

February 14, 2022

SEC Proposes Rule Amendments Related to Beneficial Ownership Reporting

Sweeping Changes Are Proposed to Regulation 13D-G

SUMMARY

On February 10, 2022, the Securities and Exchange Commission (the “SEC”) voted 3 to 1¹ (Commissioner Peirce [dissenting](#)) to propose certain amendments to Regulation 13D-G and Regulation S-T to, among other things, shorten the filing deadlines for beneficial ownership reports on Schedules 13D and 13G, expand the application of Regulation 13D-G to certain cash-settled derivative securities and broaden the circumstances under which persons are treated as a “group.”

As proposed, the amendments would:

- accelerate the filing deadline for Schedule 13D beneficial ownership reports from 10 days to five days and require that amendments be filed within one business day after a material change, and also generally accelerate the filing deadlines for Schedule 13G beneficial ownership reports;
- expand the application of Regulation 13D-G to cash-settled derivative securities (other than security-based swaps, which are subject to a parallel proposal) if held with a control intent by deeming holders of such derivative securities as beneficial owners of the underlying reference equity securities;
- add specification as to the circumstances under which two or more persons have formed a “group” that would be subject to beneficial ownership reporting obligations and provide new exemptions to permit such persons to communicate and consult with each other, jointly engage issuers and execute certain cash-settled derivative transactions without being subject to regulation as a group; and
- directly impact the 10% calculation of beneficial ownership for purposes of Section 16 of the Securities Exchange Act of 1934 (the “Exchange Act”).

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The SEC is seeking comment from the public on the proposed amendments. Comments are due on the later of 30 days after the proposed amendments are published in the Federal Register and April 11, 2022, which is 60 days after publication on the SEC's website.

BACKGROUND

Sections 13(d) and 13(g) of the Exchange Act, together with Regulation 13D-G, require investors who beneficially own more than 5% of a covered class of securities to publicly report their beneficial ownership on Schedule 13D (for active investors) or Schedule 13G (for passive investors and certain pre-IPO holders). The current deadlines for filing an initial Schedule 13D and Schedule 13G have not been updated since 1968 and 1977, respectively.² According to the Release, however, technological advances, including the ability to submit filings electronically through the SEC's EDGAR system, have "led to calls for a reassessment of the 10-day initial filing deadline."³ Accordingly, the SEC's proposed amendments are stated to be directed at modernizing the beneficial ownership reporting rules for today's markets by, among other things, shortening the Schedule 13D and Schedule 13G reporting deadlines. The proposed changes to the Schedule 13G reporting deadlines also differ based on type of qualifying investor, with "Passive Investors" being subject to significantly shorter deadlines than "Qualified Institutional Investors" and "Exempt Investors" for both initial and amended 13G filings.

The Release uses three categories of Schedule 13G filers:

- "Qualified Institutional Investors" who are eligible to file a Schedule 13G pursuant to Rule 13d-1(b) and are permitted to file an initial report on Schedule 13G within 45 days after year-end;
- "Passive Investors" who are eligible to file a Schedule 13G pursuant to Rule 13d-1(c); and
- "Exempt Investors" who are eligible to file a Schedule 13G pursuant to Rule 13d-1(d) and who acquired their greater than 5% position before the issuer's initial public offering.

For ease of reference, we use the same terms in the same manner in this memo.

Sections 13(d) and 13(g) of the Exchange Act also currently provide that 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 single person for the purposes of beneficial ownership reporting. The proposed amendments would significantly alter the current rule and expand the "group" concept.

Section 16 of the Exchange Act subjects greater than 10% beneficial owners of an issuer's voting equity securities to reporting obligations, short-swing profit liability and a short sale prohibition. The current rules under Section 16 use the same "beneficial ownership" rules under Section 13(d) for purposes of determining when a person is a greater than 10% beneficial owner. As a result, any changes to the beneficial ownership rules under Section 13(d) would also change the manner in which beneficial ownership is calculated for such Section 16 purposes.

OVERVIEW OF THE PROPOSED AMENDMENTS

Accelerated Schedule 13D and 13G Filing Deadlines

The SEC is proposing the following changes to the filing deadlines under Regulation 13D-G:

- revising (1) the Rule 13d-1(a) filing deadline for an initial Schedule 13D filing to five days after the date on which the person crosses the 5% threshold and (2) the Rule 13d-2(a) filing deadline for amendments to Schedule 13D from “promptly” to one business day after the date on which a material change occurs;⁴
- amending (1) Rules 13d-1(b) and (d) to shorten the deadline for an initial Schedule 13G filing for Qualified Institutional Investors and Exempt Investors to within five business days after the last day of the month in which the 5% threshold is crossed and (2) Rules 13d-1(e), (f) and (g) to shorten the filing deadline for an initial Schedule 13D filing 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;⁵
- amending Rule 13d-1(c) to shorten the deadline for Passive Investors to file an initial Schedule 13G to five days after the date on which the person crosses the 5% threshold;
- revising Rule 13d-2(b) to change the filing deadline for amendments to Schedule 13G to five business days after the end of the month in which a *material* change in the information previously reported occurs;⁶
- amending Rule 13d-2(c) to shorten the filing deadline for Schedule 13G amendments filed by Qualified Institutional Investors and Exempt Investors 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 such requirements applying if the thresholds were crossed at any time during a month; and
- amending Rule 13d-2(d) to revise the filing deadline for amendments filed by Passive Investors 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.

The Release also proposes to amend Rule 13(a) of Regulation S-T to permit Schedule 13D and 13G filings (and any amendments thereto) that are submitted before 10 p.m., Eastern time, on a given business day (rather than 5:30 p.m., Eastern time, as the rules currently provide) to be deemed to have been filed that same day, which the Release states would help ease filers’ administrative burdens. This is the same filing deadline for the filing of Forms 3, 4 and 5 under Section 16 of the Exchange Act. However, the Release also proposes 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.

Further, the Release proposes to define “business day” (which is currently undefined) for purposes of Regulation 13D-G to mean any day, other than a Saturday, a Sunday or a Federal holiday, from 6 a.m. to 10 p.m., Eastern time, meaning events that occur prior to 10 p.m., Eastern time, on a given day would result in such day counting as day 1. The Release also clarified in a footnote that the current 10-day deadline under Rule 13d-1(a) is measured in calendar days, and that the proposed five-day deadline for initial Schedule 13D filings under the proposed amendments would similarly be measured in calendar days (with

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the caveat that if the last day of the deadline is not a business day then such filing may be made on the next business day).

A summary of the changes that the SEC is proposing to the Schedule 13D and 13G filing deadlines is set forth in a table on pages 9 and 10 of the [Release](#). The table is also attached to this memo as Appendix A.

Regulation of Derivative Securities

In addition, the proposed amendments add a new paragraph (e) to Rule 13d-3 to deem holders of cash-settled derivative securities as beneficial owners of the reference covered class if the derivative security is held with the purpose or effect of changing or influencing the control of the issuer of the reference securities, or in connection with or as a participant in any transaction having such purpose or effect. 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, even if such a holder has no right or agreement to vote or dispose of, or direct the voting or disposition of, the underlying security.

The exclusion of security-based swaps from the proposed rule significantly limits its scope. For example, equity swaps on a single equity security would be excluded from the proposed rule since these instruments are security-based swaps. The SEC has published a separate [rule proposal](#) regarding the reporting of security-based swaps.⁷

The proposed amendments incorporate the definition of “derivative security”⁸ from the rules under Section 16 of the Exchange Act. This definition of “derivative security” is broad and is used in the Section 16 context to determine whether a reporting person has a “pecuniary interest”⁹ in the security subject to Section 16. Using this definition in the proposed rule may pick up baskets of securities where the relevant security makes up as little as 4% of the basket.¹⁰ On the other hand, derivative securities with a floating exercise price are excluded from the definition of derivative security. This would be a significant change from the current rules under Section 13(d) and would likely require the implementation of new systems to monitor.

New paragraph (e) would provide that the number of securities that a holder of such derivative security will be deemed to beneficially own will be the *larger* of: (A) to the extent applicable, 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”¹¹ of the derivative security;¹² and (B) to the extent applicable, the number 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.¹³ The Release notes that clause (A) would only 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, whereas clause (B) would be applicable to all derivative securities.

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The proposed amendments require the calculation under clause (B) to be performed on a daily basis for all derivative securities, even those that reference a fixed number of securities. The calculation in clause (A) would be a fixed number so long as the delta did not change. In the case of certain products, such as cash-settled options, the delta may change daily. For these instruments, daily calculations under clauses (A) and (B) would be required. Reporting persons would need to implement policies, procedures and systems to make those daily calculations.

Only long positions in derivative securities would be counted under the proposed rule. As a result, and similar to the SEC's parallel security-based swap position reporting proposal, reporting persons would not be able to offset short cash-settled derivative positions with long cash-settled derivative positions. This gross calculation may result in Schedule 13D filers reporting a higher beneficial ownership percentage than their economic ownership. The Release also proposes to amend Item 6 to Schedule 13D to clarify that a person is required to disclose interests in all security-based swaps and other derivative securities (including cash-settled derivative securities) that use the issuer's equity security as a reference security. The SEC is including security-based swaps in this amendment unlike proposed Rule 13d-3(e).

Group Formation and Related Exemptions

The Release proposes to align Rule 13d-5 with the statutory language in Sections 13(d)(3) and (g)(3) of the Exchange Act 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. The Release contains an extended discussion of case law that has held that in order to have a "group" there needs to be an "agreement" as to voting, holding, acquiring or disposing of the relevant securities. The SEC takes the position in the Release that an express or implied "agreement" is not necessary to have a "group." Rather, the SEC indicates that if two or more persons "act as" a group they will be deemed a group. According to the SEC, the "act as" standard encompasses not only agreements in the classic contractual sense but also "pooling arrangements, whether formal or informal, written or unwritten."¹⁴ The scope of this pooling arrangement concept is unclear from the Release, but the SEC indicates "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."¹⁵ Taken together, these statements indicate a significant expansion of the group concept.

The proposed amendments further extend the "group" concept to encompass a new so-called "tipper-tippee" provision. The new tipper-tippee provision would provide that if a person, in advance of filing a Schedule 13D, discloses to any other person that such filing will be made (to the extent such information is shared with the purpose of causing such other person to acquire securities in the same covered class) and such other person acquires, based on that information, securities in the same 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).

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The SEC justifies this expansion of the group concept on the basis that the tippee may be purchasing at lower prices than would exist if the Schedule 13D had been filed at the time and that the information may be provided by the tipper to “a trusted few.” As a result, this proposal seems to be driven more by insider trading type concerns than group concerns.

As a result of the SEC’s new view of what constitutes a group and the new tipper-tippee proposed amendment, the SEC proposes two new exceptions to ameliorate the impact of these changes. The SEC indicates:

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.¹⁶

To address this, the SEC proposes new Rule 13d-6(c) 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.

Specifically, the proposed amendment provides two or more persons will not be a group so long as:

- the communications between or among 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; and
- such persons, when taking such concerted actions, are not obligated to take such actions.

Likewise, the SEC expresses concern about the ability of financial institutions to enter into derivative transactions in the ordinary course of business. The proposed amendments would exclude from the group concept two or more persons who:

- in the ordinary course of business enter into bona fide purchase and sale agreements setting forth the terms of a derivative security; and
- 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.

If an activist investor enters into a derivative security in connection with its efforts to influence or change control of an issuer, it is unclear whether the activist and its counterparty could qualify for this exemption since the parties may not meet the no influence or control test.

Section 16

The SEC recognizes the proposed amendments will increase filings by greater than 10% beneficial owners under Section 16. The SEC estimates Section 16 filings will increase by approximately 10% if the proposed amendments are adopted. Nevertheless, the SEC does not propose any changes to the 10% beneficial ownership test under Section 16. Instead, the SEC requests comments on the issue of, for example, whether the proposed rule on equity securities underlying cash-settled derivative securities should be excluded from the Section 16 calculation.

Structured Data Requirements for Schedules 13D and 13G

Finally, the proposed amendments would require that Schedules 13D and 13G be filed using a structured, machine-readable data language, meaning all disclosures (including quantitative disclosures, textual narratives and identification checkboxes) on Schedules 13D and 13G would be required to be filed using an XML-based language. According to the Release, this is intended to make it easier for investors and markets to access, compile and analyze information that is disclosed on Schedules 13D and 13G. However, the exhibits to Schedules 13D and 13G would remain unstructured.

POTENTIAL IMPLICATIONS

Some potential implications of the proposed amendments include:

- **Broader Scope of Beneficial Ownership:** By expanding the meaning of “beneficial owner” to include persons who hold cash-settled derivative securities with a control purpose, the proposed amendments will increase the number of Section 13(d) and 13(g) filers or accelerate the time by which those filers are required to file. The SEC estimates a 5% increase in filings from this change. The term “derivative securities” is very broad and could pick up instruments that investors would not expect to convey beneficial ownership under Sections 13(d) and 13(g).
- **Groups:** The expanded meaning of “beneficial owner,” together with the proposed amendments to Rule 13d-5, including the addition of a new “tipper-tippee” provision, could significantly increase the number of scenarios in which two or more persons are deemed to have formed a group for purposes of both Section 13(d) and Section 16 of the Exchange Act. The SEC estimates a 5% increase in Section 13(d) filings as a result of this change. It could become particularly difficult for groups to coordinate in order to timely submit filings in light of the shortened filing deadlines.
- **Shareholder Activism:** The Release indicates that in 2020 over 55% of Schedule 13D filings were made on the 10th day or later following the filer crossing the 5% threshold. Shortening the deadline for initial Schedule 13D filings to five days would therefore have a significant effect in practice. Including certain cash-settled derivative securities in the beneficial ownership calculation would further exacerbate this effect by causing activists to cross the 5% threshold sooner. Similarly, there could be a substantial impact on the number of securities that an activist could acquire prior to disclosure. The shorter window would reduce activists’ ability to acquire shares at lower, pre-disclosure prices which could reduce the incentives for some activists to initiate campaigns, thereby also reducing shareholder engagement.
- **Unsolicited M&A Activity:** The shorter reporting deadlines (including for material amendments), substantially broadened definition of beneficial ownership and expansion of the “group” concept could impact certain M&A transactions by reducing an unsolicited acquirer’s

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ability to acquire exposure to a stock prior to alerting a target company. The proposed amendments may give companies with substantial takeover defenses added protection, including by effectively lowering poison pill thresholds since those thresholds are typically based on beneficial ownership levels as measured under the 13D rules.

- ***Accelerated Filings by Qualified Institutional Investors:*** Under the current reporting rules, a Qualified Institutional Investor typically only has to file a Schedule 13G once a year within 45 days of year-end based on its holdings at year-end. The proposed amendments would significantly change this reporting regime. Not only would Qualified Institutional Investors need to monitor their positions at the end of each month, but they would also need to monitor them on a daily basis to comply with the proposed amendment requirements. While the SEC indicates in the Release that Qualified Institutional Investors should already have policies, procedures and systems in place to determine beneficial ownership, we are uncertain whether those policies, procedures and systems have been designed to operate on a daily basis.
- ***10% Beneficial Ownership for Section 16 Purposes:*** The proposed amendments to Rules 13d-3, 13d-5 and 13d-6 directly impact the 10% calculation of beneficial ownership for purposes of Section 16. As a result of the expanded meaning of “beneficial owner” under Section 13(d) of the Exchange Act, the proposed amendments will increase the number of persons subject to Section 16 of the Exchange Act as well, thereby increasing the number of Section 16 filings and the number of holders subject to short-swing profit liability and short sale prohibitions under Sections 16(b) and 16(c), respectively.

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APPENDIX A

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).	<u>QIIs & Exempt Investors:</u> 45 days after calendar year-end in which beneficial ownership exceeds 5%. Rules 13d-1(b) and (d). <u>Passive Investors:</u> Within 10 days after acquiring beneficial ownership of more than 5%. Rule 13d-1(c).	<u>QIIs & Exempt Investors:</u> Five business days after month-end in which beneficial ownership exceeds 5%. Rules 13d-1(b) and (d). <u>Passive Investors:</u> 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).	<u>All Schedule 13G Filers:</u> Any change in the information previously reported on Schedule 13G. Rule 13d-2(b). <u>QIIs & Passive Investors:</u> Upon exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership. Rules 13d-2(c) and (d).	<u>All Schedule 13G Filers:</u> Material change in the information previously reported on Schedule 13G. Rule 13d-2(b). <u>QIIs & Passive Investors:</u> 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).	<u>All Schedule 13G Filers:</u> 45 days after calendar year-end in which any change occurred. Rule 13d-2(b). <u>QIIs:</u> 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). <u>Passive Investors:</u> Promptly after exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership. Rule 13d-2(d).	<u>All Schedule 13G Filers:</u> Five business days after month-end in which a material change occurred. Rule 13d-2(b). <u>QIIs:</u> Five days after exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership. Rule 13d-2(c). <u>Passive Investors:</u> 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.	<u>All Schedule 13G Filers:</u> 5:30 p.m., Eastern time. Rule 13(a)(2) of Regulation S-T.	<u>All Schedule 13G Filers:</u> 10 p.m., Eastern time. Rule 13(a)(4) of Regulation S-T.

ENDNOTES

- ¹ The Commission is currently comprised of only four commissioners following the recent departure of Commissioner Roisman, which was announced in December 2021. See Statement of Commissioner Elad L. Roisman (Dec. 20, 2021), available at <https://www.sec.gov/news/statement/roisman-20211220>.
- ² [Modernization of Beneficial Ownership Reporting](#). SEC Release Nos. 33-11030 and 34-94211 (Feb. 10, 2022) (the “Release”) at 14 and 32.
- ³ *Id.* at 15 (footnote omitted).
- ⁴ One of the SEC’s specific questions in the Release on which it is soliciting comment relates to whether the SEC should use a tiered approach rather than shortening the Schedule 13D deadline in all instances. The SEC asks, for example: “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?” *Id.* at 25.
- ⁵ However, Rule 13d-1(e)(2), which the SEC does not propose to amend, would still prohibit such persons who forfeit their eligibility to report on Schedule 13G as a result of developing a control intent from voting or directing the voting of the covered securities or acquiring an additional beneficial ownership interest in any equity securities of the issuer or any person controlling the issuer until the expiration of 10 days from the date of the Schedule 13D filing.
- ⁶ Instead of the current annual 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, the Release also proposes to revise Rule 13d-2(b) to require that an amendment to a Schedule 13G be filed only if a “material change” occurs.
- ⁷ See S&C Memo (Dec. 29, 2021), available at [sc-publication-SEC-proposes-rules-security-based-swaps.pdf \(sullcrom.com\)](#). The SEC is limited in its ability to deem a security-based swap to confer beneficial ownership of an underlying security because Section 13(o) of the Exchange Act provides that the SEC, after consultation with the Secretary of the Treasury and the bank prudential regulators, may determine, if necessary to achieve the purposes of Section 13(o), that security-based swaps provide incidents of ownership comparable to direct ownership of the underlying securities. According to the SEC, the same limitation does not apply to other derivative securities.
- ⁸ Rule 16a-1(c) under the Exchange Act defines “derivative securities,” with certain exceptions, as “any option, warrant, convertible security, stock appreciation right, or similar right 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.”
- ⁹ Rule 16a-1(a)(2)(i) under the Exchange Act defines “pecuniary interest” as “the opportunity, directly or indirectly, to profit or share in any profit derived from a transaction in the subject securities.”
- ¹⁰ See SEC No-Action Letter, Goldman Sachs & Co. (Oct. 14, 1997) (Ownership of a basket of equity securities does not represent a pecuniary interest in a security included in the basket for Section 16 purposes if such security makes up 3% or less of the market value of all of the equity securities in the basket).
- ¹¹ Proposed paragraph (e)(2)(ii) of Rule 13d-3 would define “delta” to mean, with respect to a derivative security, the ratio 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. The Release also notes 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

ENDNOTES (CONTINUED)

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.

12 The Release provides in a footnote the following illustration of the application of the proposed rule in clause (A): 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. Release at 63, n.106.

13 The Release provides in a footnote the following illustration of the application of the proposed rule in clause (B): 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 and, unlike clause (A), which will in general only change when the delta changes, will change every day if the price of the reference security changes. *Id.* at 63-64, n.107.

14 *Id.* at 80.

15 *Id.* at 82.

16 *Id.* at 95.

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