# *Chapter 42G*

# Private Placement Sales

**Ernest Edward Badway**

*Partner, Fox Rothschild LLP*

**Joshua Horn**

*Partner, Fox Rothschild LLP**





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* The authors may be contacted by email, respectively, at ebadway@foxrothschild.com and jhorn@foxrothschild.com.

## § 42G:1 Introduction

Over many years, numerous entities have used the capital raising strategy known as a private placement through the services of a securities broker-dealer. Numerous compliance-related issues arise with such private placements for both the issuers and broker-dealers who offer them to the investors. Although every issue is not covered in this brief chapter, we attempt to provide a broad overview to sensitize the reader to the concerns broker-dealers and their compliance staffs may face when firms consider raising capital for an issuer through a private placement.

Initially, we discuss the current statutory and regulatory structure for private placements, a system primarily based in exemptions and exceptions to provisions of the Securities Act of 1933 (the "Securities Act"), the Securities Exchange Act of 1934 (the "Exchange Act"), and the Investment Company Act of 1940. Next, we acknowledge certain practical aspects in the regulation of securities broker-dealers with particular emphasis on considerations that must be measured prior to raising capital for issuers through a private placement. Finally, "real world" case studies will demonstrate some pitfalls to avoid.

## § 42G:2 Statutes and Regulations Governing Private Placement Use

Recently, the SEC's Division of Economic and Risk Analysis released a study examining the use of private placements.[1] The study disclosed that, in 2012, the funds raised in the private placement market were $1.7 trillion, while the public market only raised $1.2 trillion. The study also indicated that hedge and private equity funds were responsible for over 80% of these offerings since 2009; 99% of private placements used Securities Act Rule 506; and only 10% of those who invested were non-accredited investors as discussed below.

### *§ 42G:2.1 Investors*

Private placements are, generally, marketed to institutional investors or wealthy, sophisticated individuals. The federal and state securities laws applicable to private placement, typically, recognize two types of investors: accredited investors and qualified purchasers.

"Accredited investors" are defined to include, among other things, any bank; broker or dealer; limited liability company with assets in

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1. *See* SEC, CAPITAL RAISING IN THE U.S.: AN ANALYSIS OF UNREGISTERED OFFERINGS USING THE REGULATION D EXEMPTION, 2009–2012, *available at* www.sec.gov/divisions/riskfin/whitepapers/dera-unregistered-offerings-reg-d.pdf.

excess of $5 million; any natural person with an individual or joint net worth with that person's spouse at the time of purchase exceeding $1 million (excluding the value of the person's primary residence and certain associated debt); and any natural person whose individual income is in excess of $200,000 (or joint with a spouse in excess of $300,000) for the two most recent years.[2] Interests in the fund are to be offered exclusively to accredited investors as that term is defined in Securities Act Rule 501 of Regulation D. There are other categories of investors that are also considered "accredited," including, among others, banks, insurance companies, and natural persons whose net worth (or joint net worth with a spouse) exceeds $1 million at the time of the purchase, excluding the value of the primary residence of such person, or income exceeding $200,000 in each of the two most recent years (or joint income with a spouse exceeding $300,000 for those years).[3]

The other form of investor is a qualified purchaser, defined as, among other things, any natural person who owns at least $5 million in investments; a family owned company that has more than $5 million in assets; and any other person, who in the aggregate, either owns or invests at least $25 million for its own account or the accounts of other qualified purchasers.[4]

### § 42G:2.2 Securities Act Section 4(2)

The Securities Act requires that issuers, who offer their securities in the United States by broker-dealers, must structure their offers and sales of interests as private placements to be exempt from the requirement of registration. Many issuers offer private placements pursuant to a Securities Act section 4(2) offering exemption from the securities registration requirements.

The SEC and courts review several factors to determine if an offering is public or private. Several of the factors considered are,

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2. *See* 17 C.F.R. § 230.501; 15 U.S.C. § 80b-1.
3. *See* Securities Act Rule 501.
4. *See* Investment Company Act § 2(a)(51)(A). Private placements are the route for most private equity and hedge fund offerings. However, regardless of the type of investor, to be exempt from registration under the Investment Company Act, a fund may not be beneficially owned by more than 100 people if sold to accredited investors and not made or presently proposed to be made a public offering of its securities. *See* Investment Company Act § 3(c)(1). Further, if all investors are qualified purchasers and the fund is not made or presently proposed to be made a public offering of its securities, there would be no limit to the number of investors this fund may have. *See* Investment Company Act § 3(c)(7). Nonetheless, the SEC has taken the position that the requirements under Investment Company Act section 3(c)(1) are met if the offering of securities meets the criteria of Section 4(2) of the Securities Act, or of Rule 506 of Regulation D.

among others, the number of offerees, the sophistication of the offerees, the nature of the information disseminated, and the manner of the solicitation.[5]

### § 42G:2.3 Regulation D

Private placements are, generally, made in accordance with Securities Act Rule 506 of Regulation D, a non-exclusive safe harbor for issuers relying on Securities Act section 4(2).

Securities Act Rule 506 of Regulation D permits sales of fund interests to an unlimited number of an "accredited investors," but limits the sales of a fund interest to thirty-five non-accredited investors. Securities Act Rule 506 does not limit the dollar amount of securities that can be offered. Until recently, Securities Act Rule 502(c) of Regulation D prohibited offers or sales through general solicitations or general advertising.

To help establish compliance with the requirements of Regulation D, we generally recommend that those engaged in such an offering maintain a log sheet to track each set of offering documents that are provided to a potential investor. Each private placement memorandum (PPM) sent to an investor should be consecutively numbered, and a record should be made of the person's name and address. If the person decides not to invest, every effort should be made to have that person return the PPM and related documents within a reasonable time.

Finally, a notice of sale on a Securities Act Form D must be filed within fifteen days of the first sale under Securities Act Regulation D with the SEC and various states. Failure to file will not adversely affect the availability of the exemption, but may serve as a basis for the SEC to deny the issuer future reliance on Securities Act Regulation D. Further, it is imperative to update counsel as to when the first investment is received so that counsel may file the Securities Act Form D on behalf of the issuer.

### § 42G:2.4 JOBS Act

On April 5, 2012, the Jumpstart Our Business Startups Act of 2012 (the "JOBS Act") was signed into law by President Obama. The JOBS Act directed the SEC to revise Regulation D within ninety days of its enactment to remove the prohibition on general solicitations and general advertising in offerings and sales made under Rule 506, provided that all actual buyers are accredited investors. The SEC looks

5. *See* Factors Involved in Determining Whether Transaction Is "Public Offering," Securities Act Release No. 285, 1935 WL 27785, Fed. Sec. L. Rep. (CCH) ¶ 2740 (Jan. 24, 1935); SEC v. Ralston Purina Corp., 346 U.S. 119 (1953).

at the relationship between the issuer and offeree and the method of solicitation to evaluate compliance with these requirements. The offering of interests in these funds is designed to fall within the private offering exemption from registration that is set forth in SEC Regulation D. Among the many requirements that previously had to be satisfied to take advantage of this exemption is the requirement that no general solicitation of investors be performed. Accordingly, issuers and broker-dealers are not able to use cold calling, advertising, mass e-mails or spam, websites or other similar forms of promotion to solicit investors or promote or solicit investments.

Additionally, despite its name, the JOBS Act revolves around private offerings, not job creation, unless the extra work and worry that it will heap upon the already overwhelmed securities compliance professional were taken into account. Although JOBS Act advocates claim that it will revitalize the initial public offering (IPO) market, three of the law's six titles address private placements, and two others make it easier for a company to remain private.

While the JOBS Act proposes big reforms, it leaves the details largely to the SEC, tasking it with developing enacting regulations. Thus, although the JOBS Act should make it easier for companies to stay private, it will require extra work for broker-dealers, who will need to monitor the regulatory developments related to these transactions.

### [A] No More "Private Offerings"

The JOBS Act removed the ban on general solicitations in Securities Act Regulation D Rule 506 and Rule 144A re-sale offerings to qualified institutional buyers (QIBs). Prior to the JOBS Act, companies using Securities Act Rule 506 or shareholders re-selling under Rule 144A could not advertise publically. Instead, such sellers needed a pre-existing relationship with a potential investor before beginning sales. Thus, there was a "private" and "public" divide, requiring those wishing to stay "private" to not sell to the public. As a result, some other communication (such as a regular advertisement) would be deemed a general solicitation of securities. However, this prohibition has, now, been removed by the JOBS Act.

During a Securities Act Rule 506 offering, issuers will no longer need to worry that a public comment will be deemed a solicitation. Companies could announce a Securities Act Rule 506 offering on the front page of the *Wall Street Journal* if they felt so inclined. This change to Securities Act Rule 506 boosts the effectiveness of Securities Act Rule 508's safety net, protecting companies with the safe harbor although they inadvertently failed to comply with Regulation D's rules. Securities Act Rule 508 is unavailable when the person asserting the noncompliance claim was the intended beneficiary of the rule, effectively ensuring that Securities Act Rule 508 will not offer protection for general solicitation problems.

The JOBS Act directs the SEC to promulgate rules enacting this change, meaning that the ban on general solicitation of securities offered pursuant to Securities Act Rules 506 or 144A will remain in effect until the necessary regulations are enacted. On July 10, 2013, the SEC amended both Securities Act Rules 144A and 506, permitting the use of general solicitations and general advertising in private securities offerings. These amendments eliminated the general solicitation and general advertising bans. As part of these amendments, the SEC proposed amendments to Securities Act Rule 506 that impose new filing and disclosure requirements for private offerings.[6]

The new Rule 144A amendments eliminated the restrictions on offerings made pursuant to this rule, provided that the securities are sold to a QIB or to a purchaser that the seller or its agent reasonably believes is a QIB. Thus, there will be no offeree restrictions applicable to Rule 144A transactions so long as all purchasers in Rule 144A are all reasonably believed to be QIBs.

Similarly, the Rule 506 amendments will allow general solicitation and general advertising in connection with private securities offerings if:

- the issuer verifies its securities purchasers are accredited investors;
- the accredited investors fall within one of the accredited investor categories; and
- the issuer satisfied Rules 501, 502(a) and (d).

To determine if the investor is accredited, the SEC has stated it will be an objective test, based upon each offering's and investor's particular facts and circumstances, including but not limited to:

- the nature of the purchaser and the type of accredited investor;
- the amount and type of purchaser information the issuer possesses; and

6. *See* Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144 A Offerings, SEC Release No. 33-9415 (July 10, 2013), *available at* www.sec.gov/rules/final/2013/33-9415.pdf; Disqualification of Felons and Other "Bad Actors" from Rule 506 Offerings, SEC Release No. 33-9414 (July 10, 2013), *available at* www.sec.gov/rules/final/2013/33-9414.pdf; and Amendments to Regulation D, Form D and Rule 156, SEC Release No. 33-9416 (July 10, 2013), *available at* www.sec.gov/rules/proposed/2013/33-9416.pdf.

- the nature of the offering, purchaser solicitation, and terms of the offering, including the minimum investment amount.

As part of this guidance, the SEC included a non-exclusive list of verification methods that an issuer may use to determine if an investor is an accredited investor:

- reviewing IRS records to meet the accredited investor income test;[7]
- reviewing bank and other records to meet the accredited investor net worth test;[8]
- if either test is use by a registered broker-dealer, SEC-registered investment adviser, licensed attorney, or certified public accountant, there must be written confirmation as to the steps regarding the purchaser's accredited investor status; or
- in regard to any person who purchased securities in an issuer's Rule 506(b) offering as an accredited investor prior to the effective date of Rule 506(c) and continues to hold such securities, for the same issuer's Rule 506(c) offering, obtaining a certification that the purchaser qualifies as an accredited investor.

Issuers will also have a new Form D where it must be indicated if they are using a general solicitation or general advertising. Further, all other safe harbors, not using any general solicitation or general advertising, remain unchanged and do not require accredited investor verification in those private placements.

### [B] No More "Bad Guys" in Private Placements

On July 10, 2013, the SEC also approved the bad actor disqualification rule. Issuers will not be able to rely on Securities Act Rule 506, if

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7. The Rule 501 accredited investor income test definition includes any natural person, who had an individual income in excess of $200,000, in each of the two most recent years or joint income with that person's spouse in excess of $300,000, in each of those years and has a reasonable expectation of reaching the same income level in the current year.
8. The Rule 501 accredited investor net worth test definition includes any natural person whose individual net worth, or joint net worth with that person's spouse, exceeds $1 million. To calculate net worth: (a) the person's primary residence is excluded as an asset; (b) indebtedness that is secured by the person's primary residence, up to the estimated fair market value of the primary residence at the time of the sale of securities, is excluded as a liability with certain exceptions; and (c) indebtedness, such as a mortgage, on the person's primary residence in excess of the estimated fair market value is included as a liability.

the issuer or any other person covered by the rule[9] had a "disqualifying event."[10] The new rule will not apply if the issuer demonstrates that it did not know and could not have known, using reasonable investigation, that a covered person with a disqualifying event participated in the offering. Additionally, the SEC may grant waivers from disqualification under certain conditions.

### [C] More Shareholders Do Not Require More Work?

The provisions for these new offering and re-sale rules conveniently fit into the JOBS Act's changes to Exchange Act section 12(g). Previously, a company was required to make certain Exchange Act filings if it had more than 500 shareholders. As of April 5, 2012, that number is now 2,000, and 500 may be non-accredited investors; employees who received shares under a compensation plan do not count as shareholders. Further, a company would make this calculation based upon shareholders of record—not beneficial owners—so a pension plan, mutual fund, hedge fund, or private equity fund would count as only one shareholder.

The popularity of stock-based compensation (especially in "start-up" companies) and the rise of active secondary trading in private company securities made the 500 shareholder threshold a serious concern for many private companies. Most recently (and perhaps most

9. Covered persons include predecessors of the issuer; affiliated issuers; directors and certain officers; general partners and managing members of the issuer: 20% beneficial owners of the issuer; promoters; investment managers and principals of pooled investment funds; persons compensated for soliciting investors as well as the general partners, directors, officers; and managing members of any compensated solicitor.

10. A disqualifying event includes the following: (1) criminal convictions occurring within ten years of the proposed sale or purchase of securities entered in connection with the purchase or sale of securities; (2) court injunctions and restraining orders occurring within five years of the proposed sale or purchase of securities issued in connection with the purchase or sale of securities; (3) final orders from the Commodity Futures Trading Commission, federal banking agencies and certain other regulators that bar the issuer from associating with a regulated entity, engaging in the business of securities, insurance or banking, savings association or credit union activities or are based on fraudulent conduct issued within ten years before the proposed sale of securities; (4) certain SEC disciplinary orders relating to brokers, dealers and their associated persons; (5) SEC cease-and-desist orders relating to violations of certain anti-fraud provisions and registration requirements of the federal securities laws; (6) SEC stop orders and orders suspending the Regulation A exemption issued within five years before the proposed sale of securities; (7) suspension or expulsion from a self-regulatory organization (SRO) membership or from association with a SRO member; and (8) U.S. Postal Service false representation orders issued within five years before the proposed sale of securities.

famously), Facebook launched its IPO precisely because of the Exchange Act section 12(g) limit. One may speculate that, if the statute had been passed sooner, Facebook may have remained private.

Recently, *The Economist* featured "the endangered public company" as a pack of wooly mammoths being chased by spear-wielding cave/business-men hunters. The JOBS Act might be the equivalent of handing these hunters an elephant gun, seemingly feeding into the decline of IPOs despite the On-Ramp provision.

### [D] A Different Kind of "Public" Company—Crowdfunding and Regulation A+

Additionally blurring the line between private and public offerings, the JOBS Act revises Regulation A and introduces the concept of crowdfunding. Regulation A offerings may be better understood as exempt public offerings rather than private offerings, allowing an issuer to offer to the public (mostly) unrestricted securities without having to register them with the SEC. Of course, there are some limitations, and the SEC has the power to add many more, however, the changes to Regulation A are, generally, welcomed (hence, the "Reg. A+" moniker, also known as "crowdfunding").

Crowdfunding allows companies to raise small amounts of capital from a large number of investors through the internet and social media. A company will be able to raise up to $1 million in a crowdfunding offering conducted through a broker-dealer or a funding portal, which will need to register with the SEC and a self-regulatory organization.

Brokers or funding portals will be required to, among other things, register with the SEC and a SRO, most likely, the Financial Industry Regulatory Authority (FINRA). These intermediaries will also have to ensure that each investor reviews and confirms their understanding of the risks, and comply with a host of other regulations designed to prevent an issuer from defrauding investors, including, but not limited to, background checks on the issuing companies. As such, the number and severity of these regulations may restrict the number of funding portals. Nonetheless, one should not be lulled into a false sense of security. Certainly, this will increase the responsibilities and duties for those firms who engage in this type of business.

The intermediaries will not bear the regulatory burden alone. The issuing company will need to publicly disclose information related to the offering, such as their business model, the company's capital structure, plans for the funds, and a description of the financial condition of the issuing company for several preceding years. The level of detail varies depending upon the size of the offering. Thus, companies raising over $500,000 will need to provide audited financial statements; companies raising between $100,000 and $500,000 will need reviewed financial statements; and companies raising under \$100,000 will need self-certified financial statements and the company's last tax return. Issuers will also be prohibited from advertising the crowdfunding offering, except that issuers may direct potential investors to their funding portals or broker-dealers.

Additionally, crowdfunding investors will not count as holders of record under Exchange Act section 12(g), allowing the company to potentially have thousands of shareholders without triggering public company reporting requirements under the Exchange Act. That said, a company that uses crowdfunding will still need to prepare an annual report for its investors and the SEC. The JOBS Act directs the SEC to prescribe the specifics required for these annual reports, but Congress provided little specific guidance.

Crowdfunding will, most likely, appeal to certain categories of small companies. In particular, this form of financing will appeal to those companies that are younger and more isolated from mainstream funding sources. Crowdfunding will help most companies during their earliest stages. Most start-ups are bankrolled by their founder and the founder's friends and family. However, not every entrepreneur has the money—or the friends with the money—to launch their business. Crowdfunding offers them hope, and access to a new investor base—the "crowd."

Moreover, crowdfunding will eliminate the geographical boundaries of capital formation. Angel investors tend to cluster in certain areas (like Silicon Valley), forcing certain companies to move to gain access to start-up capital. Crowdfunding will eliminate the need for personal connections to early investors, and, thus, spread the availability of start-up capital. Rural entrepreneurs will turn to crowdfunding to finance startups that a local bank would never consider.

Further, companies that market themselves towards a certain type of consumer may want to use crowdfunding to further their brand. Crowdfunding excites a certain kind of person—the Twitter-literate, socially networked, youthful and entrepreneurial investor. Crowdfunding will offer the opportunity to demonstrate a grass-root, anti-big business ethos, and may be popular with the same companies that market themselves as progressive, green, or socially conscious. For example, new B-corporations hoping to be the next Patagonia™ will likely consider crowdfunding for their first round of investment.

As exciting and interesting as crowdfunding might be, there are some significant risks and potential pitfalls to consider before any such fundraising. The SEC has the potential to make crowdfunding excessively costly, and, even without additional SEC regulations, crowdfunding requires more disclosure than private offerings conducted under Regulation D's safe harbors. After crowdfunding, the number of a company's shareholders could potentially move from a few to a few thousand overnight. Any company contemplating crowdfunding will need to carefully consider its corporate structure first to arrange strategies for maintaining control of the company and preparing subsequent investment rounds; a small company that used crowdfunding will now need to deal with thousands of investors, causing additional headaches, burdens, and responsibilities.[11]

In many ways, the JOBS Act may allow for more efficient capital raising by possibly reducing the issuer's compliance costs and regulatory distractions for private and emerging growth companies. However, in practical terms, the JOBS Act will force securities professionals to stretch their limits and prepare for new contingencies not seen in past private offerings.

### § 42G:2.5 Other Exchange Act Considerations

The Exchange Act also has disclosure requirements for all material information, ongoing disclosure obligations, and reporting requirements for these private offerings.

Section 12(g) of the Exchange Act requires domestic issuers of securities with total assets exceeding $10 million and a class of equity securities held by 2,000 or more persons to register that class of securities. Employees who hold securities pursuant to an employee compensation plan do not count as record holders for the 2,000 person threshold, and up to 500 of the 2,000 holders of record may be non-accredited investors. Until the passage of the JOBS Act, the record holder limit was 500. The administrative burdens of registration may effectively set the outer bounds of the number of investors in a domestic hedge fund at 1,999 (excluding employee-investors).

Additionally, the Exchange Act requires full disclosure of all material risks to potential investors. For example, when a broker discusses the investment opportunity with potential investors, it is important to balance the discussion and disclose all of the material risks as well as the potential rewards of the investment. The securities laws require issuers and broker-dealers to disclose all material information about the securities, the management team, the offering, and any other

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11. Although crowdfunding is a new exemption, it may ultimately be underutilized due to its many burdens. Until recently, such offerings would have been described as Regulation A capped offerings at $5 million, but Regulation A had often been ignored in favor of Regulation D. Now, Regulation A is capped at $50 million, and it is expected to be used more often. That said, to take advantage of the new Regulation A, companies will also need to file audited financial statements with the SEC annually, and the SEC might impose additional conditions (like periodic reporting requirements). Essentially, like most of the JOBS Act's provisions, the SEC has the power to modify this legislation through its rule-making ability.

items to potential investors. Certain background information related to the issuer and its principals, such as criminal convictions, past SEC actions, bankruptcies, and other items are considered material and need to be disclosed.

All of the information provided to investors should be consistent with the information contained in the PPM and/or offering circular. If there have been material developments regarding the issuer or any of the management team, the PPM and/or offering circular will need to be updated. Under no circumstances should there be any guarantees that an investor will make a profit from this investment.

The Exchange Act also has several reporting requirements that may be applicable. For example, the Exchange Act requires certain reporting to regulators. Initially, Exchange Act sections 13(d) and 13(g) require that disclosure occur once a person or group of persons have acquired direct or indirect beneficial ownership of more than 5% of a class of voting equity securities registered under the Exchange Act. Such disclosure would assume the form of a statement indicating such ownership that is filed with the SEC and a copy sent to the issuer. Such Schedules are filed electronically through the SEC's EDGAR system.

An Exchange Act Schedule 13D is to be filed within ten days after the 5% threshold was breached. Thereafter, amendments are to be filed if there is a material change in the information previously disclosed, including a change of ownership of 1% or more of the outstanding class of securities. Information disclosed in the Exchange Act Schedule 13D includes the identity of the purchaser, the purpose of the acquisition, the source of funds used to purchase the securities, voting power with respect to the securities owned, and material contracts and arrangements with respect to the securities.

Exchange Act Schedule 13G is a short form available to three classes of investors provided that they have acquired the securities in the ordinary course of their business and not with the objective of changing or influencing control of the issuer. The three investor classes eligible to use Schedule 13G are "qualified institutional investors" (including registered broker-dealers, most banks, insurance companies, registered investment companies, and registered investment advisers); "exempt investors" (referring to persons holding more than 5% of a class of subject securities at the end of a calendar year, but who have not made the acquisition subject to Exchange Act Section 13(d)); and "passive investors" (investors (i) not seeking to acquire or influence "control" of an issuer and (ii) owning less than 20% of the outstanding shares of any class of securities of such issuer). Qualified institutional investors and exempt investors must file their Exchange Act Schedule 13Gs and send copies within forty-five days of the end of the calendar year in which the 5% threshold was breached, and within ten days after the end of the first month in which beneficial ownership exceeds 10%, and within ten days of the end of any month thereafter in which such beneficial ownership increases or decreases by more than 5% as of the last day of such month. Annual filings are also required within forty-five days of year end.

Passive investors choosing to report on Exchange Act Schedule 13G are required to file an Exchange Act Schedule 13G within ten calendar days after acquiring beneficial ownership of more than 5% of a class of securities. An investor is not eligible, however, to file on Exchange Act Schedule 13G, and must file an Exchange Act Schedule 13D if it has acquired beneficial ownership of more than 5% of a class of voting securities and is unable or unwilling to certify that it is not seeking to acquire or influence "control" of the issuer. Passive investors using Exchange Act Schedule 13G are required to amend their filing within forty-five days after the end of the calendar year to report any changes in the information previously filed.

Additionally, the amendments impose several safeguards against abuse of the less intensive reporting obligations of Exchange Act section 13(g). Passive investors must promptly file an amendment to their Exchange Act Schedule 13G during the year after acquiring beneficial ownership exceeding 10% of the class of subject securities and, thereafter, upon any increase or decrease in beneficial ownership by more than 5%. When a qualified institutional investor or a passive investor no longer holds securities for passive purposes and when the passive investor's holdings reach 20% or more, such investors will lose Exchange Act Schedule 13G eligibility and are required to file an Exchange Act Schedule 13D within ten calendar days of that event, and will become subject to a "cooling off" period that begins with the date of the triggering event and continues until ten calendar days after the filing of the Exchange Act Schedule 13D. During this cooling-off period, the reporting person is prohibited from voting or directing the voting of the subject securities or acquiring additional equity securities of the issuer or any person controlling the issuer.[12]

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12. Exchange Act section 13(f) also requires institutional investment managers with investment discretion over accounts holding Exchange Act section 13(f) securities (voting securities traded on a national securities exchange or quoted on NASDAQ) with a fair market value of at least $100 million to file a quarterly report on Exchange Act Form 13F with the SEC. Reports are to be filed within forty-five days of the end of the first calendar year in which the $100 million threshold is breached, and within forty-five days after each succeeding quarter of the subsequent year. The Form 13F discloses all holdings of Exchange Act section 13(f) securities in excess of 10,000 shares and $200,000 in aggregate fair market value or principal amount in the case of convertible debt. Institutional investment managers who exercise investment discretion over $100 million or more