

SEC Revises Recent Guidance on Deadline for Initial Schedule 13D Filing

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On November 16, 2009, the Staff of the SEC's Division of Corporation Finance withdrew and reissued in revised form one of its September 2009 Compliance and Disclosure Interpretations relating to beneficial ownership reporting under Sections 13(d) and 13(g) of the Securities Exchange Act.²

The Staff's revision confirms that an investor's initial Schedule 13D must be filed within 10 days **after** the date of the trade by which the investor crosses the five-percent beneficial ownership threshold.

Rule 13d-1(a) under the Exchange Act requires an investor to file an initial Schedule 13D "within 10 days after the acquisition" that takes the investor above five-percent beneficial ownership. In its Interpretation 103.05 issued in September, the Staff raised eyebrows by stating that the trade date is day number one for purposes of calculating the 10-day filing deadline, thus implying that the investor's initial Schedule 13D is due not later than T+9. This guidance was at odds with the investment community's traditional understanding that the initial Schedule 13D is due not later than T+10.

The Staff has now restored the traditional understanding by withdrawing Interpretation 103.05. In its place, the Staff has issued Interpretation 103.10, which states that "[f]or purposes of calculating the 10-day time period, the first calendar day **after** the trade date counts as day number one." (Emphasis added.) While Interpretation 103.10 does not

explicitly address the point, the same guidance presumably applies to a passive investor filing Schedule 13G pursuant to Rule 13d-1(c). That filing is also due "within 10 days after the acquisition" that takes the investor above five-percent beneficial ownership.³

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Memorandum

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"The Staff's revision confirms that an investor's initial Schedule 13D must be filed within 10 days **after** the date of the trade by which the investor crosses the five-percent beneficial ownership threshold."

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² The Staff issued its original Interpretations on September 14, 2009. See our October 19, 2009 memorandum, "SEC Issues Interpretive Guidance on Exchange Act Sections 13(d) and 13(g)," available at http://www.rkollp.com/news_and_publications.php.

³ The withdrawal of Interpretation 103.05 and the addition of Interpretation 103.10 are the only changes to the Staff's September 2009 Interpretations. The revised Interpretations are available at <http://www.sec.gov/divisions/corpfin/guidance/reg13d-interp.htm>.

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