

**“The ABCs of Schedule 13D and Schedule 13G”**

**Thursday, January 25, 2024**

**Course Materials**

## “The ABCs of Schedule 13D and Schedule 13G”

**Thursday, January 25, 2024**

2 to 3 p.m. Eastern [archive and transcript to follow]

The SEC’s recent adoption of amendments to the beneficial ownership reporting rules under Section 13(d) and Section 13(g) of the Exchange Act and its issuance of new guidance under those rules have left lawyers for both issuers and stockholders with a lot to digest. Join our panel of experts as they provide insights into the basics of beneficial ownership reporting, the changes to the reporting scheme resulting from the amendments and the implications of the SEC’s new guidance on cash-settled derivatives and Schedule 13D “group” formation.

Joining us are:

- **Scott Budlong**, Partner, Barnes & Thornburg LLP
- **David Korvin**, Associate, Gibson, Dunn & Crutcher LLP
- **Jennifer Nadborny**, Partner, Simpson Thacher & Bartlett LLP
- **Andrew Thorpe**, Partner, Gunderson Dettmer LLP

Among other topics, the program will cover:

- Overview of Schedule 13D and 13G Requirements
- Amendments to Schedule 13D and 13G Filing Deadlines
- Amendments and Guidance on Derivative Securities
- Guidance on Schedule 13D “Groups”
- Recurring Beneficial Ownership Reporting Issues
- Implications of the Amendments and Guidance for Activism and Hostile M&A

## **“The ABCs of Schedule 13D and Schedule 13G”**

### Course Outline/Notes

1. Overview of Schedule 13D and 13G Requirements
2. Amendments to Schedule 13D and 13G Filing Deadlines
3. Amendments and Guidance on Derivative Securities
4. Guidance on Schedule 13D “Groups”
5. Recurring Beneficial Ownership Reporting Issues
6. Implications of the Amendments and Guidance for Activism and Hostile M&A

**“The ABCs of Schedule 13D and Schedule 13G”**

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# Modernization of Beneficial Ownership Reporting



The Securities and Exchange Commission adopted amendments to modernize the rules governing beneficial ownership reporting. The amendments:

- Shorten the deadlines for initial and amended Schedule 13D and 13G filings;
- Clarify the Schedule 13D disclosure requirements with respect to derivative securities; and
- Require that Schedule 13D and 13G filings be made using a structured, machine-readable data language.

In addition, the adopting release provides guidance regarding:

- The application of the current beneficial ownership reporting rules to an investor's use of certain cash-settled derivative securities; and
- The application of the current legal standard found in Sections 13(d)(3) and 13(g)(3) of the Securities Exchange Act of 1934 to certain common types of shareholder engagement activities.

## Background

Exchange Act Sections 13(d) and 13(g), 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, as applicable. An investor with control intent files Schedule 13D, while Exempt Investors and investors without a control intent, such as Qualified Institutional Investors and Passive Investors, file Schedule 13G. The deadlines for filing the initial Schedule 13D and Schedule 13G have not been updated since 1968 and 1977, respectively. Changes in the financial markets and technology warrant a reassessment of these filing deadlines and other aspects of the beneficial ownership rules to meet the needs of today's investors and other market participants.

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## Schedule 13D and 13G Amendments

For Schedule 13D, the amendments shorten the initial filing deadline from 10 days to five business days and require that amendments be filed within two business days. For certain Schedule 13G filers (i.e., qualified institutional investors and exempt investors), the amendments shorten the initial filing deadline from 45 days after the end of a calendar year to 45 days after the end of the calendar quarter in which the investor beneficially owns more

than 5 percent of the covered class. For other Schedule 13G filers (i.e., passive investors), the amendments shorten the initial filing deadline from 10 days to five business days. In addition, for all Schedule 13G filers, the amendments generally require that an amendment be filed 45 days after the calendar quarter in which a material change occurred rather than 45 days after the calendar year in which any change occurred. Finally, the amendments accelerate the Schedule 13G amendment obligations for qualified institutional investors and passive investors when their beneficial ownership exceeds 10 percent or increases or decreases by 5 percent.

To ease filers' administrative burdens associated with these shortened deadlines, the amendments extend the filing "cut-off" times in Regulation S-T for Schedules 13D and 13G from 5:30 p.m. to 10:00 p.m. Eastern time.

To remove uncertainty as to the scope of Schedule 13D's disclosure requirements with respect to derivative securities, the amendments revise Item 6 of Schedule 13D to clarify that a person is required to disclose interests in all derivative securities (including cash-settled derivative securities) that use the issuer's equity security as a reference security.

Additionally, to make it easier for investors and markets to access, compile, and analyze information disclosed on Schedules 13D and 13G, the amendments require that these filings use a structured, machine-readable data language. This requirement applies to all information disclosed on Schedules 13D and 13G (other than exhibits).

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## **Commission Guidance**

The adopting release provides guidance on the applicability of existing Rule 13d-3 to cash-settled derivative securities (other than security-based swaps). The guidance is similar to guidance the Commission previously provided in 2011 regarding the applicability of Rule 13d-3 to security-based swaps.

In addition, the adopting release provides guidance as to the application of the existing legal standard established in Exchange Act Sections 13(d)(3) and 13(g)(3) with respect to the formation of a group. That guidance is intended to clarify the Commission's view 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 adopting release also provides guidance on the application of the current legal standard found in Sections 13(d)(3) and 13(g)(3) to certain common types of shareholder engagement activities.

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### ***Additional Information:***

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

## **Checklist: Schedule 13Gs**

*By TheCorporateCounsel.net*

### **A. Overview**

When a person or entity — or a group of persons or entities — owns more than 5% of a company’s securities, they are required to make one of two types of filings with the SEC under Section 13(d) of the ’34 Act. The purpose of these filings is to inform the market about the existence of large owners of a company’s securities — and what their intentions are behind such a large ownership position.

Schedule 13D is the default disclosure statement; it is the “long form” and signals to the market that the holders might have an intent to assert control or influence over the company. As a result, this type of filing can create a stir when made.

Schedule 13G is the other type of filing, and it is more common because it is the “short form” that indicates that the holders merely have a passive investment intent.

### **B. Determining When Filing Obligation Exists**

1. **Type of Securities:** Filing obligation only applies when a person beneficially owns more than 5% of a voting class of equity securities registered under Section 12 of the ’34 Act.
  - Equity securities are broadly defined to include:
    - Common or preferred stock
    - Any security convertible into or exercisable for equity securities
    - Rights and options to acquire equity security (options, warrants, etc.)
    - Debentures convertible into equity securities — even if the conversion price is out of the money
    - Convertible bonds that can be settled in cash at issuer’s election, if cash payment tied to stock price

- American depository shares
  - Unusual or hybrid securities may require case-by-case analysis
  - Equity securities of the same class should be aggregated to determine the amount of beneficial ownership.
    - The term “class” includes securities sharing substantially similar characteristics, rights and privileges.
    - Common stock isn’t typically combined with preferred stock, even if the preferred stock is convertible.
    - Public securities and private securities are not typically deemed to be the same class, even if they share substantially similar characteristics, rights and privileges.
    - Whether separate classes of common or preferred stock constitute separate classes for Section 13(d) reporting may require a facts and circumstances analysis.
2. **“Beneficial Ownership” Definition:** A beneficial owner includes any person that directly or indirectly has (or shares) voting or investment power over a security — including the right to dispose of the securities.
- Beneficial ownership is not necessarily related to economic benefit or the legal ownership of securities.
  - A person is also deemed to be the beneficial owner of any securities that it has the right to acquire within 60 calendar days.
    - However, persons acquiring securities with the purpose or effect of changing or influencing control — or in connection with a transaction that has the purpose or effect of changing or influencing control — are deemed to beneficially own the securities, irrespective of the 60-day period.
  - Typically, a person is not deemed to beneficially own securities if the right to acquire the securities is subject to a material contingency outside the control of the person.



- Practically, there may be one or more persons that beneficially own the same securities and have an obligation to file a beneficial ownership report.
  - Two or more persons that beneficially own the same securities may file jointly on the same beneficial ownership report.
3. **Beneficial Ownership Calculation:** Beneficial ownership percentage is calculated by dividing the amount of securities beneficially owned — which should include any securities the reporting person has the right to acquire within 60 days — by the total number of outstanding securities of the class, plus the amount of securities the reporting person has the right to acquire within 60 days.
- When calculating the percentage, the reporting person may rely on the number of outstanding securities disclosed by the company in its most recent annual, quarterly or current report, unless there is a reason to believe the disclosure is inaccurate.
4. **Group Formation:** If the voting and investment power over the securities is held by several entities (via contract, voting agreement or some other mechanism), a group filing may be required if — in the aggregate — beneficial ownership is greater than 5%.
- A group is created when two or more persons agree to act together for the purpose of acquiring, holding, voting or disposing of equity securities.
  - Group status is a facts and circumstances analysis and sometimes is difficult to determine with certainty.
  - A written agreement is not required and group status may be proven by circumstantial evidence.
  - In the October 2023 amendments described below, the SEC declined to adopt proposed rule amendments regarding group formation; however, the SEC provided guidance and Q&As in the adopting release.

## C. Types of Reporting Persons

1. **Three Eligible Categories:** There are three broad categories of investors permitted to file the short-form Schedule 13G. The three categories are:

- Rule 13d-1(b): “qualified institutional investors”
- Rule 13d-1(c): “passive investors”
- Rule 13d-1(d): “exempt investors”

2. **“Qualified Institutional Investors” Category**

- Acquired the securities in the “ordinary course of business” and for “investment purposes” (*i.e.*, not with the purpose or effect of changing or influencing control or in connection with — or as a participant in — a transaction that has the purpose or effect of changing or influencing control)
- Must be one of the following eligible institutions:
  - Registered broker or dealer
  - Bank
  - Insurance company
  - Registered investment company
  - Registered investment adviser
  - Employee benefit/ERISA plan
  - Parent holding company whose direct and indirect ownership of issuer securities — excluding securities held by institutional investors — doesn’t exceed 1% of the class outstanding
  - Savings association
  - Church plan excluded from definition of investment company under the Investment Company Act

- Non-U.S. institution that is the functional equivalent of any eligible institution, as long as it is subject to a regulatory system comparable to the one applicable to the equivalent U.S. institution
- Initial reporting obligation applies only if the institutional investor beneficially owns greater than 5% at the end of the calendar year

### 3. **“Passive Investors” Category**

- Persons that have not acquired securities with the purpose or effect of changing or influencing control or in connection with — or as a participant in — a transaction that has the purpose or effect of changing or influencing control
- Beneficially owns less than 20% of the class of securities
- Per SEC staff guidance, officers and directors are not passive investors

### 4. **“Exempt Investors” Category**

- Exempt investors include the following 5% beneficial owners, provided that they have not acquired more than 2% of the class of securities during the preceding 12 months:
  - Persons who acquired the securities in a registered exchange offer
  - Persons who acquired the securities prior to the company’s IPO or December 22, 1970
  - Persons who acquired the securities in a spinoff or parent/subsidiary merger
  - Persons that crossed the 5% beneficial ownership threshold due solely to a change in total outstanding securities (*e.g.*, as a result of issuer repurchases or conversions)

5. **Group Filings:** If a filing is made by a group, all members of the group must be eligible/required to use Schedule 13G.

## **D. Initial Filing Deadlines (Before October 2023 Amendments)**

In October 2023, the SEC announced the adoption of final rules amending Regulation 13D-G, which shortened the deadlines for initial and amended Schedule 13G filings. Reporting persons aren't required to comply with the revised Schedule 13G deadlines until September 30, 2024. Here are the initial filing deadlines before the amended rules:

### **1. Qualified Institutional Investors**

- If beneficial ownership is 10% or less of the class of securities, the deadline is 45 calendar days after the end of the calendar year in which the reporting person acquired more than 5% beneficial ownership.
- If beneficial ownership exceeds 10% of the class of securities, the initial filing must be made within 10 days after the end of the first month in which the reporting person's ownership exceeds 10% beneficial ownership.

### **2. Passive Investors**

- The deadline is 10 calendar days after crossing the 5% beneficial ownership threshold.
- For purposes of the 10-calendar day calculation, the first day after the 5% beneficial ownership threshold is crossed counts as Day 1.

### **3. Exempt Investors**

- The deadline is 45 calendar days after the end of the calendar year in which the reporting person's beneficial ownership exceeds 5%.

### **4. Late Filings:** Schedule 13G eligibility is not lost if the filing deadline is missed.

## **E. Initial Filing Deadlines (After October 2023 Amendments)**

In addition to the changes to the filing deadlines described below, the October 2023 amendments allowed the filing of Schedules 13D and 13G, and amendments thereto, up until 10 p.m. ET, rather than the current 5:30 p.m. filing cut-off. Here are the initial filing deadlines, as amended:

## 1. Qualified Institutional Investors

- The deadline is 45 days after the end of the calendar quarter if, as of the end of the quarter, the investor beneficially owns more than 5% of the covered class or, if beneficial ownership exceeds 10% of the class before the end of the calendar quarter, five business days after month-end in which beneficial ownership exceeds 10%.

## 2. Exempt Investors

- The deadline is 45 days after the end of the calendar quarter if, as of the end of the quarter, the investor beneficially owns more than 5% of the covered class.

## 3. Passive Investors

- The deadline is five business days after crossing the 5% beneficial ownership threshold.
- For purposes of the five-business day calculation, the first day after the 5% beneficial ownership threshold is crossed counts as Day 1.

## 4. Late Filings: Schedule 13G eligibility is not lost if the filing deadline is missed.

## F. Contents of a Filing

### 1. Cover Page Information

- Company name and address of its principal business office
- Amendment number — if an amendment is being filed to an original filing
- Title of class of security held and CUSIP number
- Date of the event triggering filing
- Eligibility rule that the reporting person is relying on to file Schedule 13G
- Names of reporting persons

- Whether the reporting person is a member of a group
- Filer’s citizenship or place of organization
- Number of securities beneficially owned by each reporting person, showing the number of securities with sole or shared voting or dispositive power
- Aggregate amount beneficially owned by each reporting person
- Percent of the class represented by the securities beneficially owned
- If the reporting person is an institutional investor, it must indicate what kind of institution it is
- If there are multiple reporting persons, the form should have a separate cover page for each reporting person

## 2. **Other Required Information**

- Any explanatory information necessary to understand the ownership structure, including disclaimers of beneficial ownership
- Identification of any reporting person who beneficially owns or shares voting or investment power
- Identification of group members
- A narrative response to any item that requires it

## 3. **Certifications**

- Institutional investors must certify that the securities were acquired and are being held in the ordinary course of business and that the securities were not acquired or being held with the purposes or with the effect of changing or influencing control or in connection with — or as a participant in — a transaction that has the purpose or effect of changing or influencing control.
- Passive investors must certify that the securities were not acquired or being held with the purposes or with the effect of changing or influencing control or in connection with — or as a participant in —

a transaction that has the purpose or effect of changing or influencing control.

#### 4. **Exhibits**

- If the reporting person is a parent holding company and is filing as an institutional investor, it must include a list of subsidiaries as an exhibit
- Notice of dissolution of the group, if applicable

#### 5. **Signature Pages**

- For corporations or partnerships, any executive officer or general partner with authorization can sign
- For other entities, evidence of signing authority must be included in the filing
- Power of attorney may be filed or incorporated by reference

#### 6. **EDGAR:** Schedule 13Gs must be filed with the SEC electronically via EDGAR.

- Individual reporting persons must have their own EDGAR codes — a company’s EDGAR codes may not be used.
- Companies will sometimes prepare Schedule 13Gs on behalf of management shareholders or founders (although those filings are still made by the actual shareholders). See our separate [“Checklist: Schedule 13D/G Preparation — Who Does It”](#) on TheCorporateCounsel.net.
- Schedule 13Gs filed by multiple reporting persons will typically be filed using only one of the reporting persons’ EDGAR codes.

### G. **Amendments to Schedules 13G (Before October 2023 Amendments)**

It is common for there to be multiple amendments to Schedule 13Gs over time. Here are the filing deadlines for amending a Schedule 13G filing before the amended rules:

## 1. Institutional Investors

### – Annual Amendments

- Required if there has been any change in the previously filed Schedule 13G as of the end of the calendar year — whether or not material
- Required even if securities are disposed of after the end of the year
- The deadline is 45 calendar days after the end of the calendar year — February 14th (unless that falls on a weekend or holiday)
- No amendment is required if beneficial ownership changed solely because of change in total outstanding securities

### – Monthly Amendments

- Required when beneficial ownership exceeds 10% for the first time
  - Can be triggered by company redemption that pushes beneficial owner over 10%
  - Computed as of the last day of the month
- Thereafter, if beneficial ownership increases or decreases by more than 5%
- The deadline for these amendments is the 10th day of the following month

## 2. Passive Investors

### – Annual Amendments

- Required if there has been any change in the previously filed Schedule 13G as of the end of the calendar year — whether or not material



- Required even if the securities are disposed of after the end of the year
  - The deadline is 45 days after the end of the calendar year
  - No amendment required if beneficial ownership changed solely because of change in total outstanding securities
- Other Amendments
- Required when beneficial ownership exceeds 10% for the first time — can be triggered by a company redemption that pushes beneficial owner over 10%
  - Thereafter, if beneficial ownership increases or decreases by more than 5%
  - Amendments must be filed “promptly” — not defined — but could mean as soon as the day after the event requiring the amendment depending on the facts and circumstances

### 3. Exempt Investors

- Annual Amendments
- Required if any change in beneficial ownership — whether or not material
  - Required even if securities are disposed of after the end of the year
  - The deadline is 45 days after the end of the calendar year
  - No amendment required if beneficial ownership changed solely because of change in total outstanding securities
- May lose eligibility for Schedule 13G under Rule 13d-1(d) — and be required to file amendment on Form 13D or on Form 13G if an institutional investor or a passive investor — if the reporting person subsequently acquires more than 2% of the company’s securities within 12 months

#### 4. “Exit” Amendments

- Filed if a reporting person no longer beneficially owns greater than 5%
- If not otherwise required to file an amendment due to a decrease of beneficial ownership greater than 5%, an exit filing may be made in an annual amendment — or the reporting person may choose to do so in a separate amendment voluntarily filed early
- Reporting person remains subject to applicable Schedule 13G amendment requirements until an exit filing is made
- Reacquisition of 5% beneficial ownership following an exit amendment triggers a new Schedule 13G or 13D filing requirement

#### 5. Loss of Eligibility Amendments

- Institutional Investors: A reporting person loses eligibility to use the short-form Schedule 13G if it ceases to hold the securities in the ordinary course or solely for investment purposes.
  - Must file a Schedule 13D within 10 calendar days of a loss of eligibility
  - May not vote the securities held, or acquire any additional securities from the date the investment purpose changed until 10 calendar days after the Schedule 13D is filed
- Passive Investors: A reporting person loses eligibility to use the short-form Schedule 13G if they cease to hold the securities solely for investment purposes or beneficial ownership reaches or exceeds 20% of the class of securities.
  - Must file a Schedule 13D within 10 calendar days of the loss of eligibility
  - May not vote the securities held, or acquire any additional securities from the date the 20% threshold was crossed until 10 calendar days after Schedule 13D filed

- Must file a Schedule 13D once the 20% threshold is crossed, even if ownership falls below 20% again before the Schedule 13D is due
- Exempt Investors: A reporting person eligible to report on Schedule 13G under Rule 13d-1(d) who acquires beneficial ownership of more than 2% of the company's securities within any 12-month period loses eligibility to use Schedule 13G.
  - Filer must evaluate whether it remains eligible to use Schedule 13G as either an institutional investor or passive investor
  - If no longer eligible to report on Schedule 13G, then a Schedule 13D must be filed within 10 calendar days of crossing the 2% threshold
- New Officers and Directors: Per Corp Fin's guidance, a reporting person's eligibility to file a Schedule 13G will likely cease when a passive investor becomes an officer or director of the company — and a Schedule 13D will be required to be filed within 10 calendar days of the change in position.

## H. Amendments to Schedules 13G (After October 2023 Amendments)

It is common for there to be multiple amendments to Schedule 13Gs over time. Here are the filing deadlines for amending a Schedule 13G filing under the rules as amended in October 2023:

### 1. Quarterly Amendments (All Reporting Persons)

- Required if there has been a material change in the previously filed Schedule 13G
- Required even if securities are disposed of after the end of the quarter
- The deadline is 45 calendar days after the end of the calendar quarter
- No amendment is required if beneficial ownership changed solely because of change in total outstanding securities

## 2. Monthly Amendments (Qualified Institutional Investors and Passive Investors)

- Required when beneficial ownership of qualified institutional investors or passive investors exceeds 10% for the first time
  - Can be triggered by company redemption that pushes beneficial owner over 10%
  - Required if the thresholds were crossed at any time during a month
- Thereafter, if beneficial ownership increases or decreases by more than 5%
- The deadline for these amendments is five business days after the end of the month for qualified institutional investors and two business days after the date on which an amendment obligation arises for passive investors
- May lose eligibility for Schedule 13G under Rule 13d-1(d) — and be required to file amendment on Schedule 13D — if the reporting person subsequently acquires more than 2% of the company’s securities within 12 months (unless eligible to rely on Rules 13d-1(b) or 13d-1(c) to continue to report on Schedule 13G)

## 3. “Exit” Amendments

- Filed if a reporting person no longer beneficially owns greater than 5%
- If not otherwise required to file an amendment due to a decrease of beneficial ownership greater than 5%, an exit filing may be made in a quarterly amendment — or the reporting person may choose to do so in a separate amendment voluntarily filed early
- Reporting person remains subject to applicable Schedule 13G amendment requirements until an exit filing is made
- Reacquisition of 5% beneficial ownership following an exit amendment triggers a new Schedule 13G or 13D filing requirement

#### 4. Loss of Eligibility Amendments

- Institutional Investors: A reporting person loses eligibility to use the short-form Schedule 13G if it ceases to hold the securities in the ordinary course or solely for investment purposes.
  - Must file a Schedule 13D within five business days of a loss of eligibility
  - May not vote the securities held, or acquire any additional securities from the date the investment purpose changed until 10 calendar days after the Schedule 13D is filed
  
- Passive Investors: A reporting person loses eligibility to use the short-form Schedule 13G if they cease to hold the securities solely for investment purposes or beneficial ownership reaches or exceeds 20% of the class of securities.
  - Must file a Schedule 13D within five business days of the loss of eligibility
  - May not vote the securities held, or acquire any additional securities from the date the 20% threshold was crossed until 10 calendar days after Schedule 13D filed
  - Must file a Schedule 13D once the 20% threshold is crossed, even if ownership falls below 20% again before the Schedule 13D is due
  
- Exempt Investors: A reporting person eligible to report on Schedule 13G under Rule 13d-1(d) who acquires beneficial ownership of more than 2% of the company’s securities within any 12-month period loses eligibility to use Schedule 13G.
  - Filer must evaluate whether it remains eligible to use Schedule 13G as either an institutional investor or passive investor
  - If no longer eligible to report on Schedule 13G, then a Schedule 13D must be filed within five business days of crossing the 2% threshold

- New Officers and Directors: Per Corp Fin guidance, a reporting person’s eligibility to file a Schedule 13G will likely cease when a passive investor becomes an officer or director of the company — and a Schedule 13D will be required to be filed within five business days of the change in position.

## I. Restoration of Eligibility

1. **Institutional Investors and Passive Investors**: Beneficial owners that originally filed on Schedule 13G and lost eligibility may switch back to Schedule 13G if they once again qualify for the exemption.
  - Only available if the reporting person initially eligible for Schedule 13G — *i.e.*, reporting person who initially filed on Schedule 13D may not convert to Schedule 13G
2. **Exempt Investors**: A reporting person eligible for Schedule 13G under Rule 13d-1(d) loses eligibility if ownership falls below 5%.
  - Any subsequent acquisitions that trigger filings must be filed on Schedule 13D (unless the reporting person is eligible to file Schedule 13G under another rule)

[← More on Section 13\(d\) Reform: Derivatives and Group Formation](#) | [Main](#) | [September-October Issue of The Corporate Counsel](#) →

October 11, 2023

## Section 13(d) Reform: SEC Adopts Final Rules!

Yesterday, the SEC [announced](#) the adoption of final rules amending Regulation 13D-G. Here's the 295-page [adopting release](#), and here's the 2-page [fact sheet](#). Per the fact sheet, the amendments primarily:

- Shorten the deadlines for initial and amended Schedule 13D and 13G filings;
- Clarify the Schedule 13D disclosure requirements with respect to derivative securities; and
- Require that Schedule 13D and 13G filings be made using a structured, machine-readable data language.

Here's more on the new filing deadlines, which differ a bit from the [proposed form](#):

For Schedule 13D, the amendments shorten the initial filing deadline from 10 days to five **business** days and require that amendments be filed within **two** business days.

For certain Schedule 13G filers (i.e., qualified institutional investors and exempt investors), the amendments shorten the initial filing deadline from 45 days after the end of a calendar year to 45 days after the end of the calendar quarter in which the investor beneficially owns more than 5 percent of the covered class.

For other Schedule 13G filers (i.e., passive investors), the amendments shorten the initial filing deadline from 10 days to five business days. In addition, for all Schedule 13G filers, the amendments generally require that an amendment be filed 45 days after the calendar quarter in which a material change occurred rather than 45 days after the calendar year in which any change occurred.

Finally, the amendments accelerate the Schedule 13G amendment obligations for qualified institutional investors and passive investors when their beneficial ownership exceeds 10 percent or increases or decreases by 5 percent.

To ease filers' administrative burdens associated with these shortened deadlines, the amendments extend the filing "cut-off" times in Regulation S-T for Schedules 13D and 13G from 5:30 p.m. to 10:00 p.m. Eastern time.

As usual, the amendments will be effective 90 days after publication in the Federal Register, but reporting persons aren't required to comply with the structured data requirements until December 18, 2024 (with voluntary compliance permitted beginning December 18, 2023) or the revised 13G deadlines (not 13D deadlines!) until September 30, 2024. As an example, the adopting release states "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." Check out our "[Schedules 13D & 13G](#)" Practice Area where we'll post memos for more info.

If you're wondering why we didn't give a heads-up that this was on an upcoming open meeting agenda, that's because it wasn't. Here's a [blog from Broc](#) from almost 10 years ago about the SEC's ability to adopt rules by seriatim.

– **Meredith Ervine**

Posted by Meredith Ervine

Permalink: <https://www.thecorporatecounsel.net/blog/2023/10/section-13d-reform-sec-adopts-final-rules.html>



[← California Climate Disclosure Bills Are Now Law](#) | [Main](#) | [Section 13\(d\) Reform: SEC Adopts Final Rules!](#) →

October 11, 2023

## More on Section 13(d) Reform: Derivatives and Group Formation

In addition to the revised filing deadlines, the amendments also revise Schedule 13D to clarify that reporting persons must disclose interests in all derivative securities that use the issuer's equity security as a reference security (including cash-settled derivative securities) under Item 6, and the release provides guidance on the applicability of existing Rule 13d-3 to cash-settled derivative securities (other than security-based swaps). Consistent with guidance provided in its 2011 release, [Beneficial Ownership Reporting Requirements and Security-Based Swaps](#), the [release](#) discusses circumstances when the holder of non-SBS derivative securities settled exclusively in cash may have voting or investment power or otherwise could be deemed to be a beneficial owner.

In lieu of adopting the proposed amendments to Rule 13d-5 that would have tracked the statutory text of Sections 13(d)(3) and (g)(3), the release provides guidance on the formation of a group. The guidance reiterates that Rule 13d-5(b) is not designed to define "group" in a way that would substitute the legal standard in 13(d)(3) and 13(g)(3) and that the existence of a group can be established by activities without an express agreement although there must be "an informal arrangement or coordination in furtherance of a common purpose to acquire, hold, or dispose of securities of an issuer."

Commentators on the proposed rules expressed concerns about a chilling effect on shareholders' ability to communicate with each other or a company's management. Accordingly, the [release](#) (see pages 133 to 139) contains guidance in the form of questions and responses on common engagement and communication activities. Here's an example:

**Question:** Is a group formed when two or more shareholders communicate with each other regarding an issuer or its securities (including discussions that relate to improvement of the longterm 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?

**Response:** No. In our view, a discussion whether held in private, such as a meeting between two parties, or in a public forum, such as a conference that involves an independent and free exchange of ideas and views among shareholders, alone and without more, would not be sufficient to satisfy the "act as a . . . group" standard in Sections 13(d)(3) and 13(g)(3). Sections 13(d)(3) and 13(g)(3) were intended to prevent circumvention of the disclosures required by Schedules 13D and 13G, not to complicate shareholders' ability to independently and freely express their views and ideas to one another.

The policy objectives ordinarily served by Schedule 13D or Schedule 13G filings would not be advanced by requiring disclosure that reports this or similar types of shareholder communications. Thus, an exchange of views 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 under Section 13(d)(3) or 13(g)(3).

– **Meredith Ervine**

Posted by Meredith Ervine

Permalink: <https://www.thecorporatecounsel.net/blog/2023/10/more-on-section-13d-reform-derivatives-and-group-formation.html>

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## News

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### PubCo and Funds Insight: SEC Accelerates Beneficial Ownership Reporting on Schedules 13D and 13G

November 1, 2023 – Insights

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#### *Compliance with shortened filing deadlines will be required for Schedule 13D beginning in February 2024 and for Schedule 13G in September 2024*

On October 10, 2023, the U.S. Securities and Exchange Commission (SEC or Commission) adopted final rules accelerating the filing deadlines for both initial and amended beneficial ownership reports on Schedules 13D and 13G and amending certain other provisions of the beneficial ownership reporting requirements under Sections 13(d) and 13(g) of the Securities Exchange Act of 1934 (Exchange Act). The SEC also issued new interpretive guidance clarifying the application of the existing beneficial ownership rules to the use of cash-settled derivative securities and group formations.

A table summarizing the revised reporting timetables—which, in response to concerns raised by public commenters, are less onerous for investors than those originally proposed by the SEC last year—appears on pages 10-11 of the adopting release, available [here](#) and also reproduced (with light editing for clarity) in [Appendix A](#) at the end of this client alert. A set of summary tables broken out by type of Schedule 13G filer is included in [Appendix B](#).

Exchange Act Sections 13(d) and 13(g), together with the related rules of Regulation 13D-G, require an investor (including any group) that beneficially owns more than 5% of a covered class<sup>[1]</sup> of a public company's equity securities to disclose their ownership position by filing with the SEC either a Schedule 13D or a Schedule 13G. Generally, investors with control intent must file the long form Schedule 13D, while investors without control intent and certain other investors are eligible to file the more abbreviated Schedule 13G. This regulatory framework is intended to serve as a comprehensive disclosure system of corporate ownership that can alert issuers and the market to rapid accumulations of equity securities by persons who would then have the potential to change or influence control of the issuer.

According to SEC Chair Gary Gensler, the purpose of the amendments is to update “antiquated” disclosure deadlines—first enacted in 1968 and 1977—and other aspects of the beneficial ownership rules that have not kept pace with modern advances in the financial markets and technology, with the goal of “reducing overall information

asymmetries in the market, promoting transparency, allowing better-informed decision-making by investors and improving liquidity.”

Relative to the current beneficial ownership reporting system, the expedited filing timelines will enable public companies to be informed about changes in beneficial ownership positions of their major shareholders, and to identify potential activists, sooner.

## Overview

As adopted, the amendments:

- Accelerate the filing deadlines for both initial and amended beneficial ownership reports on Schedules 13D and 13G (see [Appendix A](#) and [Appendix B](#) for tables summarizing the changes), including:
  - Shorten the filing deadline for an initial Schedule 13D from 10 calendar days to **5 business days**, and specify that Schedule 13D amendments must be filed within **2 business days** after a material change;
  - Shorten the filing deadlines for many initial Schedule 13Gs and certain Schedule 13G amendments from 45 calendar days after the end of the applicable calendar *year* to **45 calendar days after the end of the applicable calendar quarter**, and require that Schedule 13G amendments be filed only after a *material change* (rather than *any change*);
- Extend the EDGAR filing cut-off time from 5:30 p.m. ET to 10:00 p.m. ET (the same deadline as for Section 16 beneficial ownership reports filed on Forms 3, 4 and 5);
- Require that Schedule 13D and 13G filings be made using a structured, machine-readable data language;
- Specify that Schedule 13D filers must disclose interests in all derivative securities that use the issuer’s equity security as a reference security, including cash-settled derivatives; and
- Expressly impute acquisitions of additional equity securities of a covered class by group members to the group at any time after the group’s formation (excluding intragroup transfers of securities).

The related new interpretive guidance:

- Clarifies the limited circumstances under which holders of cash-settled derivative securities (excluding security-based swaps (SBS))<sup>[2]</sup> may be deemed beneficial owners of the underlying reference equity securities; and
- Clarifies the scenarios in which two or more persons may be treated as a “group” subject to beneficial ownership disclosure obligations, including that an express agreement is not required and certain concerted actions may suffice (see [Appendix C](#) for the full text of this guidance).

## Ongoing SEC Enforcement Initiative Targets Untimely Beneficial Ownership Reporting

The amendments were adopted against the backdrop of the Commission’s heightened scrutiny of untimely insider filings under Exchange Act Sections 13 and 16, particularly by repeated late filers. In late September, the SEC [announced](#)—as part of an “ongoing investigation of potential beneficial ownership violations” deploying advanced data analytics—a new sweep of enforcement actions against multiple officers, directors and greater than 5% shareholders of public companies for alleged serial failures to file timely beneficial ownership reports on Form 4 and Schedules 13D and 13G regarding their holdings and transactions in company securities. The SEC also charged the companies “for contributing to the filing failures by insiders or failing to report their insiders’ filing delinquencies.”

The adopting release reiterates that the Commission has the authority to investigate and enforce beneficial ownership reporting violations and to impose various remedies for late filings, such as injunctive relief, cease-and-desist orders or civil monetary penalties. The adopting release further emphasizes that no state of mind requirement exists for these violations and thus even inadvertent failures to file still constitute violations.

#### Takeaways

The compressed filing timeframes, significant increase in required frequency of Schedule 13G reporting, structured data requirements and clarifications regarding group status will increase compliance costs for investors and likely elicit enhanced SEC scrutiny of filer compliance with the beneficial ownership reporting amendments and related guidance.

Schedule 13D and 13G filers should confirm they have effective compliance systems and processes in place to monitor beneficial ownership levels to determine whether filing obligations have been triggered. To ensure timely compliance with the tighter disclosure deadlines, filers should update their policies and procedures to monitor ownership positions on a more frequent basis, particularly for initial and amended Schedule 13G filings, which will shift to a quarterly cadence from an annual cadence. In light of the new interpretive guidance, filers should also be mindful of the potential beneficial ownership implications of holding any non-SBS cash-settled derivative securities as well as potential group status arising from their communications or activities with other shareholders and with issuers.

If you have any questions or would like more information about the amended beneficial ownership reporting requirements and related guidance discussed in this client alert, please contact your regular Gunderson Dettmer attorney or any member of our Public Companies or Venture Capital and Growth Equity Funds practice teams.

#### Key Compliance Dates

- *For the revised Schedule 13D filing deadlines and all other rule amendments except those described below*, compliance will be required upon their effectiveness 90 days after publication of the adopting release in the *Federal Register* (which is expected shortly), thus likely in **February 2024**.
- *For the revised Schedule 13G filing deadlines*, compliance will be required beginning on **September 30, 2024**.<sup>[3]</sup>
- *For the structured data filing requirement for Schedules 13D and 13G*, compliance will be required beginning on **December 18, 2024** (voluntary early compliance will be permitted beginning on December 18, 2023).

The new SEC guidance included in the adopting release related to cash-settled derivatives and group formation should be considered effective immediately.

#### Accelerated Filing Deadlines

The amendments generally accelerate the filing deadlines for both initial and amended beneficial ownership reports on Schedules 13D and 13G as described below.

#### Schedule 13D Filings

***Initial Filings—Exceed 5% Ownership; Loss of 13G Eligibility***

The filing deadline for the initial Schedule 13D is shortened to **5 business days**<sup>[4]</sup> (down from 10 calendar days) after the date<sup>[5]</sup> on which a person (including any group) acquires beneficial ownership of more than 5% of a covered class or loses eligibility to report on the short form Schedule 13G in lieu of Schedule 13D.

***Amendments—Material Changes***

The filing deadline for Schedule 13D amendments is revised to **2 business days** (from the undefined “promptly”) after the date on which a material change in the facts previously reported occurs.

***Schedule 13G Filings***

The Schedule 13G filing deadlines vary by investor category.

***Initial Filings—Exceed 5% Ownership***

*For Qualified Institutional Investors (QIIs)*<sup>[6]</sup> and *Exempt Investors*,<sup>[7]</sup> the filing deadline for the initial Schedule 13G is shortened to **45 calendar days**<sup>[8]</sup> after the end of the calendar *quarter* (from 45 calendar days after the end of the calendar *year*) in which beneficial ownership exceeds 5% of a covered class. Thus, these filers will no longer have the ability to beneficially own greater than 5% throughout a calendar year without triggering a Schedule 13G filing obligation.

*For Passive Investors*,<sup>[9]</sup> the filing deadline for the initial Schedule 13G is shortened to **5 business days** (down from 10 calendar days) after the date<sup>[10]</sup> on which they acquire beneficial ownership of more than 5% of a covered class.

***Initial Filings—Exceed 10% Ownership Prior to Quarter-End (QIIs only)***

*For QIIs*, the filing deadline for the initial Schedule 13G is shortened to **5 business days** (down from 10 calendar days) after the end of the first month in which beneficial ownership exceeds 10% of a covered class.

***Amendments—Material Changes***

*For all Schedule 13G filers*, the filing deadline for Schedule 13G amendments is shortened to **45 calendar days** after the end of the calendar *quarter* in which a **material change** in the facts previously reported occurs (from 45 calendar days after the end of the calendar *year* in which *any change* (regardless of materiality) occurs). As under the existing rules, an amendment need not be filed with respect to a change in the beneficial ownership percentage previously reported resulting solely from a change in the aggregate number of securities outstanding.

The SEC declined to explicitly define the term “material” for purposes of triggering a Schedule 13G amendment obligation or to provide an express safe harbor for certain specified *de minimis* changes in beneficial ownership.

Rather, the adopting release explains that materiality is already defined in the Exchange Act and is a familiar,

established concept in the federal securities laws.<sup>[11]</sup>

The SEC notes, however, that **the language in Rule 13d-2(a) that provides guidance for beneficial owners to determine when a Schedule 13D amendment obligation arises under that rule—including the statement that “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 when a Schedule 13G amendment is due.** But it cautions that “these are non-exclusive circumstances in which an amendment obligation has been triggered,” pointing to additional language in the rule text stating that a material change includes, “but [is] not limited to,” a “material increase or decrease in the percentage of the class beneficially owned” and that “acquisitions or dispositions of less than [1% of the class of covered securities] may be material, depending upon the facts and circumstances.”

#### ***Amendments—Exceed 10% Ownership and Subsequent 5% Changes***

*For QIIs*, the filing deadline for Schedule 13G amendments is shortened to **5 business days** (down from 10 calendar days) **after the end of the first month** in which beneficial ownership exceeds 10% of a covered class, with additional amendments due **5 business days** (down from 10 calendar days) **after the end of the first month** in which beneficial ownership subsequently increases or decreases by more than 5% of the covered class.

*For Passive Investors*, the filing deadline for Schedule 13G amendments is revised to **2 business days** (from “promptly”) after the date on which beneficial ownership exceeds 10% of a covered class, with additional amendments due **2 business days** (rather than “promptly”) after any subsequent increase or decrease in beneficial ownership by more than 5% of the covered class.

#### **Extension of Filing Cut-Off Time**

To help ease filers’ administrative burdens associated with the accelerated filing deadlines, the amendments extend the EDGAR filing cut-off time for initial and amended Schedules 13D and 13G from 5:30 p.m. ET to 10:00 p.m. ET (the same deadline as for Section 16 filings on Forms 3, 4 and 5).

In light of this additional time, the amendments remove the opportunity for a Schedule 13D or 13G filer to pursue a temporary hardship exemption under Rule 201(a) of Regulation S-T (available to filers who experience unanticipated technical difficulties preventing the timely submission of an electronic filing). However, filers will remain eligible to request a filing date adjustment under Rule 13(b) of Regulation S-T if they attempt in good faith to timely file, but the filing is delayed due to technical difficulties beyond their control (e.g., in the event of an EDGAR outage).

#### **Structured Data Requirement**

The amendments require that Schedules 13D and 13G be filed using an XML-based structured, machine-readable data language. This requirement applies to *all* information disclosed on Schedules 13D and 13G (other than

exhibits), including quantitative disclosures, textual narratives and identification checkboxes.

As is the case with other EDGAR XML filings, reporting persons will be able to, at their option, 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 in connection with the submission of the filing to EDGAR.

This requirement is intended to improve the accessibility and usability of the disclosures reported on Schedules 13D and 13G, “allowing investors to access, aggregate and analyze the reported information in a much more timely and efficient manner.”

#### **Clarification of Derivatives Disclosure in Schedule 13D**

To eliminate any ambiguity as to the scope of Schedule 13D’s disclosure requirements with respect to derivative securities, the amendments revise Item 6 of Schedule 13D—which currently requires disclosure of any contracts, arrangements, understandings or relationships with respect to the issuer’s securities—to expressly state that a Schedule 13D filer must disclose interests in *all* derivative securities that use the issuer’s equity security as a reference security, including cash-settled SBS and other derivatives settled exclusively in cash.

Previously, cash-settled derivative securities were not expressly included in the list of examples of such contracts, arrangements, understandings or relationships provided in the instructions to Item 6, and practice among Schedule 13D filers has been mixed as to whether such securities were included or excluded in the narrative disclosure in response to Item 6.

#### **Commission Guidance**

After considering significant pushback during the public comment period, the SEC elected not to adopt previously proposed changes to certain existing rules and instead published interpretive guidance in the adopting release clarifying:

- The application of the existing legal standards for determining beneficial ownership under Rule 13d-3 to an investor’s use of non-SBS cash-settled derivative securities; and
- The application of the existing legal standard governing the formation of a “group” found in Sections 13(d)(3) and 13(g)(3) to certain common types of shareholder engagement activities for beneficial ownership reporting purposes.

#### ***Treatment of Non-SBS Cash-Settled Derivatives***

Currently, holders of cash-settled derivative securities are not explicitly included in the definition of “beneficial owner” in Rule 13d-3. The new Commission guidance, which appears on pages 113-15 of the adopting release (available [here](#)), states that “[a]lthough non-SBS 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 [of the underlying reference equity security] as determined under Rule 13d-3(b) or 13d-3(d).” Under this guidance, the reporting of beneficial ownership may be required to the extent the non-SBS cash-settled derivative security:

- Provides its holder, directly or indirectly, with exclusive or shared voting or investment power over the reference equity security through a contractual term of the derivative security or otherwise;
- Is acquired with the purpose or effect of divesting its holder of beneficial ownership of the reference equity security 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); or
- Grants its holder a right to acquire beneficial ownership of the reference equity security within 60 days or with the purpose or effect of changing or influencing control of the issuer.

Notwithstanding the above instances, however, the guidance emphasizes that the final determination as to whether the holder of any non-SBS cash-settled derivative security is the beneficial owner of the reference equity security ultimately will depend on the relevant facts and circumstances.<sup>[12]</sup>

#### ***Group Formation Does Not Require Express Agreement***

The term “group” is not defined in the statutory text or any SEC rule. The appropriate legal standard for determining whether a group is formed—and thus whether the group members’ beneficial ownership must be aggregated for purposes of determining whether the reporting threshold has been crossed—is expressly stated in Sections 13(d)(3) and 13(g)(3), which provide that “[w]hen 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 new Commission guidance, which appears on pages 131-39 of the adopting release (available [here](#)), is intended to clarify the SEC’s view that **the determination as to whether two or more persons are acting as a group depends on an analysis of all the relevant facts and circumstances and not solely on the presence or absence of an express agreement, and that in certain circumstances concerted actions by two or more persons for the purpose of acquiring, holding (which includes voting) or disposing of securities of an issuer are sufficient to constitute the formation of a group: “the evidence must show, at a minimum, indicia, such as an informal arrangement or coordination in furtherance, of a common purpose to acquire, hold or dispose of securities of an issuer.”**

By contrast, “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.”

#### ***Shareholder Engagement and Communication Activities***

To address commenter concerns that this legal standard for group formation might be read too broadly and have an unintended chilling effect on communications among shareholders and shareholder engagement with issuers, the guidance also includes a set of seven Q&As with fact patterns describing a variety of common shareholder engagement and communication activities that, without further action, either would not or could be deemed to result

in the formation of a group. These interpretations are largely consistent with prior SEC guidance and views previously expressed by courts.

For example, according to the guidance, a group would *NOT* be formed when two or more shareholders:

- Communicate with each other regarding an issuer or its securities without taking any other actions, including discussions related to improvement of the issuer's long-term performance or changes in issuer practices, or coordination of "vote no" campaigns against individual directors in uncontested elections;
- Jointly make recommendations to an issuer regarding the structure and composition of its board of directors without attempting to convince the board to take specific actions through a change in the existing board membership or bind the board to take action; or
- Jointly submit a non-binding shareholder proposal to an issuer, provided there is no agreement to vote against director candidates nominated by the issuer's management or other management proposals if the non-binding proposal is not included in the issuer's proxy statement or, if passed, is not acted upon favorably by the issuer's board.

The SEC emphasizes that **"an exchange of views 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 under Section 13(d)(3) or 13(g)(3)."**

Furthermore, meetings, emails, and phone or other conversations between a shareholder and an activist investor seeking support for the activist's proposals to an issuer's board or management would not, without more (such as consenting or committing to a course of action), constitute coordination sufficient to find that the shareholder and the activist formed a group (though joint or coordinated publication of soliciting materials with an activist investor might be indicative of group formation). Similarly, a shareholder's announcement of its independently determined intention to vote in favor of an unaffiliated activist investor's director nominees would not, without more, give rise to group status.

On the other hand, if, in advance of filing a Schedule 13D, a beneficial owner of a substantial block of a covered class intentionally communicates to other market participants 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, the blockholder and any market participants who made purchases as a direct result of that communication would potentially become subject to regulation as a group.<sup>[13]</sup>

The Q&A guidance on group formation is set forth in its entirety (excluding footnotes) in [Appendix C](#) at the end of this client alert.

#### **Post-Formation Acquisitions of Beneficial Ownership by Group Members**

The final rules amend Rule 13d-5 to expressly provide that a group subject to reporting obligations under Section 13(d) or 13(g) will be deemed to acquire any additional equity securities in the same class beneficially owned by the group that are acquired by a member of the group at any time after the group's formation (including on the same day

the group was formed), excluding any intra-group transfers of equity securities.<sup>[14]</sup>

#### Related Materials

- [Final Rule and Guidance](#)
- [Fact Sheet](#)
- [Press Release](#)

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[1] A “covered class” generally includes a voting class of equity securities registered under Section 12 of the Exchange Act.

[2] SBS are excluded from the scope of the final rules because the SEC is limited in its authority to alone deem beneficial ownership due to an SBS position and because SBS meeting certain thresholds will be required to be disclosed under a separately proposed reporting regime that is the subject of a different SEC rulemaking initiative.

[3] The adopting release provides the following example: “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.”

[4] “Business day” for purposes of Regulation 13D-G (which is currently undefined) will be defined, consistent with the customary definition of the term, to mean any day other than a Saturday, Sunday or U.S. federal holiday.

[5] The adopting release clarifies 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 or on which a person loses its Schedule 13G eligibility (rather than the date of such acquisition or loss).

[6] The term “Qualified Institutional Investors” refers to the institutional investors qualified to report on Schedule 13G, in lieu of Schedule 13D and in reliance on Rule 13d-1(b), including registered broker-dealers, registered investment companies, registered investment advisers, insurance companies and other investors enumerated in Rule 13d-1(b)(1)(ii).

[7] The term “Exempt Investors” refers to persons holding beneficial ownership of more than 5% of a covered class but who have not made an acquisition of beneficial ownership subject to Section 13(d), such as founders and other pre-IPO investors or those who have not acquired more than 2% of a covered class within a 12-month period. These investors, however, are subject to Section 13(g) and required to report their beneficial ownership pursuant to Rule 13d-1(d).

[8] If the deadline falls on a Saturday, Sunday or U.S. federal holiday, then the filing may be made on the following business day.

[9] The term “Passive Investors” refers to beneficial owners 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 or held with the purpose or effect of changing or influencing the control of the issuer of such securities, or in connection with or as a participant in any transaction having that purpose or effect. These investors are eligible to report beneficial ownership on Schedule 13G in reliance on Rule 13d-1(c).

[10] The adopting release clarifies 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 acquisition).

[11] Exchange Act Rule 12b-2 provides that “[t]he 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.” The U.S. Supreme Court has held that information is material if “there is a substantial likelihood that a reasonable shareholder would consider it important” in making an investment decision, or if it would have “significantly altered the ‘total mix’ of information made available.” See *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); *Basic, Inc. v. Levinson*, 485 U.S. 224, 232 (1988); and *Matrixx Initiatives v. Siracusano*, 563 U.S. 27 (2011).

[12] The adopting release notes that this guidance is consistent with guidance the Commission issued in 2011 regarding the application of Rule 13d-3 to SBS, and that the SBS guidance provides “an instructive analytical framework” with respect to non-SBS cash settled derivatives.

[13] The SEC notes, however, that a tippee under such circumstances would not become a member of a group, and thus would not incur a reporting obligation, until it actually makes a purchase of securities of the same covered class in response to having been tipped (even if the tippee already is a beneficial owner of that class)—i.e., the communication about the upcoming filing, by itself, does not create a group.

[14] The SEC notes that absent an express provision that would treat post-formation acquisitions of beneficial ownership by group members as acquisitions by the group, the SEC (or other affected parties) must prove the acquisition is attributable to the group.

#### APPENDIX A

#### SEC SUMMARY OF REVISED SCHEDULES 13D AND 13G FILING DEADLINES

(PDF VERSION AVAILABLE [HERE](#))

Issue	Current Schedule 13D	New Schedule 13D	Current Schedule 13G	New Schedule 13G
<b>Initial Filing Deadline</b>	Within <b>10 days</b> after acquiring beneficial ownership of more than 5% or losing eligibility to file on Schedule 13G. <i>Rules 13d-1(a), (e), (f) and (g).</i>	Within <b>five business days</b> after acquiring beneficial ownership of more than 5% or losing eligibility to file on Schedule 13G. <i>Rules 13d-1(a), (e), (f) and (g).</i>	<b>QIIs &amp; Exempt Investors:</b> <b>45 days after calendar year-end</b> in which beneficial ownership exceeds 5%. <i>Rules 13d-1(b) and (d).</i> <b>QIIs:</b> <b>10 days</b> after month-end in which beneficial ownership exceeds 10%. <i>Rule 13d-1(b).</i> <b>Passive Investors:</b> Within <b>10 days</b> after acquiring beneficial ownership of more than 5%. <i>Rule 13d-1(c).</i>	<b>QIIs &amp; Exempt Investors:</b> <b>45 days after calendar quarter-end</b> in which beneficial ownership exceeds 5%. <i>Rules 13d-1(b) and (d).</i> <b>QIIs:</b> <b>Five business days</b> after month-end in which beneficial ownership exceeds 10%. <i>Rule 13d-1(b).</i> <b>Passive Investors:</b> Within <b>five business days</b> after acquiring beneficial ownership of more than 5%. <i>Rule 13d-1(c).</i>
<b>Amendment Triggering Event</b>	<b>Material change</b> in the facts set forth in the previous Schedule 13D (1% increase or decrease in beneficial ownership deemed "material"). <i>Rule 13d-2(a).</i>	No change. Same as current Schedule 13D.	<b>All Schedule 13G Filers:</b> <b>Any change</b> in the information previously reported on Schedule 13G. <i>Rule 13d-2(b).</i> <b>QIIs &amp; Passive Investors:</b> Upon exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership. <i>Rules 13d-2(c) and (d).</i>	<b>All Schedule 13G Filers:</b> <b>Material change</b> in the information previously reported on Schedule 13G. <i>Rule 13d-2(b).</i> <b>QIIs &amp; Passive Investors:</b> No change. Same as current Schedule 13G.
<b>Amendment Filing Deadline</b>	<b>Promptly</b> after the triggering event. <i>Rule 13d-2(a).</i>	Within <b>two business days</b> after the triggering event. <i>Rule 13d-2(a).</i>	<b>All Schedule 13G Filers:</b> <b>45 days after calendar year-end</b> in which <b>any change</b> occurred. <i>Rule 13d-2(b).</i> <b>QIIs:</b> <b>10 days</b> after month-end in which beneficial ownership exceeds 10% or a 5% increase or decrease in beneficial ownership. <i>Rule 13d-2(c).</i> <b>Passive Investors:</b> <b>Promptly</b> after exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership. <i>Rule 13d-2(d).</i>	<b>All Schedule 13G Filers:</b> <b>45 days after calendar quarter-end</b> in which a <b>material change</b> occurred. <i>Rule 13d-2(b).</i> <b>QIIs:</b> <b>Five business days</b> after month-end in which beneficial ownership exceeds 10% or a 5% increase or decrease in beneficial ownership. <i>Rule 13d-2(c).</i> <b>Passive Investors:</b> <b>Two business days</b> after exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership. <i>Rule 13d-2(d).</i>
<b>Filing "Cut-Off" Time</b>	<b>5:30 p.m. eastern time.</b> <i>Rule 13(a)(2) of Regulation S-T.</i>	<b>10 p.m. eastern time.</b> <i>Rule 13(a)(4) of Regulation S-T.</i>	<b>5:30 p.m. eastern time.</b> <i>Rule 13(a)(2) of Regulation S-T.</i>	<b>10 p.m. eastern time.</b> <i>Rule 13(a)(4) of Regulation S-T.</i>

## APPENDIX B

### SUMMARY OF NEW SCHEDULES 13D AND 13G FILING DEADLINES BY INVESTOR CATEGORY

(PDF VERSION AVAILABLE [HERE](#))

New Schedule 13D	
Initial Filing Deadline	<b>5 business days</b> after exceeding 5% or losing Schedule 13G eligibility <i>Amended Rules 13d-1(a), (e), (f) and (g)</i>
Amendment Filing Deadline—Material Changes	<b>2 business days</b> after material change <i>Amended Rule 13d-2(a)</i>

New Schedule 13G for Qualified Institutional Investors	
Initial Filing Deadline	(i) <b>45 calendar days after calendar quarter-end</b> in which beneficial ownership exceeds 5% or (ii) if beneficial ownership exceeds 10% prior to quarter-end, <b>5 business days</b> after first month-end in which beneficial ownership exceeds 10% <i>Amended Rule 13d-1(b)</i>
Amendment Filing Deadline—Material Changes	<b>45 calendar days after calendar quarter-end</b> in which material change occurs ( <i>other than</i> percentage ownership change resulting solely from change in shares outstanding) <i>Amended Rule 13d-2(h)</i>

Amendment Filing Deadline—Exceed 10% and Subsequent 5% Changes	<b>5 business days</b> after first month-end in which beneficial ownership exceeds 10% Thereafter, <b>5 business days</b> after first month-end in which beneficial ownership increases or decreases by more than 5% <i>Amended Rule 13d-2(c)</i>
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New Schedule 13G for Passive Investors	
Initial Filing Deadline	<b>5 business days</b> after exceeding 5% <i>Amended Rule 13d-1(c)</i>
Amendment Filing Deadline—Material Changes	<b>45 calendar days after calendar quarter-end</b> in which material change occurs ( <i>other than</i> percentage ownership change resulting solely from change in shares outstanding) <i>Amended Rule 13d-2(b)</i>
Amendment Filing Deadline—Exceed 10% and Subsequent 5% Changes	<b>2 business days</b> after exceeding 10% Thereafter, <b>2 business days</b> after increases or decreases by more than 5% <i>Amended Rule 13d-2(d)</i>

New Schedule 13G for Exempt Investors	
Initial Filing Deadline	<b>45 calendar days after calendar quarter-end</b> in which beneficial ownership exceeds 5% <i>Amended Rule 13d-1(d)</i>
Amendment Filing Deadline—Material Changes	<b>45 calendar days after calendar quarter-end</b> in which material change occurs ( <i>other than</i> percentage ownership change resulting solely from change in shares outstanding) <i>Amended Rule 13d-2(b)</i>

### APPENDIX C

#### GUIDANCE ON THE APPLICATION OF THE CURRENT LEGAL STANDARD FOR GROUP FORMATION UNDER EXCHANGE ACT SECTIONS 13(d)(3) AND 13(g)(3) TO CERTAIN COMMON TYPES OF SHAREHOLDER ENGAGEMENT ACTIVITIES

**Question:** Is a group formed when 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?

**Response:** No. In our view, a discussion whether held in private, such as a meeting between two parties, or in a public forum, such as a conference that involves an independent and free exchange of ideas and views among shareholders, alone and without more, would not be sufficient to satisfy the “act as a . . . group” standard in Sections 13(d)(3) and 13(g)(3). Sections 13(d)(3) and 13(g)(3) were intended to prevent circumvention of the disclosures required by Schedules 13D and 13G, not to complicate shareholders’ ability to independently and freely express their views and ideas to one another. The policy objectives ordinarily served by Schedule 13D or Schedule 13G filings would not be advanced by requiring disclosure that reports this or similar types of shareholder

communications. Thus, an exchange of views 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 under Section 13(d)(3) or 13(g)(3).

**Question:** Is a group formed when two or more shareholders engage in discussions with an issuer’s management, without taking any other actions?

**Response:** No. For the same reasons described above, we do not believe that two or more shareholders “act as a . . . group” for the purpose of “holding” a covered class within the meaning of those terms as they appear in Section 13(d)(3) or 13(g)(3) if they simply engage in a similar exchange of ideas and views, alone and without more, with an issuer’s management.

**Question:** Is a group formed when 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 voting against, management’s director candidates if the issuer does not take steps to implement the shareholders’ recommended actions?

**Response:** No. Where recommendations are made in the context of a discussion that does not involve an attempt to convince the board to take specific actions through a change in the existing board membership or bind the board to take action, we do not believe that the shareholders “act as a . . . group” for the purpose of “holding” securities of the covered class within the meaning of those terms as they appear in Sections 13(d)(3) or 13(g)(3). Rather, we view this engagement as the type of independent and free exchange of ideas between shareholders and issuers’ management that does not implicate the policy concerns addressed by Section 13(d) or Section 13(g).

**Question:** Is a group formed if 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?

**Response:** No. The Rule 14a-8 shareholder proposal submission process is simply another means through which shareholders can express their views to an issuer’s management and board and other shareholders. For purposes of group formation, we do not believe shareholders engaging in a free and independent exchange of thoughts about a potential shareholder proposal, jointly submitting, or jointly presenting, a non-binding proposal to an issuer in accordance with Rule 14a-8 (or other means) should be treated differently from, for example, shareholders jointly meeting with an issuer’s management without other indicia of group formation. Accordingly, where the proposal is non-binding, we do not believe that the shareholders “act as a . . . group” for the purpose of “holding” securities of the covered class within the meaning of those terms as they appear in Section 13(d)(3) or 13(g)(3). Assuming that the joint conduct has been limited to the creation, submission, and/or presentation of a non-binding proposal, those statutory provisions would not result in the shareholders being treated as a group, and the shareholders’ beneficial

ownership would not be aggregated for purposes of determining whether the five percent threshold under Section 13(d)(1) or 13(g)(1) had been crossed.

**Question:** Would 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, constitute such coordination as would result in the shareholder and activist being deemed to form a group?

**Response:** No. Communications such as the types described, alone and without more, would not be sufficient to satisfy the "act as a . . . group" standard in Sections 13(d)(3) and 13(g)(3) as they are merely the exchange of views among shareholders about the issuer. This view is consistent with the Commission's previous statement that a shareholder who is a passive recipient of proxy soliciting activities, without more, would not be deemed a member of a group with persons conducting the solicitation. Activities that extend beyond these types of communications, which include joint or coordinated publication of soliciting materials with an activist investor might, however, be indicative of group formation, depending upon the facts and circumstances.

**Question:** Would 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, without more, constitute coordination sufficient to find that the shareholder and the activist investor formed a group?

**Response:** No. We do not view a shareholder's independently-determined act of exercising its voting rights, and any announcements or communications regarding its voting decision, without more, as indicia of group formation. This view is consistent with our general approach towards the exercise of the right of suffrage by a shareholder in other areas of the Federal securities laws. Shareholders, 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.

**Question:** If 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, would the blockholder and any of those market participants that made purchases potentially become subject to regulation as a group?

**Response:** Yes. To the extent the information was shared by the blockholder with the purpose of causing others to make purchases in the same covered class and the purchases were made as a direct result of the blockholder's information, these activities raise the possibility that all of these beneficial owners are "act[ing] as" a "group for the purpose of acquiring" securities of the covered class within the meaning of Section 13(d)(3). Such purchases may implicate the need for public disclosure underlying Section 13(d)(3) and these purchases could potentially be



deemed as having been undertaken by a “group” for the purpose of “acquiring” securities as specified under Section 13(d)(3). Given that a Schedule 13D filing may affect the market for and the price of an issuer’s securities, non-public information that a person will make a Schedule 13D filing in the near future can be material. By privately sharing this material information in advance of the public filing deadline, the blockholder may incentivize the market participants who received the information to acquire shares before the filing is made. Such arrangements also raise investor protection concerns regarding perceived unfairness and trust in markets. The final determination as to whether a group is formed between the blockholder and the other market participants will ultimately depend upon the facts and circumstances, including (1) whether the purpose of the blockholder’s communication with the other market participants was to cause them to purchase the securities and (2) whether the market participants’ purchases were made as a direct result of the information shared by the blockholder.

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October 13, 2023

## **SEC ADOPTS SIGNIFICANT AMENDMENTS TO BENEFICIAL OWNERSHIP REPORTING REQUIREMENTS AND PROVIDES GUIDANCE ON DERIVATIVES REPORTING AND GROUP FORMATION MATTERS**

To Our Clients and Friends:

On October 10, 2023, the Securities and Exchange Commission (the “Commission” or “SEC”) adopted final rules (the “Final Amendments”), significantly amending the beneficial ownership reporting requirements under Regulation 13D-G as promulgated pursuant to Sections 13(d) and 13(g) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”). The Final Amendments are based on the Commission’s February 10, 2022 proposed amendments (the “Proposed Amendments”), and primarily impact Schedule 13D and 13G (“13D/G”) filing deadlines, while issuing guidance on topics such as the reporting obligations related to certain derivatives and the scenarios for potential group formation.

Specifically, the Final Amendments:

- Accelerate the 13D/G filing deadlines as detailed below
- Extend the 13D/G filing cut-off *times* from 5:30 p.m. to 10 p.m. EST
- Require disclosure of cash-settled derivative securities under Item 6 of Schedule 13D
- Impute group member acquisitions to the group once a group has been formed (excluding intragroup transfers of securities)
- Require the use of a structured, machine-readable data language (XBRL) for 13D/G filings

In addition, instead of adopting certain of the Proposed Amendments, the SEC provided guidance with respect to (i) the reporting obligations related to cash-settled derivatives and (ii) the types of situations where a Section 13(d) group may or may not be deemed to have formed.

The tables below summarize the more substantive changes to the Schedule 13D/G beneficial ownership reporting requirements.

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Schedule 13D	Current	Revised (starting Sept. 30, 2024)
Initial 13D Due Date (under Rule 13d-1(a))	Within 10 days of acquiring more than 5% beneficial ownership	Within <b>5 business days</b> of acquiring more than 5% beneficial ownership
Initial 13D Due Date  (Following Loss of 13G Eligibility under Rules 13d1(e), (f), and (g))	Within 10 calendar days after the event that causes ineligibility	Within <b>5 business days</b> of losing eligibility to file on Schedule 13G
13D/A Trigger	“Material” change	“Material” change
13D/A Due Date	“Promptly”	Within <b>two business days</b> after the triggering event
Schedule 13G filed by Qualified Institutional Investors (“QIIs”)	Current	Revised (starting Sept. 30, 2024)
Initial 13G Due Date	45 days after year-end in which beneficial ownership exceeds 5%	<b>45 days after <u>quarter-end</u></b> in which beneficial ownership exceeds 5%
Periodic 13G/A Due Date	Annual amendments: due 45 days after year-end if <u>any</u> change ( <u>not</u> including changes due to fluctuations in number of shares outstanding)	Quarterly amendments: due <b>45 days after quarter-end if a material change</b> ( <u>not</u> including changes due to fluctuations in number of shares outstanding)
Ownership Change 13G/A Due Date	10 business days after month-end if beneficial ownership exceeds 10% or there is a 5% decrease in beneficial ownership	<b>Five business days</b> after month-end if beneficial ownership exceeds 10%

# GIBSON DUNN

	Thereafter, upon deviation by more than 5% of a covered class of equity securities	Thereafter, upon deviation by more than 5% of a covered class of equity securities
<b>Schedule 13G filed by “Passive” Investors (Rule 13d-1(c))</b>	<b>Current</b>	<b>Revised (starting Sept. 30, 2024)</b>
<b>Initial 13G Due Date</b>	Within 10 days of acquiring more than 5% beneficial ownership	Within <b>5 business days</b> of acquiring more than 5% beneficial ownership
<b>Periodic 13G/A Due Date</b>	Annual amendments: due 45 days after year-end if any change (not including changes due to changes in shares outstanding)	Quarterly amendments: due <b>45 days after quarter-end if a material change</b> (not including changes due to changes in shares outstanding)
<b>Ownership Change 13G/A Due Date</b>	“Promptly” upon acquiring more than 10% beneficial ownership  Thereafter, upon deviation by more than 5% of a covered class of equity securities	Within <b>2 business days</b> of acquiring more than 10% beneficial ownership  Thereafter, upon deviation by more than 5% of a covered class of equity securities
<b>Schedule 13G filed by “Exempt” Investors (Rule 13d-1(d))</b>	<b>Current</b>	<b>Revised (starting Sept. 30, 2024)</b>
<b>Initial 13G Due Date</b>	45 days after year-end in which beneficial ownership exceeds 5%	<b>45 days after <u>quarter-end</u></b> in which beneficial ownership exceeds 5%
<b>Periodic 13G/A Due Date</b>	Annual amendments: due 45 days after year-end in which any change occurred (other than change in percentage solely due to change in shares outstanding)	Quarterly amendments: due <b>45 days after quarter-end if material change occurred</b>

## **Cash-Settled Derivatives**

The Commission declined to adopt proposed Rule 13d-3(e), which would have caused holders of certain cash-settled derivative securities, excluding security-based swaps (“SBS”), to be considered beneficial owners of the reference equity security. Instead, the Commission issued guidance on the circumstances under which a holder of a cash-settled derivative security, excluding SBS, may be deemed the beneficial owner of the reference equity security under Rule 13d-3.

The SEC originally proposed Rule 13d-3(e) in response to concerns that holders of certain cash-settled derivatives were excluded from the definition of “beneficial owner” but could still exert influence over an issuer by, among other methods, pressuring a counterparty to the derivative transaction to make certain decisions regarding the voting and disposition of the issuer’s securities. In response to public comments, the Commission determined that issuing guidance on the topic would be sufficient.

The SEC’s guidance makes reference to its [Security-Based Swaps Release](#) which outlines three characteristics of a derivative position that may lead to the imputation of beneficial ownership: (i) the derivative security confers voting and/or investment power (or a person otherwise acquires such power based on the purchase or sale of a derivative security); (ii) the derivative security 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 (iii) the derivative security grants a right to acquire an equity security. The Commission clarified that this guidance applies to non-SBS cash-settled derivatives, indicating that holders of a wide range of cash-settled derivatives could be considered beneficial owners when these circumstances exist.

The Commission also amended Item 6 of Schedule 13D to explicitly remove any implication that a person is not required to disclose interests in all derivative securities that use a covered class of security as a reference security. The new Item 6 expressly states that derivative contracts, arrangements, understandings, and relationships with respect to an issuer’s securities, including cash-settled SBS and other derivatives which are settled exclusively in cash, must be disclosed. The SEC believes that investors will benefit from this more complete picture of Schedule 13D filers’ economic interests in the relevant issuer.

## **Group Formation**

In addition, the SEC declined to adopt certain of the Proposed Amendments relating to Rule 13d5 that would have broadly expanded the type of investor activities giving rise to group formation. Instead, the Commission chose to issue guidance directly in the adopting release to the Final Amendments (the “Adopting Release”) on the scope of activities that could give rise to group formation.

In doing so, the Commission acknowledged that neither the relevant statute nor SEC rules define “group.” Instead, the Commission reiterated that the relevant standard for determining the existence of a “group” is found in Sections 13(d)(3) and 13(g)(3) of the Exchange Act. The Commission stated that the determination of whether two or more persons are acting as a group “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 guidance on activities that may or may not give rise to formation of a group is presented in question and answer format. In a helpful manner, the Commission described the following situations where a Section 13(d) group would not arise:

- Communications between two or more shareholders concerning a particular issuer, including topics relating to the improvement of the issuer’s long-term performance, 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.
- Two or more shareholders engaging in joint communications with an issuer’s management.
- Two or more shareholders making recommendations regarding the structure of the board of directors (so long as no discussion of individual directors or board expansion occurs and no commitments, agreements, or understandings are made among shareholders regarding their voting for director candidates).
- Two or more shareholders jointly submitting a non-binding shareholder proposal.
- A shareholder and an activist investor communicating regarding the activist’s proposals, (so long as the shareholder does not make a commitment to a particular course of action).

However, in the Commission’s view a group is likely to form where a beneficial owner of a substantial block of shares (one 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, and one or more of the other market participants makes purchases in the same covered class of securities as a direct result of that communication. The concept of such “tipping” was discussed in the Proposing Release and is used in the Adopting Release as an example of where, in the Commission’s view, a group would likely result.

## **Effective Dates**

The Final Amendments will become effective 90 days after their publication in the Federal Register. Compliance with the revised Schedule 13G filing deadlines will be required beginning on September 30, 2024. Compliance with the structured data requirement for Schedules 13D and 13G will be required on December 18, 2024. Compliance with the other rule amendments will be required upon their effectiveness. In determining whether to file a Schedule 13G/A for year-end 2023, on or before February 14, 2024, we recommend holders file if there is any change (other than changes due to a fluctuation in the number of shares outstanding) consistent with most filers’ traditional approach to reporting their ownership as of December 31.

## Implications

As long anticipated in light of prior comments by Chair Gensler as well as the previously proposed changes, these final amendments in theory seek to modernize the reporting timing for Schedules 13D and 13G given the modern computer age and instant nature of disclosure dissemination. That said, as a practical matter, the new rules are likely to materially impact equity accumulation strategies for activist investor hedge funds in three respects:

- The reduction from 10 calendar days to 5 business days for an initial Schedule 13D filing will shave down the period that activists have to purchase equity securities more gradually to mitigate upward price pressure and optimize their basis. Commentators have differing opinions on how material the time deadline reduction will be – but it is likely to be non-trivial.
- Second, it is clear that the Commission will be looking closely at synthetic alternatives to actual equity ownership of a reportable class. Derivatives – particularly cash-settled equity swaps - have become popular instruments for activist hedge funds to lever the financial impact of their positions without having to actually purchase securities (or arguably, in the past having had to disclose all such positions).
- Finally, while the Commission’s guidance regarding group formation in and of itself does not represent a paradigm shift, the attention placed on this area by the Commission makes it clear that interactions between activist funds – sometimes in practice performed intentionally casually by such funds – can still trigger group formation. The Commission is poised to scrutinize ‘wolf packs’ of multiple activists who can suddenly take near-concurrent positions in a given company while denying purported coordination that would in turn require formal recognition of the formation of a group.

Separate from ‘pure play’ activist hedge funds, the changes could also alter the landscape for potential acquirers who use a minority stake as a foothold in an acquisition strategy – albeit a complex strategy with the interplay of shareholder rights plans and other factors. Such investors may start as a ‘passive investor’ who must flip from Schedule 13G to Schedule 13D if they develop ‘control intent’ with respect to a given company. Investors who hold equity stakes from 5%-19.9% qualify for the ‘short form’ Schedule 13G so long as they are ‘passive’ and do not have ‘control intent’ through actions such as advocating for board changes or a change of control process/acquisition intent. If a ‘passive investor’ develops ‘control intent’ and seeks to consummate an acquisition transaction with the company – the new timeline reduces the amount of time to proceed from developing control intent to inking an acquisition contract before required public disclosure of intent on a Schedule 13D.



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# Memorandum

## SEC Amends Schedule 13D and Schedule 13G Beneficial Ownership Disclosure Requirements

October 12, 2023

On October 10, 2023, the U.S. Securities and Exchange Commission (the “SEC”) adopted amendments to certain of its public company beneficial ownership reporting requirements. Among other things, the amendments will:

- Shorten the deadline for filing an initial Schedule 13D from 10 calendar days to 5 business days;
- Specify that amendments to a Schedule 13D must be filed within 2 business days after the date of a triggering event; and
- Require many initial Schedule 13Gs and certain amendments to Schedule 13Gs be filed within 45 days after the end of the applicable calendar quarter, rather than the end of the calendar year.

Amendments were also adopted relating to, among other things, disclosure of cash-settled derivative securities and a structured data filing requirement for Schedule 13D and Schedule 13G. The SEC’s [release](#) announcing these amendments also included guidance on the application of existing legal standards to whether cash-settled derivative securities confer beneficial ownership of the underlying reference security and whether certain common shareholder engagement activities constitute “group” action for purposes of Sections 13(d)(3) and 13(g)(3) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”).

### Compliance Timeline

Compliance with the revised Schedule 13G filing deadlines will be required beginning on September 30, 2024. Compliance with the structured data filing requirement for Schedule 13D and Schedule 13G will be required on December 18, 2024. Compliance with the revised Schedule 13D filing deadlines and all other amendments adopted by the SEC will be required 90 days after publication of such amendments in the Federal Register. Guidance from the SEC included in the adopting release should be considered effective immediately.

### Key Takeaways

#### ACCELERATED FILING DEADLINES FOR INITIAL AND AMENDED SCHEDULE 13DS AND SCHEDULE 13GS

Sections 13(d) and 13(g) of the Exchange Act have long required public filing of either a Schedule 13D or a Schedule 13G by persons who beneficially own more than 5% of a class of equity security specified in Rule 13d-1(i) under the Exchange Act (generally, voting securities registered under Section 12 of the Exchange Act and referred

Memorandum – October 12, 2023

to herein as a “covered security”). The amendments adopted by the SEC will, among other things, generally shorten the deadlines for filing both initial and amended beneficial ownership reports on Schedule 13D and Schedule 13G, as discussed in further detail in the table below. The SEC also extended the hours during which Schedule 13Ds and Schedule 13Gs, and amendments thereto may be filed electronically via the SEC’s Electronic Data Gathering, Analysis, and Retrieval (“EDGAR”) system and be deemed to have been filed on the same business day to 6:00 a.m. Eastern Time through 10:00 p.m. Eastern Time (previously such filings were not considered filed on the same business day after 5:30 p.m. Eastern Time). In addition, the SEC amended Rule 13d-2(b) under the Exchange Act, which applies to all Schedule 13G filers, to require quarterly updates to previously filed Schedule 13Gs to reflect “material changes” to the facts previously supplied (replacing a prior rule requiring annual updates upon “any change” in the facts previously reported).

### Schedule 13Ds

	Current Schedule 13D	Amended Schedule 13D
<b>Initial Filing Deadline</b>	Within 10 calendar days after the date on which beneficial ownership of >5% of a covered security was acquired or eligibility to file on Schedule 13G was lost. Rules 13d-1(a), (e), (f), and (g).	Within five business days after the date on which beneficial ownership of >5% of a covered security was acquired or eligibility to file on Schedule 13G was lost. Amended Rules 13d-1(a), (e), (f), and (g).
<b>Amendment Filing Deadline</b>	Promptly after material change in the facts set forth in the previous Schedule 13D. Rule 13d-2(a).	Within two business days after the date of a material change in the facts set forth in the previous Schedule 13D. Amended Rule 13d-2(a).

### Schedule 13Gs

	Current Schedule 13G	Amended Schedule 13G
<b>Initial Filing Deadline</b>	<u>Qualified institutional investors who file pursuant to Rule 13d-1(b) under the Exchange Act (“QIIs”)</u> : (i) 45 days after the first calendar year-end on which they held >5% beneficial ownership of a covered security or, (ii) if they held >10% beneficial ownership of a covered security prior to the end of such calendar year, 10 days after the first month-end on which they held >10%. Rule 13d-1(b).	<u>QIIs</u> : (i) 45 days after the first calendar quarter-end on which they held >5% beneficial ownership of a covered security or, (ii) if they held >10% beneficial ownership of a covered security prior to the end of such calendar quarter, five business days after the first month-end on which they held >10%. Amended Rule 13d-1(b).
	<u>Passive investors who file pursuant to Rule 13d-1(c) under the Exchange Act (“Passive Investors”)</u> : Within 10 days after acquiring beneficial ownership of >5% of a covered security. Rule 13d-1(c).	<u>Passive Investors</u> : Within five business days after acquiring beneficial ownership of >5% of a covered security. Amended Rule 13d-1(c).
	<u>Exempt investors who file pursuant to Rule 13d-1(d) under the Exchange Act (“Exempt Investors”)</u> : 45 days after the initial calendar year-end on which they held >5% beneficial ownership of a covered security. Rule 13d-1(d).	<u>Exempt Investors</u> : 45 days after the initial calendar quarter-end on which they held >5% beneficial ownership of a covered security. Amended Rule 13d-1(d).

	Current Schedule 13G	Amended Schedule 13G
<b>Amendment Filing Deadline</b>	<u>All Schedule 13G filers</u> : 45 days after any calendar year-end on which <b>any change</b> to the facts set forth in the previous Schedule 13G has occurred. Rule 13d-2(b).	<u>All Schedule 13G filers</u> : 45 days after any calendar quarter-end on which <b>a material change</b> to the facts set forth in the previous Schedule 13G has occurred. Amended Rule 13d-2(b).
	<u>QIIs</u> : 10 days after the end of the first month in which they held beneficial ownership >10% of a covered security at month-end. Thereafter, ten days after the first month-end on which their beneficial ownership, computed as of the last day of the month, increased or decreased by >5% of the relevant class of covered security. Rule 13d-2(c).	<u>QIIs</u> : Five business days after the end of the first month in which they held beneficial ownership >10% of a covered security at month-end. Thereafter, five business days after the first month-end on which their beneficial ownership, computed as of the last day of the month, increased or decreased by >5% of the relevant class of covered security. Amended Rule 13d-2(c).
	<u>Passive Investors</u> : Promptly after acquiring >10% beneficial ownership of a covered security. Thereafter, promptly following any 5% increase or decrease in beneficial ownership of such security. Rule 13d-2(d).	<u>Passive Investors</u> : Two business days after acquiring >10% beneficial ownership of a covered security. Thereafter, two business days after any 5% increase or decrease in beneficial ownership of such security. Amended Rule 13d-2(d).

## CLARIFICATION OF DISCLOSURE REQUIREMENTS WITH RESPECT TO CERTAIN DERIVATIVE SECURITIES

*Amendment to Schedule 13D.* Item 6 of Schedule 13D currently requires beneficial owners to describe any contracts, arrangements, understandings or relationships they have with respect to any securities of the issuer. The SEC adopted an amendment to Schedule 13D, as codified in Rule 13d-101 under the Exchange Act, to clarify that the disclosure required by Item 6 is intended to include a description of all derivative securities held by the filer that use a covered security as their reference security, including cash-settled security-based swaps and other derivatives that are settled exclusively in cash.

*SEC Guidance.* The SEC considered, but ultimately rejected, proposed amendments that would have deemed certain holders of cash-settled derivative securities to be the beneficial owners of the underlying reference security for purposes of Rule 13d-3 under the Exchange Act. Instead of adopting such amendments, the SEC elected to provide guidance in its adopting release discussing how, under the current Rule 13d-3, persons using these types of derivative securities may be deemed to be beneficial owners of the underlying reference securities based on the same existing principles applicable to holders of other securities. The SEC’s guidance for cash-settled derivative securities, which is consistent with its 2011 guidance with respect to security-based swaps, is that holders of cash-settled derivative securities should be deemed to be the beneficial owner of the underlying reference security to the extent such derivative security, directly or indirectly, (i) confers voting or investment power over the reference security through contractual terms or otherwise; (ii) is used with the purpose or effect of divesting or preventing the vesting of beneficial ownership on the holder of the derivative security as part of a plan or scheme to evade beneficial ownership reporting requirements; or (iii) grants a right to acquire beneficial ownership of the

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reference security within 60 days or the right to acquire beneficial ownership of the reference security with the purpose or effect of changing or influencing 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 exercisable.

#### CLARIFICATION ON RULES REGARDING THE FORMATION OF GROUPS FOR SECTION 13 PURPOSES AND RELATED TOPICS

Rather than adopting certain previously proposed amendments to the rules regarding the circumstances under which two or more persons may coordinate and engage with an issuer without being subject to regulation as a group, the SEC issued guidance in its adopting release intended to provide clarity that, among other matters, two or more persons who “act as” a group for purposes of acquiring, holding, or disposing securities may be treated as a “group.” The adopting release clarifies the SEC’s position that “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 also gave examples of typical shareholder activities that, without further action, would not, in the SEC’s view, constitute multiple persons acting as a group for the purposes of Section 13(d)(3) or Section 13(g)(3) of the Exchange Act:

- Exchanging views or other types of dialogue with other shareholders, 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, including discussions related to the long-term performance of an issuer or changes in issuer practices;
- Discussions among shareholders of submissions or solicitations in support of non-binding shareholder proposals or joint submissions of such proposals (provided there is no agreement to vote against director candidates nominated by the issuer’s management or other management proposals if such non-binding shareholder proposal is not included in the issuer’s proxy statement or, if passed, not acted upon favorably by the issuer’s board of directors);
- The formation of joint engagement strategies that are not control-related, or coordination of “vote no” campaigns against individual directors in uncontested elections;
- Engaging with other shareholders in an exchange of ideas and views with the issuer’s management, including jointly making recommendations to the issuer regarding the structure and composition of the issuer’s board of directors where (i) no discussion of individual directors or board expansion occurs and (ii) no commitments are made, or agreements or understandings are reached, among the shareholders regarding the potential withholding of their votes to approve, or voting against, management’s director candidates;
- 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 commitment to a course of

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action (provided such shareholder does not engage in joint or coordinated publication of soliciting materials with such activist investor); and

- Announcements, public or private, of a shareholder's independently-determined voting intentions.

The SEC warned, however, that intentional communications by the beneficial owner of a substantial block of a covered security that is, or will be required to, file a Schedule 13D to other market participants that such a filing will be made (to the extent this information is not yet public) with the purpose of causing such market participants to make purchases in the same class of covered security may cause such blockholder and any market participants who made purchases as a direct result of such communication to become subject to regulation as a group.

#### NEW STRUCTURED DATA FILING REQUIREMENT FOR SCHEDULE 13D AND SCHEDULE 13G

The SEC adopted amendments that will require all Schedule 13D and Schedule 13G disclosures, except exhibits to such filings, be filed in EDGAR using a machine readable XML-based language specific to such filings. As is the case with other EDGAR XML filings, reporting persons will be able to, at their option, submit filings directly to EDGAR in such 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 in connection with the submission of the filing to EDGAR.

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