

# SEC Looking to Update Rules on Schedule 13D Disclosures

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On June 23, 2021, US Securities and Exchange Commission (SEC) Chairman Gary Gensler announced that, to foster market “transparency,” he has requested the SEC staff propose changes to the 50-year-old Section 13(d) beneficial ownership requirements. Specifically, Chairman Gensler requested that the staff consider accelerating the deadline for investors to alert the market when they acquire beneficial ownership of more than 5% of a public company’s stock. In an address to the London City Week’s annual international financial services forum, Chairman Gensler expressed doubt as to whether the current rules “make sense given the rapidity of current markets and technologies.”

## IN DEPTH

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The long-standing rules require investors to file a Schedule 13D within 10 days of acquiring a stake of more than 5% along with a statement on the “purpose” of the acquisition, such as exerting influence over the public company by seeking board seats or otherwise exploring a possible acquisition or restructuring of the public company. Accelerating this timeline would require activist investors to disclose their stakes more quickly, giving potential targets more time to prepare in response.

The “within 10 days” filing requirement is embedded in Section 13(d) of the Securities Exchange Act of 1934 (the Act), but the statute explicitly provides that the SEC may shorten the time by rule. Currently, Rule 13d-1 (Rule) mirrors the “within 10 days” requirement under the Act, but the Rule may be amended by the SEC. It would not be surprising if the staff also weighs changing existing rules to compress the deadline for amendments after an initial Schedule 13D is filed. Rule 13d-2(a) requires a Schedule 13D to be amended “promptly” in the event of any “material change” in the information disclosed. However, “promptly” is not defined under the rules and a rule change could codify the generally understood two business days deadline (or shorten it to one business day) rather than allow for a facts and circumstances determination.

A proposed rule to shorten the 10-day disclosure period is likely to trigger a vigorous response from

two competing forces: (1) activists claiming that a shorter window deprives them of the necessary time to accumulate their stakes without market forces ratcheting up the share price to complete their investment and (2) public companies claiming that the 10-day window is an archaic measure that unnecessarily deprives the market of material information and leaves insufficient time for them to respond to potential efforts to exert influence over the public company.

Chairman Gensler's keen interest in Section 13(d) also signals that the SEC may look to bring additional actions to enforce Section 13(d) disclosure obligations. For example, the SEC may more aggressively charge investors who violate Rule 13d-2(a) by not "promptly" amending their Schedule 13Ds when there is a material change in investment intent or in circumstances where an investor increases or decreases its beneficial ownership by 1% or more. Our Corporate Advisory and White-Collar teams recommend Schedule 13D filers review their compliance procedures to ensure they are able to effectively monitor changes in beneficial ownership or investment intent to ensure their filings are made and updated in a timely manner.

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