

CLIENT ALERT

SEC Finalizes Amendments to Rules Governing Beneficial Ownership Reporting

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On October 10, 2023, the U.S. Securities and Exchange Commission (the “SEC” or the “Commission”) voted 4 to 1 to adopt changes to the beneficial ownership reporting requirements under the Securities Exchange Act of 1934 (the “Exchange Act”).¹ The amendments revise the current deadlines for Schedule 13D and Schedule 13G filings.² The amendments are effective 90 days after the Adopting Release is published in the Federal Register, except that compliance with the revised Schedule 13G filing deadlines under Rules 13d-1 and 13d-2 will not be required until September 30, 2024 and compliance with the structured data requirements will not be required until December 18, 2024.

Notably, the Commission did not adopt a proposed rule that would have deemed certain holders of cash-settled derivatives, other than security-based swaps, as beneficial owners of the covered class of equity securities. Instead, the Commission discussed how, under current Rule 13d-3, holders of cash-settled derivative securities, including security-based swaps, are subject to regulation as beneficial owners.³ Similarly, rather than adopting several of the proposed changes to Rules 13d-5 and 13d-6, the Commission issued guidance on the application of the current legal standards for determining whether a

¹ See Modernization of Beneficial Ownership Reporting, Exchange Act Release No. 98704 (Oct.10, 2023) (the “Adopting Release”); see also Modernization of Beneficial Ownership Reporting, Exchange Act Release No. 94211 (Feb.10, 2022) (the “Proposing Release”).

² Adopting Release at p. 5.

³ *Id.* at pp. 6, 113-15 and n. 463, citing to Beneficial Ownership Reporting Requirements and Security-Based Swaps, Release No. 34-64628 (June 8, 2011) (the “Security-Based Swap Release”) and noting that beneficial ownership for cash-settled derivative securities is as described in the 2011 guidance relating to security-based swaps.

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group is formed, found in Sections 13(d)(3) and 13(g)(3), and provided examples by reference to common types of shareholder engagement activities.⁴

Filing Deadlines.

The final amendments to the filing deadlines are as follows:

- reduce the filing deadline under Rule 13d-1(a) for the initial Schedule 13D to five business days (from 10 calendar days) after the date on which a person acquires more than 5% of a covered class of equity securities (the Proposing Release had proposed five calendar days);⁵
- shorten the filing deadline under Rules 13d-1(e), (f), and (g) for the initial Schedule 13D required to be filed by persons who forfeit their eligibility to report on Schedule 13G in lieu of Schedule 13D to five business days (from 10 calendar days) after the event that causes the ineligibility (the Proposing Release had proposed five calendar days);
- revise the filing deadline under Rule 13d-2(a) for amendments to Schedule 13D to two business days (instead of “promptly”) after the date on which a material change occurs (the Proposing Release had proposed one business day);
- shorten the deadline under Rules 13d-1(b) and (d) for the initial Schedule 13G filing for “Qualified Institutional Investors” (referred to herein as “QIIs”) and Exempt Investors to within 45 days after the last day of the calendar quarter in which beneficial ownership first exceeds 5% of a covered class (previously, the deadline was 45 days after the calendar year-end and the Proposing Release had proposed changing to five business days after the end of the relevant month);⁶

⁴ *Id.* at pp. 6, 131-39.

⁵ A “covered class” is generally defined as a voting class of equity securities registered under Section 12 of the Exchange Act. *Id.* at p. 6.

⁶ A “Qualified Institutional Investor” includes, among others, a bank, broker-dealer, insurance company and registered investment adviser, in all cases, which acquired the subject securities in the ordinary course of its business and not with the purpose or effect of changing the control of the issuer or in connection with or as a participant in any transaction having such purpose or effect. *Id.* at n. 7. An “Exempt Investor” is a person holding beneficial ownership of more than 5% of a covered class, but who has not made an acquisition of beneficial ownership subject to Section 13(d). The term includes persons who acquire all of their securities prior to the initial public offering of the issuer’s voting securities and persons who acquire no more than 2% of a covered class within a 12-month period. *Id.* at p. 8. The Commission noted that the revised deadline of 45 days after calendar quarter-end aligns with the filing deadline for Form 13F filed by institutional investment managers. *Id.* at p. 72.

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- shorten the deadline under Rule 13d-1(c) for Passive Investors to file an initial Schedule 13G to within five business days (from 10 calendar days) after acquiring beneficial ownership of more than 5% of a covered class (the Proposing Release had proposed five calendar days);⁷
- revise the filing deadlines required for amendments to Schedule 13G in Rule 13d-2(b) to 45 days after the end of the calendar quarter in which a reportable change occurs (previously, the deadline was 45 days after the calendar year-end and the Proposing Release had proposed five business days after the end of the relevant month);
- amend Rule 13d-2(c) to shorten the filing deadline for Schedule 13G amendments filed by QIIs and Exempt Investors to five business days after the end of the month in which the respective filing threshold is met (from 10 calendar days after the end of the month in which the respective filing threshold is met); the Proposing Release had proposed five calendar days after the respective filing threshold is met;
- amend Rule 13d-2(d) to revise the filing deadline for Schedule 13G amendments filed by Passive Investors from a “promptly” standard to two business days (the Proposing Release had proposed one business day) after the respective filing threshold is met; and
- provide that an amendment obligation for Schedule 13G filers under Rule 13d-2(b) shall only arise upon the occurrence of a material change⁸ in the facts reported (the current threshold is any change, regardless of materiality, and this amendment is consistent with the Proposing Release).⁹

Regulation S-T was amended (as proposed) to permit Schedules 13D and 13G, and any amendments thereto, that are submitted on or before 10 p.m. (instead of 5:30 p.m.) Eastern Time on a given business day to be deemed to have been filed on that business day.¹⁰

Cash-Settled Derivatives. The Proposing Release proposed to add new paragraph (e) to Rule 13d-3 to deem certain holders of cash-settled derivatives, other than security-based swaps, as beneficial owners of the covered class of equity

⁷ A “Passive Investor” is a beneficial owner of more than 5% but less than 20% of a covered class who can certify under Item 10 of Schedule 13G that the subject securities were not acquired and are not 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. *Id.*

⁸ *Id.* at pp. 6-9. The Commission stated that while the current Rule 13d-2(b) does not include an express materiality qualifier for Schedule 13G amendments, the addition of a materiality qualifier in Rule 13d-2(b) is intended to codify the Commission’s previously stated view that there is a materiality standard inherent in the provisions governing Schedule 13G filings. *Id.* at pp. 78-79, 92. The Commission declined to provide guidance as to what constitutes a “material” change for purposes of Rule 13d-2(b), citing the definition of “material” in Rule 12b-2 under the Exchange Act and noting that the language in Rule 13d-2(a) regarding changes deemed to be “material” is “equally instructive” for purposes of determining the materiality of a change under Rule 13d-2(b). *Id.* at pp. 92-94.

⁹ *Id.* at pp. 6-9.

¹⁰ *Id.* at p. 9.

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securities. The application of proposed Rule 13d-3(e) would have been limited to those persons who hold cash-settled derivatives with the purpose or effect of changing or influencing control of the issuer of the reference security.¹¹

Activist investors raised concerns that new Rule 13d-3(e), when combined with the proposed reduction in the filing deadline for the initial Schedule 13D filing to five calendar days and the proposed changes set forth in the Security-Based Swap Release,¹² would make it difficult in many circumstances for activist investors to accumulate a meaningful position in a company prior to public disclosure of the activist's position to the company and to other investors. In addition, practitioners also raised concerns about the unintended ramifications of new Rule 13d-3(e) and the changes to Rule 13d-5 discussed below under "Groups" on stock option plans, other compensation arrangements, financing arrangements and poison pills.

In the Adopting Release, the Commission did not include proposed Rule 13d-3(e) but instead discussed the circumstances in which the holder of a cash-settled derivative security, excluding security-based swaps, may be deemed the beneficial holder of the covered class of equity securities. The Commission determined that providing guidance on the applicability of existing Rule 13d-3 to cash-settled derivative securities other than security-based swaps, consistent with the guidance provided in 2011 in regard to security-based swaps, would be appropriate. The Adopting Release provides that reporting of beneficial ownership of cash-settled derivative securities may be required in cases in which the derivative securities (1) confer voting and/or investment power (or a person otherwise acquires such power based on the purchase or sale of the security) over the covered class of equity security, (2) are used with the purpose or effect of divesting or preventing the vesting of beneficial ownership of the covered class of equity security as part of a plan or scheme to evade the reporting requirements of Section 13(d) or 13(g), or (3) grant a right to acquire an equity security within 60 days or with the purpose or effect of changing or influencing control of the issuer of the equity security regardless of when the right is exercisable.

In addition, as proposed, the Commission added new Item 6 to Schedule 13D to remove any implication that a person is not required to disclose interests in all derivative securities that use a covered class as a reference security, including with respect to derivatives not originating with the issuer, such as cash-settled options not offered or sold by the issuer and security-based swaps. The amended instruction makes clear that the disclosure must name the counterparty to the derivative.

Groups. The Proposing Release would have amended Rule 13d-5 to (i) remove any potential implication that an express or implied agreement among group members is a necessary precondition to the formation of a group under Section 13(d)(3) or 13(g)(3) of the Exchange Act, (ii) affirm 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 acquires securities in the covered class for which the Schedule 13D will

¹¹ Proposing Release at p. 55. Security-based swaps are addressed in separate rules proposed by the Commission in December 2021. See Prohibition Against Fraud, Manipulation, or Deception in Connection with Security-Based Swaps; Prohibition against Undue Influence over Chief Compliance Officers; Position Reporting of Large Security-Based Swap Positions, Exchange Act Release No. 93784 (Dec. 15, 2021).

¹² Beneficial Ownership Reporting Requirements and Security-Based Swaps, Exchange Act Release No. 64628 (June 8, 2011).

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be filed, then those persons are deemed to have formed a group within the meaning of Section 13(d)(3), and (iii) specify that when two or more persons “act as” a group, a group will be formed.¹³

The Commission elected not to adopt any of the proposed amendments but instead provided guidance on when a group is formed and added clarifying amendments to Rule 13d-5 providing that (i) a group acquires additional covered securities when a member acquires the securities after the group is formed; and (ii) intragroup transfers of covered securities are not reportable.

The SEC guidance indicated that for there to be a 13D group, two or more persons must act together “for the purpose of acquiring, holding or disposing of” an issuer’s voting equity securities. The Commission also provided the following six examples of non-group activities and one example of indirect group formation, in response to concerns raised by commentators:

(i) **A 13D group is not formed** when two or more shareholders communicate with each other regarding an issuer or its securities, including communications regarding improvements of performance, changes in issuer practices, submissions or solicitations in support of a shareholder proposal, a “vote no” campaign against directors in uncontested elections, or a joint engagement that is not control-related;¹⁴

(ii) **A 13D group is not formed** when two or more shareholders engage in discussions with management of an issuer without taking any other actions;

(iii) **A 13D group is not formed** when two or more shareholders jointly make recommendations to an issuer regarding board structure and composition (1) without discussion of individual directors or board expansion and (ii) without commitments being made or agreements or understandings being 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 recommended actions;

(iv) **A 13D group is not formed** when two or more shareholders (including one or more activists seeking support for their proposals for board or management changes) have communications about the proposals. Groups might form if there is joint or coordinated *publication* of soliciting materials;

¹³ Proposing Release at p. 11.

¹⁴ Significantly, the Commission noted that “... an exchange of views [among shareholders] and any other type of dialogue in oral or written form not involving an intent to engage in concerted actions or other agreement with respect to the acquisition, holding, or disposition of securities, standing alone, would not constitute an ‘act’ undertaken for the purpose of ‘holding’ securities of the issuer.” Adopting Release at p. 134 (emphasis added).

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(v) **A 13D group is not formed** when a shareholder announces its intention to vote in favor of an unaffiliated activist's nominees, without more coordination between the shareholder and activist investor or other indicia of group formation;¹⁵

(vi) **A 13D group is not formed** when shareholders jointly submit a non-binding shareholder proposal pursuant to Exchange Act Rule 14a-8; and

(vii) **A 13D group is formed** when a significant beneficial owner *intentionally* informs other market participants, *for the purpose of causing other persons to purchase the stock*, that it is or will be required to file a Schedule 13D and one or more of the other market participants make purchases in the same covered class *as a result of that communication*.

Exemptions. The Proposing Release sets forth proposed amendments to Rule 13d-6, including proposed new Rule 13d-6(c), which would have set forth the circumstances under which two or more persons may communicate and consult with one another and engage with an issuer without becoming subject to regulation as a group with respect to the equity securities of the issuer.¹⁶ The exemption was not included and was replaced by the guidance discussed above.

Structured Data. As proposed, the Adopting Release requires that Schedules 13D and 13G be filed using a structured, machine-readable data language.¹⁷

While the final amendments will have a significant impact on a variety of investors, including hedge funds that utilize an activist strategy where building a sizable position prior to public disclosure and qualified institutional investors, exempt investors and passive investors who, like Schedule 13D filers, will be subject to an accelerated filing schedule, the final rule addressed a number of serious concerns raised by commentators on the proposal and provided helpful guidance to facilitate independent shareholder communications and use of cash-settled derivatives without becoming subject to Section 13(d).

¹⁵ The Commission noted that “[s]hareholders, whether institutional or otherwise, are thus not engaging in conduct at risk of being deemed to give rise to group formation as a result of simply independently announcing or advising others—including the issuer—how they intend to vote and the reasons why.” *Id.* at p. 137.

¹⁶ *Id.* at pp. 11-12.

¹⁷ *Id.* at p. 12.

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