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SEC amends beneficial ownership reporting rules

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On October 10, 2023, the Securities and Exchange Commission (the SEC or the Commission) adopted amendments^[1] to Regulation 13D-G under the Securities Exchange Act of 1934, as amended (the Exchange Act), originally proposed on February 10, 2022, and provided further guidance on current legal standards regarding beneficial ownership reporting. Broadly stated, Regulation 13D-G sets forth the beneficial ownership reporting requirements of a person acquiring more than five percent beneficial ownership of a voting class of equity securities registered under Section 12 of the Exchange Act.

The amendments shorten the deadlines for Schedule 13D and 13G initial filings and any related amendments, requiring investors to accelerate their public disclosures of changes in beneficial ownership, and require filings to be made in a “structured, machine-readable data language.” The Commission also provided guidance regarding disclosure of ownership of certain cash-settled derivative securities, as well as when a group is formed for beneficial ownership purposes.

THE AMENDMENTS TO SCHEDULES 13D AND 13G

The amendments establish the following new deadlines and filing requirements for Schedule 13D and 13G filings:

Shortened deadlines for initial and amended filings:

- Schedule 13D: For Schedule 13D filers, the amendments shorten the initial filing deadline from 10 calendar days to five business days and require amendments to be filed within two business days of a triggering event.
- Schedule 13G: The amendments for Schedule 13G filers differ based upon whether investors are qualified institutional investors, exempt investors, or passive investors.
 - *Qualified institutional investors and exempt investors* : The amendments shorten the initial filing from 45 days after the end of a calendar *year* to 45 days after the end of the calendar *quarter* in which the investor beneficially owns more than 5 percent of the covered class.
 - *Passive investors*: The amendments shorten the initial filing deadline from 10 calendar days to five business days after acquiring beneficial ownership of more than 5 percent of the covered class, and modify the deadline for amendments after exceeding 10 percent of beneficial ownership or a five percent increase or decrease in beneficial ownership from “promptly” following the triggering event to within two business days.
 - *Qualified institutional investors*: The amendments shorten the initial filing deadline from 10 days to five business days after acquiring beneficial ownership of more than 10 percent of the covered class. Amendments which were required to be filed 10 days after month-end in which beneficial ownership exceeded 10 percent or a 5 percent increase or decrease in beneficial ownership must now be filed within five business days.

In addition, for all Schedule 13G filers, the amendments require that a Schedule 13G amendment be filed 45 days after the *calendar quarter* in which a material change occurred rather than 45 days after the *calendar year* in which any change occurred.

A table summarizing how the amendments impact the various filing deadlines is set forth in Appendix A.

Extended cut-off times: Considering the shortened deadlines, the amendments extend the filing cut-off times on the date a Schedule 13D or 13G must be filed from 5:30 pm to 10:00 pm Eastern time. These amendments to Rule 13(a)(4) of Regulation S-T allow Schedules 13D and 13G to be filed up to the time of day the SEC accepts insider trading reports on Forms 3, 4, and 5 and certain other filing types.

Schedule 13D cash-settled derivative securities disclosure: The amendments revise Item 6 of Schedule 13D to clarify that a person is required to disclose interests in all derivative securities (including cash-settled derivative securities) that use the issuer’s equity security as a reference security.

Previously, Item 6 set forth a non-exclusive list of legal relationships that must be reported but, since cash-settled derivative securities were not expressly included, many filers viewed cash-settled derivative securities as not requiring disclosure. The Commission amended Rule 13d-101 to expressly state that derivative contracts, arrangements, understandings, and relationships with

respect to an issuer's securities, including cash-settled securities-based swaps (SBS) and other derivatives which are settled exclusively in cash, would need to be disclosed under Item 6 of Schedule 13D.

Machine-readable filings: The new amendments require that Schedules 13D and 13G are filed using a "structured, machine-readable data language" - more specifically, 13D/G-specific XML. This includes quantitative disclosures, textual narratives, and identification checkboxes.

Filers will still have the option of submitting directly to EDGAR in 13D/G specific XML or using a web-based reporting application developed by the Commission that will generate the Schedule in 13D/G-specific XML.

BENEFICIAL OWNERSHIP REPORTING COMMISSION GUIDANCE

The SEC also issued guidance on the application of current beneficial ownership reporting rules and legal standards to an investor's use of certain cash-settled derivative securities, when a group is formed for beneficial ownership purposes, and common types of shareholder engagement activities.

Investor's use of cash-settled derivative securities: Instead of adopting new rules to deem certain holders of cash-settled derivative securities beneficial owners under Rule 13d-3, the Commission determined that the guidance provided in the 2011 Security-Based Swaps Release^[2] would provide sufficient clarity and a sufficient analytical framework to determine whether the holder of any cash-settled derivative security is the beneficial owner of the reference covered class under Rule 13d-3.

Formation of a group that meets the beneficial ownership threshold: The adopting release states that whether a group has been formed is determined under the existing legal standard established in Exchange Act Sections 13(d)(3) and 13(g)(3). The Commission reiterated that Rule 13d-5 does not provide an applicable definition. The determination of whether two or more persons are acting as a group does not depend solely on the presence of an express agreement. Depending on the particular facts and circumstances, concerted actions by two or more persons for the purpose of acquiring, holding, or disposing of securities of an issuer are sufficient to constitute the formation of a group.

Common types of shareholder engagement activities: Commenters raised objections to the proposed amendments to Rule 13d-5,^[3] arguing that it would chill shareholder engagement. The Commission did not adopt such proposed amendments but provided guidance on whether certain shareholder activity constituted a group under the current legal standard found in Sections 13(d)(3) and 13(g)(3) of the Exchange Act. The Commission addressed the following questions:

A group is not formed when :

1. two or more shareholders communicate with each other regarding an issuer or its securities or a "vote no" campaign against individual directors in uncontested elections) without taking any other actions.
2. two or more shareholders engage in discussions with an issuer's management, without taking any other actions.
3. shareholders jointly make recommendations to an issuer regarding the

structure and composition of the issuer's board of directors where (1) no discussion of individual directors or board expansion occurs and (2) no commitments are made, or agreements or understandings are reached, among the shareholders regarding the potential withholding of their votes to approve, or voting against, management's director candidates if the issuer does not take steps to implement the shareholders' recommended actions.

4. shareholders jointly submit a non-binding shareholder proposal to an issuer pursuant to Exchange Act Rule 14a-8 for presentation at a meeting of shareholders.
5. a conversation, email, phone contact, or meetings between a shareholder and an activist investor seeks support for its proposals to an issuer's board or management, without more, such as consenting or committing to a course of action.
6. an announcement or a communication by a shareholder of the shareholder's intention to vote in favor of an unaffiliated activist investor's director nominees.

A group is formed when : a beneficial owner of a substantial block of a covered class that is or will be required to file a Schedule 13D intentionally communicates to other market participants (including investors) that such a filing will be made (to the extent this information is not yet public) with the purpose of causing such persons to make purchases in the same covered class, and one or more of the other market participants make purchases in the same covered class as a direct result of that communication.

The final determination as to whether a group is formed between the blockholder and the other market participants will ultimately depend upon the facts and circumstances, including (1) whether the purpose of the blockholder's communication with the other market participants was to cause them to purchase the securities and (2) whether the market participants' purchases were made as a direct result of the information shared by the blockholder.

Compliance dates

- The amendments will become effective 90 days after publication in the Federal Register.
- Compliance with the revised Schedule 13G filing deadlines will be required beginning September 30, 2024.
- Compliance with the structured data requirement for Schedules 13D and 13G will be required December 18, 2024.
- Compliance with the other rule amendments will be required upon their effectiveness.

Practical considerations

To prepare for the new amendments and the related beneficial ownership guidance, impacted market participants, such as company insiders and greater than 5 percent beneficial owners, may consider taking the following actions:

- Review existing policies and procedures related to beneficial ownership reporting through filing of Schedules 13D or 13G and evaluate whether any

revisions or updates are needed, whether any additional policies or procedures may be necessary, including whether additional procedures would be recommended to ensure compliance with shortened deadlines and machine-readable filings, and whether any clarifications or other modifications may be desirable in advance of public disclosure.

- Seek advice of counsel prior to engaging in any communications which may lend themselves to creation of a “group” for beneficial ownership reporting purposes.
- Provide updated training to directors, officers, and other employees on the new amendments as well as on the company’s policies and procedures related to beneficial ownership reporting.

For more information and assistance in understanding and implementing the requirements, please contact the authors of this article or your DLA Piper relationship attorney.

Appendix A

Schedule 13D

	Current	Amended
Initial filing deadline	Within 10 days of acquiring >5% of beneficial ownership or losing eligibility to file on Schedule 13G	Within 5 business days of acquiring >5% or losing eligibility to file on Schedule 13G
Amendment triggering event	Material change	No change
Amendment filing deadline	“Promptly” after the triggering event.	Within 2 business days after the triggering event

Schedule 13G

	Current	Amended
Initial filing deadline		
Qualified institutional investors	45 calendar days after calendar year-end upon acquiring >5%	45 calendar days after calendar quarter-end upon acquiring >5%
	10 calendar days after month-end upon acquiring >10%	5 business days after month-end upon acquiring >10%
Exempt investors	45 calendar days after calendar year-end upon acquiring >5%	45 calendar days after calendar quarter-end upon acquiring >5%
	10 calendar days after month-end upon acquiring >10%	5 business days after month-end upon acquiring >10%
Passive investors	10 calendar days after acquiring beneficial	5 business days after acquiring beneficial

	ownership of >5%	ownership of >5%
Amendment filing deadline		
Qualified institutional investors	10 calendar days after month-end upon acquiring >10% or there was, as of the month-end a 5% +/- in beneficial ownership	5 business days after month-end upon acquiring >10% or a 5% +/- in beneficial ownership
Exempt investors	10 calendar days after month-end upon acquiring >10% or there was, as of the month-end, a 5% +/- in beneficial ownership	5 business days after month-end upon acquiring >10% or a 5% +/- in beneficial ownership
Passive investors	"Promptly" after acquiring >10% or a 5% +/- in beneficial ownership	2 business days after acquiring >10% or a 5% +/- in beneficial ownership
All Schedule 13G annual amendments	Any change in previous filing due 45 days after year-end	Material changes in previous filing due 45 days after quarter-end

[1] The "Modernization of Beneficial Reporting" adopting release is available here - [Release No. 33-11253; 34-98704](#).

[2] In the Security-Based Swaps Release, [available here](#), the Commission outlined the circumstances under which an SBS holder will become a beneficial owner, which include when an SBS:

- confers voting and/or investment power (or a person otherwise acquires such power based on the purchase or sale of a [SBS])
- is used with the purpose or effect of divesting or preventing the vesting of beneficial ownership as part of a plan or scheme to evade the reporting requirements, or
- grants a right to acquire an equity security.

[3] In the proposing release, the Commission proposed to amend Rule 13d-5 to among other things: (i) remove the potential implication that it sets forth the legal standard for group formation under Sections 13(d)(3) or 13(g)(3); (ii) add new disclosure specifying that if a person, in advance of filing a Schedule 13D, discloses to any other person that such filing will be made and such other person acquired securities in the covered class for which the Schedule 13D will be filed, those persons will have formed a group within the meaning of Section 13(d)(3); and (iii) add new disclosure specifying that when two or more persons "act as" a group under Section 13(g)(3) of the Exchange Act, the group will be deemed to have become the beneficial owner, for purposes of Section 13(g)(1) and (2) of the Exchange Act, of the beneficial ownership held by its members.

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