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Securities Alert

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SEC adopts significant changes to Regulation 13D-G

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Learn about the new requirements under Regulation 13D-G, which governs the beneficial ownership reporting requirements for significant shareholders.



What's the Impact

- / The final rules shorten the deadlines for Schedule 13D and Schedule 13G filings.
- / Schedule 13D was amended to require disclosure of cash-settled derivative securities.
- / The SEC provided guidance on the formation of groups and beneficial ownership of cash-settled derivative securities.
- / Schedules 13D and 13G will be required to be filed using an XML-based language.

On October 10, 2023, the US Securities and Exchange Commission (the SEC) adopted [final rule amendments](#) to Regulation 13D-G governing beneficial ownership reporting under Sections 13(d) and 13(g) of the Securities Exchange Act of 1934, as amended (the Exchange Act).

Amended filing deadlines for Schedules 13D and 13G and amendments

The SEC shortened the current filing deadlines for Schedules 13D and 13G filings, recognizing the technological advances, the current use of modern technologies, and the recent shortening of settlement cycles, and to rectify information asymmetries in the market. With the exception of some Schedule 13G filing deadlines described below, the revisions to the Regulation 13D-G filing deadlines move to a “business day”¹ standard. The SEC believes that this move to business days aligns more closely to other filing deadlines such as the deadlines for Form 8-K and Form 4 and that using business days consistently should ease a filer’s administrative burdens.

The filing deadlines for Schedule 13G, including amendments, in the new rules represent a change from the current annual, calendar year-end-based deadline to a quarterly, calendar quarter-end-based deadline.² Initial filings may need to be made sooner than the current February 14th deadline and amendments may need to be made quarterly. In addition, the SEC has included a materiality standard in the requirement to file amendments as opposed to the current “any change” standard. Thus, Schedule 13G filers will need to perform a quarterly analysis to determine whether there is a material change requiring an amendment, which will have to be filed within 45 days after the end of the quarter.

The SEC noted that with these changes, the rules requiring amendments to both Schedule 13D and 13G will now share the same materiality standard for determining when an amendment is due, and that the language in Rule 13d-2(a) applicable to Schedule 13D amendments, including the statement that “an acquisition or disposition of beneficial ownership of securities in an amount equal to one percent or more of the class of securities shall be deemed ‘material,’” is equally instructive for purposes of determining what changes are material under Rule 13d-2(b) applicable to Schedule 13G amendments.

The amendments to Regulation 13D-G now require filers to meet the deadlines described below:

Filing	Current Deadline	New Deadline
Initial Schedule 13D	Within 10 calendar days after the person acquires	Within five business days after the date ³ the person

¹ “Business day” will now be defined in Regulation 13D-G as any day, other than Saturday, Sunday, or a federal holiday, from midnight to 11:59 pm ET.

² The proposed rules would have applied a month-end-based deadline standard, but the SEC received several comments addressing the significant burdens that would be imposed on qualified institutional investors and exempt investors. The final rules use a calendar quarter-end-based deadline standard to address those concerns and to more align with the filing deadline for Form 13F.

³ The revised rules provide that the Schedule 13D must be filed within five business days “after the date of such acquisition” rather than the current formulation of “after such acquisition.” The SEC clarified that, for purposes of determining the filing deadline, the first day in the five-business-day count toward reaching the deadline is the day *after* the date on which beneficial ownership of more than 5% is acquired (rather than the date of such

	beneficial ownership of more than 5% of an issuer's registered equity securities or losing eligibility to file on Schedule 13G.	acquires beneficial ownership of more than 5% of an issuer's registered equity securities or loses eligibility to file on Schedule 13G.
Amendments to Schedule 13D	Promptly after a material change in the facts set forth in the previous Schedule 13D filing.	Within two business days after the date of a material change in the facts set forth in the previous Schedule 13D filing.
Initial Schedule 13G	<p>For qualified institutional investors: Within 45 days after the calendar year-end (i.e., February 14) in which beneficial ownership exceeds 5% of an issuer's registered equity securities.</p> <p>Within 10 calendar days after the month-end in which beneficial ownership exceeds 10% of an issuer's registered equity securities.</p> <p>For exempt investors:⁴ Within 45 days after the calendar year-end (i.e., February 14) in which beneficial ownership exceeds 5% of an issuer's registered equity securities.</p> <p>For passive investors:⁵ Within 10 calendar days after</p>	<p>For qualified institutional investors: Within 45 days after the end of the calendar quarter in which beneficial ownership exceeds 5% of an issuer's registered equity securities.</p> <p>Within five business days after the month end in which beneficial ownership exceeds 10% of an issuer's registered equity securities.</p> <p>For exempt investors: Within 45 days after the end of the calendar quarter in which beneficial ownership exceeds 5% of an issuer's registered equity securities.</p> <p>For passive investors: Within five business days after the date of acquiring beneficial</p>

acquisition).

⁴ The term "exempt investors" refers to persons holding beneficial ownership of more than 5% of an issuer's registered equity securities, but who have not acquired beneficial ownership subject to Section 13(d).

⁵ The term "passive investors" refers to beneficial owners of more than 5% but less than 20% of an issuer's registered equity securities who can certify under 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.

	acquiring beneficial ownership of more than 5% of an issuer's registered equity securities.	ownership of more than 5% of an issuer's registered equity securities.
Amendments to Schedule 13G	<p>For all: Within 45 days after the calendar year-end (i.e., February 14) following <i>any change</i> in the facts set forth in the previous Schedule 13G filing.</p> <p>For qualified institutional investors: 10 calendar 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.</p> <p>For passive investors: Promptly after exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership.</p>	<p>For all: Within 45 days after the calendar quarter following <i>any material change</i> in the facts set forth in the previous Schedule 13G filing.</p> <p>For qualified institutional investors: Within five business days after month-end after acquiring beneficial ownership of more than 10% of an issuer's registered equity securities, or a 5% increase or decrease in beneficial ownership of an issuer's registered equity securities.</p> <p>For passive investors: Within two business day after acquiring beneficial ownership of more than 10% of an issuer's registered equity securities, or a 5% increase or decrease in beneficial ownership of an issuer's registered equity securities.</p>

In light of the shorter filing deadlines, the amendments also revise Regulation S-T to extend the EDGAR filing "cut-off" times for Schedules 13D and 13G, and amendments thereto, to 10:00 pm ET to be deemed filed the same business day. Consequently, the amendments eliminate the temporary hardship exemption under Rule 201(a) of Regulation S-T for Schedules 13D and 13G. A filer may still request a filing date adjustment under Rule 13(b).

Cash-settled derivative securities

Guidance regarding beneficial ownership of the reference securities

The SEC proposed an amendment to add a new paragraph (e) to Rule 13d-3 to provide the holders of cash-settled derivative securities would be deemed beneficial owners of the registered equity securities referenced by such derivative securities, if such holders hold the derivative securities with the intent to influence control over the issuer, or in connection with or as a participant in any transaction having such intent.

The SEC decided not to adopt proposed Rule 13d-3(e) and instead provide guidance on the applicability of current Rule 13d-3 to cash-settled derivative securities. The SEC stated that although the determination under Rule 13d-3 as to whether the holder of any cash-settled derivative security is the beneficial owner of the reference class ultimately will depend on the relevant facts and circumstances, its current interpretive guidance applicable to security-based swaps (the three elements of which correspond to Rule 13d-3(a), (b), and (d)(1), respectively)⁶ provides an instructive analytical framework with respect to cash-settled derivative securities.

The SEC noted that although non-security-based swaps derivative securities settled exclusively in cash generally are designed to represent only an economic interest, discrete facts and circumstances could arise where the holder of these securities may have voting or investment power as described in Rule 13d-3(a) or otherwise could be deemed to be a beneficial owner as determined under Rule 13d-3(b) or 13d-3(d), as described below.

- / First, under Rule 13d-3(a), to the extent a non-security-based swap cash-settled derivative security provides its holder, directly or indirectly, with exclusive or shared voting or investment power, within the meaning of that rule, over the reference covered class through a contractual term of the derivative security or otherwise, the holder of that derivative security may become a beneficial owner of the reference class.
- / Second, to the extent a non-security-based swap cash-settled derivative security is acquired with the purpose or effect of divesting its holder of beneficial ownership of the reference class or preventing the vesting of that beneficial ownership as part of a plan or scheme to evade the reporting requirements of Section 13(d) or 13(g), the derivative security may be viewed as a contract, arrangement, or device within the meaning of those terms as used in Rule 13d-3(b). The holder of such cash-settled derivative security, therefore, may be deemed

⁶ The SEC previously explained in its [release](#) regarding security-based swaps the circumstances under which a holder of a security-based swap may become a beneficial owner as determined under Rule 13d-3. It noted that “our existing regulatory regime may require the reporting of beneficial ownership” in cases in which a security-based swap (1) “confers voting and/or investment power (or a person otherwise acquires such power based on the purchase or sale of a [security-based swap]),” (2) “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 (3) “grants a right to acquire an equity security.”

a beneficial owner under Rule 13d-3(b) in this context.

- / Finally, under Rule 13d-3(d)(1), a person is deemed a beneficial owner of an equity security if the person (1) has a right to acquire beneficial ownership of the equity security within 60 days or (2) acquires the right to acquire beneficial ownership of the equity security with the purpose or effect of changing or influencing the control of the issuer of the security for which the right is exercisable, or in connection with or as a participant in any transaction having such purpose or effect, regardless of when the right is exercisable. As the SEC stated in the security-based swaps release, Rule 13d-3(d)(1) applies regardless of the origin of the right to acquire the equity security. If such a right originates in a derivative security that is nominally "cash-settled" or from an understanding in connection with that derivative security, Rule 13d-3(d)(1) would apply.

Guidance regarding formation of a group in connection with acquisition of derivative security

The SEC also provided guidance regarding the acquisition of cash-settled derivative securities and the formation of a group under Sections 13(d)(3) and 13(g)(3). The SEC noted that many such derivatives are not considered securities of the issuer as they originate with persons other than the issuer and simply reference a class of an issuer's securities. The SEC does not believe that persons who, in the ordinary course of business, acquire derivative securities settled exclusively in cash would generally be deemed to "act as a ... group" under Sections 13(d)(3) and 13(g)(3). While an agreement may be entered into to set the terms of the derivative security, in the SEC's view, such an agreement between an investor in a cash-settled derivative security and a counterparty entered into for the ordinary course of business would fail to satisfy the "act as a ... group" element in Sections 13(d)(3) and 13(g)(3) absent other indicia of group status such as agreements to vote or other factors. The SEC noted that a financial institution counterparty may purchase securities in the reference covered class and hold them for the duration of the agreement to offset risk exposure. However, it stated that "we believe that if the counterparty acts on its own initiative and not at the direction of the investor or otherwise on its behalf, there is no basis to assert that the investor and counterparty acted in concert and thus subjected themselves to regulation as a group."

Amendment to Schedule 13D regarding derivative securities

The SEC proposed amendments to Item 6 of Schedule 13D to clarify the disclosure requirements with respect to derivative securities held by a person reporting on that schedule. Based on its belief that investors could benefit from more complete disclosure of a Schedule 13D filer's economic interests in the issuer, including economic interests via positions in cash-settled derivatives, the SEC amended Item 6 of Schedule 13D to require disclosure of cash-settled security-based swaps and other derivatives which are settled exclusively in cash.

Formation of a “group”

SEC Guidance

The SEC proposed amendments to Rule 13d-5 to align the text of the rule with the statutory provisions. The SEC stated that the proposed amendments were not intended to change how the SEC views what is meant by “act as a group” for the purposes of Sections 13(d)(3) and 13(g)(3) of the Exchange Act. The amendments were intended to codify through a rule amendment the SEC’s views that “the determination of whether two or more persons are acting as a group does not depend solely on the presence of an express agreement and that, 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.”

The SEC decided not to adopt the proposed amendments but rather provide guidance as to the application of the existing legal standard established in Sections 13(d)(3) and 13(g)(3) with respect to the formation of a group. The SEC acknowledged that the term “group” is not defined in either the Exchange Act or Regulation 13D-G and stated that the relevant standard for determining whether a group has been formed is found in Sections 13(d)(3) and 13(g)(3). Both Sections 13(d)(3) and 13(g)(3) provide that when two or more persons act as a group for the purpose of acquiring, holding, or disposing of securities of an issuer, such group shall be deemed a “person.” The SEC stated that when it proposed Rule 13d-5(b) in 1975 it was not trying to define “group” but instead was attempting to define the term “acquisition.” Persons can be viewed as acting together if they are taking concerted actions in furtherance of any the purposes of acquiring, holding, or disposing of securities of the issuer. The determination depends on an analysis of all the relevant facts and circumstances and not solely on the presence or absence of an express agreement, as two or more persons may take concerted action or agree informally. The SEC notes that group activity may be demonstrated by circumstantial evidence.

Essentially, the SEC states its interpretive standard in the following sentence: “Indeed, the Commission recognizes that for a finder of fact, including the Commission itself, to determine that a group has been formed under Section 13(d)(3) or 13(g)(3), the evidence must show, at a minimum, indicia, such as an informal arrangement or coordination in furtherance, of a common purpose to acquire, hold,⁷ or dispose of securities of an issuer.” The SEC recognizes that inadvertent or coincidental contact would not be sufficient to satisfy the standard given the absence of volitional acts made in concert or in coordination with others.

The SEC provided a series of questions and answers offering additional guidance which we have included in **Exhibit A** to this alert.

⁷ The SEC views the term “holding” as subsuming the term “voting.”

[Amendments to Rule 13d-5](#)

The SEC did adopt some amendments to Rule 13d-5. Rule 13d-5 was amended to include new Rules 13d-5(b)(1)(i) and 13d-5(b)(2)(i). These amended rules expressly impute beneficial ownership of securities to a group that is regulated under Section 13(d)(3) or Section 13(g)(3) when any member of the group becomes a beneficial owner of additional securities in the same class held by the group. Specifically, if any member of the group, after the date of the group's formation, becomes the beneficial owner of additional equity securities of a covered class, the group will be deemed to have acquired beneficial ownership of equity securities of such covered class.

Additionally, new Rules 13d-5(b)(1)(iii) and 13d-5(b)(2)(ii) clarify that a group would not be deemed to have become the beneficial owner of additional equity securities in the same class beneficially owned by the group if, after the group's formation, a member becomes the beneficial owner of additional equity securities through a sale by, or transfer from, another member of the group.

[Dissemination of Schedules 13D and 13G](#)

Currently, Rule 13d-7 requires a copy of Schedules 13D and 13G, including amendments, to be sent to the issuer at its principal executive office by registered or certified mail and a copy of Schedule 13D and amendments thereto to be sent to each national securities exchange where the security is traded. As part of the modernization of Regulation 13D-G, the amendments rescind in its entirety Rule 13d-7.

[XML-based language requirements for Schedules 13D and 13G](#)

The amendments require that Schedules 13D and 13G be filed using an XML-based language specific to Schedules 13D and 13G. All information disclosed on the Schedules, including any quantitative disclosures, textual narratives, and checkboxes would need to be structured using the specific XML-based language, while exhibits filed with the Schedules would remain unstructured.

[What's next?](#)

With a few exceptions noted below, the amendments will become effective 90 days after publication in the *Federal Register*. Compliance with the structured data requirement for Schedule 13D and 13G will be required beginning on December 18, 2024. However, the Commission welcomes earlier adoption, which may begin on December 18, 2023. Additionally, compliance with the revised Schedule 13G filing deadlines for both initial filings and amendments will not be required before September 30, 2024; therefore, beneficial owners will continue to be required to comply with the current Schedule 13G filing deadlines through September 29, 2024.

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