KURTIN PLLC
Attorneys at Law

**February 11, 2022**

## SEC Proposes Rule Amendments to Modernize Exchange Act Beneficial Ownership Reporting

On February 10, 2022, the U.S. Securities and Exchange Commission ("SEC") proposed rule amendments to modernize Beneficial Ownership Reporting under the Securities Exchange Act of 1934 ("the Exchange Act") and Regulation 13D-G promulgated pursuant to it.

Pursuant to the current regulation, any investor (natural person or entity) acquiring more than 5% of the stock of an Exchange Act reporting company must file Schedule 13D with the SEC within 10 days of the purchase putting the investor over the 5% threshold. The Schedule, which is publicly available on the SEC's EDGAR database, provides information on the investor, the investor's intentions in making the investment, and how the stock purchase is being financed (the source of funds for the purchase). The 13D information, for example, can reveal if the stock purchase is being made as a tender offer prelude to a negotiated acquisition of the company, a "toehold" investment prior to a planned hostile takeover, or by an activist shareholder seeking more management control, and therefore conveys valuable information to the company's other shareholders, officers, board of directors and other market participants, such as other potential acquirers, supposedly in time to respond to market movements, mount a takeover defense, or take other action. If the investor does not intend a takeover, it can instead file Schedule 13G within 10 days of acquiring between 5 and 20% of the company's stock (above 20%, it must file Schedule 13D even if no takeover is planned).

The beneficial ownership filing rules for Reg. 13D-G, which have not been updated for Schedule 13D since 1968 and for Schedule 13G since 1977, have been repeatedly criticized for the 10-day delay period in the modern, high-speed trading era, during which an investor with takeover or activist intentions can withhold material market information for 10 days, creating information asymmetries between the investor and the company and the rest of the market and consequent advantages for the investor. In response, the SEC is proposing amendments to:

- Shorten the Schedule 13D filing period from 10 days (calendar days) to 5 days, with amendments to be filed within 1 business day;
- Shorten the Schedule 13G filing period from 10 days to 5 days for general 13G filers ("passive investors"), with certain 13G filers like Qualified Institutional Investors, or "QIBs," having 5 business days after the end of the month in which the 5% threshold is passed (down from 45 days after year-end now), with amendments for all 13G filers to be filed within 5 business days after the month in which a material change occurred (down from 45 days after year-end) (there are also proposed amendments for Schedule 13G filers upon exceeding 10% beneficial ownership or either a 5% increase or decrease in beneficial ownership of a covered class, with QIBs and passive investors required to file an amendment within 5 days and one business day, respectively) (for a description of QIBs, see our "Resales of Restricted Securities: Deal Points" and "Raising Capital through Private Placements: Deal Points," both available at **Kurtin PLLC Whitepapers and Advisories**);
- Provide that holders of certain cash-settled derivative securities will be "deemed" beneficial owners of the underlying "reference" equity securities;
- Provide that interests in all derivatives that use the issuer's equity securities and reference securities be disclosed; and
- Clarify the circumstances under which two or more persons form a "group" under Reg. 13D-G and the Exchange Act to include "tipper-tippee" relationships in which non-public information is shared about an upcoming 13D filing with another person who subsequently purchases the issuer's securities based on that information; however, the proposed rule will also create new exemptions for permitted investor and investor-issuer communication and consultation without group regulation, as when doing so without the intention to change or influence issuer control, or when investors and financial institutions enter into agreements governing the terms of derivatives.

The proposed rule looks to herald a new, faster and more scrutinized Schedule 13D/13G level of activity in an area that has been fairly staid for a long time. The SEC proposed rule is available **Here**. The proposal is open for public comments for the longer of 60 days from publication on the SEC website or in the Federal Register.

For additional information, please contact us at **info@kurtinlaw.com**.

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