rule. To help ensure that acquisitions made by a group member after the date of group formation are attributed to the group once the collective beneficial ownership among group members exceeds 5% of a covered class, and reduce the Commission's evidentiary burden, we propose to amend Rule 13d-5 to expressly impute such acquisitions to the group. Proposed new Rule 13d-5(b)(1)(iii) would provide that a group under Section 13(d)(3) will be deemed to have acquired beneficial ownership of equity securities of a covered class if any member of the group becomes the beneficial owner of additional equity securities of such covered class after the date of the group's formation. Proposed new Rule 13d-5(b)(2)(ii) would contain nearly identical language, with conforming changes to address circumstances in which a member of a group under Section 13(g)(3) becomes the beneficial owner of additional equity securities of a covered class after the date of the group's formation.

d. Proposed Rules 13d-5(b)(1)(iv) and (b)(2)(iii)

We also are proposing amendments to Rule 13d-5 to carve out from the purview of proposed Rules 13d-5(b)(1)(iii) and (b)(2)(ii) intra-group transfers of equity securities of a

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[146] The Commission has indicated that the 2% exemption operates on "a rolling twelve-month basis." Filing and Disclosure Requirements Relating to Beneficial Ownership, Release No. 34-17353 (Dec. 4, 1980) [45 FR 81556 at 81557 (Dec. 11, 1980)]. In other words, for an acquisition to be exempt under Section 13(d)(6)(B), "it must, when taken together with all other acquisitions of beneficial ownership by the same person of securities of the same class during the preceding twelve months, not exceed two percent of the class." *Id*.

covered class. Specifically, proposed Rule 13d-5(b)(1)(iv) would provide that a group under Section 13(d)(3) will not be deemed to have acquired beneficial ownership in a covered class if a member of the group becomes the beneficial owner of additional equity securities in such covered class through a sale by, or transfer from, another member of the group. Proposed new Rule 13d-5(b)(2)(iii) would contain nearly identical language, with conforming changes to address circumstances in which a member of a group under Section 13(g)(3) becomes the beneficial owner of additional equity securities in a covered class through a sale by, or transfer from, another member of the group.

e. Proposed Amendment to the Title of Rule 13d-5

To further align Rule 13d-5 with Section 13(d)(1), we also propose to amend the title of the rule to "Acquisitions of beneficial ownership" to remove the potential implication that Section 13(d) and Rule 13d-1(a) could only apply if a person made an actual acquisition of securities. Under Section 13(d)(1), a person becomes subject to a reporting obligation "after acquiring" beneficial ownership, which determination may or may not include an actual acquisition of securities based on whether a person is a beneficial owner under Rule 13d-3. We also are proposing conforming amendments to Rule 13d-5(a) to replace the references to an "acqui[sition] of securities" with references to an "acqui[sition] of beneficial ownership."

f. Proposed Redesignation of Current Rule 13d-5(b)(2)

Finally, for the avoidance of doubt or confusion as to the regulatory purpose Rule 13d-5 is intended to serve, and to reinforce its operation as a provision that governs acquisitions of beneficial ownership, we propose to relocate Rule 13d-5(b)(2) to neighboring Rule 13d-6, titled "Exemption of certain acquisitions," and redesignate it as new Rule 13d-6(b). No substantive changes would be made to the text of the rule. That amendment is discussed in more detail in Section II.D below.

<u>Request for Comment</u>

54. Should we amend Rule 13d-5 to add new Rules 13d-5(b)(1)(i) and (b)(2)(i), as proposed? Rather than amending the rule as proposed to affirm that an express or implied agreement is not needed to subject a group to reporting under Section 13(d) or 13(g), should we instead issue a Commission interpretation that reiterates this point?
55. Should we amend Rule 13d-5 to add new Rule 13d-5(b)(1)(ii), as proposed? Does the current regulatory framework sufficiently address such activity? Would the possible imposition of a Schedule 13D filing obligation adequately remediate the behavior we are seeking to address? Are there any changes to proposed Rule 13d-5(b)(1)(ii) that we should consider, such as further clarification to address situations where the non-public information about the Schedule 13D filing is shared by an employee who is not authorized to do so?
56. Should we amend Rule 13d-5 to add new Rules 13d-5(b)(1)(iii) and (b)(2)(ii), as proposed? Alternatively, should additional acquisitions made by group members after the date of group formation under Section 13(d) be exempted, or should additional persons under Section 13(g) be exempted from regulation as a group, and if so, what would be the grounds upon which such exemptions could be granted?
57. Should we amend Rule 13d-5 to add new Rules 13d-5(b)(1)(iv) and (b)(2)(iii), as proposed?
58. Instead of amending Rule 13d-5 as proposed, should we propose a definition of the term "group" and, if so, how should the term be defined?
59. Should we propose a rule or amendments to existing rules that would require groups to report exclusively on Schedule 13D, and if so, why should groups not be able to avail themselves of reporting on Schedule 13G in lieu of Schedule 13D as they do today? For example, Rule 13d-1(b)(1)(ii)(K) identifies a group as being among the qualified institutions eligible to report on Schedule 13G in lieu of Schedule 13D provided that every member of the group is a qualified institution. Should this provision be rescinded and

other revisions be made to ensure that groups would be ineligible to qualify as QIIs or Passive Investors that report beneficial ownership on Schedule 13G?

60. Have shareholders suffered quantifiable harm as a result of any weakness in the current regulatory framework as applied to groups, and if so, would new rules or amendments beyond what we have already proposed prevent such harm caused by undisclosed group activity from recurring?

61. Is certain group activity going unreported under the current regulatory framework because it does not involve acquiring, holding or disposing of a covered class, and if so, what additional rule proposals or modifications could be made to address such activity?

62. Do instances exist in which shareholders in a covered class were harmed as a result of the tipping arrangements described above, and if so, could such harm be quantified? To the extent any such shareholder harm has occurred, please explain how such harm occurred.

63. Would Rule 13d-5(b)(1)(ii) unduly chill communications between shareholders and market participants, such as investment advisers? If so, what modifications to the proposed rule should we consider? For example, should application of the rule be conditioned on the recipient of the tip intending to coordinate with the tipper or making its purchases in reliance on the non-public information that the tipper provided so as to avoid a scenario in which such recipient is unwittingly deemed a member of a group simply by virtue of the tipper's independent communications or actions?

64. Given that Rule 13d-5(b)(1)(ii) would operate and apply in addition to, and not to the exclusion of, Section 13(d)(3),[147] should the Commission issue guidance about the facts and circumstances under which it would find that two or more persons "act as a group" under Section 13(d)(3) in the context of a tipper-tippee relationship or otherwise?

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[147] *See supra* note 142.

65. Should the scope of proposed Rule 13d-5(b)(1)(ii) be expanded to include the group formation standards under Section 13(g)(3) as well, and if so, why? Would other investors be incentivized to take a position in a covered class upon learning that a Schedule 13G filing was expected to be made by an Exempt Investor? For example, have any individual investors or groups filed a Schedule 13G as an Exempt Investor while also advocating for change without disclosure given the absence of an analogue to Item 4 of Schedule 13D or requirement under Item 10 of Schedule 13G for an Exempt Investor to certify as to its passivity? Similarly, should the scope of proposed Rule 13d-5(b)(1)(ii) be expanded to cover Schedule 13G filings made by a group of QIIs or Passive Investors given that such groups—like Schedule 13D filers—still will have made an acquisition subject to Section 13(d)?

66. For purposes of this release, "market participant" means any investor in or trader of a covered class.[148] Should any modifications be made to our interpretation of the term "market participant"? Alternatively, should we adopt a definition of the term "market participant" in Regulation 13D-G? If so, should Regulation 13D-G be amended to include a provision dedicated to providing defined terms used throughout the regulation?

D. Proposed Amendments to Rule 13d-6 to Create Certain Exemptions

We are proposing a series of amendments to Rule 13d-6 to reorganize the rule and exempt certain circumstances from resulting in a person being deemed to have acquired beneficial ownership of, or otherwise to beneficially own, equity securities of a covered class for purposes of Sections 13(d) and 13(g). Specifically, we are proposing to amend Rule 13d-6 to:

- Redesignate the current text of Rule 13d-6 as Rule 13d-6(a);
- Redesignate the current text of Rule 13d-5(b)(2) as Rule 13d-6(b);

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[148] *See supra* note 144.

- Add new paragraph (c) to create an exemption from Sections 13(d)(3) and 13(g)(3) for certain circumstances in which two or more persons take concerted actions with respect to an issuer or a covered class; and
- Add new paragraph (d) to create an exemption from Sections 13(d)(3) and 13(g)(3) for certain circumstances in which two or more persons enter into an agreement setting forth the terms of a derivative security.

These proposed amendments are discussed in further detail below.

1. Background

Congress granted the Commission the authority to issue exemptions from the application of Sections 13(d) and 13(g). The Commission can, under Section 13(d)(6)(D), exempt, by rule, acquisitions "as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of [Section 13(d)]." Congress similarly granted the Commission authority under Section 13(g)(6) to exempt any person or class of persons from Section 13(g) "as it deems necessary or appropriate in the public interest or for the protection of investors." The Commission exercised this authority when it adopted Rule 13d-6, which exempts certain acquisitions. Currently, it sets forth one exemption from Section 13(d) for the acquisition of securities of an issuer by a person who, prior to such acquisition, was a beneficial owner of more than 5% of the outstanding securities of the same class as those acquired, provided that certain conditions are met.

We recognize that our proposal to amend Rule 13d-5, as discussed above, may raise concerns among investors as to whether their communications and other activities with other investors would constitute the formation of a group. We also recognize the possibility that additional exemptions may be warranted to address situations in which beneficial ownership reporting under Section 13(d) or 13(g) by a group would be unnecessary from an investor protection standpoint or even contrary to the public interest. Specifically, we are aware that activity exists among shareholders, investors, holders of derivatives and other market

participants that may, absent an exemption, implicate Sections 13(d)(3) and 13(g)(3). For example, institutional investors or shareholder proponents may wish to communicate and consult with one another regarding an issuer's performance or certain corporate policy matters involving one or more issuers. Subsequently, those investors and proponents may take similar action with respect to the issuer or its securities, such as engaging directly with the issuer's management or coordinating their voting of shares at the issuer's annual meeting with respect to one or more company or shareholder proposals.

The beneficial ownership reporting system is not intended to impede communications among shareholders or between proponents and issuers that are not undertaken with the purpose or effect of changing or influencing control of an issuer. Accordingly, the regulatory purposes of Sections 13(d) and 13(g) would not be served by treating investors and proponents under those circumstances as a single person that "act[s] as" a group by virtue of its "holding" of a covered class within the meaning of Sections 13(d)(3) and 13(g)(3).

Similarly, investors in an equity-based derivative security may need to, in order to acquire the derivative security, enter into an agreement governing the terms of such instrument with a financial institution that, in the ordinary course of its business, acts as a counterparty to such investors. To offset any risk exposure to that derivative security, including any obligations that may arise at settlement, the financial institution may accumulate the reference equity security in a covered class and hold such reference security for the duration of the agreement. But for the joint actions of the parties in entering into the agreement, that specific acquisition of beneficial ownership in the covered class by the financial institution would not have occurred. As such, entry into such an agreement may implicate Sections 13(d)(3) and (g)(3) because two persons may be viewed as "act[ing] as" a group given the financial institution's foreseeable acquisition of a covered class. Assuming that the investor and the financial institution did not enter into the agreement with the purpose or effect of changing or influencing control of the issuer, the regulatory purposes of Sections 13(d) and 13(g) would not be furthered by treating the

investor and the financial institution as members of a group under Sections 13(d)(3) and 13(g)(3) solely by virtue of their entrance—for strictly commercial purposes and not for purposes of acquiring, holding or disposing of a covered class—into that agreement.

2. Proposed Amendments

We are proposing amendments to Rule 13d-6 to exempt certain actions taken by two or more persons from the scope of Sections 13(d)(3) and 13(g)(3) if those actions do not have the purpose or effect of changing or influencing the control of an issuer and thus are not within the purpose of Section 13(d).

As an initial matter, we are proposing to redesignate current Rule 13d-6 as Rule 13d-6(a) to allow for new exemptions to be added as subsequent paragraphs of Rule 13d-6. The text of current Rule 13d-6 would not be changed in any way.

In light of our proposed amendments to Rule 13d-5, we also are proposing to add new paragraph (c) to Rule 13d-6 to avoid chilling communications among shareholders or impeding shareholders' engagement with issuers where those activities are undertaken without the purpose or effect of changing or influencing control of the issuer (and are not made in connection with or as a participant in any transaction having such purpose or effect).[149] Proposed Rule 13d-6(c) would provide that two or more persons will not be deemed to have acquired beneficial ownership of, or otherwise beneficially own, an issuer's equity securities as a group solely

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[149] The Commission has previously articulated policy concerns similar to those that underlie this proposed exemption. For example, in a rulemaking effort in the late 1990s, the Commission took steps to ensure that "the Section 13(d) reporting obligations [do not] restrict a shareholder's ability to engage in proxy related activities," including their "ability to use the proxy rule exemptions that were adopted in 1992 to facilitate communications among shareholders." Amendments to Beneficial Ownership Reporting Requirements, Release No. 34-39538 (Jan. 12, 1998) [63 FR 2854 at 2858 (Jan. 16, 1998)]. In adopting those proxy rule exemptions, the Commission noted that "[t]he purposes of the proxy rules themselves are better served by promoting free discussion, debate and learning among shareholders and interested persons." Regulation of Communications Among Shareholders, Release No. 34-31326 (Oct. 16, 1992) [57 FR 48276 at 48279 (Oct. 22, 1992)]. Finally, as discussed *supra* note 47, our proposal, if adopted, would not change the existing standards for determining whether a person is engaging in an activity that would have the purpose or effect of changing or influencing the control of the issuer. For example, our proposal would not change the Commission's existing view that most proxy solicitations in support of a proposal specifically calling for a change of control of an issuer (*e.g.*, a contested election of directors, a sale of the issuer or the restructuring of the issuer) would clearly have the purpose and effect of changing or influencing control. *See* Amendments to Beneficial Ownership Reporting Requirements, Release No. 34-39538 (Jan. 12, 1998) [63 FR 2854 at 2859 (Jan. 16, 1998)]. See also *supra* note 99 for the definition of "control" under Rule 12b-2 of Regulation 12B.

because of their concerted actions related to an issuer or its equity securities, including engagement with one another or the issuer, provided they meet certain conditions. Such interactions, depending upon the level of coordination and degree to which the persons advocate in furtherance of a common purpose or goal, could be found to satisfy the "act as" a group standard under Section 13(d)(3) or 13(g)(3) for the purpose of "holding" a covered class. To help ensure that the exemption is available only where such persons independently determine to take concerted actions, the proposed exemption would be available only if such persons are not directly or indirectly obligated to take such actions (*e.g.*, pursuant to the terms of a cooperation agreement or joint voting agreement).

In addition, we are proposing to add new paragraph (d) to Rule 13d-6, in light of proposed new Rule 13d-3(e), to avoid impediments to certain financial institutions' ability to conduct their business in the ordinary course. Proposed Rule 13d-6(d) would provide that two or more persons will not be deemed to have formed a group under Section 13(d)(3) or 13(g)(3) solely by virtue of their entrance into an agreement governing the terms of a derivative security. This exemption would only be available if the agreement is a bona fide purchase and sale agreement entered into in the ordinary course of business. Further, the exemption would only be available if such persons do not enter into the agreement with the purpose or effect of changing or influencing control of the issuer, or in connection with or as a participant in any transaction having such purpose or effect.

Finally, as noted above, we are proposing to redesignate current Rule 13d-5(b)(2) as new Rule 13d-6(b). Current Rule 13d-5(b)(2) was first adopted in 1978 as a means to effectively exempt acquisitions from being attributed to a group within the meaning of Section 13(d)(3) solely by virtue of concerted actions by QIIs relating to the purchase of equity securities in a

private offering.[150] As such, our proposed placement of this provision, which operates to exempt an actual purchase transaction by a group from otherwise being treated as an acquisition under Rule 13d-5(b)(1), into Rule 13d-6, should add to administrative convenience as the provision would appear alongside another acquisition transaction already so exempted.

Request for Comment

67. Should we amend Rule 13d-6 as proposed?
68. Should we add new Rule 13d-6(c), as proposed, to exempt certain concerted actions by two or more persons from serving as the basis for group formation? Are the proposed conditions for reliance on this exemption appropriate? For example, is there another way that we can ensure that persons seeking to rely upon the exemption would independently reach decisions that result in concerted action being taken other than by requiring that such persons not be directly or indirectly obligated to take concerted actions, as proposed in Rule 13d-6(c)(2)? Alternatively, if we adopt proposed Rule 13d-6(c), should we omit proposed paragraph (c)(2) and, therefore, only condition availability of the exemption on the requirement set forth in proposed paragraph (c)(1)?
69. Is the proposed Rule 13d-6(c) exemption broad enough to exempt activity by shareholders who coordinate to make non-binding proposals under 17 CFR 240.14a-8 or otherwise, or is an express exemption needed for shareholders who act together in introducing such proposals?
70. Should we add new Rule 13d-6(d), as proposed, to exempt the entrance by two or more persons into an agreement governing the terms of a derivative security from serving as the basis for group formation? Are the proposed conditions for reliance on this exemption

[150] Current Rule 13d-5(b), by its terms, acknowledges that the joint, concerted action by institutional investors specified in Rule 13d-1(b) to purchase an issuer's equity securities pursuant to an agreement among QIIs would constitute an acquisition by a group subject to Section 13(d) absent a regulatory accommodation. The Commission therefore adopted the equivalent of an exemption by codifying its view within Rule 13d-5(b)(2) that the "group shall be deemed not to have acquired any equity securities beneficially owned by the other members of the group."

appropriate? For example, does the condition that the agreement must be a bona fide purchase and sale agreement entered into in the ordinary course of business mitigate the concerns underlying Sections 13(d)(3) and 13(g)(3)?

71. Will the proposed new exemptions in Rule 13d-6 facilitate any actions that would be contrary to the intent of Sections 13(d) and 13(g)?

72. Congress broadly determined that when two or more persons "act as" a group for the purpose of acquiring, holding or disposing of a covered class, the persons would be treated as a single person for purposes of reporting beneficial ownership. Are there actions taken among shareholders other than the ones that we have proposed to exempt that the Commission should consider exempting?

73. To the extent that a group would qualify to report on Schedule 13G pursuant to Rule 13d-1(b), (c), or (d), do the costs of such a group complying with the beneficial ownership reporting requirements outweigh the benefits? For example, how would a Schedule 13G filed by a group contribute to price discovery? Should the Commission wholly exempt any group that qualifies to file a Schedule 13G from having to report at all, and if so, under what other conditions, if any, should such an exemption be available?

74. Should we redesignate current Rule 13d-5(b)(2) as new Rule 13d-6(b), as proposed? Would the relocation of that exemption, without altering the substance of that exemption, alter its availability or use or have any other collateral effects?

E. Proposed Amendments to Schedule 13D to Clarify Disclosure Requirements Regarding Derivative Securities

We are proposing to amend Schedule 13D, codified at Rule 13d-101, to clarify the disclosure requirements with respect to derivative securities held by a person reporting on that schedule. Specifically, we are proposing to amend Item 6 to Schedule 13D to remove any implication that a person is not required to disclose interests in all derivative securities that use a covered class as a reference security.

1. Background

In enacting Sections 13(d)(1)(A) through (E),[151] Congress specified certain information that beneficial owners must report once they incur a filing obligation. Under Section 13(d)(1)(E), Congress provided that a beneficial owner must report "information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including [the] transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or with holding of proxies . . . ." Consistent with the mandate of Section 13(d)(1)(E), this baseline disclosure requirement has existed within Schedule 13D since 1968.

Schedule 13D sets forth the information that beneficial owners reporting pursuant to Rule 13d-1(a) or 13d-2(a) must disclose. In addition to the information specified by Sections 13(d)(1)(A) through (E), Congress also authorized the Commission to require disclosure of "such additional information" it prescribes as "necessary or appropriate in the public interest or for the protection of investors."

Item 6 of Schedule 13D 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" and sets forth a non-exclusive list of examples of such contracts, arrangements, understandings or relationships.[152] Because cash-settled derivative securities were not expressly included among these examples, questions may arise as to whether beneficial

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[151] 15 U.S.C. 78m(d)(1).

[152] 17 CFR 240.13d-101. This rule codifies Schedule 13D, and Instruction A thereto provides, in relevant part, that a filer must "[a]nswer every item. If an item is inapplicable or the answer is in the negative, so state." *Id.* To the extent the initial disclosure provided indicates that the item was inapplicable or that there were no contracts, arrangements, understandings or relationships to report, the filer remains obligated under Section 13(d)(2) and corresponding Rule 13d-2(a) to report material changes to such a response.

owners should report contracts, arrangements, understandings or relationships "with respect to" an issuer's securities given that (1) only a purely economic, but no legal, interest is held through such derivatives in any class of an issuer's securities and (2) the issuer's securities are only used as a reference security.[153] Further, the current requirement could be interpreted as excluding the use of cash-settled options not offered or sold by the issuer, or other derivatives not originating with the issuer, including other cash-settled derivatives such as security-based swaps.

2. Proposed Amendments

We are proposing to amend to Item 6 of 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. The proposed amendment would expressly state that such derivative contracts, arrangements, understandings and relationships with respect to an issuer's securities, including cash-settled security-based swaps and other derivatives which are settled exclusively in cash, would need to be disclosed under Item 6 of Schedule 13D in order to comply with Rules 13d-1(a) and 13d-101.

The proposed amendment also would clarify that the derivative security need not have originated with the issuer or otherwise be part of its capital structure in order for a disclosure obligation to arise. At present, the formulation "with respect to securities of the issuer" in Item 6 might be read to suggest that contracts, arrangements, understandings or relationships that only create economic exposure to the issuer's equity securities or are otherwise considered synthetic could be excluded. Accordingly, to remove any ambiguity as to the scope of the required disclosures, we propose to revise Item 6 to expressly state that the use of derivative instruments, including cash-settled security-based swaps and other derivatives settled exclusively in cash,

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[153] As used in this release and the proposed revision to Item 6 of Schedule 13D, the term "reference security" means the class of securities into which a derivative security is convertible, exchangeable or exercisable for, or, alternatively, if not convertible into or exchangeable or exercisable for, the class of securities from which the derivative security has economic exposure and has its value determined according to the terms of the derivative's governing instrument.

which use the issuer's securities as a reference security are included among the types of contracts, arrangements, understandings and relationships which must be disclosed. To further minimize any potential ambiguity regarding what interests need to be disclosed, we also propose to eliminate the "including but not limited to" regulatory text that precedes the itemization of the instruments or arrangements covered.

Request for Comment

75. Should we amend Item 6 of Schedule 13D as proposed?
76. Are there any reasons not to expressly require disclosure of contracts, arrangements, understandings or relationships involving cash-settled derivative securities, including security-based swaps, under Item 6? To the extent that any such derivative instruments should not be subject to disclosure, why would excluding such instruments be appropriate given the statutory mandate in Section 13(d)(1)(E)?
77. Do any other modifications need to be made to Item 6 in order to clarify the types of instruments or arrangements that are required to be disclosed, and, if so, what clarifications should we make and why? For example, should we include a general "catch-all" provision that requires disclosure of any contracts, arrangements, understandings or relationships substantially similar to the ones listed?
78. Should the "including but not limited to language" under Item 6 be eliminated, as proposed? Would this serve to remove ambiguity about what is required by the Item? Should the language be retained, and if so, why? Do any interests in a class of an issuer's securities exist that derive from sources not considered to be contracts, arrangements, understandings or relationships that should be subject to disclosure under Item 6, and if so, what are those sources? Conversely, are there reasons to exclude any particular instrument or class of instrument from Item 6 of Schedule 13D?

F. Proposed Structured Data Requirement for Schedules 13D and 13G

We are proposing to require that beneficial ownership reports on Schedules 13D and 13G be filed using a structured, machine-readable data language. In particular, we are proposing to require that Schedules 13D and 13G be filed in part using an XML-based language specific to Schedules 13D and 13G ("13D/G-specific XML").[154] For both Schedules, all disclosures, including quantitative disclosures, textual narratives, and identification checkboxes, would be structured in 13D/G-specific XML under the proposal, with the exception of the exhibits to the Schedules, which would remain unstructured.

1. Background

Currently, the EDGAR Filer Manual requires Schedules 13D and 13G to be filed electronically on the Commission's EDGAR system in HTML or ASCII.[155] HTML and ASCII are both unstructured data languages; thus, the disclosures reported on Schedules 13D and 13G are not currently machine-readable.[156] As a result, information disclosed on Schedules 13D and 13G is more difficult for investors and markets to access, compile and analyze as compared to information that is submitted in a machine-readable data language.

While the majority of EDGAR filings are submitted in HTML or ASCII, certain EDGAR filings are submitted using machine-readable, XML-based languages that are each specific to the particular EDGAR document type being submitted.[157] This includes filings that, like Schedules

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[154] This would be consistent with the approach used for other XML-based structured data languages created by the Commission for certain EDGAR Forms, including the data languages used for reports on each of Form 13F, Form D and the Section 16 beneficial ownership reports (Forms 3, 4 and 5).

[155] *See supra* Section II.A.6.a; EDGAR Filer Manual (Volume II) version 59 (Sept. 2021) ("EDGAR Filer Manual"), at 5-1 (requiring EDGAR filers generally to use ASCII or HTML for their document submissions, subject to certain exceptions). Schedule 13D and 13G filers are required, by rule, to comply with the requirements of the EDGAR Filer Manual. *See* 17 CFR 232.301 ("Filers must prepare electronic filings in the manner prescribed by the EDGAR Filer Manual, promulgated by the Commission, which sets forth the technical formatting requirements for electronic submissions.").

[156] The term "machine-readable" is defined in 44 U.S.C. 3502 as "data in a format that can be easily processed by a computer without human intervention while ensuring no semantic meaning is lost."

[157] *See* Current and Draft Technical Specifications, *available at* https://www.sec.gov/edgar/filer-information/current-edgar-technical-specifications.

13D and 13G, are submitted by individuals and entities other than the registrant.[158] For these EDGAR XML filings, filers are typically provided the option to either submit the filing directly to EDGAR in XML, or manually input their disclosures in an online web application and/or web form developed by the Commission that converts the completed form into an EDGAR-specific XML document.

2. Proposed Amendments

We are proposing to replace the current HTML or ASCII requirement for Schedules 13D and 13G in the EDGAR Filer Manual with a structured data language requirement—specifically, with a requirement to use Schedule 13D/G-specific XML—for the disclosures reported on those Schedules. As is the case with other EDGAR Form-specific XML filings, reporting persons would be able to, at their option, submit filings directly to EDGAR in Schedule 13D/G-specific XML or use a web-based reporting application developed by the Commission that would generate the Schedule in 13D/G-specific XML.[159] We believe that a structured data requirement for the disclosures reported on Schedules 13D and 13G would greatly improve the accessibility and usability of the disclosures, allowing investors to access, aggregate and analyze the reported information in a much more timely and efficient manner.[160]

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[158] Examples include the Section 16 beneficial ownership reports (Form 3, 4 and 5) and Form 13F. *See id*.

[159] In addition, the Commission would develop electronic "style sheets" that, when applied to the reported XML data, would represent that data in human-readable form on EDGAR.

[160] Section 13(g)(5) of the Exchange Act provides, in part, that "the Commission shall take such steps as it deems necessary or appropriate in the public interest or for the protection of investors . . . to tabulate and promptly make available the information contained in any report filed pursuant to this subsection in a manner which will, in the view of the Commission, maximize the usefulness of the information to . . . the public." 15 U.S.C. 78m(g)(5). The requirements proposed in this section would be consistent with this mandate. Although this statutory language applies only to beneficial ownership reports filed pursuant to Section 13(g)—*i.e.*, a Schedule 13G filed by an Exempt Investor—we believe these public benefits would be furthered by applying the requirements proposed in this section to all Schedule 13D and 13G filers.

Request for Comment

79. Should we replace the current HTML or ASCII requirement for Schedules 13D and 13G with a structured data requirement for the disclosures reported on those Schedules, as proposed?
80. Rather than adding a structured data requirement for all disclosures (other than exhibits) reported on Schedules 13D and 13G, should we narrow the requirement to cover only a subset of the disclosures, such as the quantitative disclosures?
81. Should we require the disclosures on Schedules 13D and 13G to be submitted using a different structured data language than 13D/G-specific XML? Why or why not? If another structured data language would be more appropriate, please identify which one, and explain why.
82. Would this proposed requirement yield reported data that is more useful to investors, compared with maintaining the current HTML or ASCII requirement for Schedules 13D and 13G, or requiring Schedules 13D and 13G to be filed in a structured data language other than a 13D/G-specific XML?

G. Implications of the Proposed Amendments on Section 16

Section 16 of the Exchange Act was designed both to provide the public with information about securities transactions and holdings of every person who is the beneficial owner of more than 10% of a class of equity security registered under Exchange Act Section 12[161] ("10% holder"), and each officer and director (collectively, "insiders") of the issuer of such a security, and to deter such insiders from profiting from short-term trading in issuer securities while in possession of material, non-public information. Upon becoming an insider, or upon Section 12 registration of the class of equity security, Section 16(a)[162] requires an insider to file an initial

[161] 15 U.S.C. 78l.

[162] 15 U.S.C. 78p(a).

report with the Commission disclosing his or her beneficial ownership of all equity securities of the issuer.[163] Section 16(a) also requires insiders to report subsequent changes in such ownership.[164] To prevent misuse of inside information by insiders, Section 16(b)[165] provides the issuer (or shareholders suing on the issuer's behalf) a private right of action to recover any profit realized by an insider from any purchase and sale (or sale and purchase) of any equity security of the issuer within a period of less than six months.[166]

As applied to 10% holders, Congress intended Section 16 to reach persons presumed to have access to information because they can influence or control the issuer as a result of their equity ownership.[167] Because Section 13(d) addresses these types of relationships, the Commission adopted Rule 16a-1(a)(1) to define 10% holders under Section 16 as persons deemed 10% beneficial owners under Section 13(d) and the rules thereunder.[168] The Section 13(d) analysis, such as counting beneficial ownership of the equity securities underlying derivative securities exercisable or convertible within 60 days,[169] is therefore imported into the 10% holder determination for Section 16 purposes. The application of Rule 16a-1(a)(1) is straightforward; if a person is a 10% beneficial owner as determined pursuant to Section 13(d) and the rules thereunder, the person is deemed a 10% holder under Section 16.[170]

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[163] Insiders file these reports on Form 3. 17 CFR 249.103.

[164] Insiders file transaction reports on Forms 4 and 5. 17 CFR 249.104 and 249.105.

[165] 15 U.S.C. 78p(b).

[166] In addition, insiders are subject to the short sale prohibitions of Section 16(c).

[167] *See* S. Rep. No. 1455, at 55, 68 (1934); *see also* S. Rep. No. 792, at 20-1 (1934); S. Rep. No. 379, at 21-2 (1963).

[168] Ownership Reports and Trading By Officers, Directors and Principal Security Holders, Release No. 34-28869 (Feb. 21, 1991) [56 FR 7242 (Feb. 21, 1991)] (stating that as applied to 10% holders, Section 16 "is intended to reach those persons who can be presumed to have access to inside information because they can influence or control the issuer as a result of their equity ownership" and noting that Section 13(d) of the Exchange Act "specifically addresses such relationships").

[169] 17 CFR 240.13d-3(d).

[170] For example, the Commission applied an analysis derived from Rule 13d-3(d)(1) in publishing its views regarding when equity securities underlying a security future that requires physical settlement should be counted for

Thus, the proposed amendments to Rules 13d-3, 13d-5 and 13d-6 would directly impact the analysis under Rule 16a-1(a)(1) as to whether a person is a 10% holder. For example, because proposed Rule 13d-3(e) would provide that holders of cash-settled derivative securities in specified circumstances will be "deemed" beneficial owners of the reference securities in a covered class for purposes of Sections 13(d) and (g), those holders also would be deemed beneficial owners of such reference securities for purposes of determining whether that person is a 10% holder under Section 16. By expanding the meaning of "beneficial owner" under Rule 16a-1(a)(1) to include persons who hold cash-settled derivatives in specified circumstances, proposed Rule 13d-3(e) could increase the number of 10% holders and, in turn, the number of persons subject to Section 16(a)'s disclosure obligations,[171] Section 16(b)'s short-swing profit liability[172] and Section 16(c)'s short sale prohibitions.[173] Similarly, two or more persons may be deemed to have formed a group that beneficially owns more than 10% of a covered class as a result of the application of our proposed amendments to Rule 13d-5, particularly with respect to the tipper-tippee relationships that are the subject of proposed Rule 13d-5(b)(1)(ii). Under this circumstance, each group member would be considered a 10% holder subject to Sections 16(a), (b), and (c).[174] By contrast, the proposed amendments to Rule 13d-6 would create new exemptions under which two or more persons will not be deemed to have acquired beneficial ownership of an issuer's equity securities as a group. To the extent beneficial owners qualify for

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purposes of determining whether the purchaser of the security future is subject to Section 16 as a 10% holder by operation of Rule 16a-1(a)(1). Commission Guidance on the Application of Certain Provisions of the Securities Act of 1933, the Securities Exchange Act of 1934, and Rules thereunder to Trading in Security Futures Products, Release No. 34-46101 (June 21, 2002) [67 FR 43234 at Q 7 (June 27, 2002)].

[171] *See supra* notes 163-164 and accompanying text.

[172] *See supra* note 165 and accompanying text.

[173] *See supra* note 166.

[174] Ownership Reports and Trading By Officers, Directors and Principal Security Holders, Release No. 34-28869 (Feb. 21, 1991) [56 FR 7242 at n.54 (Feb. 21, 1991)] (noting that "[i]n contrast to Section 13(d), which requires a group filing, the group itself would not be a separate person for Section 16 purposes" and that, instead, "for purposes of determining status as a ten percent holder under Section 16, the securities beneficially owned by the group must be included in the calculation by each individual member of the group").

and rely on the proposed exemptions in Rule 13d-6, those exemptions may offset any potential increase in the number of persons who become 10% holders as a result of our proposed amendments to Rule 13d-5.

Given that Rule 16a-1(a)(1) has the same purpose as Regulation 13D-G—*i.e.*, to identify persons who can influence or control the issuer as the result of equity ownership—it appears appropriate to continue to apply the standards of Regulation 13D-G, as proposed to be amended, to identify 10% holders subject to Section 16. Accordingly, we believe it is not necessary to propose any amendments to Rule 16a-1(a)(1) in this release, but solicit public comment on the Section 16 implications resulting from our proposed amendments to Rules 13d-3, 13d-5, and 13d-6.

Request for Comment

83. Should Rule 16a-1(a)(1) import the beneficial ownership determinations of proposed Rule 13d-3(e) to determine who is a 10% holder for purposes of Section 16?
84. Conversely, should we exclude holdings of cash-settled derivative securities with the purpose or effect of changing or influencing control of the issuer that would be included for the purposes of proposed Rule 13d-3(e) from 10% holder identification for purposes of Section 16? If so, should all types of such derivative holdings be excluded or only certain types of instruments? For example, under proposed Rule 13d-3(e), only long positions in such securities would be counted, and short positions would not be netted against long positions or otherwise taken into account. Similarly, as proposed, if a derivative security does not have a fixed delta (*i.e.*, if the delta is variable and changes over the term of the derivative security), then a person who holds such derivative security would calculate the delta on a daily basis based on the closing market price of the reference equity security on that day for purposes of determining whether such person is a 10% holder. Are these criteria appropriate to apply to 10% holder determinations under Section 16?

85. Would including ownership of cash-settled derivative securities held with the purpose or effect of changing or influencing the control of the issuer for purposes of 10% holder determinations be consistent with the purposes of Section 16? Should inclusion of these securities result in persons becoming 10% holders subject to Section 16(b)'s short-swing profit liability and Section 16(c)'s short sale prohibitions, as well as Section 16(a)'s disclosure obligations? If not, please explain why.

86. Would the inclusion of such securities for purposes of Section 16 10% holder determinations cause practical issues for any type of business? For example, would this potentially impair the capability of financial institutions to execute transactions using derivative securities, including as counterparties to clients, in the ordinary course of their business? If so, please explain why.

87. Are there reasons why a holder of the cash-settled derivative securities covered by proposed Rule 13d-3(e) should be deemed the beneficial owner of the reference securities in a covered class for purposes of Sections 13(d) and (g) but not the beneficial owner of those reference securities for purposes of determining whether that person is a 10% holder under Section 16? If so, should we amend Rule 16a-1(a)(1) to avoid the application of proposed Rule 13d-3(e) to the determination as to whether a person is a 10% holder under Section 16? For example, should we amend Rule 16a-1(a)(1) such that it defines 10% holders under Section 16 as persons deemed 10% beneficial owners under Section 13(d) and the rules thereunder other than Rule 13d-3(e)?

88. Could the requirement in proposed Note 2 to Rule 13d-3(e)(2) (*i.e.*, that the holder of a derivative security without a fixed delta calculate the delta on a daily basis) result in situations in which a person's beneficial ownership does not exceed 10% of a covered class at the time that person acquires a derivative security, but then exceeds 10% at a later time solely by virtue of the fact that the delta of the derivative security changed (*i.e.*, not

as a result of any further acquisitions)? If so, would it be appropriate to subject that person to the requirements of Section 16 under such circumstances?

89. Should Rule 16a-1(a)(1) import the group formation and beneficial ownership acquisition standards of Rule 13d-5, as altered by our proposed amendments, for purposes of determining who is a 10% holder for purposes of Section 16?

90. Should Rule 16a-1(a)(1) import the acquisition exemptions set forth in Rule 13d-6, as altered by our proposed amendments, for purposes of determining who is a 10% holder for purposes of Section 16?

91. Would importing the proposed amendments to Rules 13d-5 and 13d-6, as would be the case under Rule 16a-1(a)(1), be inconsistent with the purposes of Section 16? If so, please explain.

III. Economic Analysis

A. Introduction

Section 13(d) was enacted in 1968 with the intent to alert the marketplace to rapid accumulations of equity securities which might represent a shift in corporate control.[175] Together with Regulation 13D-G,[176] these regulatory provisions have existed for more than 50 years. As discussed above, technological advances since 1968, such as the ability to submit filings electronically through the Commission's EDGAR system and the use of modern information technology in today's financial markets, have reduced the time needed to prepare and file Schedules 13D and 13G.[177] Financial product innovation over the past half-century, such as the use of cash-settled derivative securities and the advent of electronic trading, have outpaced the

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[175] *See* H.R. Rep. No. 90-1711 (1968), *supra* note 24; *see also supra* note 95.

[176] The Commission adopted Regulation 13D, the predecessor to Regulation 13D-G, in 1968. *See* 33 FR 11015 (Aug. 2, 1968), *supra* note 64.

[177] *See supra* Section II.A.1.

reach of the regulation when first adopted.[178] These developments can provide large investors with opportunities to acquire substantial stakes in companies that exceed the Section 13(d) and (g) reporting threshold that may not have existed previously.[179] In addition, the legal landscape has evolved since the passage of the Williams Act. Hostile tender offers, once a prominent hallmark of the takeover wave in the 1980s, have become comparatively rare since the development and widespread adoption of the "poison pill" shareholder rights plan in the 1980s as an anti-takeover device.[180] Today's market for corporate control features activist investors, particularly activist hedge funds, who seek to influence governance through accumulation of strict minority equity stakes instead of full control.[181] As a result, less share accumulation is needed for large investors to exert influence. To modernize the beneficial ownership reporting requirements and improve their operation and efficacy, and to provide investors and market participants with more timely disclosure of information related to corporate control, we are proposing amendments to Regulation 13D-G and related technical changes to Regulation S-T. Specifically, we are proposing to (1) revise the current deadlines for Schedule 13D and Schedule

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[178] *See supra* Section II.B.

[179] We note that while the reporting obligations under Exchange Act Section 16 and the Hart-Scott-Rodino Antitrust Improvements Act of 1976 could reduce incentives for large shareholders to accumulate substantial stakes that exceed the Section 13(d) and (g) reporting threshold, they do not eliminate those incentives or the need for more timely beneficial ownership reporting, as proposed. *See infra* Section III.B.1.

[180] *See* Kahan and Rock (2019), *infra* note 260 at 922-23 ("In effect, the poison pill moved the decision on the success of a hostile bid from shareholders voting with their feet (by tendering their shares in a tender offer) to shareholders voting by ballot (by replacing a majority of the board). . . . To get a rough sense of the current prevalence of toeholds, we collected data from Thompson Reuters on proposed takeovers that were classified as hostile. There were twenty-four such proposals between 2010 and 2015."); *see also supra* note 22.

[181] *See* Brav, Jiang and Li (2021), *infra* note 215 (noting that "[a]ctivist hedge funds also differ from corporate raiders that operated in the 1980s, as they tend to accumulate strict minority equity stakes and do not seek direct control," and "[a]ctivists are both outsiders and insiders, in that they do not seek full control but operate by influencing control"). We also note that today's market for corporate control has seen an increasing use of low-threshold poison pills (threshold of 10%-15%) along with evolving governance practice. Legal scholars have warned that too restrictive pills could negatively affect activist investors' profits and incentives and thereby activism. *See* Kahan and Rock (2019), *infra* note 260 (recommending that "[w]hether pills with a threshold of 10% or 15% (low-threshold pills) should be permitted against activists [should] depend[] on the context," and "pills with a threshold of less than 10% and pills with a 'wolf-pack' trigger [should be regarded as] presumptively invalid" because "[s]uch pills are not a reasonable response to any cognizable threat and impose excessive restrictions on the ability of an activist to conduct a credible contest and communicate with other shareholders"); *see also infra* Section III.C.1.b.i.

13G filings; (2) amend Rule 13d-3 to deem holders of certain cash-settled derivative securities as beneficial owners of the reference covered class; (3) align the text of Rule 13d-5, as applicable to two or more persons who act as a group, with the statutory language in Sections 13(d)(3) and (g)(3) of the Exchange Act; and (4) 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 with respect to the issuer's equity securities. We also are proposing certain related technical changes to Regulation S-T in connection with these proposed amendments and requirements that Schedules 13D and 13G be filed using a structured, machine-readable data language.

Overall, we believe the proposed amendments would benefit investors and market participants by providing more timely information relating to significant stockholders as well as potential changes in corporate control, facilitating investor decision-making and reducing information asymmetry in the market. We also recognize that these amendments could increase costs for investors and issuers. For example, the amendments could increase costs for blockholders seeking to influence or control an issuer, and therefore potentially inhibit shareholder activism and the improvement of corporate efficiency.

We are mindful of the costs and benefits of the proposed amendments. The discussion below discusses in detail the potential economic effects of the proposed amendments, including the likely benefits and costs, as well as the likely effects on efficiency, competition and capital formation.[182] At the outset, we note that, where possible, we have attempted to quantify the benefits, costs and effects on efficiency, competition and capital formation expected to result

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[182] Section 3(f) of the Exchange Act [15 U.S.C. 78c(f)] requires the Commission, when engaging in rulemaking where it is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition and capital formation. Further, Section 23(a)(2) of the Exchange Act [15 U.S.C. 78w(a)(2)] requires the Commission, when making rules under the Exchange Act, to consider the impact that the rules would have on competition and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the Exchange Act.

from the proposed amendments. However, we are unable to quantify all potential economic effects because we lack information necessary to provide reasonable estimates for those effects. For example, the Commission is unable to reasonably quantify the potential harm to investors as a result of mispricing under the current rules, or the reduction in trading costs due to improvements to liquidity or capital formation that may arise from more efficient pricing under the proposed amendments. We also are unable to quantify, with precision, the increased costs for blockholders to initiate corporate change as a result of the shortened Schedule 13D filing deadlines and, therefore, the reduction of the costs and benefits the presence of such blockholders bring. To estimate such costs, we would need to know, for example, how many potential blockholders would reduce their share accumulation prior to disclosure after the proposed rule change, and the amount of any such reduction. The ability for blockholders to achieve their target accumulation level prior to disclosure depends on such target level, the liquidity of the targeted covered class, their acquisition plans and their ability to adapt the plans. Because we do not have all the inputs for these variables, we cannot provide a reasonable estimate of the effects of the proposed amendments. Where we are unable to quantify the economic effects of the proposed amendments, we provide a qualitative assessment of the potential effects and encourage commenters to provide data and information that would help quantify the benefits, costs and potential impacts of the proposed amendments on efficiency, competition and capital formation.

B. Economic Baseline

1. Current Regulatory Framework

To understand the effects of the proposed amendments, we first compare them to the current regulatory framework.

a. Filing Deadlines

Section 13(d)(1) and Rule 13d-1(a) together require a person who directly or indirectly acquires "beneficial ownership" of more than 5% of a covered class to file a Schedule 13D

within 10 days of the acquisition that exceeds 5%.[183] For investors who are eligible to file a Schedule 13G, the filing deadlines for the initial Schedule 13G are 45 days after the end of calendar year for QIIs and Exempt Investors if they beneficially own more than 5% of a covered class as of the last day of the calendar year, and within 10 days of acquiring beneficial ownership of more than 5% of a covered class for Passive Investors, under Rules 13d-1(b), (d), and (c), respectively.[184] Rules 13d-1(e), (f), and (g) set forth the initial Schedule 13D filing obligations for investors who are no longer eligible to file Schedule 13G.[185]

Sections 13(d)(2) and 13(g)(2), together with Rules 13d-2(a), (b), (c), and (d), set forth amendment obligations related to original filings. Rule 13d-2(a) provides that if any material change occurs to the facts reported in the initial Schedule 13D filing, an amendment disclosing that change shall be filed with the Commission "promptly."[186] Rule 13d-2(b) requires that for all persons who report beneficial ownership on Schedule 13G, an amendment shall be filed "within forty-five days after the end of each calendar year if, as of the end of the calendar year, there are any changes in the information reported in the previous filing on that Schedule [13G]."[187] In addition, Rule 13d-2(c) requires QIIs to file an amendment to their Schedule 13G within 10 days after the end of the first month in which their beneficial ownership exceeds 10% of a covered class, or increases or decreases by more than 5% of the covered class, once across the 10% threshold.[188] For Passive Investors, current Rule 13d-2(d) requires that they "promptly" file an amendment to their Schedule 13G upon acquiring greater than 10% of a covered class, or if, once

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[183] *See supra* Section II.A.1.

[184] *See supra* Section II.A.3.

[185] *See supra* Section II.A.2.

[186] *See supra* Section II.A.4.a and note 65.

[187] *See supra* Section II.A.4.a.

[188] *See supra* Section II.A.5.a.

across the 10% threshold, they increase or decrease their beneficial ownership by more than 5% of the covered class.[189]

In addition to Sections 13(d) and (g), Exchange Act Section 16 provides the public with information about the securities transactions and holdings of an insider of an issuer, including 10% holders.[190] Rule 16a-1(a)(1) defines 10% holders under Section 16 as persons deemed 10% beneficial owners under Section 13(d) and the rules thereunder.[191] Within 10 days of becoming an insider (including within 10 days of becoming a 10% holder), or upon registration of the class of equity security under Section 12, Section 16(a) requires an insider to file an initial report (Form 3) with the Commission disclosing his or her beneficial ownership of all equity securities of the issuer.[192] Section 16(a) also requires insiders (including 10% holders) to report subsequent changes in such ownership by the end of the second business day following the day the transaction was executed (Form 4).[193] These filing requirements are not necessarily duplicative with the Schedule 13D and 13G filing requirements given that, among other things, they only begin to apply to certain beneficial owners once the 10% threshold has been crossed and may require materially different disclosures, such as those relating to pecuniary interests. The reporting obligation under Section 16 could reduce incentives for large shareholders to accumulate stakes exceeding 10%; however, it should not eliminate such incentives, the extent of which would depend on the objectives of the blockholders.

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[189] *Id*.

[190] *See supra* Section II.G.

[191] *See supra* note 168 and accompanying text.

[192] *See* 15 U.S.C. 78p(a)(2)(B); *see also supra* notes 162-163 and accompanying text.

[193] *See* 15 U.S.C. 78p(a)(2)(C); *see also supra* note 164 and accompanying text.

Lastly, certain acquisitions of ownership stakes are reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR")[194] via the Notification and Report Form.[195] Instead of requiring public disclosure after acquiring beneficial ownership of a certain percentage of the covered class, HSR requires notification to the Federal Trade Commission and the Department of Justice prior to acquisition of any voting securities or assets if the acquisition will cause value of the acquirer's holdings to exceed certain dollar thresholds (*i.e.*, if the value of equity or assets to be acquired exceeds $368 million, or if it is between $92 million and $368 million and meets some additional criteria).[196] Because the dollar thresholds are not tied to the size of the target company, the category of persons required to report under Sections 13(d) and (g) would not necessarily be identical to those required to give prior notice under HSR. Also, unlike Section 13(d) and (g) reporting, the filing of the Notification and Report Form and the information in it are not publicly disclosed, except in some special circumstances.[197] Similar to Section 16 reporting obligations, reporting obligations under HSR could also reduce incentives for blockholders to accumulate ownership. However, this effect should be relatively smaller than those under Section 16, because the filings under HSR are not publicly disclosed.

b. Beneficial Ownership

Neither Section 3(a) nor Section 13(d) of the Exchange Act defines the term "beneficial owner" or "beneficial ownership." Regulation 13D-G similarly does not expressly define those terms. Rule 13d-3(a) provides that a person is a beneficial owner of a security if that person, directly or indirectly, has or shares voting power and/or investment power. In addition, Rule

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[194] Pub. L. 94–435, 90 Stat 1383 (1976)

[195] 16 CFR part 803, appendix A.

[196] *See* 15 U.S.C. 18a(a), (b)(1)(A); 16 CFR 803.1; Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 86 FR 7870 (Feb. 2, 2021). Specifically, notification is required either by planned acquisition of in excess of $200 million in voting securities or assets as adjusted annually or in excess of $50 million as adjusted annually combined with certain additional factors. Adjusted thresholds are published for each fiscal year to reflect the percentage change in the gross national product for that year compared to the gross national product for the year ending September 30, 2003.

[197] *See* 15 U.S.C. 18a(h).

13d-3 deems certain persons to be beneficial owners even if they lack voting power and investment power. Rule 13d-3(b) deems a person who uses any contract, arrangement or device to divest or prevent the vesting of beneficial ownership of the security as part of a plan or scheme to evade reporting under Section 13(d) to be a beneficial owner. Rule 13d-3(d) deems a person to be a beneficial owner of an equity security if that person holds a right to acquire the security that is exercisable within 60 days or who acquires a right to acquire the security for the purpose or with the effect of changing or influencing control of the issuer of securities regardless of when that right is exercisable. Under the current rule, the scope of beneficial ownership ordinarily does not include holders of cash-settled derivative securities because those instruments generally do not convey voting or investment power over any equity securities in the reference covered class.[198] As noted above, if a person is deemed a beneficial owner for the purposes of Section 13(d) and the rules thereunder, then he or she also is deemed a beneficial owner for the purposes of Exchange Act Section 16 to the extent the beneficial ownership held exceeds 10% of a covered class.[199]

c. Group Formation

Under Sections 13(d)(3) and (g)(3), two or more persons "act[ing]" as a "group for the purpose of acquiring, holding, or disposing of [equity] securities" constitute a single person for purposes of those statutory provisions.[200] Rule 13d-5(b) states that when two or more persons "agree to act together" for the purpose of acquiring, holding, voting or disposing equity

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[198] *See supra* Section II.B.1. Under certain circumstances, investors in security-based swaps may be beneficial owners, as determined under Rule 13d-3, of a covered class. To the extent that a holder of a security-based swap owns that security not exclusively settled in cash, the person could be viewed as a beneficial owner under Rule 13d-3(d)(1). In addition, if a security-based swap is used as part of plan or scheme to evade beneficial ownership reporting, the person could be deemed a beneficial owner as described in Rule 13d-3(b). Finally, if the holder of a security-based swap directly or indirectly holds the power to direct a counterparty how to vote or dispose of shares in a covered class used as a reference security, that person can be a beneficial owner as provided in Rule 13d-3(a). *See* Beneficial Ownership Reporting Requirements and Security-Based Swaps (Confirmation), Release No. 34-64628 (June 8, 2011) [76 FR 34579 (June 14, 2011)].

[199] *See supra* note 168 and accompanying text; *see also supra* Section II.G.

[200] *See supra* Section II.C.1.

securities, the group formed thereby shall be deemed to have acquired beneficial ownership, for purposes of Sections 13(d) and (g), of all equity securities of the issuer beneficially owned by such persons.

d. Item 6 of Schedule 13D

As discussed in Section II.E.1., Congress set forth a statutory requirement under Section 13(d)(1)(E) that a person disclose "information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including [the] transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or with holding of proxies . . . ." This obligation is codified at Rule 13d-101 and reflected in Item 6 of Schedule 13D. Item 6 provides only an illustrative subset of the types of contracts, arrangements, understandings or relationships that must be disclosed, and cash-settled derivative securities have not been expressly identified in the list of examples, which could create an impression that a person is not required to disclose interests in all derivative securities that use the issuer's equity security as a reference security.

2. Affected Parties

The relevant market participants for purposes of establishing the economic baseline for the proposed rules include: all investors that are required or potentially required to report their beneficial ownership on Schedules 13D and 13G; the issuers of the equity securities beneficially owned; investors that rely on beneficial ownership reports in connection with their investment decisions as to issuers' securities; shareholders of the issuer, particularly the long-term shareholders of the issuer, who might be more affected by shareholder activism; market professionals, such as analysts that valuate securities; the financial institutions that serve as counterparties to cash-settled derivatives; and the management of the issuer. Section 16 filers also are relevant market participants because Section 13(d) and the rules thereunder are used to

determine whether a person's beneficial ownership exceeds 10% and must be reported on Forms 3, 4 and 5.

During the calendar year 2020, the Commission received a total of 10,542 Schedule 13D filings[201] and 44,059 Schedule 13G filings,[202] involving 3,940 unique Schedule 13D filers and 8,789 unique Schedule 13G filers, respectively. To understand the extent to which the proposed amendments could affect holders with reporting obligations, we examine their current filing practice. Our preliminary analysis of the 2020 filings[203] shows that Schedule 13D filers reported a median accumulation of 8.4% of shares in their initial Schedule 13D filings. Approximately 20.7% of the initial Schedule 13D filings were filed within the first five days after the acquisition that crossed the 5% threshold. The median number of days between the acquisition that crossed the 5% threshold and the initial Schedule 13D filing was 10 days[204] with 22.9% of the initial Schedule 13D filings being made on the 10th day. A detailed day-by-day breakdown of the percentage of the filings made each day after crossing the 5% threshold is provided in Figure 1 and Table 1 below. For Schedule 13G filers, the median number of days between the date on which the 5% threshold was crossed and the initial filing was 21, and the median reported accumulation was 6.3%.[205]

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[201] Out of all the Schedule 13D filings, there were a total of 2,288 initial filings and 8,254 amendments.

[202] Out of all the Schedule 13G filings, there were a total of 12,838 initial filings and 31,221 amendments.

[203] We were able to collect data for our analysis from 2,236 initial Schedule 13D filings and 12,759 initial Schedule 13G filings. Out of the 2,236 initial Schedule 13D filings, there are 994 unique filings with sufficient data for our subsequent analysis.

[204] We note that approximately 32.9% of the Schedule 13D filings were made after 10 days. However, not all of these filings are considered late by the Commission. By rule, the Commission accepts as timely any filing that, if the calendar due date falls on a weekend or holiday, is received by the next business day. *See supra* note 3. Therefore, after we take into account weekends and holidays, we preliminarily estimate that about 20.1% of the filings are deemed late.

[205] We note that Schedule 13G filers include QIIs, Exempt Investors and Passive Investors. Under the current rules, Passive Investors must file their initial Schedule 13G within 10 days of acquiring more than 5% beneficial ownership, and Exempt Investors and QIIs must file within 45 days of the calendar year end in which their beneficial ownership exceeds 5%. Accordingly, the median filing time for all Schedule 13G filers presented here could be skewed for different types of filers. More specifically, the median of 21 days might be shorter than the actual median for QIIs and Exempt Investors, and longer than the actual median for Passive Investors. It is impracticable to produce statistics for different types of filers at this point because underlying data are not structured into an analyzable format.

Figure 1: Number of days between crossing 5% and the filing of an initial Schedule 13D

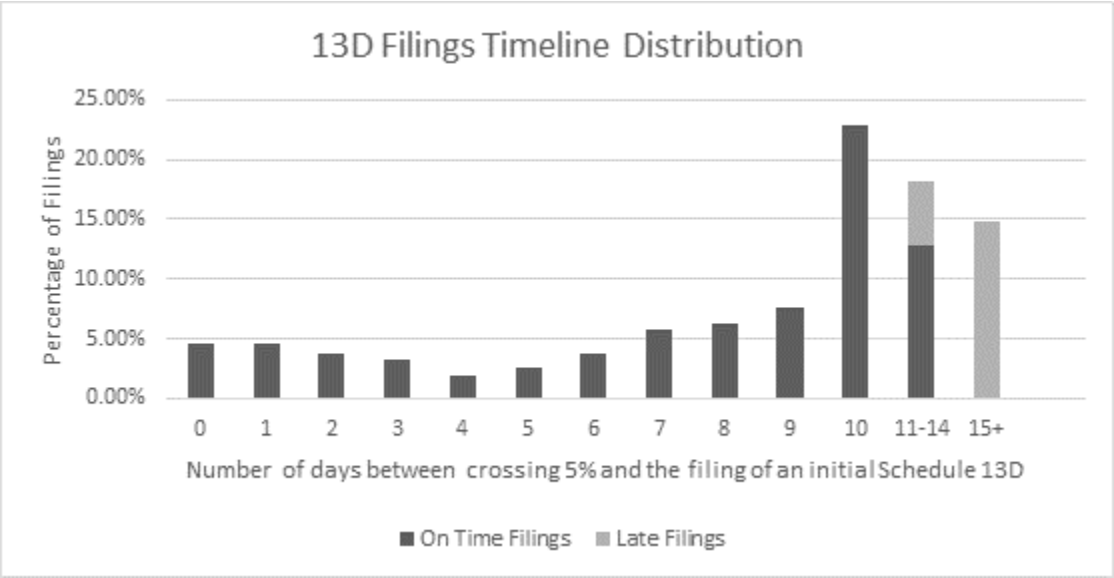

Table 1: Distribution of the number of days between crossing 5% and the filing of an initial Schedule 13D

Distribution of number of days between crossing 5% threshold and filing of Schedule 13D							
Day Bin	**0**	**1**	**2**	**3**	**4**	**5**	**6**
Number of Events	45	45	38	33	19	26	38
Percent of Sample	4.5%	4.5%	3.8%	3.3%	1.9%	2.6%	3.8%
Day Bin	**7**	**8**	**9**	**10**	**11-14**	**15+**	**Total**
Number of Events	57	62	76	228	180	147	994
Percent of Sample	5.7%	6.2%	7.6%	22.9%	18.1%	14.8%	100.0%

Note: The graph and table are based on staff analysis of 2020 EDGAR initial Schedule 13D filings. Filers are currently required to file within 10 days of the acquisition that exceeds 5% of a covered class.

C. Potential Benefits and Costs of the Proposed Amendments

We have considered the potential costs and benefits associated with the proposed amendments. Overall, we believe the proposed amendments to Regulation 13D-G would benefit investors and market participants by providing more timely information relating to significant stockholders as well as potential changes in corporate control, facilitating investor decision-making, reducing information asymmetry and improving price discovery in the market. We also recognize that the proposed amendments could impose costs on the affected parties. For instance, the proposed amendments could increase the costs for blockholders to influence or control an issuer and potentially inhibit shareholder activism and its goal of improving corporate

efficiency. A discussion of the anticipated economic costs and benefits of the proposed amendments is set forth in more detail below. We also expect the proposed amendments to affect compliance burdens. The quantitative estimates of changes in those burdens for purposes of the Paperwork Reduction Act of 1995 ("PRA") are further discussed in Section IV below. For purposes of the PRA, we estimate that the proposed amendments would result in an increase of 140,799 burden hours from the increase in the number Schedule 13D filings and 13G filings.[206] In addition, the estimated increase in the paperwork burden as a result of the proposed amendments for Forms 3, 4, and 5 will be 1,099 hours, 16,911 hours and 594 hours, respectively.[207]

1. Proposed Amendments to Rules 13d-1 and 13d-2 and Rules 13 and 201 of Regulation S-T

a. Benefits

i. Schedule 13D filing deadlines

We are proposing to amend Rule 13d-1(a) to shorten the initial Schedule 13D reporting deadline from 10 days to five days after the date of the acquisition that exceeds 5% of a covered class. We believe the proposed change would benefit investors, issuers and other market participants by providing them more timely disclosure on material information related to potential changes of corporate control. More timely disclosure of such market-moving information could improve transparency, reduce information asymmetry and mispricing in the market, and allow investors to make more informed investment decisions.

As discussed above, significant stock ownership contains market-moving information related to potential changes of corporate control which could influence investors' decision making, and therefore Section 13(d) was enacted with the intention to "alert the market place to

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[206] *See infra* Section IV.B.

[207] *See infra* Section IV.B.

every large, rapid aggregation or accumulation of securities, regardless of technique employed, which might represent a potential shift in corporate control."[208] Following technological advances and financial product innovation in the years since Section 13(d)'s enactment,[209] the current 10-day filing deadline under Section 13(d)(1) and Rule 13d-1(a) could be used by shareholders to acquire more—sometimes far more—than 5% of a covered class during the 10-day window before any disclosure, a concern raised by some observers.[210] For example, Barry, Brav and Jiang (2020) has documented that, while blockholders disclosed a median ownership of 6.5% in their Schedule 13D filings, filers in the top 5th percentile of reported ownership disclosed an accumulation of 22.5% of the shares when initial Schedule 13D filings are made,[211] far exceeding the 5% threshold. These statistics suggest that while the reporting obligations under Section 16 and HSR may reduce the incentives for shareholders to accumulate ownership far above the statutory threshold, they do not eliminate such accumulations. However, such practice is also not as pervasive as some have claimed.[212] Nevertheless, the ability or practice for shareholders to accumulate a level of beneficial ownership far exceeding the statutory threshold without timely disclosure could undermine the benefits of beneficial ownership reporting, increasing information asymmetry and mispricing in the market. Thus, by shortening the deadline for initial Schedule 13D filings, the proposed amendment could improve the timeliness

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[208] *See supra* note 95.

[209] *See supra* Section II.A.1 and Section II.B.1.

[210] *See* Wachtell Petition, *supra* note 16; *see also* Guhan Subramanian, *Corporate Governance 2.0*, HARV. BUS. REV. (Mar. 2015) (using the example of activist shareholders' acquisition of a large stake in J.C. Penney to illustrate that some shareholders are "disorderly" and a takeover by such parties could be "disastrous" for the company), *available at* https://hbr.org/2015/03/corporate-governance-2-0; *Williams Cos. Stockholder Litig.*, No. 2020-0707, 2021 WL 754593, at *33-34 (Del. Ch. Feb. 26, 2021), *aff'd.*, No. 139, 2021, 2021 WL 5112495 (Del. Nov. 3, 2021).

[211] *See infra* note 217 (findings are based on based on hedge fund activism events over the period 1994-2016); *see also* Lucian A. Bebchuk, Robert J. Jackson Jr, Alon Brav and Wei Jiang, *Pre-disclosure accumulations by activist investors: Evidence and policy*, 39.1 J. CORP. L. 1-34 (2013) (reporting that filers in top 5th percentile disclosed 21.2% of ownership based on a sample of data includes a total number of 2,040 Schedule 13D filings made by activist hedge funds from 1994 to 2007).

[212] *See supra* note 211.

of beneficial ownership reporting, benefiting investors and other market participants through improved transparency and reduced information asymmetry in the market.

Schedule 13D contains information related to significant stockholders and potential changes of corporate control. Such information is important to investors' decision making, because the change in control over the issuer of the relevant covered class could directly affect the change in management, its key operational decisions, strategy and financial results, and thereby its valuation.[213] The current 10-day filing deadline leads to a delay of such market moving information being incorporated by the market, leading to less efficient pricing and information asymmetries that would harm investors.[214] It is well documented in the academic literature that economically significant price changes occur in response to news about changes in corporate control, such as the initial filing of a Schedule 13D.[215] For example, Brav et al. (2008) find that the filing of a Schedule 13D is associated with large positive average abnormal returns, in the range of 7% to 8%, during the [–20,+20] announcement window, and about 2% during the filing day and the following day.[216] Similar to Brav et al. (2008), Klein and Zur (2009) document

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[213] *See, e.g.*, Brav et al. (2008), *infra* note 215 (finding an increase in issuer's payout, operating performance and CEO turnover after 13D filings).

[214] *See, e.g.*, Wachtell Petition, *supra* note 16 ("[T]he ten-day [Schedule 13D] reporting lag leaves a substantial gap after the reporting threshold has been crossed during which the market is deprived of material information and creates incentives for abusive tactics on the part of aggressive investor prior to making a filing."); *see also*, Coffee and Palia (2016), *supra* note 19 ("[T]he gains that activists make in trading on asymmetric information—before the Schedule 13D's filing—come at the expense of selling shareholders. . . . Disclosure that is delayed ten days enables activists to profit from trading on asymmetric information over that period . . . .").

[215] *See, e.g.*, Alon Brav, Wei Jiang, Frank Partnoy, and Randall Thomas, *Hedge Fund Activism, Corporate Governance, and Firm Performance*, 63.4 THE JOURNAL OF FINANCE 1729-1775 (2008) (finding "The abnormal return around the announcement of activism is approximately 7%, with no reversal during the subsequent year."); *see also* April Klein and Emanuel Zur, *Entrepreneurial Shareholder Activism: Hedge Funds and Other Private Investors*, 64.1 THE JOURNAL OF FINANCE 187-229 (2009) (finding "a significantly positive market reaction for the target firm around the initial Schedule 13D filing date, significantly positive returns over the subsequent year.")); *see also* Christopher Clifford, *Value Creation or Destruction? Hedge Funds as Shareholder Activists*, 14 THE JOURNAL OF CORPORATE FINANCE 323-336 (2008) ("Firms targeted by activists earn an average cumulative abnormal return of 3.4% during the (-2,+2) window around the filing date"). For a comprehensive survey of literature on hedge fund activism, see also Alon Brav, Wei Jiang, and Rongchen Li, Governance by Persuasion: Hedge Fund Activism and Market-based Shareholder Influence (December 10, 2021), European Corporate Governance Institute – Finance Working Paper No. 797/2021, *available at* https://ssrn.com/abstract=3955116 or http://dx.doi.org/10.2139/ssrn.3955116 (retrieved from SSRN Elsevier database).

[216] *See* Brav et al. (2008), *supra* note 215.

that issuers targeted by hedge funds earn a mean market-adjusted abnormal return of 5.5% over the [-30, +5] window around the initial Schedule 13D filing date and 7.2% for the [-30, +30] period around the filing. Extending the analysis by Brav et al. (2008) to more recent years, Barry, Brav and Jiang (2020) report an average abnormal return about 4.5% over the [-20, 20] window.[217] Therefore, during any delay between a market-moving event and the Schedule 13D filing, securities are likely to be mispriced relative to a full-information benchmark, and information asymmetry between Schedule 13D filers and those with whom they share the information, and the rest of the market, is greater than otherwise. The prolonged delay could, therefore, harm the investors who happen to sell their shares during the 10-day window. As discussed in Section III.A, we are not able to quantify the potential harm to investors due to data limitations. If an initial Schedule 13D were required to be filed more promptly, those investors might be able to sell their shares at a higher price, or they may re-evaluate their investment decisions. Timelier reporting would also allow other market participants, such as analysts and investment advisers, to better value the securities and make better recommendations. We recognize that the benefit of more timely reporting to investors and other market participants could be offset by the costs to blockholders and other investors as a result of the proposed amendment's effect on shareholder activism. We discuss these offsetting costs in more detail below in Section III.C.b.i.

Additionally, academic studies have shown that information asymmetry has a first-order effect on liquidity.[218] Thus, the proposed amendment, by reducing information asymmetry, would provide incremental benefits to investors in general through the increased liquidity of the shares of the companies subject to Schedule 13D filings. The Commission implicitly recognized

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[217] *See* John Barry, Alon Brav, and Wei Jiang, Hedge Fund Activism: Updated tables and figures (Feb. 6, 2020), *available at* https://faculty.fuqua.duke.edu/~brav/HFactivism_March_2019.pdf.

[218] *See, e.g.*, Lawrence Glosten and Paul Milgrom, *Bid, Ask, and Transaction Prices in a Specialist Market with Heterogeneously Informed Investors*, 14 THE JOURNAL OF FINANCIAL ECONOMICS 71-100 (1985).

the importance of this point when it accelerated deadlines for Form 4 and Form 8-K filings, as discussed above.[219]

We also are proposing to amend Rule 13d-2(a) to require that all amendments to Schedule 13D be filed within one business day after the material change that triggers the amendment obligation. Rule 13d-2(a) currently requires a Schedule 13D amendment to be filed "promptly" to disclose a material change. The benefits of this proposed amendment to Rule 13d-2(a) are very similar to the benefits of our proposed amendment to Rule 13d-1(a) discussed above. More timely reporting would facilitate price discovery in the market, reduce information asymmetry and mispricing, and therefore allow investors to make more informed investment decisions. In addition, as discussed above, replacing the "promptly" requirement with a bright-line requirement would provide greater clarity as to when material changes are to be disclosed, which could reduce filer confusion and improve compliance. The positive economic effect on the information environment and investor decision-making associated with our proposed amendment to Rule 13d-1(a) also apply to our proposed conforming revisions to Rules 13d-1(e), (f), and (g).

ii. Schedule 13G filing deadlines

We are also proposing amendments to Rules 13d-1(b), (c), and (d), and Rules 13d-2(b), (c), and (d) to shorten other reporting deadlines under Regulation 13D–G, which govern the deadlines for initial Schedule 13G filings and Schedule 13G amendments.

As discussed above, currently, under Rules 13d-1(b), (c), and (d), for beneficial owners with reporting obligations who are eligible to file a Schedule 13G, the filing deadlines for the initial Schedule 13G are 45 days after the end of calendar year for QIIs and Exempt Investors if they beneficially own more than 5% of a covered class as of the last day of the calendar year, and

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[219] We recognize that the accelerated deadlines apply, in the case of Form 8-K filings, to issuers, and rely on different statutory authorities compared to deadlines for Schedule 13D filings. However, their economic effects on liquidity are similar. *See also supra* note 26.

within 10 days of acquiring beneficial ownership of more than 5% of a covered class for Passive Investors. Under the current rules, QIIs and Exempt Investors may avoid beneficial ownership reporting altogether by selling down their positions before the end of the year. As discussed in Section II.A.4.b., the avoidance of beneficial ownership reporting enabled by these reporting deadlines could undermine the informational benefits of reporting under Sections 13(d) and 13(g). Together with Section 13(d), Section 13(g) was intended to provide a "comprehensive disclosure system of corporate ownership" applicable to all persons who are the beneficial owners of more than 5% of a covered class.[220] Information regarding beneficial ownership is important to the market, regardless whether it is disclosed on Schedule 13D or 13G. There is evidence that the initial filing of Schedule 13G, like that of Schedule 13D, generates a positive stock price reaction, albeit smaller in magnitude.[221] Therefore, the avoidance of beneficial ownership reporting on Schedule 13G made possible in part by the extended length of time in which certain beneficial owners have to report, if at all, could contribute to information asymmetry and mispricing in the market. As with the Schedule 13D filings, the prolonged delay in Schedule 13G reporting could harm the investors who happen to sell their shares in the days before the filing. To address this concern, we are proposing to shorten the filing deadlines for an initial Schedule 13G to (1) no more than five business days after the end of the month in which their beneficial ownership exceeds 5% of a covered class for QIIs and Exempt Investors, and (2) five days after acquiring beneficial ownership of more than 5% of a covered class for Passive Investors.

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[220] *See* 43 FR 18484 (Apr. 28, 1978), *supra* notes 51 and 52.

[221] *See*, *e.g.*, Alex Edmans, Vivian W. Fang, and Emanuel Zur, *The Effect of Liquidity on Governance*, 26.6 THE REVIEW OF FINANCIAL STUDIES 1443-1482 (2013) (finding that Schedule 13G filings generate on average approximately 0.8% cumulative abnormal return during the (-1,+1) window around the filing date, and more specifically, "[a] 13G filing leads to a positive market reaction, a positive holding period return, and an improvement in operating performance; all these effects are stronger in more liquid firms"); *see also* Christopher Clifford, *Value Creation or Destruction? Hedge Funds as Shareholder Activists*, 14 THE JOURNAL OF CORPORATE FINANCE 323-336 (2008) ("Firms targeted by passive investors earn an average cumulative abnormal return of 1.6% during the (-2,+2) window around the filing date.").

By shortening the initial Schedule 13G deadlines, the proposed amendments would reduce the opportunities for these holders to avoid their reporting obligations and improve transparency. Academic research has provided evidence that Schedule 13G filings contain value-relevant information—*i.e.*, they are shown to lead to positive announcement returns and improvements in firm operating performance.[222] Therefore, timely reporting of value-relevant information would facilitate price discovery and reduce information asymmetry and mispricing in the market, benefiting investors and other market participants similar to our proposed shortening of the initial Schedule 13D filing deadline.

The proposed amendments would also shorten reporting deadlines for Schedule 13G amendments under Rules 13d-2(b), (c), and (d). We believe the potential benefits of shortening initial Schedule 13G filing deadlines discussed above also apply to the accelerated filing of the Schedule 13G amendments.

b. Costs

i. Schedule 13D filing deadlines

It could be costly to shorten the deadline for filing the initial Schedule 13D under Rule 13d-1(a) as proposed because it may have a negative impact on corporate control and related shareholder engagement activities. Activists seeking to influence or control an issuer may be deterred from undertaking initiatives to engage management or launch campaigns because of the reduced gains in stockholder value that activists could capture and the earlier warning provided to management as a result of the proposed amendments, according to academic research.[223] We discuss these potential effects and mitigating factors below.

Facilitating the use of low-threshold poison pills

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[222] *See* Edmans, Fang, and Zur (2013), *supra* note 221.

[223] *See* Bebchuk, Jackson, Brav and Jiang (2013), *supra* note 211.

There is a concern that a shortened reporting deadline could give early notice to an issuer's management regarding a potential takeover attempt.[224] This accelerated filing deadline thus may provide management with more of an opportunity to quickly deploy defense mechanisms, increasing the costs for blockholders to successfully carry out their initiatives. Bebchuk et al. (2013) argue that shortening the deadline would "enable incumbents to adopt low-trigger poison pills that make it impossible for outside blockholders to accumulate additional shares after they cross the five-percent threshold," and therefore "deter outside investors from accumulating large blocks of stock in public companies."

While we recognize the concern that a shortened reporting deadline could aid the use of low-threshold poison pills, the filing deadline's impact on shareholder activism through low-threshold poison pills may be overstated for several reasons. First, while the use of low-threshold (10%-15%) poison pills has increased, such poison pills have been scrutinized by courts, academia and industry. Issuers' ability to adopt poison pill plans with low triggering thresholds is limited by the requirements of state law, with courts in Delaware and other jurisdictions scrutinizing poison pill plans under heightened judicial standards and at least one court expressing skepticism of a poison pill plan that had a 5% triggering threshold.[225] In addition, as discussed above, legal scholars have expressed concern that these pills are too restrictive and could negatively affect activist investors' profits and incentives and thereby activism.[226] Kahan and Rock (2019) have stated that pills with a threshold of 10% or 15% should be permitted depending on the context, and that pills with a threshold of less than 10% and pills with a "wolf-pack" trigger should be regarded as presumptively invalid, because the latter pills are "not a reasonable response to any cognizable threat and impose excessive restrictions on the

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[224] *See id*.

[225] *Williams Cos. Stockholder Litig.*, 2021 WL 754593, at *2.

[226] *See* Kahan and Rock (2019), *infra* note 260.

ability of an activist to conduct a credible contest and communicate with other shareholders."[227] And the long-standing guidance of the proxy advisory firm Institutional Shareholder Services is that the ownership trigger cannot be so low as to be unduly restrictive and recommending that defensive pills generally should have a trigger no lower than 20%.[228] Pills with 5% triggers are extremely rare in practice.[229]

Second, the median reported ownership on initial Schedule 13D filings are much lower than the historically conventional triggers of about 20%, or recent precedents which tended to cluster in the 10%-15% range.[230] As discussed above, our preliminary analysis of 2020 filings show that the median reported accumulation was 8.4% for all initial Schedule 13D filers. According to Barry, Brav and Jiang (2020), the median reported ownership was 6.3% in their sample of hedge fund filers.[231] Because blockholders could potentially accumulate fewer shares under the shortened reporting deadline, the reported ownership on initial Schedule 13D filings may be even lower than the prevalent poison pill triggers, and therefore unlikely to trigger low-threshold poison pills.[232]

Moreover, the length of the reporting period is not likely to affect the ability of issuers to adopt poison pill plans quickly. For example, issuers today already have the ability to implement

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[227] *Id.* at 970.

[228] *See* Paul J. Shim, James E. Langston, and Charles W. Allen, Cleary Gottlieb Steen & Hamilton LLP, *ISS and Glass Lewis Guidances on Poison Pills during COVID-19 Pandemic*, Harvard Law School Forum on Corporate Governance (April 26, 2020), *available at* https://corpgov.law.harvard.edu/2020/04/26/iss-and-glass-lewis-guidances-on-poison-pills-during-covid-19-pandemic/.

[229] These pills are designed to protect a company's net operating loss ("NOL") and were held to be valid because of tax regulations. *See* Eldar and Wittry (2021), *infra* note 230; *see also Versata Enterprises, Inc. v. Selectica, Inc.*, 5 A.3d 586 (Del. 2010).

[230] *See* Ofer Eldar and Michael D. Wittry, *Crisis Poison Pills*, 10 REV. CORPORATE FIN. STUD. 204, 204-251 (2021) (reporting that conventional triggers historically have been about 20%, while also documenting a lower average trigger of about 12% in their study of crisis pills adopted during the Covid-19 pandemic); *see also* Shim et al. (2020), *supra* note 228.

[231] *See supra* note 217.

[232] *See also* Adam O. Emmerich et al., *Fair Markets and Fair Disclosure: Some Thoughts on the Law and Economics of Blockholder Disclosure, and the Use and Abuse of Shareholder Power*, 3 HARV. BUS. L. REV. 135, 154-156 (2013) ("[S]hareholder rights plans play a crucial corporate governance role by, among other things, protecting shareholders from coercive, partial or two-tier tender offers . . . .").

a poison pill plan quickly by having a "shelf" poison pill plan that could be implemented by the issuer's board as soon as 24 hours after the Schedule 13D filing is made.[233] This would remain true even if we reduce the Schedule 13D deadline from 10 days to five days.

Inhibiting shareholder activism

Shortening the deadline may reduce blockholders' profits from stock price increases attributable to corporate governance improvements, and, as a result, reduce incentives for them to seek influence or a change in control. Blockholders have to expend resources to succeed in their bids to replace or influence inefficient management. They bear the costs for such initiatives, but share the improvement in corporate efficiency and security prices with other investors of the issuer upon the disclosure.[234] By shortening the initial Schedule 13D filing deadline, the proposed amendments would reduce opportunities for blockholders to profit from their research and time investments that motivate large share accumulations, which could be used to acquire more shares at lower prices, selectively inform other investors to acquire shares or for other purposes. This inability to benefit from the observable increase in stock price after the announcement of the presence of an activist may reduce their incentive to initiate the change. A five-day deadline would nonetheless still allow blockholders to profit from their additional information, as contrasted, for example, with the original Williams Act amendment requiring prior notification.[235]

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[233] Francis J. Aquila, *Adopting a Poison Pill in Response to Shareholder Activism* (April 2016) ("[W]hen a threat arises, a shelf pill can be put into action within 24 hours. Without a shelf pill, the Board still has the ability to adopt a poison pill quickly and without the need for a shareholder vote. However, having a shelf pill increases a company's response time because it has prepared all the necessary paperwork in advance."), *available at* https://www.sullcrom.com/files/upload/Apr16_InTheBoardroom.pdf.

[234] *See*, *e.g.*, Sanford J. Grossman and Oliver D. Hart, *Takeover Bids, the Free-Rider Problem, and the Theory of the Corporation*, THE BELL JOURNAL OF ECONOMICS 42-64 (1980) (showing that "shareholders can free ride on the raider's improvement of the corporation, thereby seriously limiting the raider's profit"). Note, however, that the model in this paper assumes immediate price adjustment. *See also* Bebchuk, Jackson, Brav and Jiang (2013), *supra* note 211.

[235] *See* Bebchuk and Jackson, *supra* note 17, at 44 (recounting the history of the Williams Act).

In addition to blockholders, the proposed change could also be costly for general shareholders of companies that are potential targets of activist blockholders. There is evidence from the academic literature that the presence of blockholders is associated with improved outcomes for shareholders.[236] If blockholders are disincentivized from seeking corporate control, it is possible that value-increasing corporate changes that could happen otherwise might not take place.[237] The finance literature indicates that companies targeted by activist hedge funds, which are a subset of all blockholders filing Schedule 13D,[238] tend to improve productivity without increases in wages.[239] Activists also tend to relocate underused assets to more productive uses. Additionally, studies show that the mere threat of activism incentivizes potential targets to increase payouts to shareholders and reduce investment in the long term, as well as improve operating performance.[240]

While we recognize that a shortened initial Schedule 13D filing deadline might have the potential to inhibit shareholder activism through reduced incentives, there are several reasons to expect that this effect, including its impact on corporate control, would be limited. First, academic research has shown that the presence of activist blockholders in a company is driven by many factors, including the company's size, the extent to which the company is undervalued,

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[236] *See, e.g.*, Marianne Bertrand and Sendhil Mullainathan, *Are CEOs Rewarded for Luck? The Ones Without Principals Are*, 116 QUARTERLY JOURNAL OF ECONOMICS 901-33 (2001); Lucian A. Bebchuk, Yaniv Grimstein, and Urs Peyer, *Lucky CEOs and Lucky Directors*, 65 JOURNAL OF FINANCE 2363-2401 (2010); James A. Brickley, Ronald Lease, and Clifford Smith, *Ownership Structure and Voting on Antitakeover Amendments*, 20 JOURNAL OF FINANCIAL ECONOMICS 267-91 (1988); Anil Shivdasani, *Board Composition, Ownership Structure, and Hostile Takeovers*, 16 JOURNAL OF ACCOUNTING AND ECONOMICS 167-198 (1993).

[237] *See* Lucian Bebchuk, Alma Cohen, and Allen Ferrell, *What Matters in Corporate Governance?* 22.2 THE REVIEW OF FINANCIAL STUDIES 783-827 (2009) (finding that management entrenchment level is "monotonically associated with economically significant reductions in firm valuation as well as large negative abnormal returns during the 1990–2003 period"). For more discussion on managerial entrenchment and the costs, see Andrei Shleifer and Robert W. Vishny, *Management entrenchment: The case of manager-specific investments*, 25.1 JOURNAL OF FINANCIAL ECONOMICS 123-139 (1989).

[238] Other subsets of Schedule 13D filers include, for example, mutual funds, pension funds, investment advisers, private individuals and public companies.

[239] *See* Alon Brav, Wei Jiang, and S. Kim, *The Real Effects of Hedge Fund Activism: Productivity, Asset Allocation, and Labor Outcomes*, 28.10 THE REVIEW OF FINANCIAL STUDIES 2723-2769 (2015).

[240] *See, e.g.*, Nikolay Gantchev, Oleg Gredil, and Chotibhak Jotikasthira, *Governance under the Gun: Spillover Effects of Hedge Fund Activism*, THE REVIEW OF FINANCE 1031-1068 (2018).

the liquidity of its stock, its leverage and the ownership stake of its officers and directors, among others.[241] Thus, it is reasonable to expect that some of these factors may play a more important role in a blockholder's decision to take a stake in a company compared with the ability to obtain a large block undetected, or to receive compensation in the form of inside knowledge. For example, how undervalued the stock of the company is, or the size of the company, may determine the willingness of a blockholder to obtain a stake in the company.

Second, even with a shortened filing deadline, as proposed, blockholders still stand to gain based on their information on the day of the filing, as well as on additional information they have regarding their plans to acquire more shares. As discussed above, Brav et al. (2008) show that the filing day and the following day see an abnormal return about 2.0%, and that return continues trending up to a total of 7.2% in 20 days.[242] Brav et al. (2008) also suggest that hedge funds adopt different strategies regarding announcing their activist intent. While some launch aggressive activism only after they have filed a Schedule 13D, some hedge funds file a Schedule 13D after publicly announcing their activist intent. These varying practices further indicate that the gains from share accumulation prior to Schedule 13D filings is not the only way for blockholders to profit or succeed in their activism.

Third, based on the statistics shown in academic research, the negative impact from the proposed amendments might not be as severe as some have suggested. For example, according to Barry et al. (2020), approximately 28% of their sample of activist hedge funds filed an initial Schedule 13D within five days after crossing the 5% threshold.[243] Additionally, their subsample analysis shows that the activist hedge funds that filed with 0-1 days and 2-4 days after crossing

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[241] *See, e.g.*, Alex Edmans, Vivian W. Fang and Emanuel Zur, *The Effect of Liquidity on Governance*, 26.6 THE REVIEW OF FINANCIAL STUDIES 1443-1482 (2013); Christopher Clifford and Laura Lindsey, *Blockholder Heterogeneity, CEO Compensation, and Firm Performance*, 51.5 THE JOURNAL OF FINANCIAL AND QUANTITATIVE ANALYSIS 1491-1520 (2016); Brav, Jiang, and Li, (2021), *supra* note 215.

[242] *See* Brav et al. (2008), *supra* note 215.

[243] *See* Barry, Brav and Jiang (2020), *supra* note 217 (studying hedge fund activism events over the period 1994-2016).

5% threshold reported on average 9.6% and 9.7% ownership, both of which are actually slightly higher than the overall average of 9.2% across all activist hedge fund filings.[244] Even for funds that accumulate large percentage ownership before filing, their ownership percentages do not differ by much at the time of the filing. For example, the 95% percentile of activist hedge funds that file within 0-1 days after crossing 5% threshold accumulate 20.5% ownership, which is the same as those that file within 8-10 days after crossing the threshold. These statistics from the study suggest that a non-trivial number of blockholders are already voluntarily filing their initial Schedule 13D in what would be a timely manner under our proposed amendments, and the percent ownership they are able to accumulate is comparable to those who disclose later. These statistics suggest that it may be possible to obtain target percentages within the proposed filing deadline.[245] In addition, academic literature suggests that, unlike the "corporate raiders" of the 1980s who sought direct control, today's blockholders' aim is to "influence" corporate policies and governance, which requires lower levels of ownership.[246] Namely, it seems possible for blockholders to adapt to the proposed deadline, albeit at a higher cost for some.[247] Although the circumstances were not identical, lowering the statutory reporting threshold from 10% to 5% in 1970 did not appear to inhibit the increase in hostile takeovers and issuer deployment of

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[244] *Id.* at 12.

[245] The 95th percentile of share accumulation reported in Barry et al. (2020) is approximately 20.5%. Brav et al (2021), in describing trends in activism, note an increased importance of hedge fund activism, characterized by lower stakes than those acquired by "corporate raiders" who sought direct control in the 1980s. *See* Brav, Jiang, and Li (2021), *supra* note 215.

[246] *See* Brav, Jiang, and Li (2021), *supra* note 215.

[247] It is possible that larger shareholders are more likely to be able to accumulate target amounts at faster speeds. The speed of accumulation could also depend on the size and liquidity of the target issuer. Therefore, the proposed amendments could affect smaller blockholders, or blockholders who are trying to acquire shares in less liquid firms, more than others.

corresponding defensive measures in the following decades—indeed, corporate America experienced a takeover wave in the 1980s.[248]

Fourth, regarding a shorter reporting window's effects on shareholder activism, some scholars contend that the concerns discussed above are overstated, because a shorter reporting window may negatively affect short-term oriented activism more than the long-term oriented activism. Short-term oriented activism could be suboptimal for long-term shareholders, and therefore the shortened deadline might provide some benefit or incur less costs to long-term shareholders by encouraging more long-term focused activism.[249] Specifically, these scholars assert that blockholders do not always have a superior strategy—sometimes these investors could be short-term focused, and incumbent management does not necessarily embody entrenchment.[250] They argue that shortening the reporting window would not necessarily disincentivize shareholder activism *per se*—while it might disincentivize short-term focused shareholder activism because blockholders could experience reduced profit in the short-term, it should matter less to blockholders who truly believe they could improve the firm value in the long-term. Shortening the initial Schedule 13D reporting window has thus been recommended

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[248] *See* Andrei Shleifer and Robert W. Vishny, *Takeovers in the '60s and the '80s: Evidence and Implications*, Strategic management journal 12.S2 (1991): 51-59 ("The American economy has experienced two large takeover waves in the postwar period: one in the 1960s and one in the 1980s. Both waves had a profound impact on the structure of corporate America. The dominant trend in the '60s was diversification and conglomeration. The '80s takeovers, in contrast, reversed this process and brought American corporations back to greater specialization.").

[249] *See* Coffee and Palia (2016), *supra* note 19, at 596 ("To sum up, the arguments against 'closing the window' work only if one assumes both that activists are the hero of the story and that they generate value for all shareholders. Neither assumption seems sound, at least without substantial qualification. Nor does the fear that closing the window will chill activism sound convincing. Activists are reaping record returns at present; the number of such campaigns is accelerating, and fears for their future seem premature.").

[250] *See* Coffee and Palia (2016), *supra* note 19, at 592 ("[A]ctivists do not always need to have a superior strategy; indeed, some may seek to launch an activist campaign largely to roil the waters on the premise that noisy activism will be read by the market as signaling a possible takeover or restructuring. Even when the proposed change is flawed, those who purchase shares in the target firm before the filing of a Schedule 13D and exit at an early point will likely profit handsomely."), and at 593 ("If management is in fact motivated today to maximize the firm's stock price, attempts to limit management's discretion through sudden and concealed activist campaigns would not necessarily lead to optimal outcomes. Also, because management generally has better information than outsiders—coupled with a strong incentive to maximize the firm's stock price—one can no longer begin from the premise that investment projects favored by management are the product of an inefficient preference for 'empire-building.' If that premise was justified in its time that time is now past.").

as an approach to encourage longer-term holdings and deter short-term activists without necessarily insulating managements from shareholder accountability.[251] Therefore, from this viewpoint, to the extent that the proposed amendments could encourage blockholders to focus on long-term value creation, they could improve corporate control.[252] We note that while the literature shows that a price increase in a window around a Schedule 13D reporting event does not reverse in the long term, providing evidence opposite to this view,[253] the determination of long-term returns (*e.g.*, over a year or more after the Schedule 13D filing), and whether there is indeed an increase in value in the long term that can be attributed to a particular filing, is inherently more complicated.

Shortening the initial Schedule 13D filing deadline could also increase compliance costs for beneficial owners who have an obligation to file an initial Schedule 13D. These beneficial owners could incur a one-time cost to update their information technology system to monitor the share accumulations and generate alerts and reports in time to accommodate the rule change. They may also need to allocate more resources on an ongoing basis to monitor their holdings so that they can meet their obligation to file an initial Schedule 13D. These compliance costs could be significant for certain filers (*e.g.*, those whose share accumulations need to be aggregated across different time zones or jurisdictions).

We believe the proposed amendment to Rule 13(a)(4) of Regulation S-T, which would extend the Schedule 13D and 13G filing "cut-off" time from 5:30 p.m. to 10 p.m., should mitigate the additional compliance costs for Schedule 13D filers resulting from the proposed amendments to Rules 13d-1(a), (e), (f), and (g). We do not think the proposed amendment to Rule 201(a) of Regulation S-T would have any significant cost or benefit. While the proposed amendment would make temporary hardship exemptions unavailable to filers of Schedules 13D

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[251] *Id*. at 594.

[252] *See* Coffee and Palia (2016), *supra* notes 249 and 250.

[253] *See supra* note 215.

and 13G, as discussed in Section II.A.6.b., the proposed treatment is consistent our treatment of Forms 3, 4 and 5, and the proposed amendments to Rule 13(a)(4) should avoid the need for such hardship exemptions.

Finally, we note that the compliance costs and mitigating factors discussed above also would apply to our proposed amendments to Rule 13d-2(a) that would shorten the filing deadline for Schedule 13D amendments.

ii. Schedule 13G filing deadlines

Accelerated Schedule 13G filings (for both initial filings and amendments) under our proposed amendments to Rules 13d-1(b), (c), and (d) and Rules 13d-2(b), (c), and (d) could potentially impose costs on filers. These costs may appear to be significant for QIIs because the proposed amendments to Rules 13d-1(b) and 13d-2(b) and (c) would significantly shorten the filing deadlines for these holders and potentially increase their filing frequency. Under the proposed amendments to Rules 13d-1(b) and 13d-2(b), QIIs would be required to file an initial and amended Schedule 13G, respectively, no more than five business days after the end of the month in which their beneficial ownership exceeds 5% of a covered class or a material change occurs. This deadline is significantly shorter than the current deadline of 45 days after the end of the calendar year for both an initial and amended Schedule 13G filing. In addition, under the proposed amendments to Rule 13d-2(c), QIIs would be required to file an amendment to their Schedule 13G within five days after the date on which their beneficial ownership exceeds 10% of a covered class, or increases or decreases by more than 5% of the covered class once across the 10% threshold, rather than the current requirement of 10 days after the end of the relevant month.

While shortening the filing deadlines could improve the timeliness of Schedule 13G reporting and market efficiency, it could also negatively impact some filers, particularly some QIIs (*e.g.*, mutual funds or hedge funds). The existing academic literature identifies free riding and front running as explanations for why more timely disclosure would negatively impact fund

performance, and provides evidence that mutual funds experienced reduced returns after the Commission required more frequent portfolio disclosure.[254] The finding of a reduction in returns may be attributable to several factors, according to the literature. First, more timely filings may reveal a fund's proprietary information or trading strategies to other market participants, thus allowing those participants to free ride by copying the fund's strategies without incurring a cost to research, identify and devise profitable strategies.[255] Funds typically need to expend considerable resources to research and identify promising investments, and profits from the research take time to accrue. For example, it is estimated that it could take 12 to 18 months for mutual funds to profit after the date a newly acquired stock is first added to a fund's portfolio. Therefore, more timely disclosure would provide free-riding opportunities for other investors to mimic or reverse engineer a fund's strategy, which could ultimately diminish a fund's return.[256] Second, more timely disclosure could increase the risk that funds would be front run by outside investors. Specifically, more timely disclosure could potentially allow professional investors to better understand a fund's strategies and anticipate trades of the fund. Therefore, those professional investors may attempt to trade ahead of the funds to capture the temporary impact

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[254] *See infra* notes 255-257 for academic literature; *see also* Final Rule: Shareholder Reports and Quarterly Portfolio Disclosure of Registered Management Investment Companies, 17 CFR parts 210, 239, 249, 270, and 274, Release Nos. 33-8393; 34-49333; IC-26372; File No. S7-51-02 [69 FR 11244 (March 9, 2004)], *available at* https://www.sec.gov/rules/final/33-8393.htm#IIB4. Notably, the Commission decided to adopt the quarterly disclosure requirement with a 60-day delay as opposed to the 45-day delay or monthly reporting as some had suggested, citing the concerns that "more frequent portfolio holdings disclosure and/or a shorter delay for release of this information may expand the opportunities for predatory trading practices that harm fund shareholders."

[255] *See* Russ Wermers, *The Potential Effects of More Frequent Portfolio Disclosure on Mutual Fund Performance*, 7.3 Perspective 1-11 (2001).

[256] *Id.*; *see also* Mary Margaret Frank, James M. Poterba, Douglas A. Shackelford, and John B. Shoven, *Copycat Funds: Information Disclosure Regulation and the Returns to Active Management in the Mutual Fund Industry*, 47.2 THE JOURNAL OF LAW AND ECONOMICS 515-541 (2004) ("[W]hile these actively managed funds earned higher returns before expenses than their associated copycat funds, after expenses copycat funds earned statistically indistinguishable, and possibly higher, returns."); Vikas Agarwal, Kevin A. Mullally, Yuehua Tang, and Baozhong Yang, *Mandatory Portfolio Disclosure, Stock liquidity, and Mutual Fund Performance*, 70.6 THE JOURNAL OF FINANCE 2733-76 (2015) (finding that more informed mutual funds, especially those holding stocks with greater information asymmetry, experience greater performance deterioration after the Commission increased mutual fund periodical filing from semi-annual to quarterly in 2004).

on prices of traded securities.[257] As a result, funds could see an increase in trading costs and a decrease in returns.

While most of the literature focuses on mutual fund portfolio disclosure when discussing the tradeoff between timely reporting and fund performance, we believe the tradeoff between timely reporting and fund performance can be applied to the Schedule 13G reporting by QIIs. The proposed amendment to the initial Schedule 13G deadline (shortening the deadline to five business days after the end of the applicable month) would be a significant change for QIIs considering both the current deadline (45 days after the applicable calendar year) and the filing requirements for other forms that QIIs generally file (including the 60-day deadline for Form N-Q as discussed above, and the 45-day deadline for Form 13F). The accelerated deadline under the proposed amendments could reveal valuable information about a fund's investment strategies, facilitate free riding and front running behaviors, and therefore potentially reduce a fund's returns and harm fund shareholders. In the long run, the proposed accelerated disclosure requirements could reduce incentives for funds to collect and process information, leading to market inefficiency.

We recognize that the proposed accelerated filing requirements could potentially increase the risks of free riding or front running for certain Schedule 13G filers. However, we also note that Schedule 13G filings are different from portfolio disclosures such as Form N-Q or Form 13F. Schedule 13G filings do not have a set frequency and do not require a disclosure of a fund's entire portfolio. Thus, these filings are unlikely to provide information with the level of precision and predictability needed for free riding or front running purposes. Therefore, we believe the risks of increased free riding and front running as a result of the proposed amendments are likely to be low.

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[257] *See* Wermers (2001), *supra* note 255; *see also* Sophie Shive, and Hayong Yun, *Are Mutual Funds Sitting Ducks?* 107.1 JOURNAL OF FINANCIAL ECONOMICS 220-237 (2013) (providing evidence on front running behavior by showing that hedge funds trade on expected mutual fund flows, and showing that this type of anticipatory trading is stronger after 2004 when quarterly portfolio disclosure was required of mutual funds).

Shortening Schedule 13G filing deadlines could also generate compliance costs for filers. QIIs may incur a one-time cost to update their information technology systems to monitor share accumulations and generate alerts and reports in time to accommodate the rule change. They may also need to allocate more resources on an ongoing basis to monitor material changes so they can meet their obligations to file amendments to Schedule 13G. However, as mentioned in Section II.A.3.b., because these holders with reporting obligations typically have compliance systems to monitor Schedule 13G filing obligations on at least a monthly basis (*e.g.*, in case their holdings exceed more than 10% at the end of the month), the ongoing cost could be mitigated. Overall, we believe the compliance costs to QIIs should be minor.

For Passive Investors, the filing deadline for an initial Schedule 13G would be shortened from 10 days to five days under the proposed amendment to Rule 13d-1(c). The proposed amendment to Rule 13d-2(b) would accelerate the filing deadline for Schedule 13G amendments from the current standard of 45 days after the end of the calendar year to within five business days of the end of the month in which a material change occurs. In addition, the proposed amendment to Rule 13d-2(d) would change the Schedule 13G amendment deadline for Passive Investors from the current "promptly" standard to five days after the date on which their beneficial ownership exceeds 10% of a covered class, or increases or decreases by more than 5% once across the 10% threshold. Similar to QIIs, Passive Investors may incur a one-time cost to update their information technology systems to monitor share accumulations in order to accommodate the rule change. They may also need to allocate more resources to monitor material changes on an ongoing basis so they can meet their obligations to file amendments to Schedule 13G in a more timely manner.

Exempt Investors would be required to file an initial and amended Schedule 13G no more than five business days after the end of the month in which their beneficial ownership exceeds 5% or a material change occurs under the proposed amendments to Rules 13d-1(d) and 13d-2(b), as compared to the current deadlines of 45 days after the end of calendar year for both initial and

amended Schedule 13G filings. As a result, Exempt Investors may also incur one-time and continuing compliance costs as a result of the proposed amendments.

Passive Investors and Exempt Investors should not incur the economic costs associated with the risk of free-riding and front-running that QIIs would, because they do not actively manage their portfolios like QIIs do. However, the compliance costs to Passive Investors and Exempt Investors may be relatively higher than those to QIIs. Specifically, neither Passive Investors nor Exempt Investors currently need to monitor their beneficial ownership levels on a monthly basis as QIIs do to determine whether their holdings exceed more than 10% at the end of the month and trigger an initial Schedule 13G filing pursuant to Rule 13d-1(b)(2).

For all Schedule 13G filers, an increase in compliance costs may reduce their incentive to invest in smaller public companies, where equity holdings could more easily cross the 5% threshold. This could ultimately reduce the liquidity of these issuers' equity securities and potentially their incentives to be listed on an exchange.

We are unable to quantify the potential increase in costs related to the proposed shortened Schedule 13D and 13G filing deadlines due to the lack of data. For example, we lack data to estimate how the proposed amendments would affect blockholders' ability to initiate corporate change because such ability would depend on their target share accumulation level, the liquidity of their target stocks and their acquisition plans. Regarding Schedule 13G filings, the potential increase in costs would depend on a filer's investment strategy and frequency of disclosure after the rule change. Because we do not have all the inputs for these variables, we cannot provide a reasonable estimate for these costs.

2. Proposed Amendment to Rule 13d-3

a. Benefits

The proposed amendment to Rule 13d-3 would deem holders of certain cash-settled derivative securities as beneficial owners of the reference securities in a covered class. Overall,

we believe this proposed amendment could improve transparency, promote market stability and ultimately enhance investor protection.

First, the proposed amendment could benefit investors and other market participants by providing improved transparency regarding persons with significant economic interests in an issuer's equity securities and potential control intent. Under current Rule 13d-3, it is possible for holders of cash-settled derivative securities to acquire economic exposure to substantial blocks of securities without public disclosure because those instruments generally do not convey voting or investment power over the reference equity security. However, academic literature has raised concern over the "hidden ownership" through cash-settled equity-based derivatives, because in many cases, holders of such derivative securities may have the *de facto* ability to procure votes quickly when needed.[258] According to these studies, counterparties to these derivative contracts commonly hedge their risks by purchasing the reference shares related to these contracts and, at the end of the contract when those share are no longer needed, sell the shares to reduce their exposure.[259] It is convenient, and sometimes even expected (*e.g.*, in the U.K.), for counterparties

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[258] *See* Henry T.C. Hu, and Bernard Black, *Hedge Funds, Insiders, and the Decoupling of Economic and Voting Ownership: Empty Voting and Hidden (Morphable) Ownership*, 13.2-3 JOURNAL OF CORPORATE FINANCE 343-367 (2007); *see also* Pierre-Henri Conac, *Cash-Settled Derivatives as a Takeover Instrument and the Reform of the EU Transparency Directive*, *in* THE EUROPEAN FINANCIAL MARKET IN TRANSITION 49-68 (2011).

[259] *See, e.g.*, Pierre-Henri Conac (2011), at 51 (stating "[a]lthough it seems that CSDs [cash-settled derivatives] are not equivalent for the investor to holding the shares, the reality can be quite different. The reason is that banks do not want to face the risk that the price of the share increases and they have to pay the difference. Therefore, in order to hedge their risk, they usually purchase the underlying shares relating to the CSDs. At the end of the contract, the banks will normally sell their shares in the market in order to pay to the investor the difference with the price at the beginning of the contract. Even if the bank does not do so, it will not keep the shares once the contract terminates since it usually has no use of the shares. This is especially the case if the CSDs relate to a large number of shares, unless the bank is interested in keeping an exposure to this company which is usually not the case. Then, nothing prevents the investor from purchasing the shares that the bank is selling in the open market. Alternatively, the investor and the bank can decide before the end of the contract to modify it in order that the contract will not be settled in cash but will be settled physically by delivery of the underlying shares. Therefore, if the bank holds the shares in order to hedge its risk, the investor is during the life of the CSD a quasi-shareholder, except that subject to the contractual agreement, he usually does not control the voting rights attached to the shares held by the bank."); *see also* Eugenio de Nardis, and Matteo Tonello, *Know your shareholders: the use of cash-settled equity derivatives to hide corporate ownership interests*, Conference Board Director Notes No. DN-009, 2010 (stating "The derivatives dealer (i.e., the short party in the derivatives transaction) often holds the underlying securities as a hedge against its short position. Especially in those cases where the equity swap involves a substantial amount of shares of a single company, hedging with matched shares may be the only commercially sound choice for the dealer, as alternative hedging strategies are likely to be limited and more expensive.").

to sell these shares back to their customers, the holders of the cash-settled derivative securities.[260] Alternatively, the holder of the derivative security and the counterparty can always try to modify the terms of a derivative security to settle the contract by transferring the reference securities instead of cash. Therefore, cash-settled derivative securities could ultimately be settled in kind. This optionality allows holders of the derivatives to have the ability to influence or control an issuer without triggering public disclosure. Indeed, there have been takeover attempts using this *de facto* ability to quickly acquire shares.[261]

Holders of cash-settled derivative securities could also influence or control an issuer in other ways. For example, they might try to influence the counterparties to vote any hedged shares according to their desire. Additionally, any shares used in a hedge would be eliminated from the universe of voting shares as a result of the derivative contract, altering the balance of the voting power.[262] Of course, there is no guaranteed success through these approaches. However, significant economic interest could confer some credibility upon the activist with other shareholders,[263] which could increase the likelihood of success.

Section 13(d) requires public disclosure of the rapid accumulation of sizable positions linked to equity ownership by investors with potential control intent. As discussed above,

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[260] *See* Henry T.C. Hu and Bernard Black (2007), *supra* note 258 (stating that in the U.K., it is "frequently the expectation" of a long equity swap holder that the dealer would "ensure" that shares are available to be voted by its customer or sold to the customer on closing out the swap). *But see* Marcel Kahan and Edward Rock, *Anti-Activist Poison Pills*, 99 B.U. L. REV. 915, 948-953 (2019) (taking a different view regarding cash-settled derivative securities' effectiveness in achieving activists' objectives in the context of poison pills and arguing that synthetic equity confers no voting rights, and hence poses no threats that should be counted toward a poison pill triggering threshold).

[261] *See, e.g.*, *The Case of Volkswagen*, THE HEDGE FUND JOURNAL, Nov. 2008 (available at https://thehedgefundjournal.com/the-case-of-volkswagen/). While most of the examples referenced in this discussion involve European transactions or cash-settled security-based-swaps (which are excluded from the proposed amendments), the underlying mechanism for exercising influence over the voting, acquisition or disposition of reference securities is the same as for other cash-settled derivative securities. *See also supra* Section II.B.1 and note 88.

[262] *See* Wachtell Petition, *supra* note 16.

[263] *See* Marcel Kahan and Edward Rock (2019), *supra* note 260, at 950 ("While synthetic equity entails no voting rights, it enables an activist shareholder to increase its economic stake and confers some credibility upon the activist with other shareholders (albeit presumably less than actual share ownership).").

information related to a potential change in corporate control is material to the market, and withholding the information could lead to information asymmetry and mispricing in the market.[264] Therefore, by expanding the scope of beneficial ownership to include certain holders of cash-settled derivative securities, the proposed amendments would address concerns regarding large shareholders using "hidden ownership" to avoid their reporting obligations. Treating such holders as beneficial owners also would reduce information asymmetries and enhance investor protection. Greater transparency would allow investors to make more informed investment decisions and help other market participants to better evaluate securities.

Enhanced disclosure could also promote market stability. Rapid accumulation of large equity positions could impact the liquidity of a covered class, and the lack of disclosure could prevent the market from incorporating that liquidity risk into the pricing for the security. Therefore, an unwinding of the positions could lead to excessive volatility and adversely impact the stock price of an issuer.

b. Costs

Deeming certain holders of cash-settled derivative securities to be a beneficial owner may result in new entrants to the Sections 13(d), 13(g), and 16 reporting systems, and thus generate increased costs for those who previously were not subject to these regulations. These persons may incur more extensive and ongoing compliance costs due to their reporting obligations under these provisions. For example, as discussed in Section II.B.2., a person who holds a derivative security with variable delta would need to calculate the delta on a daily basis, for purposes of determining the number of equity securities that such person will be deemed to beneficially own. In addition, persons who would become ten percent holders as a result of proposed Rule 13d-3(e) would be subject to Section 16(b)'s short-swing profit liability and Section 16(c)'s short sale prohibitions.

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[264] *See supra* Section III.C.1.A.i.

The proposed amendment could also potentially reduce the incentive to use cash-settled derivatives for hedging purposes, especially when hedging large positions. The financial institutions that serve as counterparties to cash-settled derivatives could be negatively affected because the reduced use of cash-settled derivatives could result in loss in revenue. However, we believe the impact on hedging incentives should be limited. If holders of derivative securities have an economic reason to use derivative securities to limit their market risk exposure, the potential compliance costs should be small compared to the downside of not using them. In addition, we are proposing Rule 13d-6(d) to provide that two or more persons will not be deemed to have formed a group under Section 13(d)(3) or 13(g)(3) solely by virtue of their entrance into an agreement governing the terms of a derivative security. This proposed exemption seeks to avoid impediments to certain financial institutions' ability to conduct their business in the ordinary course, which, we believe, could mitigate some of the costs imposed on financial institutions.

We are unable to quantify these costs related to beneficial ownership disclosure, because we lack data on the current use of cash-settled derivative securities to provide reasonable estimates on how such use would change.

3. Proposed Amendments to Rules 13d-5 and 13d-6

a. Benefits

The Commission is proposing a series of amendments to Rule 13d-5 to clarify and affirm its operation as applied to two or more persons who "act as" a group under Sections 13(d)(3) and (g)(3) of the Exchange Act.[265] Current Rule 13d-5(b) states that when two or more persons "agree to act together" for the purpose of acquiring, holding, voting or disposing of equity securities of an issuer, then the group that is formed has acquired beneficial ownership of the securities. The intent of the rule, together with Sections 13(d)(3) and (g)(3), is to prevent

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[265] *See supra* Section II.C.

investors from coordinating to circumvent the 5% threshold in Sections 13(d) and (g). However, recent academic research has underscored concerns that groups of blockholders may work together to gain control of corporate boards without making appropriate disclosure.[266]

The proposed amendments would remove the potential for Rule 13d-5(b) to be construed as requiring that an express or implied agreement exists between two or more persons before a group can be formed. By clarifying and affirming that an express or implied agreement is not needed to subject a group to regulation under Section 13(d) or 13(g), the proposed amendments would avoid misinterpretation of the rule, help ensure that the law is applied as it was intended to be, and improve transparency. Investors and other market participants would benefit to the extent that they receive more timely disclosure to make more informed investment decisions or better evaluate securities as a result of the proposed amendments.

b. Costs

To the extent that blockholders misinterpreted Rule 13d-5 as requiring an express or implied agreement before they are required to report their collective holdings, these blockholders may incur a cost as a result of the proposed amendments. For example, blockholders seeking to coordinate with other investors for corporate influence or control might no longer be able to avoid reporting because there is no express or implied agreement among the members. These blockholders would thus incur additional compliance costs related to the filing of Schedule 13D. Considering that the proposed amendments would also shorten the filing deadlines for Schedule 13D, it could be particularly costly for members to keep track of the shares purchased as a group and coordinate among themselves in order to file on time. Additionally, such a group of blockholders, to the extent its beneficial ownership exceeded 10% of a covered class, would be

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[266] *See, e.g.*, Carmen X. W. Lu, *Unpacking Wolf Packs*, 125 YALE L.J. 773, 775-76, 777 (2016) (observing that wolf packs, which may not be deemed groups by some courts despite "empirical and anecdotal evidence of coordination" if there is not "specific evidence of coordination," are able to evade Section 13(d) reporting if, for instance, "each of the activist investors acquires less than a five percent stake in the target"); *see also* John C. Coffee, Jr. and Darius Palia, *supra* notes 19 and 143.

deemed a "beneficial owner" as defined under Rule 16a-1(a)(1). Under our administration of Section 16, each group member would be considered a 10% holder subject to Sections 16(a), (b), and (c). Thus, such blockholders may incur additional compliance costs for their filing obligations under Section 16.

Further, it could be more costly for blockholders to use group formation to influence or change corporate control, to the extent that they misinterpreted Rule 13d-5 as requiring an express or implied agreement, because they would no longer be able to accumulate shares at a pre-disclosure price as they might have done under such a misimpression. As we have discussed in Section III.C.1.b., if earlier disclosure were made, stock prices would likely increase, and, therefore, blockholders would have to acquire shares at a higher price and the profit they would expect to receive would be reduced. As a result, it is possible that the proposed amendments could chill shareholder engagement. Reduced shareholder engagement may result in less monitoring of an issuer's management by shareholders. Because of the principal-agent relationship between investors and management in a corporation, there may exist conflicts between management of the issuer and investors.[267] Thus, less monitoring by investors as a result of reduced shareholder engagement could negatively affect firm value. However, we note that these are the costs blockholders or large shareholders should have incurred anyway when forming a group for purposes of Section 13(d), and in this regard, the proposed amendments would not expand, but rather would clarify and affirm, the applicability of existing reporting obligations.

Additionally, by removing any potential misimpression that an agreement must exist for determining whether a group is formed, the proposed amendments could potentially chill shareholder communications in general, as shareholders may be uncertain whether their coordination constitutes "acting as" a group. As discussed in Section II.D.1., shareholders may

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[267] *See* Michael C. Jensen, and William H. Meckling, *Theory of the firm: Managerial behavior, agency costs and ownership structure*, 3.4 JOURNAL OF FINANCIAL ECONOMICS 305-360 (1976).

choose to communicate with one another regarding an issuer's performance or a certain policy matter, and they may take similar action with respect to the issuer or its securities, such as aligning their voting of shares at the issuer's annual meeting with respect to one or more proposals. We recognize the potential risk of chilling such communications. We therefore are also proposing amendments to Rule 13d-6 to exempt certain actions taken by two or more persons from the scope of Sections 13(d)(3) and 13(g)(3). In addition to proposed Rule 13d-6(d), which we discussed in Section III.C.2.b above, proposed Rule 13d-6(c) would provide that two or more persons will not be deemed to have acquired beneficial ownership of, or otherwise beneficially own, an issuer's equity securities as a group solely because of their concerted actions related to an issuer or its equity securities, including engagement with one another or the issuer. This exemption would only be available if such persons, when taking such concerted actions, are not directly or indirectly obligated to take such actions and communications among or between such persons are not undertaken with the purpose or the effect of changing or influencing control of the issuer. This exemption would, therefore, exclude activity that is not contemplated within the purpose of Section 13(d). Additionally, to the extent beneficial owners qualify for and rely on the proposed exemptions in Rule 13d-6, those exemptions may offset any potential increase in the number of persons who become 10% holders as a result of our proposed amendments to Rule 13d-5. Thus, the proposed exemptions in Rule 13d-6 may lower the potential compliance costs associated with filings under Section 16 that are generated by the proposed amendments to Rule 13d-5. We believe the proposed exemption could alleviate the concern that the proposed amendments to Rule 13d-5 could chill communications among shareholders and shareholders' engagement with issuers for reasons that do not implicate the purpose of Section 13(d).

We are unable to quantify the costs of our amendments related to group formation. Because we lack data on how many groups may not be reporting beneficial ownership because of

the misimpression that an agreement is required, we cannot provide reasonable estimates on how such reporting practices would change.

4. Proposed Amendments to Item 6 of Schedule 13D

Item 6 of Schedule 13D provides that beneficial owners must describe "any contracts, arrangements, understandings or relationships (legal or otherwise)" with respect to any securities of the issuer, and cash-settled derivative securities have not been expressly identified in the list of examples. The proposed amendment would make it explicit that cash-settled derivative securities (including cash-settled security-based swaps) that use the issuer's securities as a reference security are included among the types of contracts, arrangements, understandings and relationships that must be disclosed.

We believe the proposed amendment is consistent with the proposed amendment to Rule 13d-3 discussed in Section II.B. We also believe it is consistent with our goal of modernizing the beneficial ownership reporting requirements and improving their operation and efficacy. Given that the baseline disclosure requirement was set forth in 1968, and the derivative securities market has evolved significantly since then, investors would benefit if the language of the disclosure requirement reflects current market practice and the range of instruments that should be disclosed as contemplated by Section 13(d)(1)(E). By revising Item 6 to clarify what instruments are covered, the proposed amendments could improve compliance with Rules 13d-1(a) and 13d-101, and reduce potential ambiguity as well as litigation risk for filers. To the extent that the proposed amendment would enhance beneficial ownership reporting, investors and the market would benefit. However, filers could incur additional compliance costs, to the extent that they have not already been providing such disclosure.

5. Proposed Structured Data Requirement for Schedules 13D and 13G

The proposed amendments would require all disclosures reported on Schedules 13D and 13G other than the exhibits to be submitted using a structured, machine-readable data language—specifically, in 13D/G-specific XML. Currently, Schedules 13D and 13G are

submitted in HTML or ASCII, neither of which is a structured data language; as such, the disclosures currently reported on Schedules 13D and 13G are not machine-readable. This aspect of the proposed amendments is expected to benefit investors and markets by facilitating the use and analysis, both by the public and by the Commission, of the ownership disclosures reported by filing persons on Schedules 13D and 13G, compared to the current baseline. We expect this would improve the public dissemination and accessibility of material information about potential change of control transactions.

We anticipate that the incremental costs associated with requiring reporting persons to submit the information disclosed on Schedules 13D and 13G in 13D/G-specific XML, compared to the baseline of submitting the Schedules in in HTML or ASCII, would be relatively low. Because we would provide reporting persons with the option of using a fillable web form that converts inputted disclosures into 13D/G-specific XML, the proposed structuring requirement would not impose upon filers without structured data experience the implementation costs of establishing related compliance processes and expertise. Filers who choose to submit directly in 13D/G-specific XML rather than use the web form may incur the aforementioned implementation costs, with costs varying based on their prior experience with encoding and transmitting structured disclosures.

D. Anticipated Effects on Efficiency, Competition and Capital Formation

We believe the proposed amendments together could have a positive effect on market efficiency, but there may be some offsetting effects as well. As discussed above, currently, large shareholders could use the 10-day window to accumulate a level of beneficial ownership far exceeding the 5% threshold before reporting. They could seek to avoid the 5% reporting threshold through the use of cash-settled derivative securities or refrain from communicating or undertaking actions that could result in the formation of groups. By shortening Schedule 13D and 13G filing deadlines, expanding the scope of beneficial ownership to include holders of certain cash-settled derivative securities, and, clarifying and affirming that an actual agreement is

not needed for the formation of a group, the proposed amendments could help ensure that large shareholders, including groups, comply with the reporting threshold, and therefore improve disclosure regarding material information related to potential changes of corporate control. More timely and enhanced disclosure would reduce information asymmetry and mispricing in the market, thereby improving liquidity and market efficiency. More efficient prices and more liquid markets help allocate capital to its most efficient uses. By making material information available to the public sooner, and reducing the differential access to information, the proposed amendments could increase public trust in markets, thereby aiding in capital formation. Finally, we believe that the proposed amendments could promote competition in that those who delay reporting would not have an advantage over similarly situated shareholders who report earlier. Furthermore, lowering information asymmetry could also increase competition among market participants. For example, if blockholders selectively reveal information, this gives some market participants advantages over others.

On the other hand, we recognize that some aspect of the proposed amendments could increase the costs of accumulating large blocks of shares. If some investors choose not to trade when they otherwise might have, capital formation, and therefore market efficiency, could be harmed. However, this cost would be offset by increased liquidity that arises from reducing information asymmetry.

Furthermore, because accumulating large blocks may be more expensive, investors may be less incentivized to do so. To the extent that large blocks aid in monitoring managerial behavior or facilitating changes in corporate control for inefficient management, capital formation could be adversely effected. By reducing the ability of blockholders to engage in "tipping," enhanced disclosure also would lower private benefits from accumulating blocks, potentially reducing the incentives for blockholders to initiate corporate change. However, while rents to the business of initiating corporate change may fall, general access to information would increase, offsetting the effects described.

E. Reasonable Alternatives

1. Alternative Filing Deadlines

As an alternative to the proposed amendments, we considered alternative filing deadlines for an initial Schedule 13D. For example, we considered filing deadlines that are longer than the proposed five days but shorter than the current 10-day deadline. These alternatives would reduce the compliance costs for filers, especially those with operations in different jurisdictions or time zones. They would also allow blockholders to accumulate more shares before making their filings, reducing the concern that the five-day deadline could discourage shareholder activism and encourage management entrenchment. However, these alternatives would result in less timely reporting, and be less beneficial to investors, other market participants and the overall efficiency of the market. We also considered filing deadlines that are shorter than the proposed five-day deadline. These alternative deadlines would provide more timely reporting to investors and market. However, they could have more negative effects on shareholder activism.

We also considered shortening the deadline for QIIs to file an initial Schedule 13G to 45 days after the end of the quarter, instead of the proposed deadline of five business days after the end of the applicable month. This approach would be more in line with the current portfolio reporting requirement for institutional investors and mutual funds for Form 13F and Form N-Q, and could reduce the potential risk of free riding or front running as discussed in Section III.C.1.b.ii and the costs to QIIs as a result. On the other hand, similar to the alternative Schedule 13D deadline, this alternative Schedule 13G deadline would provide less timely disclosure compared to the proposed approach, and thus be of less benefit to investors and the market.

2. Tiered Approach and Purchasing Moratorium

We understand that certain persons who would be required to file a Schedule 13D under a shortened deadline could view an earlier deadline as a means of forfeiting a proprietary trading strategy or minimizing the opportunity to earn a return that is high enough to offset their research

costs and litigation, reputational and investment risks. Rather than shortening the deadline in all instances, we also considered a tiered approach, such as maintaining the 10-day deadline for acquisitions of greater than 5% but no more than 10% while instituting a shorter deadline if beneficial ownership exceeds 10%. We also considered whether the deadline for the initial Schedule 13D filing should vary based on a particular characteristic of the issuer, such as its market capitalization or trading volume. A tiered approach would affect fewer filers than the proposed deadlines discussed above, and thus would be less costly. A tiered approach also would result in less timely reporting than the proposed approach, providing less benefit to investors and the market.

Finally, we also considered maintaining the 10-day deadline if the filer "stands still" by not acquiring additional beneficial ownership once the 5% threshold has been crossed and until the Schedule 13D is filed. This approach would differentiate between investors seeking to establish a small minority stake and those seeking to exert influence or accumulate a control position, including beneficial ownership amounting to a majority or more of the covered class. While this approach would be the most effective in enforcing the 5% threshold, it could also be the most costly in terms of its impact on shareholder activism. It would effectively place a speed bump on blockholders' acquisitions, and provide opportunities for management to defend and entrench themselves. In addition, it might be operationally difficult to ensure that the purchases of the shares add up to no more than 5%, especially when shares are purchased from different sources, or purchases are made by different entities. Further, this alternative would not increase the timeliness of Schedule 13D reporting, and thus would not provide the same benefits to investors and the market as the proposal. Rather than propose a deadline based upon a person's willingness to abstain from making additional acquisitions once the 5% threshold has been crossed, we instead have solicited comment on the efficacy of such an alternative while taking into account the operational difficulties associated with a person's attempt to acquire no more than the minimum reportable amount of beneficial ownership.

3. Consolidate Beneficial Ownership Reporting

We also considered consolidating beneficial reporting into one form, Schedule 13D (*i.e.*, by eliminating Schedule 13G). This approach would include a reduction in some of the compliance burdens applicable to former Schedule 13G filers that would now be required to file a Schedule 13D. For example, because there would be only one form, former Schedule 13G filers would no longer need to monitor their eligibility continuously. Also, with the new deadlines for Schedule 13D, no need would exist to amend the other filing deadlines applicable to (former) Schedule 13G filers. However, this alternative would further accelerate the filing for former Schedule 13G filers, and exacerbate the concerns about free-riding and front-running risks these filers could face as discussed above, potentially reducing their profits and increasing their costs.

4. Section 16 Rule Amendment

We considered amending Rule 16a-1(a)(1) to avoid the application of proposed Rule 13d-3(e) to the determination as to whether a person is a 10% holder under Section 16. More specifically, under this alternative, a holder of the cash-settled derivative securities covered by proposed Rule 13d-3(e) would be deemed the beneficial owner for purposes of Sections 13(d) and (g), but not the beneficial owner of those reference securities for purposes of determining whether that person is a 10% percent holder under Section 16. This alternative could reduce the costs of proposed Rule 13d-3(e) and its impact on Section 16 reporting obligations. However, the alternative approach could also potentially create two standards for determining beneficial ownership, potentially leading to confusion in the market and concerns regarding whether the rule is applied differentially to different groups of filers. Also, investors and the market would receive less informative Section 16 disclosures under the alternative as compared to the proposed approach, and the disclosures would thus be less beneficial.

5. Modify Scope of Structured Data Requirement

We also considered modifying the scope of the proposed structured data requirement for Schedules 13D and 13G. For example, we considered narrowing the requirement to include only the quantitative disclosures reported on Schedules 13D and 13G. Narrowing the scope of the structuring requirement to include only the quantitative disclosures could provide a clearer focus on those data points that could potentially be used most widely for market-level aggregation, comparison and analysis. However, the non-quantitative disclosures on Schedules 13D and 13G, such as textual narratives and identification checkboxes, also would be valuable for data users to access and analyze in an efficient and automated manner. In addition, the incremental cost savings to filers of requiring only quantitative disclosures to be structured would be low given the availability of a fillable web form in which filers would be able to input both quantitative and non-quantitative Schedule 13D and 13G disclosures.

F. Request for Comment

We request comment on all aspects of our economic analysis, including the potential costs and benefits of the proposed amendments and alternatives thereto, and whether the proposed amendments, if adopted, would promote efficiency, competition and capital formation or have an impact on investor protection. In addition, we also seek comment on alternative approaches to the proposed amendments and the associated costs and benefits of these approaches. Commenters are requested to provide empirical data, estimation methodologies, and other factual support for their views, in particular, on costs and benefits estimates. Specifically, we seek comment with respect to the following questions:

92. Would the proposed amendments shortening Schedule 13D filing deadlines negatively affect shareholder activism? If yes, are there any other reasons for such effects besides the ones we have discussed? Would such effects be more or less significant than our assessment? Would the benefits justify the costs? Are you aware of any data or methodology that could help us quantify the effects? Are there any factors that could mitigate these effects besides the ones we discussed? Is it fair to presume that

blockholders generally have the ability to adapt to a five-day filing deadline given the fact that a number of them are already filing on this deadline voluntarily?

93. Studies observe share accumulations well above 10% of an issuer in the 95th percentile of the data set. Is it fair to presume that those accumulations are for purposes other than shareholder activism? If so, what are those purposes? What are the outcomes of such accumulations? If not, and such high accumulations were made for the purposes of activism, what motivates abnormally high accumulation at the time of 13D filings?

94. Would the proposed amendments shortening Schedule 13G filing deadlines increase the risk of free-riding or front-running for Schedule 13G filers? Would such effects be more or less significant than our assessment? Are there any other costs associated with these proposed amendments besides the ones we have identified? Would the benefits justify the costs? Are you aware of any data or methodology that could quantify the costs?

95. Would the proposed amendments to Rule 13d-3 regarding cash-settled derivative securities negatively affect the use of derivative instruments? Would such effect be more or less significant than our assessment? Are there any other economic effects associated with these proposed amendments that we have not discussed? Would the benefits justify the costs? Are you aware of any data or methodology that could help quantify the costs? To what extent do holders of derivative securities have the ability to influence or direct the voting, acquisition or disposition of shares acquired by the counterparty to hedge its position? Is it common for the holder to acquire the hedge securities from the counterparty and/or the counterparty to settle its positions with shares (rather than cash)? Please provide any data to support your view.

96. Would the proposed amendments affirming our view on group formation have negative effects on shareholder activism, engagement and communication? Would such effects be more or less significant than our assessment? Are there any other economic effects associated with these proposed amendments that we have not discussed? Would the

benefits justify the costs? Are you aware of any data or methodology that could help quantify the costs?

97. Would the proposed amendments requiring submission of all disclosures (other than exhibits) on Schedules 13D and 13G in a structured, machine-readable data language (specifically 13D/G-specific XML) increase the accessibility and usability of those disclosures by investors and markets? Would this effect consequently improve transparency and reduce any existing information asymmetries related to beneficial ownership reporting on Schedules 13D and 13G? What are the incremental compliance costs associated with the structuring requirements? Would those costs be mitigated by the availability of an online web form that would render manually inputted disclosures into 13D/G-specific XML, as discussed? How, if at all, would the nature and magnitude of benefits and costs change if the scope of the proposed structuring requirement were modified (for example, by requiring structuring of only quantitative disclosures)? Are there any other economic effects associated with these proposed amendments that we have not discussed? Would the benefits justify the costs? Are you aware of any data or methodology that can help quantify the costs?

98. Are there any other costs and benefits to market participants that are not identified or are misidentified in the above analysis?

99. Would the proposed amendments affect efficiency, competition and capital formation as we have discussed? Would such effects be more or less significant than our assessment? Are there any other effects on efficiency, competition and capital formation that are not identified or are misidentified in the above analysis? Are you aware of any data or methodology that can help quantify these effects?

100. Are there any other costs and benefits associated with alternative approaches that are not identified or misidentified in the above analysis? Should we consider any of the

alternative approaches outlined above instead of the proposed amendments? Which approach and why?

101. Are there any other alternative approaches to improve Section 13(d) and (g) disclosure that we should consider? If so, what are they and what would be the associated costs or benefits of these alternative approaches?

IV. Paperwork Reduction Act

A. Summary of the Collections of Information

Certain provisions of our rules, schedules and forms that would be affected by the proposed amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[268] We are submitting the proposed amendments to the Office of Management and Budget ("OMB") for review in accordance with the PRA.[269] The hours and costs associated with maintaining, disclosing or providing the information required by the proposed amendments constitute paperwork burdens imposed by such collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information requirement unless it displays a currently valid OMB control number.

The titles for the affected collections of information are:

- "Regulation 13D and Regulation 13G; Schedule 13D and Schedule 13G" (OMB Control No. 3235-0145);
- "Form 3 - Initial Statement of Beneficial Ownership of Securities" (OMB Control No. 235-0104);
- "Form 4 - Statement of Changes In Beneficial Ownership" (OMB Control No. 3235-0287); and

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[268] 44 U.S.C. 3501 *et seq*.

[269] 44 U.S.C. 3507(d); 5 CFR 1320.11.

- "Form 5 - Annual Statement of Beneficial Ownership" (OMB Control No. 3235-0362).

These schedules and forms contain item requirements that outline the information a reporting person must disclose. Compliance with the information collections is mandatory. Responses to the information collections are not kept confidential and there is no mandatory retention period for the information disclosed.

B. Incremental and Aggregate Burden and Cost Estimates for the Proposed Amendments to Rules 13d-2, 13d-3, 13d-5, and 13d-101

Below we estimate the incremental and aggregate effect on paperwork burden as a result of certain of our proposed amendments. To fully analyze the impact of our proposed amendments, our estimates generally constitute the upper limit of the amount of paperwork burden that potentially could be incurred by the parties affected by our proposed amendments, specifically with respect to our proposed amendments to Rules 13d-2, 13d-3, 13d-5, and 13d-101. In deriving our estimates, we recognize that the burdens would likely vary among individual respondents based on a number of factors, including the nature and conduct of their business.

We believe that the proposed amendments potentially could increase the number of responses to the existing collection of information for Schedules 13D and 13G as well as Forms 3, 4 and 5. For example, the proposed amendments to Rule 13d-2(b) with respect to the standard that requires an amendment to Schedule 13G could potentially increase the filing frequency for Schedule 13G amendments.[270] Similarly, our proposed amendments to Rules 13d-3 and 13d-5 potentially could result in additional persons becoming subject to Regulation 13D-G and Section

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[270] *See supra* Section III.C.1.b.ii. For example, Rule 13d-2(b) currently requires that a Schedule 13G be amended 45 days after the calendar year-end in which any change occurred to the information previously reported. Under our proposed amendment to Rule 13d-2(b), a Schedule 13G would have to be amended five business days after the end of the month in which a material change occurred to the information previously reported. Although an amendment under Rule 13d-2(b) currently is required for "any" change in the information previously reported, that rule only requires that one amendment be filed annually, if at all. Under the proposed revisions to that rule, although the standard for determining an amendment obligation would only arise upon a "material" change to the information previously reported, the rule changes could theoretically result in numerous amendments being filed on an annual basis, with as many as 12 Schedule 13G amendments being filed annually pursuant to Rule 13d-2(b).

16 which would result in those persons being required to make initial and amended Schedule 13D and Schedule 13G filings and Form 3, 4, and 5 filings.[271]

For purposes of this PRA, we estimate that there could be an additional 36,702 annual responses to the collection of information under Regulation 13D-G[272] as a result of the proposed amendments, 36,190 of which would be attributable to our proposed amendments to Rule 13d-2,[273] 83 of which would be attributable to our proposed amendment to Rule 13d-3,[274] and 429

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[271] *See supra* Sections III.C.2.b and 3.b. For example, a holder of cash-settled derivative securities may be deemed the beneficial owner of more than 5% of a covered class or a 10% holder as a result of the application of proposed Rule 13d-3(e). In addition, two or more persons may be deemed to have formed a group that beneficially owns more than 5% of a covered class or a 10% holder as a result of the application of our proposed amendments to Rule 13d-5, particularly with respect to the tipper-tippee relationships that are the subject of proposed Rule 13d-5(b)(1)(ii). The group, therefore, may have to comply with Section 13(d) and Section 16.

[272] To the extent that a person or entity incurs a burden imposed by Regulation 13D-G, it is encompassed within the collection of information estimates for Regulation 13D-G. This burden includes the preparation, filing, processing and circulation of initial and amended Schedules 13D and 13G.

[273] The current OMB inventory for Regulation 13D-G reflects 8,587 annual responses. As discussed in Section III.B.2 *supra*, a total of 54,601 total Schedule 13D and 13G filings were made during calendar year 2020. *See supra* notes 201-202 and accompanying text. Of those filings, 31,221, or 57.18%, were Schedule 13G amendments. *Id.* Upon further review of that data set, we note that 25,642, or 82.13%, of those filings were made within the first 45 days of calendar year 2020. For purposes of this PRA estimate, therefore, we assume that 57.18% of the 8,587 annual responses in the current OMB inventory for Regulation 13D-G, or 4,910 responses, are Schedule 13G amendments. Of those 4,910 responses, we assume that 67%, or 3,290 responses, were made pursuant to Rule 13d-2(b). Our proposed amendment to Rule 13d-2(b) could result in 12 Schedule 13G amendments being filed annually pursuant to Rule 13d-2(b), as compared to the one annual amendment currently required by Rule 13d-2(b). *See supra* note 270. As such, for purposes of this PRA, we estimate that there would be 39,480 Schedule 13G amendments filed annually pursuant to Rule 13d-2(b) as a result of our proposed amendments (calculated by multiplying (x) the 3,290 annual responses currently attributable to Rule 13d-2(b) by (y) 12), resulting in 36,190 additional responses to the collection of information under Regulation 13D-G (calculated as the difference between (x) the 39,480 annual responses estimated to be attributable to Rule 13d-2(b) as a result of the proposed amendments and (y) the 3,290 annual responses currently attributable to Rule 13d-2(b)). We note, however, that this estimate likely reflects the upper limit of the potential increases in the number of annual Regulation 13D-G responses as a result of our proposed amendments to Rule 13d-2(b) because (1) the proposed amendments would revise Rule 13d-2(b) to require a Schedule 13G be amended only for a "material" change to the information previously reported, as compared to the current requirement that an amendment be filed for "any" change to the information previously reported and (2) the information previously reported by many Schedule 13G filers may not change materially on a monthly basis.

[274] For purposes of this PRA estimate, we assume that the proposed amendment to Rule 13d-3 potentially would lead to an increase in the number of Schedule 13D filings. We do not expect that the number of Schedule 13G filings would increase given that proposed Rule 13d-3(e)(1)(i)(C) would deem a person to be a beneficial owner only if such person held the derivative securities with the purpose or effect of changing or influencing the control of the issuer of the relevant covered class, or in connection with or as a participant in any transaction having such purpose or effect. Consequently, Exempt Investors are the only type of Schedule 13G filer that could be deemed beneficial owners of a cash-settled derivative security's reference covered class under proposed Rule 13d-3(e) and continue to report beneficial ownership on Schedule 13G. We believe, however, that certain persons filing a Schedule 13G as an Exempt Investor, such as founders of companies and early investors in an issuer's class of equity securities who made their acquisition before the class was registered under Section 12 of the Exchange Act,

of which would be attributable to our proposed amendments to Rule 13d-5.[275] We also estimate that there would be an additional 2,197 Forms 3 filed, an additional 33,821 Forms 4 filed, and an additional 594 Forms 5 filed as a result of the proposed amendments.[276]

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already control or may be in a position to control the issuer, and generally would not have a need to acquire or hold cash-settled derivative securities to effectuate influence or control over an issuer. Exempt Investors also may seek to avoid acquiring beneficial ownership of more than 2% of a covered class as a result of application of proposed Rule 13d-3(e) given that such an acquisition could not only jeopardize their eligibility to rely upon the Section 13(d)(6)(B) exemption, but also reduce or eliminate their capacity to acquire any shares with voting rights during the twelve month period in which the availability of the exemption is measured. As discussed in Section III.B.2 *supra*, there were a total of 10,542 Schedule 13D filings made in calendar year 2020. *See supra* notes 201-202 and accompanying text. Those 10,542 filings comprised 19.3% of the total number of Schedule 13D and 13G filings (54,601) made in calendar year 2020. *Id.* Applying that percentage to the current OMB inventory for Regulation 13D-G, we assume that 1,657 (or 19.3%) of the 8,587 annual responses are Schedule 13D filings. As noted in Section III.C.2.b *supra*, we lack data on the current use of cash-settled derivative securities. Based on the number of Schedule 13D filings that were made in 2020, however, we assume that the proposed amendment to Rule 13d-3 could result in a 5% increase in the number of Schedule 13D filers. As such, we estimate that there would be 83 additional responses to the collection of information under Regulation 13D-G as a result of our proposed amendment to Rule 13d-3 (calculated by multiplying (x) the 1,657 estimated number of Schedule 13D filings in the OMB inventory by (y) 5%). We note, however, that our analysis may overestimate the potential increase in the number of annual Regulation 13D-G responses as a result of our proposed amendment to Rule 13d-3. For example, it is possible that those derivative holders that may beneficially own more than 5% of a covered class as a result of proposed Rule 13d-3(e) would have eventually acquired beneficial ownership of more than 5% of such covered class in the same calendar year even absent application of proposed Rule 13d-3(e). In such cases, although application of proposed Rule 13d-3(e) would accelerate the point in time at which such person's initial Schedule 13D filing obligation arose, it would not necessarily cause additional persons to become Schedule 13D filers. In addition, it is possible that persons who use such derivatives may take steps to avoid becoming beneficial owners—or minimize or entirely eliminate the use of such derivatives—in order to avoid a Schedule 13D filing obligation if proposed Rule 13d-3(e) were adopted.

[275] As discussed in Section III.C.3.b *supra*, because we lack data on how many groups may not be reporting beneficial ownership because of the misimpression that an agreement is required, we cannot provide reliable estimates on how such reporting practices would change. For purposes of this PRA estimate, however, we assume that our proposed amendments to Rule 13d-5 could result in a 5% increase in the number Schedule 13D and 13G filers. As such, based on the current OMB inventory for Regulation 13D-G, which reflects 8,587 annual responses, we estimate that the number of responses will be increased by 429 filings (calculated by multiplying (x) the current 8,587 annual responses by (y) 5%). We note, however, that our analysis may overestimate the potential increase in the number of annual Regulation 13D-G responses as a result of the adoption of our proposed amendments to Rule 13d-5 because such adoption may incentivize persons to take steps to avoid triggering a requirement to report beneficial ownership. For example, two or more persons who collectively beneficially own in excess of 5% of a covered class may avoid coordination that could result in them being found to have "act[ed] as" a group for the purpose of acquiring, holding or disposing of a covered class absent reliance on an exemption. In addition, our proposed amendments to Rule 13d-6 would create new exemptions under which two or more persons will not be deemed to have acquired beneficial ownership of, or otherwise beneficially own, an issuer's equity securities as a group. As such, to the extent beneficial owners qualify for and rely on the proposed exemptions in Rule 13d-6, those exemptions may offset any potential increase in the number of annual Regulation 13D-G responses as a result of the adoption of our proposed amendments to Rule 13d-5.

[276] The current OMB inventories for Forms 3, 4 and 5 reflect 21,968, 338,207 and 5,939 annual responses, respectively. As discussed above, our proposed amendments to Rules 13d-3 and 13d-5 could increase the number of persons required to make Form 3, 4 and 5 filings. *See supra* note 271 and accompanying text. For purposes of this PRA estimate, we assume that any increase in the number of Form 3, 4 and 5 filings will correspond with our estimated increase in the number of Schedule 13D filings as a result of our proposed amendment to Rule 13d-3, which is 5%, and the increase in the number of Schedule 13D and 13G filings as a result of our proposed amendment to Rule 13d-5, which is also 5%. *See supra* notes 274 and 275. Taking the sum of these percentages

In addition to a potential increase in the number of annual responses, we expect that the proposed amendments would change the estimated burden per response for Regulation 13D-G.[277] For both Schedule 13D and Schedule 13G filers, we expect that the proposed structured data requirements would increase the estimated burden per response by requiring that the disclosures in those schedules be made using the 13D/G-specific XML. For Schedule 13D filers, we expect that the amendment to Rule 13d-3 would increase the estimated burden per response if such filers hold cash-settled derivative securities as a result of the calculations required by proposed Rule 13d-3(e) to determine the number of reference securities that such filers would be deemed to beneficially own pursuant to that proposed rule.[278] Finally, for Schedule 13D, we expect that the amendments to Item 6 of Schedule 13D potentially could increase the estimated burden per response by specifying that disclosure is required under Item 6 for the use of cash-settled derivative securities with respect to an issuer's securities.[279]

The burden estimates were calculated by estimating the number of parties we anticipate would expend time, effort and/or financial resources to generate, maintain, retain, disclose or provide information in connection with the proposed amendments and then multiplying by the estimated amount of time, on average, such parties would devote in response to the proposed amendments. The following table summarizes the calculations and assumptions used to derive our estimates of the aggregate increase in burden corresponding to the proposed amendments.

(10%) and applying that sum percentage to the current OMB inventories for Forms 3, 4 and 5, we estimate that the number of responses will be increased by 2,197, 33,821 and 594 for Forms 3, 4 and 5, respectively. But see *supra* notes 274 and 275 for a discussion of why this analysis may overestimate the potential increase in the number of annual Form 3, 4 and 5 responses as a result of our proposed amendments to Rules 13d-3 and 13d-5.

[277] We do not expect that the proposed amendments would change the estimated burden per response for Form 3, 4, or 5 because the proposed amendments would not alter the filing deadlines for those forms or the type or form of the information required to be disclosed.

[278] Although applicable to both current and potential Schedule 13D and 13G filers, we assume that the proposed amendment to Rule 13d-3, if adopted, would affect only the burden hours for Schedule 13D filers, and not for Schedule 13G filers. See *supra* note 274 for a discussion of why we do not believe that the proposed amendment to Rule 13d-3 would impact Schedule 13G filers.

[279] We further expect, however, that this potential increase may be offset by the proposed amendment to Item 6 that would delete the "including but not limited to" proviso.

PRA Table 1. Calculation of Increase in Burden Hours Resulting from the Proposed Amendments

	Schedule 13D Filings (A)	Schedule 13G Filings (B)
Number of Responses [a]	1,823	43,466
Burden Hours Per Response [b]	4.29	3.69
Column Total [c]	7,821	160,390
Aggregate Increase in Burden Hours [d]	140,799	

[a] As discussed in Section III.B.2 *supra*, there were 54,601 total Schedule 13D and 13G filings during calendar year 2020, comprised of 10,542 Schedule 13D filings and 44,059 Schedule 13G filings. *See supra* notes 201-202 and accompanying text. We note, therefore, that 19.3% of the filings were Schedule 13D filings and 80.7% of the filings were Schedule 13G filings. Applying those percentages to the current OMB inventory for Regulation 13D-G, we assume that 1,657 (or 19.3%) of the 8,587 annual responses are Schedule 13D filings and that the remaining 6,930 (or 80.7%) are Schedule 13G filings. When taking into account the potential effects of the proposed amendments, if adopted, we estimate that (1) the number of Schedule 13D filings could increase by 10% (166 additional filings) as a result of the proposed amendments to Rules 13d-3 and 13d-5 and (2) the number of Schedule 13G filings could increase by 5% (346 additional filings) as a result of the proposed amendments to Rule 13d-5 and 36,190 as a result of the proposed amendments to Rule 13d-2. *See supra* notes 273-275.

[b] The current OMB inventory reflects a total of 27,412 annual burden hours for Regulation 13D-G. When applied to the current OMB inventory of 8,587 annual responses, this results in an average of 3.19 burden hours per Schedule 13D or 13G filing. We use these per filing burden hours as a baseline for estimating the burden impact of the proposed amendments. For the proposed structured data requirements, we estimate they would increase the burden per response for both Schedule 13D and 13G filers by 0.5 burden hours. Our assumption is that the burden would be greatest in the first year after adoption, as filers adjust to the new requirement and update their Schedule 13D and 13G preparation and filing processes accordingly. We estimate that the burden of the proposed structured data requirement would be 1 hour in the first year and 0.25 hours in each of the following two years for a three-year average of 0.5 burden hours. For the proposed amendment to Rule 13d-3, we estimate they would increase the burden per respondent by 0.5 hours. Our assumption is that the burden would be the greatest in the first year after adoption, as filers adjust to the new requirements and develop systems and processes to determine the amount of their beneficial ownership as a result of their holdings of cash-settled derivative securities. We estimate that the burden of the proposed amendment to Rule 13d-3 would be 1 hour in the first year and 0.25 hours in each of the following two years for a three-year average of 0.5 burden hours. Although we expect that the burden of complying with the requirements of proposed Rule 13d-3(e) (including, in particular, the requirements in the notes to proposed Rule 13d-3(e)(2) that the relevant calculations be performed on a daily basis) would be greater than the burden of complying with the structured data requirements, we also expect that a relatively small percentage of all Schedule 13D filers hold cash-settled derivative securities and, therefore, Rule 13d-3(e) would only apply to a subset of Schedule 13D filers (whereas the structured data requirements would apply to all Schedule 13D and 13G filers). As such, we believe that it is appropriate to adjust the burden per respondent accordingly. Finally, for the proposed amendments to Item 6 of Schedule 13D, we estimate they would increase the burden per respondent by 0.1 hours. Although these proposed amendments could, in some cases, substantially increase the amount of disclosure made pursuant to Item 6, we believe that this estimate accurately reflects that only a relatively small percentage of all Schedule 13D filers hold cash-settled derivative securities and, therefore, would be required to make additional disclosures. In addition, we also expect that any increased burden may be somewhat offset by the proposed amendment to Item 6 that would delete the "including but not limited to" proviso. Taken together, we estimate that

the proposed amendments could increase the annual burden hours per Schedule 13D filing by 1.1 hours and increase the annual burden hours per Schedule 13G filing by 0.5 hours. When added to the current average of 3.19 burden hours per Schedule 13D or 13G filing, we estimate that if the proposed amendments were adopted, the average burden hours per Schedule 13D filing would be 4.29 hours and the average burden hours per Schedule 13G filing would be 3.69 hours.

[c] Derived by multiplying the number of responses in each column by the burden hours per response.

[d] Derived by adding together the column totals (168,211 hours) and subtracting from that sum the total annual burden hours for Regulation 13D-G currently reflected in the OMB inventory (27,412 hours).

The table below illustrates the incremental change to the total annual compliance burden in hours and in costs[280] as a result of the proposed amendments. The table sets forth the percentage estimates we typically use for the burden allocation for each response.

PRA Table 2. Calculation of Aggregate Increase in Burden Hours Resulting from the Proposed Amendments

Total Number of Estimated Responses (A)†	Total Increase in Burden Hours (B)††	Increase in Burden Hours Per Response (C) = (B)/(A)	Increase in Internal Hours (D) = (B) x 75%	Increase in Professional Hours (E) = (B) x 25%	Increase in Professional Costs (F) = (E) x $400
45,289	140,799	3†††	105,599	35,200	$14,080,000

† This number reflects an estimated increase of 36,702 annual responses to the existing Regulation 13D-G collection of information. *See supra* notes 272-275 and accompanying text. The current OMB PRA inventory estimates that 8,587 responses are filed annually for Regulation 13D-G.

†† Calculated as the sum of annual burden increases estimated for Schedule 13D and 13G filings. *See supra* PRA Table 1.

††† The estimated increases in Columns (C), (D) and (E) are rounded to the nearest whole number.

Finally, the table that follows summarizes the requested paperwork burden for Regulation 13D-G that will be submitted to OMB for review in accordance with the PRA, including the estimated total reporting burdens and costs, under the proposed amendments.

PRA Table 3. Requested Paperwork Burden for Regulation 13D-G under the Proposed Amendments

Current Burden			Program Change			Revised Burden		
Current Annual Responses (A)	Current Burden Hours (B)	Current Cost Burden (C)	Increase in Number of Responses (D)‡	Increase in Internal Hours (E)‡‡	Increase in Professional Costs (F)‡‡‡	Annual Responses (G) = (A) + (D)	Burden Hours (H) = (B) + (E)	Cost Burden (I) = (C) + (F)

[280] Our estimates assume that 75% of the burden is borne by the reporting persons and 25% is borne by outside professionals at $400 per hour. We recognize that the costs of retaining outside professionals may vary depending on the nature of the professional services; but for purposes of this PRA analysis, we estimate that such costs would be an average of $400 per hour.

8,587	27,412	$32,894,000	36,702	105,599	$14,080,000	45,289	133,011	$46,974,000

[±] *See supra* notes 272-275 and accompanying text.

[±±]From Column (D) in PRA Table 2.

[±±±]From Column (F) in PRA Table 2.

In addition, the requested increase in the paperwork burden for Forms 3, 4, and 5 that will be submitted to OMB for review in accordance with the PRA will be 1,099 hours, 16,911 hours and 594 hours, respectively, and zero dollars for each Form.[281]

Given the number of variables that are highly specific to the unique circumstances of each type of person affected by the proposed amendments, our ability to predict the magnitude of corresponding costs and burdens with any precision is limited. Therefore, we encourage public commenters to consider our assessment and provide additional information and, where available, data that would be helpful in deriving our estimates for purposes of the PRA.

Request for Comment

Pursuant to 44 U.S.C. 3506(c)(2)(B), we request comment in order to:

- Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information would have practical utility;
- Evaluate the accuracy and assumptions and estimates of the burden of the proposed collection of information;
- Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected;

[281] These amounts are calculated based on the estimated number of additional Forms 3, 4, and 5 filed as a result of the proposed amendments—2,197, 33,821 and 594, respectively, *see supra* note 276 and accompanying text—multiplied by the current OMB inventory number of hours per response. The current OMB inventory indicates that there are 0.5 burden hours associated with each Form 3 and Form 4 filing and one burden hour associated with each Form 5 filing. The current OMB inventory also indicates that there are $0 of burden dollars associated with each Form 3, 4, and 5 filing.

- Evaluate whether there are ways to minimize the burden of the collection of information on those who respond, including through the use of automated collection techniques or other forms of information technology; and
- Evaluate whether the proposed amendments would have any effects on any other collection of information not previously identified in this section.

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing the burdens. Persons who desire to submit comments on the collection of information requirements should direct their comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy of the comments to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549, with reference to File No. S7-06-22. Requests for materials submitted to the OMB by us with regard to these collections of information should be in writing, refer to File No. S7-06-22 and be submitted to the Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington DC 20549. Because the OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, a comment to the OMB is best assured of having its full effect if the OMB receives it within 30 days of publication.

V. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"),[282] the Commission must advise OMB as to whether the proposed amendments constitute a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results, or is likely to result, in:

- An annual effect on the economy of $100 million or more (either in the form of an

[282] Pub. L. 104-121, Title II, 110 Stat. 857 (1996); 5 U.S.C. 801 *et seq*.

increase or a decrease);

- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment or innovation.

We request comment on whether the proposed amendments would be a "major rule" for purposes of SBREFA. We solicit comment and empirical data on: (a) the potential effect on the U.S. economy on an annual basis; (b) any potential increase in costs or prices for consumers or individual industries; and (c) any potential effect on competition, investment or innovation. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

VI. Regulatory Flexibility Act Certification

The RFA requires Federal agencies, in promulgating rules, to consider the impact of those rules on small entities. Section 603(a) of the Administrative Procedure Act,[283] as amended by the RFA, generally requires the Commission to undertake a regulatory flexibility analysis of all proposed rules, or proposed rule amendments, to determine the impact of such rulemaking on "small entities."[284] Section 605(b) of the RFA states that this requirement shall not apply to any proposed rule or proposed rule amendment which, if adopted, would not have a significant economic impact on a substantial number of small entities.[285]

For purposes of Commission rulemaking in connection with the RFA, a small entity includes: (1) when used with reference to an "issuer" or a "person," other than an investment company, an "issuer" or "person" that, on the last day of its most recent fiscal year, had total

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[283] 5 U.S.C. 603(a).

[284] Although Section 601(b) of the RFA defines the term "small entity," the statute permits agencies to formulate their own definitions. The Commission has adopted definitions for the term "small entity" for the purposes of Commission rulemaking in accordance with the RFA. Those definitions, as relevant to this proposed rulemaking, are set forth in 17 CFR 240.0-10. *See* Final Definitions of "Small Business" and "Small Organization" for Purposes of the Regulatory Flexibility Act, Release No. 34-18452 (Jan. 28, 1982) [47 FR 5215 (Feb. 4, 1982)].

[285] *See* 5 U.S.C. 605(b).

assets of $5 million or less;[286] or (2) a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to 17 CFR 240.17a-5(d) ("Rule 17a-5(d)"),[287] or, if not required to file such statements, a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the last business day of the preceding fiscal year (or in the time that it has been in business, if shorter); and is not affiliated with any person (other than a natural person) that is not a small business or small organization.[288] An investment company, including a business development company,[289] is considered to be a "small business" if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[290]

Although the proposed amendments would apply to beneficial owners regardless of their size, we believe that the vast majority of the beneficial owners that would be subject to the proposed amendments would not be small entities for purposes of the RFA. For example, the proposed amendments to the filing deadlines in Rules 13d-1 and 13d-2, as well as the proposed amendments to Rules 13 and 201 of Regulation S-T and the proposed structured data requirements, only would impact persons who beneficially own more than 5% of a covered class. In addition, the proposed amendment to Rule 13d-3 would apply to holders of cash-settled derivative securities; we believe that persons who hold such derivatives are generally larger, sophisticated investors. Similarly, while the proposed amendments to Rule 13d-5 could apply to numerous smaller persons who individually, absent formation of a group pursuant to the

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[286] *See* 17 CFR 240.0-10(a).

[287] Rule 17a-5(d).

[288] *See* 17 CFR 240.0-10(c).

[289] Business development companies are a category of closed-end investment company that are not registered under the Investment Company Act [15 U.S.C. 80a-2(a)(48) and 80a-53-64].

[290] 17 CFR 270.0-10(a).

proposed amendments, would not beneficially own more than 5% of a covered class, we believe that persons who take concerted actions that would implicate the proposed amendments generally would be larger, sophisticated investors. That same belief applies to the exemptions contained in the proposed amendments to Rule 13d-6.

For the foregoing reasons, the Commission certifies, pursuant to 5 U.S.C. 605(b), that the proposed amendments, if adopted, would not have a significant economic impact on a substantial number of small entities for purposes of the RFA. We invite commenters to address whether the proposed amendments would have a significant economic impact on a substantial number of small entities, and, if so, what would be the nature of any impact on small entities. We request that commenters provide empirical data to illustrate the extent of the impact. Such comments will be considered in the preparation of any final rules (and in a Final Regulatory Flexibility Analysis if one is needed) and will be placed in the same public file as comments on the proposed amendments themselves.

VII. Statutory Authority

We are proposing the rule amendments contained in this release under the authority set forth in Sections 3(a), 3(b), 13, 16, and 23(a) of the Exchange Act.

List of Subjects

17 CFR Part 232

Administrative practice and procedure, Reporting and recordkeeping requirements, Securities.

17 CFR Part 240

Reporting and recordkeeping requirements, Securities.

TEXT OF AMENDMENTS

For the reasons set out in the preamble, the Commission proposes to amend title 17, chapter II, of the Code of Federal Regulations as follows:

PART 232 — REGULATION S-T - GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

1. The general authority citation for part 232 continues to read as follows:

Authority: 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s(a), 77z-3, 77sss(a), 78c(b), 78*l*, 78m, 78n, 78o(d), 78w(a), 78*ll*, 80a-6(c), 80a-8, 80a-29, 80a-30, 80a-37, 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

§ 232.13 [Amended]

2. Amend § 232.13(a)(4) by:

a. Removing the words "or a Schedule 14N" and adding ", a Schedule 14N" in their place; and

b. Adding the phrase ", or a Schedule 13D or Schedule 13G, inclusive of any amendments thereto (§§240.13d-101 and 240.13d-102 of this chapter)," immediately preceding "submitted by direct transmission".

§ 232.201 [Amended]

3. Amend § 232.201(a) introductory text by:

a. Removing the word "or" that immediately precedes "an Asset Data File"; and

b. Adding after the phrase "Asset Data File (as defined in § 232.11)," the phrase "or a Schedule 13D or Schedule 13G (§§240.13d-101 and 240.13d-102 of this chapter)".

PART 240 – GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

4. The authority citation for part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78*l*, 78m, 78n, 78n-1, 78o, 78o-4, 78o-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78dd, 78*ll*, 78mm, 80a-20, 80a-23,

80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 *et seq.,* and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; Pub. L. 111-203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112-106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

Section 240.13d-3 is also issued under Public Law 111-203 § 766, 124 Stat. 1799 (2010).

* * * * *

5. Amend § 240.13d-1 by revising paragraphs (a), (b)(2), (c) introductory text, (d), (e)(1) introductory text, (f)(1), (g), and (i) to read as follows:

§240.13d-1 Filing of Schedules 13D and 13G.

(a) Any person who, upon acquiring directly or indirectly the beneficial ownership of any equity security of a class which is specified in paragraph (i) of this section, is directly or indirectly the beneficial owner of more than five percent of the class shall, within five days after the date of the acquisition, file with the Commission, a statement containing the information required by Schedule 13D (§240.13d-101).

(b) * * *

(2) The Schedule 13G filed pursuant to paragraph (b)(1) of this section shall be filed within five business days after the end of the month in which the person became obligated under paragraph (b)(1) of this section to report the person's beneficial ownership as of the last day of the month, *provided*, that it shall not be necessary to file a Schedule 13G unless the percentage of the class of equity security specified in paragraph (i) of this section beneficially owned as of the end of the month is more than five percent.

(c) A person who would otherwise be obligated under paragraph (a) of this section to file a statement on Schedule 13D (§240.13d-101) may, in lieu thereof, file with the Commission, within five days after the date of an acquisition described in paragraph (a) of this section, a short-form statement on Schedule 13G (§240.13d-102). *Provided*, that the person:

* * * * *

(d) Any person who, as of the end of any month, is or becomes directly or indirectly the beneficial owner of more than five percent of any equity security of a class specified in paragraph (i) of this section and who is not required to file a statement under paragraph (a) of this section by virtue of the exemption provided by Section 13(d)(6)(A) or (B) of the Act (15 U.S.C. 78m(d)(6)(A) or 78m(d)(6)(B)), or because the beneficial ownership was acquired prior to December 22, 1970, or because the person otherwise (except for the exemption provided by Section 13(d)(6)(C) of the Act (15 U.S.C. 78m(d)(6)(C))) is not required to file a statement, shall file with the Commission, within five business days after the end of the month in which the person became obligated to report under this paragraph (d), a statement containing the information required by Schedule 13G (§240.13d-102).

(e)(1) Notwithstanding paragraphs (b) and (c) of this section and §240.13d-2(b), a person that has reported that it is the beneficial owner of more than five percent of a class of equity securities in a statement on Schedule 13G (§240.13d-102) pursuant to paragraph (b) or (c) of this section, or is required to report the acquisition but has not yet filed the schedule, shall immediately become subject to paragraph (a) of this section and §240.13d-2(a) and shall file a statement on Schedule 13D (§240.13d-101) within five days if, and shall remain subject to those requirements for so long as, the person:

* * * * *

(f)(1) Notwithstanding paragraph (c) of this section and §240.13d-2(b), persons reporting on Schedule 13G (§240.13d-102) pursuant to paragraph (c) of this section shall immediately become subject to paragraph (a) of this section and §240.13d-2(a) and shall remain subject to those requirements for so long as, and shall file a statement on Schedule 13D (§240.13d-101) within five days after the date on which the person's beneficial ownership equals or exceeds 20 percent of the class of equity securities.

* * * * *

(g) Any person who has reported an acquisition of securities in a statement on Schedule 13G (§240.13d-102) pursuant to paragraph (b) of this section, or has become obligated to report on the Schedule 13G (§240.13d-102) but has not yet filed the Schedule, and thereafter ceases to be a person specified in paragraph (b)(1)(ii) of this section or determines that it no longer has acquired or holds the securities in the ordinary course of business shall immediately become subject to paragraph (a) or (c) of this section (if the person satisfies the requirements specified in paragraph (c)) and §240.13d-2 (a), (b), or (d), and shall file, within five days thereafter, a statement on Schedule 13D (§240.13d-101) or amendment to Schedule 13G, as applicable, if the person is a beneficial owner at that time of more than five percent of the class of equity securities.

* * * * *

(i)(1) For the purpose of this section, the term "equity security" means any equity security of a class which is registered pursuant to section 12 of that Act, or any equity security of any insurance company which would have been required to be so registered except for the exemption contained in section 12(g)(2)(G) of the Act, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940; provided, such term shall not include securities of a class of non-voting securities.

(2) For the purpose of this section, the term "business day" means any day, other than Saturday, Sunday, or a Federal holiday, from 6 a.m. to 10 p.m., eastern time.

* * * * *

6. Amend § 240.13d-2 by:

a. Revising paragraphs (a), (b), (c), and (d); and

b. Removing the parenthetical authority citation at the end of the section.

The revisions read as follows:

§240.13d-2 Filing of amendments to Schedules 13D or 13G.

(a) If any material change occurs in the facts set forth in the Schedule 13D (§240.13d-101) required by §240.13d-1(a), including, but not limited to, any material increase or decrease in the percentage of the class beneficially owned, the person or persons who were required to file the statement shall file or cause to be filed with the Commission an amendment disclosing that change within one business day after that change. An acquisition or disposition of beneficial ownership of securities in an amount equal to one percent or more of the class of securities shall be deemed "material" for purposes of this section; acquisitions or dispositions of less than those amounts may be material, depending upon the facts and circumstances.

(b) Notwithstanding paragraph (a) of this section, and provided that the person filing a Schedule 13G (§240.13d-102) pursuant to §240.13d-1(b) or (c) continues to meet the requirements set forth therein, any person who has filed a Schedule 13G (§240.13d-102) pursuant to §240.13d-1(b), (c), or (d) shall amend the statement within five business days after the end of each month if, as of the end of the month, there are any material changes in the information reported in the previous filing on that Schedule, including, but not limited to, any material increase or decrease in the percentage of the class beneficially owned; *provided, however,* that an amendment need not be filed with respect to a change in the percent of class outstanding previously reported if the change results solely from a change in the aggregate number of securities outstanding. Once an amendment has been filed reflecting beneficial ownership of five percent or less of the class of securities, no additional filings are required unless the person thereafter becomes the beneficial owner of more than five percent of the class and is required to file pursuant to §240.13d-1.

(c) Any person relying on §240.13d-1(b) that has filed its initial Schedule 13G (§240.13d-102) pursuant to §240.13d-1(b) shall, in addition to filing any amendments pursuant to §240.13d-2(b), file an amendment on Schedule 13G (§240.13d-102) within five days after the date on which the person's direct or indirect beneficial ownership exceeds 10 percent of the class of equity securities. Thereafter, that person shall, in addition to filing any amendments pursuant

to §240.13d-2(b), file an amendment on Schedule 13G (§240.13d-102) within five days after the date on which the person's direct or indirect beneficial ownership increases or decreases by more than five percent of the class of equity securities. Once an amendment has been filed reflecting beneficial ownership of five percent or less of the class of securities, no additional filings are required by this paragraph (c).

(d) Any person relying on §240.13d-1(c) that has filed its initial Schedule 13G (§240.13d-102) pursuant to §240.13d-1(c) shall, in addition to filing any amendments pursuant to paragraph (b) of this section, file an amendment on Schedule 13G (§240.13d-102) within one business day after acquiring, directly or indirectly, greater than 10 percent of a class of equity securities specified in §240.13d-1(d), and thereafter within one business day after increasing or decreasing its beneficial ownership by more than five percent of the class of equity securities. Once an amendment has been filed reflecting beneficial ownership of five percent or less of the class of securities, no additional filings are required by this paragraph (d).

* * * * *

7. Amend § 240.13d-3 by:

a. Revising paragraph (d) introductory text;

b. Adding paragraph (e); and

c. Removing the parenthetical authority citation at the end of the section.

The revision and addition read as follows:

§240.13d-3 Determination of beneficial owner.

* * * * *

(d) Notwithstanding the provisions of paragraphs (a), (c), and (e) of this section:

* * * * *

(e)(1)(i) A person shall be deemed to be the beneficial owner of a number of securities for purposes of Sections 13(d) and 13(g) of the Act, calculated in accordance with paragraph (e)(2) of this section, in a class of equity securities if that person holds a derivative security, as

defined in §240.16a-1(c) (Rule 16a-1(c)), other than a security-based swap as defined by section 3(a)(68) of the Act (15 U.S.C. 78c(a)(68)) and the rules and regulations thereunder in this part:

(A) That references such class of equity securities;

(B) To the extent that such derivative security is required to be settled exclusively in cash and holding such security has not otherwise resulted in a determination that the person is a beneficial owner under this section; and

(C) That is held with the purpose or effect of changing or influencing the control of the issuer of such class of equity securities, or in connection with or as a participant in any transaction having such purpose or effect.

(ii) Any securities not outstanding which are referenced by such derivative security shall be deemed to be outstanding for the purpose of computing the percentage of outstanding securities of the class owned by such person but shall not be deemed to be outstanding for the purpose of computing the percentage of the class by any other person.

(2)(i) The number of securities that a person shall be deemed to beneficially own pursuant to paragraph (e)(1) of this section shall be the larger of (in each case as applicable):

(A) The product that is obtained by multiplying {x} the number of securities by reference to which the amount payable under the derivative security is determined by {y} the delta of the derivative security; and

(B) The number that is obtained by {x} dividing the notional amount of the derivative security by the most recent closing market price of the reference equity security, and then {y} multiplying such quotient by the delta of the derivative security.

(ii) For the purpose of this section, the term "delta" means, with respect to a derivative security, the ratio that that is obtained by comparing {x} the change in the value of the derivative security to {y} the change in the value of the reference equity security.

NOTE 1 TO PARAGRAPH (e)(2). For purposes of determining the number of equity securities that a person shall be deemed to beneficially own pursuant to this paragraph (e), only

long positions in derivative securities should be counted. Short positions in derivative securities should not be netted against long positions or otherwise taken into account.

NOTE 2 TO PARAGRAPH (e)(2). For purposes of determining the number of equity securities that a person shall be deemed to beneficially own pursuant to this paragraph (e), the calculation in clause (x) of paragraph (e)(2)(i)(B) of this section should be performed on a daily basis.

NOTE 3 TO PARAGRAPH (e)(2). If a derivative security does not have a fixed delta, then a person who holds such derivative security should calculate the delta on a daily basis, for purposes of determining the number of equity securities that such person shall be deemed to beneficially own pursuant to this paragraph (e), based on the closing market price of the reference equity security on that day.

8. Revise § 240.13d-5 to read as follows:

§240.13d-5 Acquisition of beneficial ownership.

(a) A person who becomes a beneficial owner of securities shall be deemed to have acquired such beneficial ownership for purposes of section 13(d)(1) of the Act, whether such acquisition was through purchase or otherwise. However, executors or administrators of a decedent's estate generally will be presumed not to have acquired the beneficial ownership held by the decedent's estate until such time as such executors or administrators are qualified under local law to perform their duties.

(b)(1)(i) When two or more persons act as a group under section 13(d)(3) of the Act, the group shall be deemed to have acquired beneficial ownership, for purposes of section 13(d) of the Act, of all equity securities of an issuer beneficially owned by any such persons as of the date of the group's formation.

(ii) A person that is or will be required to report beneficial ownership on Schedule 13D (§240.13d-101) who, in advance of making such filing, directly or indirectly discloses to any other market participant the non-public information that such filing will be made, acts as a group

with such other person or persons within the meaning of section 13(d)(3) of the Act to the extent such information was shared with the purpose of causing such other person or persons to acquire equity securities of the same class for which the Schedule 13D will be filed, and such group will be deemed to have acquired any beneficial ownership held in the same class by its members as of the earliest date on which such other person or persons acquired beneficial ownership based on such information.

(iii) A group regulated as a person pursuant to section 13(d)(3) of the Act shall be deemed to have acquired beneficial ownership, as determined under paragraph (a) of this section and for purposes of sections 13(d)(1) and (2) of the Act, if any member of the group becomes the beneficial owner of additional equity securities in the same class beneficially owned by the group after the date of the group's formation. The beneficial ownership so acquired shall be reported as being held by the group through the earlier of {x} the date of the group's dissolution or {y} the date of that member's withdrawal from the group.

(iv) Notwithstanding paragraph (b)(1)(iii) of this section, a group regulated under section 13(d)(3) of the Act shall not be deemed to have acquired beneficial ownership, as determined under paragraph (a) of this section, if a member of the group becomes the beneficial owner of additional equity securities in the same class beneficially owned by the group after the date of group formation through a sale by or transfer from another member of the group.

(2)(i) When two or more persons act as a group under section 13(g)(3) of the Act, the group shall be deemed to have become the beneficial owner, for purposes of sections 13(g)(1) and (2) of the Act, of all equity securities of an issuer beneficially owned by any such persons as of the date of group formation notwithstanding the absence of an acquisition subject to section 13(d) of the Act.

(ii) A group regulated as a person pursuant to section 13(g)(3) of the Act shall be deemed to have become the beneficial owner, for purposes of sections 13(g)(1) and (2) of the Act, if any member of the group becomes a beneficial owner of additional equity securities in the same class

held by the group after the date of the group's formation and through the earlier of {x} the date of the group's dissolution or {y} the date of that member's withdrawal from the group.

(iii) Notwithstanding paragraph (b)(2)(ii) of this section, a group regulated under section 13(g)(3) of the Act shall not be deemed to have become the beneficial owner of additional equity securities in the same class beneficially owned by the group if a member of the group becomes the beneficial owner of additional such equity securities in that same class after the date of the group's formation through a sale by or transfer from another member of the group.

9. Revise § 240.13d-6 to read as follows:

§240.13d-6 Exemption of certain acquisitions.

(a) The acquisition of securities of an issuer by a person who, prior to such acquisition, was a beneficial owner of more than five percent of the outstanding securities of the same class as those acquired shall be exempt from section 13(d) of the Act; provided, that:

(1) The acquisition is made pursuant to preemptive subscription rights in an offering made to all holders of securities of the class to which the preemptive subscription rights pertain;

(2) Such person does not acquire additional securities except through the exercise of his pro rata share of the preemptive subscription rights; and

(3) The acquisition is duly reported, if required, pursuant to section 16(a) of the Act and the rules and regulations thereunder in this part.

(b) A group shall be deemed not to have acquired any equity securities beneficially owned by the other members of the group solely by virtue of their concerted actions relating to the purchase of equity securities directly from an issuer in a transaction not involving a public offering; provided, that:

(1) All the members of the group are persons specified in § 240.13d-1(b)(1)(ii);

(2) The purchase is in the ordinary course of each member's business and not with the purpose nor with the effect of changing or influencing control of the issuer, nor in connection

with or as a participant in any transaction having such purpose or effect, including any transaction subject to § 240.13d-3(b);

(3) There is no agreement among, or between any members of the group to act together with respect to the issuer or its securities except for the purpose of facilitating the specific purchase involved; and

(4) The only actions among or between any members of the group with respect to the issuer or its securities subsequent to the closing date of the non-public offering are those which are necessary to conclude ministerial matters directly related to the completion of the offer or sale of the securities.

(c) Two or more persons shall not be deemed to have acquired beneficial ownership of, for purposes of section 13(d) of the Act, or otherwise beneficially own, for purposes of section 13(g) of the Act, an issuer's equity securities as a group under sections 13(d)(3) or 13(g)(3) of the Act solely because of their concerted actions with respect to such issuer's equity securities, including engagement with one another or the issuer or acquiring, holding, voting or disposing of the issuer's equity securities; provided, that:

(1) Communications among or between such persons are not undertaken with the purpose or the effect of changing or influencing control of the issuer, and are not made in connection with or as a participant in any transaction having such purpose or effect, including any transaction subject to § 240.13d-3(b); and

(2) Such persons, when taking such concerted actions, are not directly or indirectly obligated to take such actions.

(d) Two or more persons who, in the ordinary course of their business, enter into a bona fide purchase and sale agreement setting forth the terms of a derivative security, as defined in §240.16a-1(c) (Rule 16a-1(c)), with respect to a class of equity securities shall not be deemed to have acquired beneficial ownership of, for purposes of section 13(d)(1) of the Act and § 240.13d-5, or otherwise beneficially own, for purposes of section 13(g) of the Act, any such

equity securities of the issuer referenced in the agreement as a group under sections 13(d)(3) or 13(g)(3) of the Act; provided, that such persons did not enter into the agreement with the purpose or effect of changing or influencing control of the issuer, or in connection with or as a participant in any transaction having such purpose or effect, including any transaction subject to § 240.13d-3(b).

10. Amend § 240.13d-101 by revising Item 6 to read as follows:

§ 240.13d-101 Schedule 13D - Information to be included in statements filed pursuant to § 240.13d-1(a) and amendments thereto filed pursuant to § 240.13d-2(a).

* * * * *

Item 6. Contracts, Arrangements, Understandings or Relationships With Respect to Securities of the Issuer. Describe any contracts, arrangements, understandings, or relationships (legal or otherwise) among the persons named in Item 2 and between such persons and any person with respect to any securities of the issuer, including any class of such issuer's securities used as a reference security, in connection with any of the following: call options, put options, security-based swaps or any other derivative securities, transfer or voting of any of the securities, finder's fees, joint ventures, loan or option arrangements, guarantees of profits, division of profits or loss, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, understandings, or relationships have been entered into. Include such information for any of the securities that are pledged or otherwise subject to a contingency the occurrence of which would give another person voting power or investment power over such securities except that disclosure of standard default and similar provisions contained in loan agreements need not be included.

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By the Commission.

Dated: February 10, 2022.

Vanessa A. Countryman,

Secretary.

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