

SEC Reporting & Compliance Alert

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SEC Amends Beneficial Ownership Reporting Rules, Shortening Deadlines and Offering Guidance on 'Groups' and Cash-Settled Derivatives

On October 10, 2023, the Securities and Exchange Commission (SEC) voted 4-1 to adopt amendments to its beneficial ownership reporting rules.

Sections 13(d) and 13(g) of the Securities Exchange Act of 1934, as amended (Exchange Act), require that beneficial owners of more than 5% of a company's registered class of voting securities report their beneficial ownership on a Schedule 13D or, if eligible, a short form Schedule 13G. The new rules accelerate the filing deadlines for Schedules 13D and 13G and provide additional guidance on formation of a "group" and other beneficial ownership-related issues. They represent an effort by the SEC to update the reporting requirements to provide more timely and complete information for the modern market, as current rules have not been updated for decades.

Key aspects of the new rules are described in further detail below.

Accelerated Schedule 13D Deadlines

Under the current reporting regime, any person required to file a Schedule 13D must file it within 10 calendar days after acquiring more than 5% of a class of registered voting equity securities and amend it "promptly" thereafter to report any material changes. The new rules shorten the initial deadline for Schedule 13D filings to five business days and require amendments to be filed within two business days of any material change in previously reported information.

Accelerated Schedule 13G Deadlines

The current deadlines for Schedule 13G filings depend on whether a person files as a qualified institutional investor (QII) (pursuant to Rule 13d-1(b)), passive investor (pursuant to Rule 13d-1(c)) or exempt investor (pursuant to Rule 13d-1(d)). The new rules generally require the filing of an initial Schedule 13G within 45 days after the end of the quarter in which the QII or exempt investor crosses the 5% threshold at quarter-end, or within five business days of crossing the threshold for passive investors, and subsequent amendments are generally required within 45 days after the end of the quarter in which there are any material changes in the information last reported. Shorter deadlines apply to QIIs or passive investors whose beneficial ownership exceeds 10%.

These accelerated deadlines for Schedule 13G filings are summarized in the table at the end of this alert.

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No More Annual Schedule 13G Amendments; Potential Quarterly Amendments

Notably, the new rules require that all Schedule 13G filings be amended within 45 days after the end of the calendar *quarter* in which any material change occurred. Under the current rules, except in certain situations, all Schedule 13G filings must be amended within 45 days after the end of the calendar year for *any changes* to the previous disclosure.

The SEC declined to define what is a material change for these purposes and instead pointed to the general concept of materiality under Rule 12b-2.¹ The SEC signaled that any acquisitions or dispositions of 1% or more of the outstanding class of securities should be deemed material for Schedule 13G amendment purposes, based on the 1% threshold prescribed under Rule 13d-2(a) for Schedule 13D amendment purposes.

Extended EDGAR Filing Cut-Off Time

In light of the shortened filing deadlines, the SEC extended the filing cut-off times for Schedules 13D and 13G from 5:30 p.m. to 10:00 p.m. Eastern Time.

New Guidance on Cash-Settled Derivative Securities

The SEC had proposed amending the beneficial ownership rules to provide that any person with a control purpose that held cash-settled derivatives (other than security-based swaps)² would be deemed to beneficially own the underlying securities. However, in response to concerns raised in comments on the proposed rules, the SEC declined to adopt these amendments. Instead, the SEC provided guidance that explains in what limited circumstances a holder of cash-settled derivatives (other than security-based swaps) could be viewed as beneficially owning the underlying securities under the current rules.

Under the new guidance, although cash-settled derivatives by their terms settle only in cash and generally are designed to represent only an economic interest in the referenced securities, the holder can still be deemed to beneficially own the underlying securities if one of the following is the case:

- The terms of the derivative provide the holder with any sole or shared voting or investment power over the underlying securities, through a contractual arrangement or otherwise.

¹ See 17 C.F.R. § 240.12b-2 (providing that information is material if “there is a substantial likelihood that a reasonable investor would attach importance in determining whether to buy or sell the securities”).

² Security-based swaps were excluded from the proposal due to a separate SEC proposal that would require any person to disclose security-based swap positions that exceed certain thresholds. See our January 21, 2022 client alert “SEC Proposes New Disclosure Rule for Security-Based Swap Positions,” for additional information on the proposed rules related to security-based swaps.

- The holder acquired the derivative with the purpose or effect of divesting itself of beneficial ownership over the underlying security or preventing the vesting of beneficial ownership as part of a scheme to evade the reporting requirements of Section 13(d) or (g) of the Exchange Act.
- The holder has the right to acquire the underlying security within 60 days, or acquires the right to acquire beneficial ownership of the security with a control purpose, regardless of when the right is exercisable.³

Additionally, the SEC amended Schedule 13D to clarify that interests in all derivative securities relating to the applicable registered class, including cash-settled security-based swaps and other cash-settled derivatives, must be disclosed in Item 6 of Schedule 13D. Some practitioners had previously argued that interests in such securities fell outside the scope of disclosure on Schedule 13D. This amendment confirms that such disclosure is required.

New Guidance and Rules on the Formation of a “Group”

Sections 13(d)(3) and 13(g)(3) of the Exchange Act state that a “group” is formed when two or more persons act as a group for purposes of acquiring, holding or disposing of issuer securities. Rule 13d-5(b)(1) under the Exchange Act states that a group is formed when two or more persons agree to act together for purposes of acquiring, holding, voting or disposing of issuer securities. The SEC had proposed amending Rule 13d-5(b)(1) to eliminate the reference to an agreement to act together and make the rule more closely follow the wording of the statute.

In light of the comments received on the proposal, the SEC did not adopt the proposed amendment to Rule 13d-5 but instead issued guidance to clarify its views with respect to the formation of a group under the existing rules.

The guidance provides that two or more persons could be deemed to act together, and thereby formed a group as contemplated by Section 13(d)(3) and 13(g)(3), if they take concerted actions for the purpose of acquiring, holding or disposing of issuer securities.⁴ That determination depends on an analysis of all the relevant facts and circumstances and, notably, no express agreement is required to form a group. In addition, when in dispute, proving the formation of a group requires evidence that shows, at a minimum, indicia of a common purpose to acquire, hold or dispose of issuer securities, such as an informal arrangement or coordination in furtherance of any of these purposes.

³ See 17 C.F.R. §§ 240.13d-3(a) and (b).

⁴ The SEC noted that, in its view, “holding” of issuer securities includes voting of issuer securities.

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The guidance also clarified, through a series of illustrative questions and answers, when certain shareholder communications with the issuer's management or other shareholders may be deemed to have resulted in the formation of a group.

The SEC adopted additional rule changes to clarify that: (a) any acquisition of beneficial ownership by a group member is an acquisition of beneficial ownership by the group, and (b) intra-group transfers of securities by group members do not constitute an acquisition of beneficial ownership by the group (*e.g.*, when determining whether the 1% threshold for an amendment is triggered due to intra-group transfers).

After reviewing the comments, the SEC did not adopt other proposed rule changes that were intended to clarify certain group issues.

Structured Data Requirements

The new rules require Schedules 13D and 13G (other than exhibits) to be filed using a machine-readable, structured data format as EDGAR XML filings, in an effort to make it easier for investors and other market participants to access, compile and analyze the disclosure. The SEC noted that this format would be similar to other XML-based structured data format used for Section 16 filings, Form 13F and Form D. The new format might impact the look of Schedule 13D and 13G filings and the amount of time it takes to prepare and file them.

Compliance Dates

The amendments will become effective 90 days after publication of the new rules in the Federal Register. However, compliance with

new Schedule 13G deadlines is not required before September 30, 2024. While compliance with the structured data requirements is not required until December 18, 2024, voluntary compliance is permitted beginning on December 18, 2023.

Impact on Investors

The amended rules will require investors to implement systems that permit them to monitor their beneficial ownership more closely. For Schedule 13D filers, they will need to have systems in place that can detect material changes (such as acquisitions or dispositions of 1% or more of the outstanding shares on a firm-wide basis) quickly in order to have amendments prepared and filed in a timely manner. This will be particularly critical if investors require outside counsel to prepare the drafts, which must then be reviewed and approved internally before execution and filing.

Schedule 13G filers will need to monitor their positions on a quarterly basis to determine whether any quarterly amendments are required. QIIs and exempt investors must also be prepared to file initial Schedules 13G more quickly, instead of waiting until 45 days after the end of the applicable year.

All investors who are subject to Schedule 13D or 13G filing requirements must be mindful of potential group issues and potential consequences from holding any cash-settled derivative securities.

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More information on the new rules is available in the SEC's [adopting release](#) and accompanying [press release](#) and [fact sheet](#).

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Changes to Schedule 13G Filing Deadlines

Type of Schedule 13G	Current Filing Requirements	New Filing Requirements
Qualified Institutional Investors (under Rule 13d-1(b))	<p>Initial Filing: The earlier of: (a) 45 days after the end of the year in which a person's beneficial ownership exceeds 5% at year-end; and (b) 10 days after the end of the first month in which the person's beneficial ownership exceeds 10% at month-end.</p> <p>Annual Amendment: Within 45 days after the end of the year, unless there are no changes to the information last reported.</p> <p>Additional Amendments: Within 10 days after the end of the first month in which a person's beneficial ownership exceeds 10% at month-end. Thereafter, within 10 days after the end of any month in which the person's month-end beneficial ownership increases or decreases by more than 5%.</p>	<p>Initial Filing: The earlier of: (a) 45 days after the end of the calendar quarter in which a person's beneficial ownership exceeds 5% at quarter-end; and (b) 5 business days after the end of the first month in which the person's beneficial ownership exceeds 10% at month-end.</p> <p>Annual Amendment: None.</p> <p>Quarterly Amendment: Within 45 days after the end of the calendar quarter in which there are any material changes in the information last reported.</p> <p>Additional Amendments: Within 5 business days after the end of the first month in which a person's beneficial ownership exceeds 10% at month-end. Thereafter, within 5 business days after the end of any month in which the person's month-end beneficial ownership increases or decreases by more than 5%.</p>
Passive Investor (under Rule 13d-1(c))	<p>Initial Filing: Within 10 days after acquiring more than 5% beneficial ownership.</p> <p>Annual Amendment: Within 45 days after the end of the year, unless there are no changes to the information last reported.</p> <p>Additional Amendments: Promptly after acquiring greater than 10% beneficial ownership. Thereafter, promptly after the person's beneficial ownership increases or decreases by more than 5%.</p>	<p>Initial Filing: Within 5 business days after acquiring more than 5% beneficial ownership.</p> <p>Annual Amendment: None.</p> <p>Quarterly Amendment: Within 45 days after the end of the calendar quarter in which there are any material changes in the information last reported.</p> <p>Additional Amendments: Within two business days after acquiring greater than 10% beneficial ownership. Thereafter, within two business days after the person's beneficial ownership increases or decreases by more than 5%.</p>
Exempt Investor (under Rule 13d-1(d))	<p>Initial Filing: Within 45 days after the end of the year in which a person's beneficial ownership exceeds 5% at year-end.</p> <p>Annual Amendment: Within 45 days after the end of the year, unless there are no changes to the information last reported.</p>	<p>Initial Filing: Within 45 days after the end of the calendar quarter in which a person's beneficial ownership exceeds 5% at quarter-end.</p> <p>Annual Amendment: None.</p> <p>Quarterly Amendment: Within 45 days after the end of the calendar quarter in which there are any material changes in the information last reported.</p>

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