

Manual of Publicly Available Telephone Interpretations

O. REGULATIONS 13D AND 13G AND SCHEDULES THEREUNDER

1. Regulations 13D-13G

A shareholder owns over 5% of a class of equity security of a corporation. The corporation's Form 10 registering this class of security under Section 12(g) of the Exchange Act has just become effective. If the shareholder has not added any securities to its holdings since the effective date of the Form 10, the shareholder may report its holdings on Schedule 13G, since such shareholder has not "acquired" any securities registered pursuant to Section 12 of the Exchange Act. (See Section 13(d), which requires an "acquisition" for the application of the reporting provisions, and also Rule 13d-1(c)). In the event the shareholder acquires additional equity securities after the effective date of the Form 10, the shareholder must report its entire holdings on Schedule 13D if the most recent acquisition, when added to all other acquisitions of securities of the same class during the twelve months immediately preceding the date of the most recent acquisition, aggregates to more than 2% of the class of such securities. (See Section 13(d)(6)(B) of the Exchange Act). This twelve month period may run back from the date of the acquisition into the time when the company was privately held. If the shareholder has acquired 2% or less during this period, the shareholder simply may reflect the present acquisition in its Schedule 13G.

2. Regulations 13D-13G

A shareholder who acquired in excess of ten percent of a class of equity securities prior to the registration of that class pursuant to Section 12 of the Exchange Act, need not file a Schedule 13D upon registration of that class. This position is based on the fact that Section 13(d) requires a filing of Schedule 13D only upon the acquisition of a Section 12 security. Pursuant to Rule 13d-1(c), however, any shareholder so exempt from filing Schedule 13D must file a Schedule 13G within 45 days after the end of the calendar year in which the Exchange Act registration becomes effective. Furthermore, the provisions of Rule 13d-1(b)(2), which require certain ten percent shareholders to file a Schedule 13G within ten days after the end of a designated month, are limited to those institutional investors listed in Rule 13d-1(b)(1), and do not encompass a shareholder filing Schedule 13G pursuant to Rule 13d-1(c). Accordingly, this ten percent shareholder is not required to file within ten days after the end of the month in which the Exchange Act registration statement becomes effective, but may wait until the annual Schedule 13G is due.

3. Rule 13d-5(b); Section 13(d)

A limited partnership and two general partners formed a control group in a non-public company. Since the time the company registered pursuant to Section 12(g), the group has been filing on Schedule 13G. Now the group would like to add a new member who owns more than 2% of the equity securities of the company. The Division staff took the position that the addition of a new member, with 2% or more beneficial ownership, would be deemed an acquisition by the group of 2% or more of a Section 12 security, and would require the group and all its members to report their holdings on Schedule 13D.

4. Rule 13d-6; Section 13(d)

A shareholder could not rely on Rule 13d-6, which exempts from the requirements of Section 13(d) acquisitions by a 5 percent beneficial holder pursuant to subscription rights, to avoid amending a previously filed Schedule 13D to reflect such an acquisition. Rule 13d-6 should be read to relate only to the initial filing obligation; thus, a 5 percent holder, previously exempt from filing on Schedule 13D, would not be subject to the filing requirement solely by virtue of the exercise of subscription rights. Rule 13d-2, however, requires an amendment to disclose any change in the information previously filed with the Commission, and should control where the shareholder has previously filed a Schedule 13D.

5. Rule 13d-1(a)

In calculating the number of outstanding shares, shares repurchased by the issuer to fund a stock option plan are not considered to be outstanding even if the shares are not retired or put in treasury. Section 13(d)(4) of the Exchange Act provides that the class of outstanding shares will not include shares "held by or for the account of the issuer".

6. Rule 13d-1(b)(1); Schedule 13G

A broker-dealer, eligible to file reports of ownership on Schedule 13G, and certain individuals formed a limited partnership, with the broker-dealer as sole general partner and the individuals as limited partners. The partnership itself was not one of the persons listed in Rule 13d-1(l)(ii) as eligible to file ownership reports on Schedule 13G. The question was presented whether the partnership could file Schedule 13G, as opposed to Schedule 13D, inasmuch as the general partner is qualified to use Schedule 13G. The Division staff expressed the view that the partnership must file on Schedule 13D. In order to be eligible to use Schedule 13G the partnership, and not just the general partner, must be a person listed in Rule 13d-1(b)(l)(ii) or otherwise eligible pursuant to Rule 13d-1(c).

7. Rule 13d-1(b)(l)(ii)(B)

The Division staff took the position that it will not draw a distinction between savings and loan associations and banks for purpose of eligibility to file a Schedule 13G, rather than a Schedule 13D.

8. Rule 13d-1(c)

A bank converted to a holding company structure. A five percent shareholder who had been filing the equivalent of a Schedule 13G with the Comptroller of the Currency received five percent of the holding company's stock in a one-for-one exchange, but after the stock had been registered with the Commission under Section 12(g) of the Exchange Act. The Division staff took the position that the five percent holder could file on Schedule 13G, rather than Schedule 13D. The filing would be an initial filing with the Commission requiring payment of a fee, not an amendment to the filings previously made with the Comptroller.

9. Rule 13d-2(a); Schedule 13D

Although short sales by a 13D reporting person normally will not change that person's Rule 13d-3 beneficial ownership (since such sales do not change the amount of shares over which the reporting person has voting or investment power", such sales may trigger a requirement to amend the Schedule 13D pursuant to Rule 13d-2 unless all applicable changes in the facts previously set

forth in the reporting person's Schedule 13D are not material. For example, the short sale may represent a change in the source of funds (Item 3), a possible shift in purpose (Item 4) (particularly to the extent that a plan or proposal to dispose of securities of the issuer was not disclosed previously), a "transaction" in the subject security (Item 5), as well as a "contract, agreement, understanding, or relationship ... with respect to ... securities of the issuer" (Item 6) and required exhibit (Item 7). The same analysis applies to a pledge of the securities in a secured transaction or the writing of call options.

10. Rule 13d-2(b)

Any person who has filed a Schedule 13G must file an annual amendment to the Schedule within 45 days after the end of the calendar year, to report any changes in the information presented. (No Amendment is required if there have been no changes). This obligation is not limited to institutional investors.

11. Rule 13d-3(d)(3)

A pledgee of securities who prior to default lacks the power either to vote or to dispose of the securities is not considered to be the beneficial owner of the securities, provided the pledge agreement is bona fide and was not entered into with the purpose or effect of changing or influencing the control of the issuer. After a default by the pledgor has occurred, however, Rule 13d-3(d)(3) should be examined to determine whether the pledgee has become the beneficial owner of the securities. If the conditions of Rule 13d-3(d)(3) cannot be met by the pledgee, the pledgee will be deemed to have acquired beneficial ownership of the pledged securities on the date of default and therefore the pledgee must file a Schedule 13D within 10 days thereafter.

12. Schedule 13D

Counsel to a Schedule 13D reporting person that had acquired warrants from the issuer that were not exercisable for six months, sought the Division staff's concurrence that the acquisition would not trigger a Schedule 13D amendment requirement, since the warrants were not exercisable within 60 days. Counsel was advised that an amendment was required to amend Item 4(a) (plans to acquire additional securities) and Item 6 (contracts) disclosures and to file the warrant agreement pursuant to Item 7 of Schedule 13D.

13. Schedule 13D; Item 2(e)

The required summary of the terms of any judgment, decree or final order covered by Item 2(e) of Schedule 13D includes specific quantitative disclosures, such as the dollar amount of any penalty imposed or the duration of any injunction ordered or bar imposed.

14. Schedule 13D, Items 4 and 6

The Division staff is of the view that the references to "securities of the issuer" in Items 4(a) and 6 of Schedule 13D include all securities of the issuer, whether or not an equity or voting security or of a class registered or to be registered under Section 12. Therefore, a reporting person which has formulated any plans or proposals or entered into any agreements involving the acquisition of debt securities of the issuer generally will be required to amend promptly the Schedule 13D Item 4 and 6 disclosures.

15. Schedule 13D, Item 6

A 13D reporting person entered into a contingent contract with an unaffiliated third party for the sale of a sufficient number of shares to cause the third party to hold over 5% of the equity class when the sale occurred. The filing person must promptly amend its Schedule 13D Item 6 disclosures as a result of the contingent contract. However, the third party purchaser will not acquire beneficial ownership until it has a right to acquire the shares within 60 days; accordingly, the third party purchaser has no Schedule 13D filing obligation until the contingencies over which it has no control are waived or satisfied. If all material contingencies are within the third party's control either to waive or satisfy, a Schedule 13D filing obligation arises immediately upon purchase.

16. Schedule 13D; Rule 13d-2(a)

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