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Legal Update

SEC Proposed Amendments to Schedules 13D and 13G

Background

On February 10, 2022, the Securities and Exchange Commission (the "SEC") proposed amendments to Schedules 13D and 13G relating to beneficial ownership reports (the "Proposed Amendments").[1]

The Securities Exchange Act of 1934 (the "Exchange Act"), Section 13(d), was originally enacted to address the increasing use of cash tender offers in corporate takeovers. Section 13(d) requires disclosure by investors of the accumulation of significant positions, or of certain increases in such positions, in the voting stock of public companies. These disclosures are intended to provide transparency to the market generally, and to stockholders and the company, and to function as an early warning to the company regarding a potential change of control transaction. Section 13(g) permits short-form disclosure by certain passive or early investors that hold or obtain significant positions in the voting stock of public companies. Specifically, Section 13(g) states that "[a] person who would otherwise be obligated. . .to file a statement on Schedule 13D may, in lieu thereof, file with the Commission, a short-form statement on Schedule 13G."[2]

Context of Proposed Amendments

The Proposed Amendments are intended to modernize the rules that govern reporting on Schedules 13D and G by, among other things, making information available to the public in a more timely manner, deeming holders of certain cash-settled derivative securities to be beneficial owners of the reference equity securities, and clarifying the disclosure requirements in respect of derivative securities.

SEC Chair Gary Gensler stated that "[i]nvestors currently can withhold market moving information from other shareholders for 10 days after crossing the 5 percent threshold before filing a Schedule 13D, which creates an information asymmetry between these investors and other shareholders. The filing of Schedule 13D can have a material impact on a company's share price, so it is important that shareholders get that information sooner. The Proposed Amendments also would clarify when and how certain derivatives acquired with control intent count towards the 5 percent threshold, clarify group formation, and create related exemptions."[3]

SEC Commissioner Hester Peirce dissented, noting that the technology, or lack thereof, was not a factor in enacting Section 13(d) in 1968, and that information disparity among investors helps markets function. Commissioner Peirce stated that the SEC wants ". . .to encourage investors to ferret out information and find undervalued companies."[4]

The Dodd Frank Wall Street Reform and Consumer Protection Act (the "Dodd Frank Act") made minor amendments to Sections 13(d) and 13(g) of the Exchange Act, but also provided the SEC with authority to adopt rules to shorten the 10-day filing period for Schedules 13D and 13G filings. In addition, the Dodd Frank Act also amended Section 13(d)(1) by providing the SEC with authority to require beneficial ownership reporting of security-based swaps. Additional Congressional interest in beneficial ownership reports came in the form of proposed legislation that has been referred to as the Brokaw Act, originally introduced in 2016 by US Senators Tammy Baldwin and Jeff Merkley. This legislation would have amended Sections 13(d) and 13(g) to direct the SEC to shorten the reporting period in which a Schedule 13D must be filed. The proposed legislation also would have modified the definition of "beneficial ownership," making it broader and including pecuniary and indirect pecuniary interests, and also setting out a methodology for calculating beneficial ownership in the context of derivative instruments. Of course, the Brokaw Act was not enacted, and has been the subject of some debate since its introduction.

Against this backdrop, the SEC has proposed the amendments that we summarize below, which the proposing release (the "Proposing Release") states are consistent with "efforts to accelerate public disclosures of material information to the market." The Proposing Release acknowledges the chilling effect that the shortening of the initial Schedule 13D filing deadline may have on an investor's ability and incentive to effect changes at companies, which changes may be beneficial to all shareholders. In the context of referencing the economic analysis undertaken, the Proposing Release cites academic studies and notes that "there are several reasons to expect that this effect, including its impact on corporate control, would be limited." However, not much detail is provided. In addition, there is little economic analysis provided with respect to the changes related to derivatives.

Filing Deadlines, Amendments and Formats

The SEC proposed changes that would shorten multiple filing deadlines for Schedules 13D and 13G as follows:

- **Rule 13d-1(a)** – an investor that exceeds 5 percent of a covered class of equity (generally, a "covered class" means a voting class of equity securities registered under Section 12 of the Exchange Act) would need to file within five days instead of 10 days;
- **Rules 13d-1(e), (f), and (g)** – an investor who forfeits eligibility to report on Schedule 13G instead of 13D would need to file a Schedule 13D within five days after the event causing such ineligibility instead of 10 days;
- **Rule 13d-2(a)** – amendments to Schedule 13D for material changes would need to be filed one business day after the occurrence of the material change (currently "promptly");
- **Rules 13(d)-1(b) and (d)** – the initial Schedule 13G filing deadline for Qualified Institutional Investors[5] ("QIIs") and Exempt Investors[6] would be within five business days after the month in which beneficial ownership first exceeds 5 percent of a covered class instead of within 45 days after calendar year-end;
- **Rule 13d-1(c)** – Passive Investors[7] would need to file a Schedule 13G within five days of exceeding 5 percent of a covered class instead of 10 days;
- **Rule 13d-2(b)** – amendments to Schedule 13G would need to be filed five business days after the month in which a reportable change occurs instead of 45 days after calendar year-end (but the Proposed Amendments raise the threshold for what constitutes a reportable change from "any change" to a "material change");

- **Rule 13d-2(c)** – Qualified Institutional Investors would need to amend a Schedule 13G within five days of exceeding 10 percent of a covered class instead of 10 days after the month in which such change occurred. Additionally, the new five-day deadline would apply for any additional deviation of more than 5 percent of a covered class (the deadlines would apply to such percentage changes at any time during the month); and
- **Rule 13d-2(d)** – Passive Investors would need to amend a Schedule 13G one business day after exceeding 10 percent of a covered class instead of "promptly" after the ownership change. Additionally, the new one business day deadline would apply for any additional deviation of more than 5 percent of a covered class.

The SEC also proposed extending the "cut-off" time for filing Schedules 13D and 13G and any amendments thereto from 5:30 p.m. ET to 10:00 p.m. ET on a business day.

The Proposed Amendments are summarized in the following table (reprinted from the Proposing Release):

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 percent or losing eligibility to file on Schedule 13G. Rules 13d-1(a), (e), (f) and (g).	Within 5 days after acquiring beneficial ownership of more than 5 percent 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 percent. Rules 13d-1(b) and (d). Passive Investors: Within 10 days after acquiring beneficial ownership of more than 5 percent. Rule 13d- 1(c).	QIIs & Exempt Investors: 5 business days after month-end in which beneficial ownership exceeds 5 percent. Rules 13d-1(b) and (d). Passive Investors: Within 5 days after acquiring beneficial ownership of more than five percent. 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 percent beneficial ownership or a 5 percent 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 percent beneficial ownership or a 5 percent 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 percent or there was, as of the month-end, a 5 percent increase or decrease in beneficial ownership. Rule 13d-2(c). Passive Investors: Promptly after exceeding 10 percent beneficial ownership or a 5 percent increase or decrease in beneficial ownership. Rule 13d-2(d).	All Schedule 13G Filers: 5 business days after month-end in which a material change occurred. Rule 13d-2(b). QIIs: 5 days after exceeding 10 percent beneficial ownership or a 5 percent increase or decrease in beneficial ownership. Rule 13d-2(c). Passive Investors: 1 business day after exceeding 10 percent beneficial ownership or a 5 percent increase or decrease in beneficial ownership. Rule 13d-2(d).
Filing "Cut-Off" Time	5:30 p.m. ET. Rule 13(a)(2) of Regulation S-T.	10:00 p.m. ET. Rule 13(a)(4) of Regulation S-T.	All Schedule 13G Filers: 5:30 p.m. ET. Rule 13(a)(2) of Regulation S-T.	All Schedule 13G Filers: 10:00 p.m. ET. Rule 13(a)(4) of Regulation S-T.

The SEC also proposed that Schedules 13D and 13G be filed using a structured, machine-readable data language. This would require that all disclosures be filed with XML-based language for ease of investor access.

Derivatives

Additional proposed amendments would change the beneficial ownership status of holders of certain cash-settled derivatives, other than security-based swaps, by adding a new paragraph (e) to existing Rule 13d-3, and clarify the application of Item 6 of Schedule 13D to cash-settled derivatives positions.

BACKGROUND AND RATIONALE

Currently, under Rule 13d-3, holders of derivatives that are settled "in kind" or that otherwise convey a right to acquire a covered class are considered "beneficial owners" of the covered class. For example, a person that holds an option, a warrant or a convertible security exercisable or convertible within 60 days is deemed a beneficial owner of the covered class of securities. Under Rule 13d-3d(d)(1), if a right has been acquired for the purpose or with the effect of changing or influencing control of the issuer of the securities, that person is treated as a beneficial owner of the underlying class of equity securities, regardless of when the right is exercisable, exchangeable or convertible. By contrast, a holder of a derivative that provides nothing more than economic exposure to the reference security has generally not been considered a beneficial owner of the reference security.

Some critics have raised concerns about this difference in treatment between physically settled and cash-settled instruments. Critics have claimed that, for example, a holder of cash-settled derivatives might seek to use its "synthetic" position in an issuer's securities to exert influence or control. The SEC cited several such concerns in its Proposing Release, noting the possibility that holders could seek to influence the voting or disposition decisions of their derivative counterparties, who might hold the actual reference securities to hedge their exposure under the derivative. Further, such immobilized hedge positions, if not voted, could magnify the voting power that the holder controls through its non-synthetic positions, or the holder could acquire its counterparty's hedge positions through an amendment of, or arrangements outside, the derivative's terms. In addition, holders "may present these economic positions to an issuer or its shareholders as a basis on which they should engage with them."[8] To address these concerns, proposed Rule 13d-3(e) would deem certain holders of cash-settled derivatives to have beneficial ownership of the reference equity securities, causing the derivatives position to be counted toward the reporting thresholds of Section 13(d). However, as noted by Commissioner Peirce in her dissent,

> The proposed expansion of the definition of beneficial ownership to cover certain cash-settled derivative securities lacks sufficient justification given that these securities do not convey ownership or voting rights. The proposed amendments to Rule 13d-3 appear to be based on concerns raised in academic literature that focus on transactions in foreign jurisdictions and security-based swaps, both of which are excluded from the scope of these rules. Perhaps commenters will provide evidence establishing a clearer link between ownership of cash-settled derivatives and the potential to change control of the issuer.

While the SEC recognized that cash-settled derivatives "ordinarily do not entitle their holders to acquire the reference securities," it nonetheless concluded that, "[t]o the extent such derivative security is held with the purpose or effect of changing or influencing the control of the issuer, . . .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)."[9]

SCOPE

Proposed new Rule 13d-3(e)(1) would provide that a holder of a cash-settled derivative security, other than a security-based swap, will be "deemed" the beneficial owner of the reference equity securities if the derivative 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.

For purposes of proposed Rule 13d-3(e), the term "derivative security" would have the meaning set forth in Rule 16a-1(c).[10] However, proposed Rule 13d-3(e) would not apply to security-based swaps, as defined in Section 3(a)(68) of the Exchange Act and the rules and regulations thereunder. Disclosure of large positions in security-based swaps would be addressed under a proposal issued in December 2021 for a new Rule 10B-1, as discussed further below. Thus, a cash-settled total return swap on a single reference equity security (perhaps the paradigmatic case of a synthetic ownership position) generally would fall under proposed Rule 10B-1, whereas proposed Rule 13d-3(e) would apply, for example, to certain cash-settled options or transactions comprised of combinations of such options.

CALCULATION OF UNDERLYING REFERENCE SECURITIES FOR REPORTING PURPOSES

Proposed paragraph (e)(2)(i) of Rule 13d-3 provides that the number of equity securities that a holder of a cash-settled derivative will be deemed to beneficially own pursuant to paragraph (e)(1) will be the larger of two calculations, as set forth in proposed paragraphs (e)(2)(i)(A) and (B), in each case as applicable.[11]

- Under proposed paragraph (e)(2)(i)(A), the number of securities would be 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[12] of the derivative security.
- Under proposed paragraph (e)(2)(i)(B), the number of securities would be calculated 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.

For purposes of determining the number of equity securities attributable to a holder of a cash-settled derivative, only long positions should be counted, and short positions, whether direct or synthetic, should not be netted or otherwise taken into account. The calculation (based on the closing market price) in clause (x) of paragraph (e)(2)(i)(B), when that paragraph is applicable, must be performed on a daily basis. If a derivative security has a variable delta, then, under either paragraph, the delta must be calculated daily. Commenters are likely to raise concerns about the usefulness and practicality of a daily calculation of the delta, which in general would be model-dependent and could oscillate rapidly in certain scenarios, such as when an option is near expiry and the price of the reference equity security is near a strike price.

DISCLOSURE REQUIREMENTS UNDER ITEM 6 OF SCHEDULE 13D

Proposed amendments to Item 6 of Schedule 13D would clarify the disclosure requirements with respect to derivative securities held by a person reporting on that schedule. 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."[13] According to the SEC, ambiguity may currently exist because cash-settled derivatives are not expressly included among the examples of contracts subject to Item 6, and because questions could arise as to whether the language, "with respect to" securities of the issuer, encompasses derivatives that do not originate with the issuer or confer only a purely economic, but no legal, interest in a class of an issuer's securities.

The proposed revisions to Item 6 would expressly state that the use of derivative instruments, including cash-settled, security-based swaps and other derivatives settled exclusively in cash, which use the issuer's securities as a reference security are included among the types of contracts, arrangements, understandings and relationships that must be disclosed.

REPORTING OF SECURITY-BASED SWAP POSITIONS ON SCHEDULE 10B

In a separate rulemaking, the SEC proposed Rule 10B-1, which 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.[14] 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) represents more than 5 percent of a class of equity securities.[15] In the SEC's view, proposed Rule 10B-1, if adopted, would provide sufficient information regarding holdings of cash-settled, security-based swaps such that additional regulation under Regulation 13D-G would be unnecessarily duplicative.

Acting as a Group

The SEC also proposed 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.

Those sections currently state that "[W]hen two or more persons act as a. . .group for purposes of acquiring, holding, or disposing of securities of an issuer, such. . .group shall be deemed a 'person'. . ."[16] But, as the Proposing Release notes, the sections do not define the term "group." The level of coordinated activity by two or more persons that would render them a "group," and, thus, subject them to regulation as a "person," has been a factual question. Many courts have determined that an agreement among group members to act together is a prerequisite to a finding that there is a "group."

The SEC proposed to amend Rule 13d-5 to clarify that forming a group does not require an agreement.

Rule 13d-5(b)(1) would be redesignated as Rule 13d-5(b)(1)(i) and revised to remove the reference to an agreement between two or more persons. Rule 13d-5(b)(1)(i) would 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.

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.

Proposed Rule 13d-5(b)(1)(ii) would state that a person who shares information about such person's upcoming Schedule 13D filing, to the extent that this information is not yet public and is communicated with the purpose of causing others to make purchases, and a person who subsequently purchases the issuer's securities based on this information would be deemed to have formed a group within the meaning of Section 13(d)(3). Furthermore, a group will be deemed to have acquired beneficial ownership of the securities of any market participant with whom the large blockholder communicates material information regarding the impending filing obligation, as outlined in the Proposing Release.

The Proposed Amendments also would address post-formation acquisitions of beneficial ownership by group members.

EXEMPTIONS FROM THE APPLICATION OF SECTIONS 13(D) AND 13(G)

Proposed new 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 the issuer's equity securities, including engagement with one another, provided (i) communications among or between such persons are not undertaken with 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 and (ii) such persons, when taking such concerted actions, are not directly or indirectly obligated to take such actions.

Proposed new Rule 13d-6(d) would address financial institutions acting as derivatives counterparties, and would provide that two or more persons will not be deemed to have formed a group solely by virtue of their entrance into an agreement governing the terms of a derivative security. The exemption will only be available if entered into in the ordinary course of business and if the agreement is a bona fide purchase and sale agreement not entered into 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.

IMPACT ON SECTION 16

The Proposing Release notes that the proposed amendments to Rules 13d-3,13d-5 and 13d-6 would impact an analysis under Rule 16a-1(a)(1) as to whether a person is a 10-percent holder. By potentially expanding the definition of "beneficial owner," the proposed rules may result in increasing the number of persons subject to Section 16 filing requirements. The SEC requests comment as to whether there are reasons why a holder of cash-settled derivatives 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 securities for purposes of determining whether that person is a 10-percent holder under Section 16. There are a number of similar interpretive questions arising under Section 16 and the rules thereunder as a result of the proposed amendments to Rules 13d-3, 13d-5 and 13d-6.

COMMENT PERIOD

Comments are due by the later of: 60 days following issuance (which is April 11, 2022), or 30 days following publication of the Proposing Release in the Federal Register.

Given the significant number of changes, and the potentially wide-ranging effects of the proposed changes on institutional investors, passive investors and financial institutions, this is a very short comment period.

The SEC has encouraged the submission of comments on any aspect of the Proposed Amendments and has specifically requested comments on over 100 topics, many of which are multi-faceted. Interested parties should assess as soon as possible whether they would like to join the conversation on the Proposed Amendments by sending comments to the SEC.

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Endnotes

[1] Available at https://www.sec.gov/rules/proposed/2022/33-11030.pdf; *see also* related SEC announcement at https://sec.gov/news/press-release/2022-22.

[2] *See* 17 CFR 240.13d-1(b)(1).

[3] SEC Press Release, SEC Proposes Rule Amendments to Modernize Beneficial Ownership Reporting (February 10, 2022) *available at* https://www.sec.gov/news/press-release/2022-22.

[4] SEC Statement, Dissenting Statement on Proposed Modernization of Beneficial Ownership Reporting (February 10, 2022) *available at* https://www.sec.gov/news/statement/peirce-13d-20220210.

[5] "Qualified Institutional Investor" includes ". . .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."

[6] "Exempt Investor" includes ". . .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."

[7] "Passive Investors" includes ". . .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)."

[8] Modernization of Beneficial Ownership Reporting, Release Nos. 33-11030; 34-94211 (the "Proposing Release"), page 60.

[9] Id., page 61. Drawing a contrast to the current regulatory framework, under which, as the SEC notes, a fact-intensive inquiry into the existence of "a plan or scheme to evade the reporting requirements" is required to attribute beneficial ownership, the SEC observed that a "comparatively less extensive and more streamlined inquiry" would suffice under proposed Rule 13d-3(e). Id., page 58, note 97.

[10] *See* id., page 58, note 98; 17 CFR 240.16a-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).

[11] Alternative calculation methodologies are needed because the terms of the derivative would not necessarily specify a way to calculate the number of reference securities on which the amount payable pursuant to that security is based, as required for proposed paragraph (e)(2)(i)(A) to be applicable. According to the SEC, 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)." Id., page 64. However, the Proposing Release does not specify a definition of the term "notional amount."

[12] The term "delta" means, with respect to a derivative, the ratio that is obtained by comparing (x) the change in the value of the derivative to (y) the change in the value of the reference equity security.

[13] Rule 13d-101.

[14] *See* 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)] (the "SBS Release"), available at https://www.federalregister.gov/documents/2022/02/04/2021-27531/prohibition-against-fraud-manipulation-or-deception-in-connection-with-security-based-swaps.

[15] *See* Proposing Release page 66, note 113; SBS Release, note 138 and accompanying text. Some of the calculation methodologies for determining the "security-based swap equivalent position" overlap with those employed under proposed paragraph (e)(2)(i) of Rule 13d-3. However, the reporting thresholds and calculation methodologies under the two proposed rules are not entirely comparable. For example, if the security-based swap equivalent position represents more than 2.5% of a class of equity securities, the calculation of the security-based swap equivalent position will include in the numerator all of the underlying equity securities owned by the holder of the security-based swap position, as well as the number of shares attributable to any options, security futures, or any other derivative instruments based on the same class of equity securities. In addition, proposed Rule 10B-1 incorporates a gross notional amount threshold of $300 million for equity swaps, which could result in a reportable position even if the security-based swap equivalent position is less than 5% of a class of equity security.

[16] *See* Proposing Release, page 11, footnote 10.