

Legal Update

SEC Adopts Amendments for Reporting Beneficial Ownership on Schedules 13D and 13G

On October 10, 2023, the U.S. Securities and Exchange Commission (the "SEC") adopted changes to Schedules 13D and 13G relating to beneficial ownership reports (the "Amendments").¹ The Amendments are intended to modernize the rules governing beneficial ownership reporting and generally shorten the period for initial and amended filings, clarify requirements for derivative securities and criteria for determining when persons are acting as a group, and require that certain information be provided in a structured, machine-readable data format.

BACKGROUND

Sections 13(d) and 13(g) of the Securities Exchange Act of 1934 (the "Exchange Act"), along with Regulation 13D-G, require an investor who beneficially owns more than 5 percent of a covered class of equity securities to publicly file either a Schedule 13D or a Schedule 13G. The deadlines for filing the initial Schedule 13D and Schedule 13G have not been updated since 1968 and 1977, respectively.

On February 10, 2022, the SEC proposed certain amendments with respect to beneficial ownership reporting. The proposed amendments sought to make information available to the public in a more timely manner, deem holders of certain cash-settled derivative securities to be beneficial owners of the reference equity securities, and clarify the disclosure requirements in respect of derivative securities. In response to the proposed amendments, a significant number of public comments were submitted, including those that pointed out the increased administrative burdens and costs associated with the proposed changes and others that asserted the proposed changes reflect the technological advances and developments in the financial markets.²

Final Amendments

FILING DEADLINES

While the final rules do not go as far as some of those initially proposed, there are significant changes to the deadlines for initial and amended Schedule 13D and 13G filings, as summarized in the below chart (reprinted from the SEC's adopting release ("Adopting Release")).

Issue	Current Schedule 13D	New Schedule 13D	Current Schedule 13G	New Schedule 13G
Initial Filing Deadline	Within 10 days after acquiring beneficial ownership of more than 5 percent or losing eligibility to file on Schedule 13G. Rules 13d-1(a), (e), (f) and (g).	Within 5 business days after acquiring beneficial ownership of more than 5 percent or losing eligibility to file on Schedule 13G. Rules 13d-1(a), (e), (f) and (g).	<p>QIIs & Exempt Investors: 45 days after calendar year-end in which beneficial ownership exceeds 5 percent. Rules 13d-1(b) and (d).</p> <p>QIIs: 10 days after month-end in which beneficial ownership exceeds 10%. Rule 13d-1(b).</p> <p>Passive Investors: Within 10 days after acquiring beneficial ownership of more than 5 percent. Rule 13d-1(c).</p>	<p>QIIs & Exempt Investors: 45 days after calendar quarter-end in which beneficial ownership exceeds 5 percent. Rules 13d-1(b) and (d).</p> <p>QIIs: 5 business days after month-end in which beneficial ownership exceeds 10%. Rule 13d-1(b).</p> <p>Passive Investors: Within 5 business days after acquiring beneficial ownership of more than five percent. Rule 13d-1(c).</p>
Amendment-Triggering Event	Material change in the facts set forth in the previous Schedule 13D. Rule 13d-2(a).	Same as current Schedule 13D: Material change in the facts set forth in the previous Schedule 13D. Rule 13d-2(a).	<p>All Schedule 13G Filers: Any change in the information previously reported on Schedule 13G. Rule 13d-2(b).</p> <p>QIIs & Passive Investors: Upon exceeding 10 percent beneficial ownership or a 5 percent increase or decrease in beneficial ownership. Rules 13d-2(c) and (d).</p>	<p>All Schedule 13G Filers: Material change in the information previously reported on Schedule 13G. Rule 13d-2(b).</p> <p>QIIs & Passive Investors: Same as current Schedule 13G: Upon exceeding 10 percent beneficial ownership or a 5 percent increase or decrease in beneficial ownership. Rules 13d-2(c) and (d).</p>
Amendment Filing Deadline	Promptly after the triggering event. Rule 13d-2(a).	Within two business days after the triggering event. Rule 13d-2(a).	<p>All Schedule 13G Filers: 45 days after calendar year-end in which any change occurred. Rule 13d-2(b).</p> <p>QIIs: 10 days after month-end in which beneficial ownership exceeded 10 percent or there was, as of the month-end, a 5 percent increase or decrease in beneficial ownership. Rule 13d-2(c).</p> <p>Passive Investors: Promptly after exceeding 10 percent beneficial ownership or a 5 percent increase or decrease in beneficial ownership. Rule 13d-2(d).</p>	<p>All Schedule 13G Filers: 45 days after calendar quarter-end in which a material change occurred. Rule 13d-2(b).</p> <p>QIIs: 5 business days after month-end in which beneficial ownership exceeds 10 percent or a 5 percent increase or decrease in beneficial ownership. Rule 13d-2(c).</p> <p>Passive Investors: 2 business days after exceeding 10 percent beneficial ownership or a 5 percent increase or decrease in beneficial ownership. Rule 13d-2(d).</p>
Filing “Cut-Off” Time	5:30 p.m. ET. Rule 13(a)(2) of Regulation S-T.	10:00 p.m. ET. Rule 13(a)(4) of Regulation S-T.	All Schedule 13G Filers: 5:30 p.m. ET. Rule 13(a)(2) of Regulation S-T.	All Schedule 13G Filers: 10:00 p.m. ET. Rule 13(a)(4) of Regulation S-T.

CASH-SETTLED DERIVATIVES

The SEC also provided guidance in the Adopting Release on the applicability of existing beneficial ownership rules to cash-settled derivatives and associated group formation questions in lieu of adopting the amendments originally proposed.

The proposed amendment on beneficial ownership would have provided that a holder of a cash-settled derivative security, other than a security-based swap, is deemed the beneficial owner of the reference equity securities if the derivative is held with the purpose or effect of changing or influencing the control of the issuer of the reference securities, or in connection with or as a participant in any transaction having such purpose or effect. Considering the views expressed by commenters, the SEC determined instead that SEC guidance on the applicability of existing Rule 13d-3 to cash-settled derivative securities, similar to previous guidance in connection with security-based swaps, would provide sufficient clarity. While noting that determinations regarding beneficial ownership ultimately will depend on the relevant facts and circumstances, the SEC guidance sets out an analytical framework consisting of three elements, which correspond to current Rules 13d-3(a) (direct or indirect voting and/or investment power), (b) (evasive plan or scheme) and (d)(1) (right to acquire beneficial ownership).

- Under Rule 13d-3(a), a holder of a cash-settled derivative security is deemed a beneficial owner of the reference security to the extent the cash-settled derivative security provides the holder, directly or indirectly, with exclusive or shared voting or investment power over the reference security, through a contractual term of the security or otherwise.
- Under Rule 13d-3(b), if the cash-settled derivative security is acquired with the purpose or effect of divesting the holder of beneficial ownership of the reference security or preventing the vesting of beneficial ownership as part of a plan or scheme to evade the reporting requirements, the holder would be deemed a beneficial owner. Because the guidance does not elaborate on what constitutes the prevention of vesting or the meaning of a “plan or scheme to evade,” it is questionable whether it provides added clarity in cases where a cash-settled derivative position is unwound and replaced by a physical position after the Schedule 13D threshold is crossed, even if the physical position is acquired independently of the derivative and its unwinding.
- Finally, under Rule 13d-3(d)(1), the holder of the cash-settled derivative would have beneficial ownership if it has the right to acquire beneficial ownership (as defined in Rule 13d-3(a)) of the reference security within 60 days, or if the holder acquires the right to acquire such beneficial ownership with the purpose or effect of changing or influencing the control of the issuer of the reference security, or in connection with or as a participant in any transaction having such purpose or effect, regardless of when the right is exercisable. The SEC observes that Rule 13d-3(d)(1) would apply regardless of the origin of the right to acquire the reference security, including if such right originates from “an understanding in connection with that derivative security.”

With regard to Schedule 13D disclosure of derivatives positions, the final rules amend Rule 13d-101 to expressly state that derivative contracts, arrangements, understandings, and relationships with respect to an issuer’s securities, including cash-settled security-based swaps and other derivatives which are settled exclusively in cash, would need to be disclosed under Item 6 of Schedule 13D.

ACTING AS A GROUP

Under the beneficial ownership reporting framework, reporting may be required when two or more persons act as a “group” for purposes of acquiring, holding, or disposing of securities of an issuer. Under Rule 13d-5(b)(1) under the Exchange Act, two or more persons who agree to act together for purposes of acquiring, holding, voting or disposing of issuer securities are treated as a “group.” The proposed amendments would have revised Rule 13d-5(b)(1) to remove the reference to an agreement, and indicated that when two or more persons act as a group under Section 13(d)(3) of the Exchange Act, the group would be deemed to have acquired beneficial ownership of all of the equity securities of a covered class beneficially owned by each of the group’s members as of the date on which the group is formed. The SEC did not codify the definition of a “group” as it initially proposed, but it did clarify that the relevant statutes (Sections 13(d)(3) and 13(g)(3) of the Exchange Act) do not require an express agreement for persons to be a “group.” Instead, the determination of a “group” remains a facts and circumstances–based determination.

Along with its guidance, the SEC provided a few examples of what would constitute a “group.” For example, discussions among shareholders without committing to a course of action, jointly engaging with management without attempting to convince the board to change existing board membership, and jointly submitting a non-binding shareholder proposal will not constitute a group. On the other hand, if a beneficial owner of a substantial block of a covered class will be filing a Schedule 13D and intentionally communicates to other market participants that such a filing will be made with the purpose of causing the other market participants to make purchases of the same class of securities, then the actions of the beneficial owner and market participants would likely result in the formation of a group.

STRUCTURED DATA FILING

The final rules require all disclosures in Schedule 13D and 13G filings (other than exhibits) to be filed using a structured, machine-readable XML-based language, similar to other XML-based EDGAR filings. Reporting persons will be able to submit filings directly to EDGAR in 13D/G-specific XML or use a web-based reporting application developed by the SEC that will generate the Schedule in 13D/G-specific XML.

EFFECTIVE DATES

The Amendments will become effective 90 days after publication in the *Federal Register*. Compliance with revised Schedule 13G filing dates will be required starting September 30, 2024. Compliance with the structured data requirement for Schedules 13D and 13G will be required beginning on December 18, 2024.

KEY TAKEAWAYS

- The accelerated filing deadlines may increase compliance costs and, particularly for Schedule 13G filers, will result in a significant increase in the number of filings required to be made.
- The decision to provide guidance based on existing legal standards to determine if a holder of a cash-settled derivative security may be deemed the beneficial owner of the reference security avoids the complexities that the proposed rule would have imposed and is largely consistent with how informed practitioners currently approach the issue.
- The determination of what constitutes a “group” will remain facts and circumstances-based.

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Endnotes

¹ Modernization of Beneficial Ownership Reporting, Securities Exchange Act Release Nos. 33-11253; 34-98704 (Oct. 10, 2023), <https://www.sec.gov/files/rules/final/2023/33-11253.pdf> (Adopting Release)

² SEC Proposed Amendments to Schedules 13D and 13G (Feb. 14, 2022) https://mayerbrown.admin.onenorth.com/-/media/files/perspectives-events/publications/2022/02/legal-update--sec-proposed-amendments-to-schedules-13d-and-13g_.pdf

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