

Multiple Classes of Stock: Form 4 Reporting & Short Swing Matching

As companies continue to go public with dual classes of stock - SEC and proxy advisory firm scrutiny aside - questions arise around Form 4 reporting and short-swing profit recovery rules. For example, do you need to include all classes of stock on a Form 4 if you're only reporting a transaction in one class? Are transactions in one class of securities matchable under the short-swing profit rules with transactions in another class of securities? Form 4 Reporting: Form 4 requires reporting only for securities of the same class - or classes - as the securities involved in the transaction. So if you're reporting an option exercise for Class A common stock in Table I, you're not also required to report your holdings of Class B common stock in Table I. You can, though companies typically do not. An initial Form 3, though, must include all holdings of common stock and derivative securities, including those of multiple classes of common stock. Things get a bit more complicated where one class of stock is convertible into another class of securities, say upon a sale of shares into the market. In that case, you will still need to include two classes on the Form 4, one to report the conversion of the convertible securities - and the other to report the sale of those converted securities. Short-Swing Matching: And what about short-swing matching for the two classes of securities? The SEC and the courts generally treat two classes of common stock that only have different voting rights independently of each other for determining 10% owner status under Section 16 of the Securities Exchange Act. But things are a bit murkier in the area of short-swing matching - the SEC did not extend this position to the short swing profit recovery rules. But the Second Circuit in *Gibbons v. Malone*, 703 F. 3d 595 (2d Cir. 2013), held that transactions in different series of common stock were not matchable where the securities were separately traded, nonconvertible and have different voting rights. This case is helpful for the position that transactions in typical dual-class securities should not be matchable with one another. But companies should nonetheless carefully track transactions involving the different classes of securities. Insiders should be aware of the potential risk, including that the company may receive a demand letter from a plaintiff's lawyer seeking disgorgement of profits, notwithstanding the court case. The Section 16 plaintiff's bar continues to be inventive and resourceful.

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