

SEC Report Highlights Beneficial Ownership Reporting Risks for Investor Organizations

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On October 7, 2026, the U.S. Securities and Exchange Commission (the “SEC”) issued a rare report of investigation under Section 21(a) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”), concerning Climate Action 100+ (“CA100”) and the election of dissident directors at ExxonMobil Corporation’s (“ExxonMobil”) May 2021 annual shareholder meeting (the “Report”). The Report highlights two distinct beneficial ownership reporting risks under the Exchange Act for investors participating in coordinated engagement through membership in an investor organization: (i) coordinated engagement may result in the formation of a “group” whose holdings must be aggregated for beneficial ownership reporting purposes and (ii) the investors’ conduct in support of an organization’s efforts to change or influence control of a specific issuer may cause them to lose eligibility to report on short-form Schedule 13G, requiring reporting on Schedule 13D instead.

The SEC declined to pursue an enforcement action based on the conduct known to it and made no findings of violations. Instead, the SEC issued the Report to inform asset managers and investors who would join, or would consider joining, an organization such as CA100 to take appropriate steps to ensure compliance with reporting requirements under the Exchange Act. As such, the Report’s guidance extends beyond climate initiatives to any investor organization that seeks to change or influence control of specific issuers.

Background. CA100 is an investor-led organization whose members engage with selected public companies to improve climate change governance, reduce emissions and strengthen climate-related financial disclosures. According to the Report, CA100 designates lead investors to pursue its objectives at particular companies and “flags” shareholder votes that it considers important, encouraging its members to support those matters.

Ahead of ExxonMobil’s 2021 annual meeting, CA100 expanded its flagging process to include director elections and flagged the ExxonMobil director vote in support of Engine No. 1, an activist investor seeking to replace four incumbent directors. While acknowledging independence safeguards by individual investors and testimony

disputing CA100's influence, the SEC examined whether investors used CA100 as a means of coordinating their votes in that contest. The Report focuses on whether investors' actual conduct was consistent with their stated independence, rather than treating either membership or a disclaimer of coordination as conclusive.

Group Formation. Sections 13(d)(3) and 13(g)(3) of the Exchange Act treat two or more persons acting as a group to acquire, hold or dispose of an issuer's securities as a single person for beneficial ownership reporting purposes. As a result, if a group's combined beneficial ownership exceeds 5% of a covered class (generally, a class of voting equity securities registered under Section 12 of the Exchange Act, and including shares over which an asset manager exercises voting or investment power on behalf of clients), a reporting obligation under Section 13(d) or Section 13(g) may arise for each member of the group, even if no member individually beneficially owns more than 5%. In addition, to the extent a group's combined beneficial ownership exceeds 10%, individual members may also have reporting obligations under Section 16(a) of the Exchange Act (as well as be subject to restrictions and liabilities under Section 16(b) and Section 16(c) of the Exchange Act).

The Report emphasizes that group formation depends on the totality of the facts and circumstances and does not require a written agreement or an intention to obtain corporate control. An express or implied agreement, arrangement, understanding or concerted action may instead be established through circumstantial evidence. Although the SEC did not conclude that a group had formed in connection with the 2021 ExxonMobil director election, the Report highlights CA100's efforts to coordinate engagement by its members through intermediaries, flag votes and pressure members to align their voting decisions as practices that raised concerns about potential group formation. According to the Report, those efforts, together with any agreement or concerted action to advance shared voting objectives, could support a finding that a group had formed. The Report further emphasized that a statement reserving independent voting discretion would not prevent such a finding if the evidence showed that investors had, in practice, expressly or implicitly agreed to act together in voting the issuer's shares.

At the same time, the Report distinguishes investor coordination from independent decisions by investors that reach similar conclusions. Joining an organization ordinarily does not, by itself, establish a group, nor does a passive exchange of views with an activist or an independently determined announcement supporting an unaffiliated activist's nominees. The analysis may change, however, where membership is accompanied by commitments to align votes or engage particular issuers in pursuit of the organization's objectives. The relevant question is therefore not simply whether investors share a policy preference, but whether their conduct demonstrates that they are acting together with respect to the issuer's securities.

It is also important to note that coordination is not itself unlawful, but it may require disclosure by the group's members of certain information, as discussed below.

Schedule 13G Eligibility. The second topic addressed by the Report is that an investor's conduct may cause it to lose its eligibility to report beneficial ownership on Schedule 13G, independent of whether the investor is a member of a group. In particular, to file on Schedule 13G, qualified institutional investors ("QIIs") relying on Rule 13d-1(b), and passive investors relying on Rule 13d-1(c), must satisfy conditions concerning the absence of a purpose or effect of changing or influencing control of the issuer, which includes the power to direct an issuer's management and policies.

The Report explains that commitments and coordinated actions supporting an investor organization's board-refresh campaign may indicate a control-related purpose, particularly where the objective is to replace directors who have resisted the organization's policy goals. Similar concerns can arise when membership in an organization is coupled with commitments and actions aimed at specific management or policy outcomes. While ordinary-course dialogue with management, an exchange of views or a vote for dissident directors does not automatically disqualify a shareholder from filing on Schedule 13G, an investor should consider whether its engagement has moved beyond expressing views to conduct undertaken with the purpose or effect of changing or influencing control.

Under Rule 13d-1(b), QIIs must also acquire and continue to hold securities in the "ordinary course of business" to be eligible to file on Schedule 13G. Although the SEC has not defined that term, the Report specifically cautions index fund managers to consider whether participation in a coordinated initiative unrelated to a fund's benchmark performance, including through participation in an intermediary-driven organization such as CA100, is consistent with that requirement.

Section 16 Implications. The Report also highlights potential consequences under Section 16 of the Exchange Act. Where a group's combined beneficial ownership exceeds 10% of a covered class, its members may be treated as greater-than-10% beneficial owners for purposes of Section 16 even if their individual holdings are below that threshold. Group formation may therefore result in Section 16(a) reporting obligations and potential short-swing profit disgorgement liability under Section 16(b), in addition to any Schedule 13D filing obligations.

Section 16(b) generally requires a covered investor to disgorge to the issuer profits realized from a purchase and sale, or sale and purchase, of the issuer's equity securities within a period of less than six months, without requiring proof of trading on inside information.

Practical Takeaways. When considering joining an organization or engaging in coordinated activities, investors should consider the specific commitments being made. Relevant considerations include issuer-specific objectives, expectations about voting, communications with other members or intermediaries, and processes for evaluating members' support for the organization's initiatives. Stewardship and compliance teams should consider whether those activities remain consistent with any limits intended to preserve independent decision-making, rather than relying on a membership disclaimer alone.

The Report does not prohibit collective engagement, but underscores that the relevant analysis around reporting of beneficial ownership follows an investor's actual conduct and objectives. Investors seeking to avoid group membership or status as a non-passive shareholder for purposes of Section 13(d) of the Exchange Act should therefore carefully review their engagement with other investors and issuers and specific voting decisions to ensure that any limits placed on their participation in an organization are observed.

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Please do not hesitate to contact us with any questions regarding beneficial ownership reporting on Schedule 13G or Schedule 13D.



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