

SEC Adopts Rule Amendments To Modernize Beneficial Ownership Reporting

On October 10, 2023, in a 4-1 vote, the Securities and Exchange Commission (the “SEC”) adopted [final rule amendments](#) (the “Final Rule Amendments”) to modernize beneficial ownership reporting under Sections 13(d) and 13(g) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”). In summary, the Final Rule Amendments:

- shorten the deadlines for initial filings and amendments to Schedules 13D and 13G beneficial ownership reports;
- require that the filings be made using a structured, (XML-based) machine-readable data language (the “Structured Data Requirement”);
- clarify the application of Regulation 13D-G to certain derivative securities; and
- provide guidance on the application of the existing statutory language to the circumstances under which two or more persons may be deemed to have formed a “group” subject to beneficial ownership reporting obligations.

However, the Final Rule Amendments do not adopt some of the more fundamental changes related to group formation that had been included in the initially proposed rules.

All changes adopted under the Final Rule Amendments will go into effect 90 days after publication in the Federal Register, except that compliance with the revised Schedule 13G filing deadlines and with the new Structured Data Requirement will be mandatory only from September 30, 2024 and December 18, 2024, respectively.

SUMMARY

While the Final Rule Amendments shorten the existing Schedule 13D and 13G filing deadlines, they are more moderate than the deadlines initially proposed by the SEC in the February 10, 2022 proposal release (the “Proposal”). The Final Rule Amendments also opt for “clarifications” and “guidance” around derivative securities and “group” formation, whereas the Proposal had contemplated potentially significant revisions to the text of the rules themselves.

DEADLINES AND CUT-OFF TIMES FOR SCHEDULE 13D AND SCHEDULE 13G FILINGS

Exchange Act Sections 13(d) and 13(g) and Regulation 13D-G require an investor with beneficial ownership of more than 5% of a covered class¹ of equity securities (“Covered Securities”) to report such beneficial ownership on a publicly filed Schedule 13D or Schedule 13G.

The Final Rule Amendments shorten the deadline for filing an initial Schedule 13D from 10 calendar days to 5 business days after acquiring more than 5% ownership of Covered Securities (or losing eligibility to file the less burdensome Schedule 13G that is available only to certain types of investors). Amendments to Schedule 13D will now need to be filed within two business days following any material change in the facts disclosed on the initial Schedule 13D (rather than “promptly” following such change). The Proposal had suggested 5-day and one-business day deadlines for these filings, respectively.

The Final Rule Amendments also affect the filing deadlines for Schedule 13G and Schedule 13G amendments for the various categories of filers (*i.e.*, qualified institutional investors (“QIIs”)², exempt investors³ and passive investors⁴). The Final Rule Amendments:

- Alter the requirement for an initial Schedule 13G for QIIs and exempt investors from 45 days after year-end to 45 days after the end of the calendar quarter in which beneficial ownership first exceeds 5% of the Covered Securities (*Proposal: five business days after month-end*);
- Shorten the initial filing deadline for filing a Schedule 13G for passive investors from 10 days to 5 business days after acquiring beneficial ownership of more than 5% of the Covered Securities (*Proposal: 5 days*);
- Alter the annual amendment requirement for Schedule 13G, which currently requires Schedule 13G amendment filings 45 days after the end of the calendar year if any changes exist as of such year end, to a quarterly amendment requirement

filed 45 days after the end of the calendar quarter if any material changes exist as of such quarter end, in the facts previously reported (*Proposal: five business days after month-end in which a material change occurs*);

- Shorten the deadline for QIIs to file Schedule 13G amendments to report crossing the 10% threshold of ownership in the Covered Securities and subsequent ownership increases or decreases by more than 5% of the Covered Securities (in each case, computed as of the last day of the month), from 10 days to 5 business days after the end of the month in which the relevant triggering event occurs (*Proposal: five days after the triggering event occurs*); and
- Shorten the deadline for passive investors to file Schedule 13G amendments to report acquiring greater than 10% of the Covered Securities and subsequent ownership increases or decreases by more than 5% of the Covered Securities, from “promptly” to two business days after the relevant triggering event occurs (*Proposal: one business day after the triggering event occurs*).

The SEC does not define “material changes” for purposes of Schedule 13G amendments, but points to the materiality definition in Rule 12b-2 under the Exchange Act⁵ and also indicates that the language applicable to Schedule 13D amendments for material changes, including the statement that a change in beneficial ownership of 1% or more is deemed material, will be “instructive” for purposes of determining materiality for Schedule 13G.

In line with the Proposal, the Final Rule Amendments extend the EDGAR filing “cut-off” times for Schedules 13D and 13G from 5:30 p.m. to 10:00 p.m. Eastern Time and remove the temporary hardship exemption for late filings. This change brings the Schedule 13D and 13G filings’ cut-off times in line with those applicable to insiders’ requirements to report holdings and transactions in an issuer’s securities pursuant to Section 16 of the Exchange Act (*i.e.*, Forms 3, 4 and 5) and filings on Form 144 under the Securities Act of 1933, as amended.

The changes summarized above are set out in table format below.

	Schedule 13D		Schedule 13G	
	Current	New	Current	New
Initial Filing Deadline	Within 10 days after acquiring beneficial ownership of more than 5% or losing eligibility to file on Schedule 13G.	Within five business days after acquiring beneficial ownership of more than 5% or losing eligibility to file on Schedule 13G.	<i>QIIs & Exempt Investors:</i> 45 days after calendar year-end in which beneficial ownership exceeds 5%.	<i>QIIs & Exempt Investors:</i> 45 days after calendar quarter-end in which beneficial ownership exceeds 5%.
			<i>QIIs:</i> 10 days after month-end in which beneficial ownership exceeds 10%.	<i>QIIs:</i> Five business days after month-end in which beneficial ownership exceeds 10%.
			<i>Passive Investors:</i> Within 10 days after acquiring beneficial ownership of more than 5%.	<i>Passive Investors:</i> Within five business days after acquiring beneficial ownership of more than 5%.
Amendment Filing Deadline	Promptly after a material change in the facts set forth in the previous Schedule 13D.	Within two business days after a material change in the facts set forth in the previous Schedule 13D.	<i>All Schedule 13G Filers:</i> 45 days after calendar year-end if, as of the end of the calendar year , there are any changes in the information previously reported on Schedule 13G.	<i>All Schedule 13G Filers:</i> 45 days after calendar quarter-end if, as of the end of the calendar quarter , there were any material changes in the information previously reported on Schedule 13G.
			<i>QIIs:</i> 10 days after month-end in which beneficial ownership exceeded 10% or there was, as of the month-end, a 5% increase or decrease in beneficial ownership.	<i>QIIs:</i> Five business days after month-end in which beneficial ownership exceeds 10% or there was, as of the month-end, a 5% increase or decrease in beneficial ownership.
			<i>Passive Investors:</i> Promptly after exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership.	<i>Passive Investors:</i> Two business days after exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership.
Filing “Cut-Off” Time	5:30 p.m. Eastern Time.	10 p.m. Eastern Time.	<i>All Schedule 13G Filers:</i> 5:30 p.m. Eastern Time.	<i>All Schedule 13G Filers:</i> 10 p.m. Eastern Time.

STRUCTURED DATA LANGUAGE

The Final Rule Amendments require Schedule 13D and 13G filings to use a structured, machine-readable data language for all information disclosed on such filings, including quantitative disclosures, textual narratives and identification checkboxes but excluding exhibits to the filings. This change brings Schedule 13D and 13G filings in line with the format used for beneficial ownership report filings under Section 16 (*i.e.*, Forms 3, 4 and 5) and filings on Form 13F.

In response to commenters who requested a test period for the revised Schedules and a taxonomy release prior to mandatory compliance, the SEC is providing a one-year voluntary compliance period during which the XML schema will be publicly available, starting on December 18, 2023.

APPLICATION TO CERTAIN DERIVATIVE SECURITIES

As a result of concerns expressed by commenters (in many cases either large investors or their related trade groups), the Final Rule Amendments do not expand the “beneficial owner” definition to explicitly include certain holders of cash-settled derivative securities. Instead, the SEC describes circumstances in which a holder of a cash-settled derivative security, other than a security-based swap, may be deemed the beneficial owner of the Covered Securities under the existing rules, in a manner similar to the [guidance](#) it provided in 2011 with respect to the beneficial ownership status of holders of security-based swaps.

While, as set out above, cash-settled derivative securities will not always be captured by the beneficial ownership definition, they will in all cases need to be described under amended Item 6 of Schedule 13D. Item 6 of Schedule 13D currently requires beneficial owners to “[d]escribe any contracts, arrangements, understandings or relationships (legal or otherwise) ... with respect to any securities of the issuer” and sets forth a non-exclusive list of examples that does not expressly include derivatives. The Final Rule Amendments implement the Proposal’s suggestion to include an explicit reference to derivatives in Item 6 and turn the enumeration of examples into a finite list.

“GROUP” DEFINITION

The Final Rule Amendments do not amend the rules relating to the formation of a “group” for beneficial ownership purposes, walking back the element of the Proposal that received the most comments and attention. The SEC had proposed to delete the current reference to “an agreement” between two or more persons and would have specified instead that two or more persons need to “act as” a group for purposes of acquiring, holding or disposing of securities to qualify as such. It would also have amended Rule 13d-5 to expressly provide that a group would be formed by (1) a person who shares information about their upcoming Schedule 13D filing, to the extent this information is not yet public and is communicated with the purpose of causing others to make their own purchases, and (2) a person who subsequently purchases the issuer’s securities based on this information (the so-called “tipper-tippee” scenario). The Proposal also included two new “group” exemptions describing circumstances in which two or more persons could communicate and consult with one another and engage with an issuer, or enter into an agreement setting forth the terms of a derivative security in the ordinary course of business, in each case without forming a group.

Commenting on its Proposal, the SEC reiterates that its intent was to align the text of the rules with the underlying statutory provisions. However, extensive comments pointed to fears that shareholder engagement would be chilled and activist campaigns would be complicated by the threat of litigation over whether communications had resulted in group formation.

In light of these concerns, the SEC opted to issue guidance about its interpretation of the existing legal standard. Some of the key points include:

- The appropriate legal standard for determining whether a group is formed is found in Sections 13(d)(3) and 13(g)(3). This legal standard requires that “two or more persons act as a... group”.
- The language of Rule 13d-5(b) (which refers to an “agreement” to act) is not a definition of “group” and is not a substitute for the express legal standard identified above.

- Persons may be viewed as “acting” together if they are taking concerted actions in furtherance of any of three purposes: “acquiring”, “holding” (which includes voting) or “disposing of” securities of an issuer. A facts and circumstances analysis should not focus solely on the presence or absence of an express agreement, as two or more persons may take concerted action or agree informally.
- Group activity may be demonstrated by circumstantial evidence. However, there must, at a minimum, be indicia, such as an informal arrangement or coordination in furtherance, of a common purpose to acquire, hold or dispose of securities of an issuer.
- The fact that two or more persons took similar actions is not conclusive in and of itself that a group has been formed.

In response to concerns around the chilling of shareholder engagement, the SEC also provides guidance in the Final Rule Amendments on the application of the legal standard to certain common types of shareholder activities, as summarized below.

Group Formed?	Shareholder engagement activity
No	Two or more shareholders communicate with each other regarding an issuer or its securities (including discussions that relate to improvement of the long-term performance of the issuer, changes in issuer practices, submissions or solicitations in support of a non-binding shareholder proposal, a joint engagement strategy (that is not control-related), or a “vote no” campaign against individual directors in uncontested elections) without taking any other actions
	Two or more shareholders engage in discussions with an issuer’s management, without taking any other actions
	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 votes against, management’s director candidates if the issuer does not take steps to implement the shareholders’ recommended actions
	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
	A conversation, email, phone contact or meetings between a shareholder and an activist investor that is seeking support for its proposals to an issuer’s board or management, without more, such as consenting or committing to a course of action
	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
Yes (potentially)	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

Importantly, the SEC’s commentary generally emphasizes the importance of concerted action to the question of group formation. As a result, no group

will be formed by the “free and independent exchange of thoughts” without more, or the “independently-determined act of exercising voting

rights”. Similarly, joint shareholder proposals will not trigger group formation so long as they are “non-binding” and free of “springing conditions”, such as an arrangement to vote against a management slate of directors if the non-binding proposal is not included in the issuer’s proxy statement. Conversely, however, in all scenarios, any indication of concerted action, such as joint or coordinated publication of soliciting materials with an activist investor, might tip the analysis in favor of group formation.

The Final Rule Amendments do adopt the Proposal’s adjustments to the location within the rules of some existing provisions and amendments to clarify that a reporting group will be deemed to acquire any additional Covered Securities acquired by a member of the group after its formation, other than as a result of an intra-group transfer.

COMPLIANCE DATES

All changes adopted under the Final Rule Amendments will go into effect 90 days after publication in the Federal Register, except that compliance with the revised Schedule 13G filing deadlines will be mandatory only from September 30, 2024 (meaning, for example, that a Schedule 13G filer will be required to file an amendment within 45 days after September 30, 2024 if, as of end of the day on that date, there were any material changes in the information the filer previously reported on Schedule 13G) and compliance with the new Structured Data Requirement will be mandatory only from December 18, 2024, subject to the year-long voluntary compliance runway mentioned above.

TAKEAWAYS

While the Final Rule Amendments make welcome changes that we believe are overdue to some of the deadlines for Section 13D and 13G filings, the changes from the Proposal related to derivative securities and the “group” definition ultimately make the Final Rule Amendments a more incremental rulemaking than a transformative one. The change to Item 6 of Section 13D will likely provide registrants with somewhat more insight into the use of cash-settled derivatives by Section 13D filers and the SEC’s guidance on the definition of “group” may provide incrementally more clarity on the extent to which investors may interact with one another and tactics they may employ before they cross the line of group formation. However, we believe that even following the effectiveness of the Final Rule

Amendments, registrants will still need to be highly vigilant to activist tactics that remain outside the scope of Section 13D and 13G disclosure requirements. For example, registrants should remain attuned to evidence of potential derivative market activity that could suggest the acquisition of a large derivative stake by an activist and we believe registrants will also remain potentially vulnerable to the actions of multiple activists that have exchanged views (through industry conferences, “idea dinners” or other similar activities) in a manner that the SEC has permitted to avoid “group” formation. Accordingly, registrants should continue to carefully review their readiness to respond to activist investor activity.

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- 1 A “covered class” generally means, with limited exceptions, a voting class of equity securities registered under Section 12 of the Exchange Act. *See* Exchange Act Section 13(d)(1) and Rule 13d-1(i).
 - 2 A list of investors that are QIIs can be found in 17 CFR 240.13d-1(b)(1)(ii).
 - 3 “Exempt investors” refers to persons holding beneficial ownership of more than 5% of a covered class at the end of the calendar year, but who have not made an acquisition of beneficial ownership subject to Section 13(d), such as pre-IPO investors or those who have not acquired more than 2% of a covered class within a 12-month period. *See* Rule 13d-1(d).
 - 4 “Passive investors” refer to beneficial owners of more than 5% but less than 20% of Covered Securities who are able to certify pursuant to Item 10 of Schedule 13G that the subject securities were not acquired or held for the purpose or effect of changing or influencing the control of the issuer of such securities and were not acquired in connection with or as a participant in any transaction having such purpose or effect. *See* Rule 13d-1(c).
 - 5 Rule 12b-2 states: “The term “material,” when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to buy or sell the securities registered.” This definition is consistent with the established definition adopted by the Supreme Court in foundational cases such as *TSC Industries, Inc. v. Northway, Inc.*, 426 US 438 (1976) and *Basic Inc. v. Levinson*, 485 U.S. 224 (1988).

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