

# Client Alert

October 2023

## SEC Adopts Changes to Schedule 13D and Schedule 13G Reporting

### What Happened:

On October 10, 2023, the Securities and Exchange Commission (**SEC**) voted 4 to 1 to adopt amendments to the rules relating to Schedule 13D and Schedule 13G (**Regulation 13D-G**) under the Securities Exchange Act of 1934, as amended (**Exchange Act**).<sup>1</sup> The adoption of these amendments ends a process that began on February 10, 2022, when the SEC proposed sweeping changes to Regulation 13D-G.<sup>2</sup>

### The Bottom Line:

The amendments accelerate the filing deadlines for Schedule 13D and Schedule 13G (though not as much as originally proposed) and require that Schedule 13D and Schedule 13G filings be made using a structured, machine-readable data language. However, the SEC abandoned its proposal to add detailed new provisions regarding derivative securities and the formation of “groups” for purposes of Section 13(d). Instead, the adopting release provides guidance on the applicability of existing beneficial ownership rules governing derivatives group reporting. While still a major revision of this rule set, the rules as adopted will represent a much less significant change to Regulation 13D-G than originally proposed.

The rule becomes effective 90 days after the adopting release is published in the Federal Register. Compliance with the requirements related to the revised Schedule 13G filing deadlines will be required beginning on September 30, 2024. Compliance with the requirements related to the use of structured, machine-readable data language will be required beginning on December 18, 2024.

### The Full Story:

#### Schedule 13D and Schedule 13G Filing Changes

Sections 13(d) and 13(g) of the Exchange Act and Regulation 13D-G require an investor, or a group of investors, acquiring beneficial ownership of greater than 5% of a class of registered equity securities to publicly file a “beneficial ownership report” on either a Schedule 13D or a Schedule 13G, as applicable. An investor with control intent files such a report on Schedule 13D, while investors without a control intent, such as Passive Investors<sup>3</sup> and Qualified Institutional Investors,<sup>4</sup> and Exempt Investors<sup>5</sup> (regardless of intent), file such report on a Schedule 13G. The SEC, in its effort to modernize beneficial ownership reporting in light of changes in the financial markets and available technology, adopted amendments to Regulation 13D-G that, generally, accelerate the filing deadlines for initial and amended beneficial ownership reports filed on Schedules 13D and 13G.

With respect to Schedule 13D, the current rules require a filing to be made within 10 calendar days of an investor, or group of investors, acquiring beneficial ownership of more than 5% of a covered class of equity securities; however, the amended rules will reduce this timeframe by requiring a Schedule 13D to be filed within five business days of such acquisition. Further, the amended rules will require that Schedule 13D amendments be filed within two business days after the date of a triggering event. The current

rules require that an amendment must be filed “promptly” after a material change in any facts previously reported (though in practice “prompt” was often considered to be about two business days).

With respect to Schedule 13G, the amended rules will change the filing requirements by:

- accelerating the initial filing deadline of Schedule 13G for Passive Investors from ten days to five business days after crossing the 5% threshold;
- accelerating the initial filing deadline of Schedule 13G for Qualified Institutional Investors and Exempt Investors from 45 days after the end of a calendar year during which the crossing of the 5% threshold occurred to 45 days after the end of the calendar quarter during which such event occurred;
- requiring that amendments to Schedule 13Gs for all filers be filed 45 days after the calendar quarter in which a material change has occurred rather than the previous requirement of 45 days after the calendar year in which any change occurred; and defining “material” for these purposes as including (but not limited to) a 1% or more change in beneficial ownership; and
- requiring that additional amendments to Schedule 13Gs for Passive Investors and Qualified Institutional Investors be filed when beneficial ownership exceeds 10% and for any subsequent 5% increase or decrease within two business days of such event (for Passive Investors) and within five business days of the last day of the month during which such event occurs (for Qualified Institutional Investors).

Attached to this alert at the end is a useful table that summarizes the changes adopted with respect to the accelerated Schedule 13D and Schedule 13G filing requirements, as more particularly described above. Also, in connection with the newly-adopted accelerated filing requirements, the amendments (1) extend the filing “cut-off” time—that is, the time by which a filing must be accepted by the SEC to be considered filed on that day—from 5:30 pm to 10:00 pm Eastern time for all Schedule 13D and Schedule 13G filings made on EDGAR and (2) require that Schedule 13D and Schedule 13G filings be made using, a structured, machine-readable data language.

### Changes Relating to Derivative Securities

Under the current rules, cash-settled derivatives are generally not thought to confer beneficial ownership of the referenced registered equity securities because the holder of a long cash-settled derivative does not have the right to acquire or vote the underlying shares. The proposed rules would have added a new paragraph (e) to Rule 13d-3 to deem holders of cash-settled derivative securities, other than security-based swaps (**SBS**), to be the beneficial owners of the relevant class under certain circumstances. This proposal was met with a chorus of objections from investors. In the final rules, the SEC decided not to adopt proposed paragraph (e) to Rule 13d-3, instead opting to provide guidance on how the holder of cash-settled derivative securities may already be deemed the beneficial owner under existing Rule 13d-3.

According to the SEC, “[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 examples of such facts, the guidance provides that a holder of non-SBS cash-settled derivative securities may be deemed a beneficial owner if:

- a non-SBS cash-settled derivative security provides its holder, directly or indirectly, with exclusive or shared voting or investment power, within the meaning of Rule 13d-3(a), over shares in the relevant class (through a contractual term of the derivative security or otherwise);
- a non-SBS cash-settled derivative security is acquired with the purpose or effect of divesting its holder of beneficial ownership 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), as the derivative security may be viewed as a contract, arrangement, or device within the meaning of those terms as used in Rule 13d-3(b); or

- the holder of a non-SBS cash settled derivative security has a right to acquire beneficial ownership of the equity security within 60 days or acquires the right to acquire beneficial ownership of the equity security with the purpose or effect of changing or influencing the control of the issuer of the security for which the right is exercisable, or in connection with or as a participant in any transaction having such purpose or effect, regardless of when the right is exercisable.

It does not appear that this new guidance breaks any new ground. Each of these examples appears to merely paraphrase parts of existing Rule 13d-3.

It should be noted that the final amendments to Regulation D-G did adopt a small change relating to derivatives. Item 6 of Schedule 13D has been amended such that disclosure is required of all contracts “with respect to any securities of the issuer, *including any class of such issuer’s securities used as a reference security*, in connection with any of the following: call options, put options, *security-based swaps or any other derivative securities*, transfer or voting of any of the securities, finder’s fees, joint ventures, loan or option arrangements, guarantees of profits, division of profits or loss, or the giving or withholding of proxies....” (emphasis supplied).

### “Group” Changes

The current version of Regulation 13D-G contemplates that when investors form a “group,” the group is deemed to be the beneficial owner of the securities owned by the group’s members. The Proposing Release would have, among other things, made clear that the existence of a group does not depend solely upon whether the parties had an agreement to act together. As we – and many commenters to the proposed rule – have noted, this would have represented a significant shift from prior practice and decades of case law.

Except for some technical amendments to Rule 13d-5, however, the SEC did not adopt the changes to Rule 13d-5 as proposed, instead opting to provide guidance on the applicability of the existing beneficial ownership rules on the determination of whether a group has formed. In particular, the SEC reiterated its views that “the determination of whether two or more persons are acting as a group does not depend solely on the presence of an express agreement and that, depending on the particular facts and circumstances, concerted actions by two or more persons for the purpose of acquiring, holding or disposing of securities of an issuer are sufficient to constitute the formation of a group.”<sup>6</sup> Further, the SEC noted that for a fact finder to determine that a group has been formed under Sections 13(d)(3) or 13(g)(3), the “evidence must show, at a minimum, indicia, such as an informal arrangement or coordination in furtherance, of a common purpose to acquire, hold, or dispose of securities of an issuer.”<sup>7</sup>

Recognizing the concerns many commenters had with respect to the proposed rule and the fact-based analysis of the existing framework, and intending to prevent the chilling of shareholder engagement, the SEC provided guidance on the application of the existing standard in the form of questions and answers. That guidance includes the following:

- A group is not formed when two or more shareholders communicate with each other regarding an issuer or its securities without taking other actions.
- A group is not formed when two or more shareholders engage in discussions with an issuer’s management, without taking other actions.
- A group is not formed when shareholders jointly make recommendations to an issuer regarding the structure and composition of the issuer’s board of directors when no discussion of individual

directors or board expansion occurs and 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.

- A group is not formed if shareholders jointly submit a non-binding shareholder proposal to an issuer under Rule 14a-8 of the Exchange Act.
- A group is not formed simply by conversations, emails, phone contact or meetings between a shareholder and an activist investor that is seeking support for its proposals. A group may be formed if such activities extend beyond the foregoing items.
- A group is not formed, without more, by a shareholder's announcement or communication of such shareholder's intention to vote in favor of an unaffiliated activist investor's director nominees.
- A group **is** formed, however, 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 that such a filing will be made (to the extent such 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.<sup>8</sup>

Importantly, the SEC's decision to issue guidance instead of adopting the proposed amendments permits the decades of case law on the determination of whether a group exists to stand.<sup>9</sup>

In addition to the above guidance, the SEC made a few technical changes to the rules governing groups under Section 13(d)(3) and 13(g)(3). In particular, the SEC amended Rule 13d-5 to expressly impute acquisitions made by a group member after the date of group formation to the group once the collective beneficial ownership among group members exceeds 5% of a covered class. The SEC also amended Rule 13d-5 to provide that a group under Section 13(d)(3) will not be deemed to have acquired beneficial ownership in a covered class if a member of the group becomes the beneficial owner of additional equity securities in such covered class through a sale by, or transfer from, another member of the group.

Investors that file Schedule 13D or Schedule 13G should review this alert regarding SEC's rule changes. The capital markets, M&A and structured finance and securitization practices at Hunton Andrews Kurth LLP will continue to monitor the impacts of this rule-making and other Section 13 reporting matters. Please contact us if you have any questions or would like further information regarding the adopting release.

**Summary Table**

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

Issue	Current Schedule 13D	New Schedule 13D	Current Schedule 13G	New Schedule 13G
			<p><u>QIIs</u>: 10 days after month-end in which beneficial ownership exceeded 10% or there was, as of the month-end, a 5% increase or decrease in beneficial ownership. Rule 13d-2(c).</p> <p><u>Passive Investors</u>: Promptly after exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership. Rule 13d-2(d).</p>	<p><u>QIIs</u>: Five business days after month-end in which beneficial ownership exceeds 10% or a 5% increase or decrease in beneficial ownership. Rule 13d-2(c).</p> <p><u>Passive Investors</u>: Two business days after exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership. Rule 13d-2(d).</p>
<b>Filing “Cut-Off” Time</b>	5:30 p.m. eastern time. Rule 13(a)(2) of Regulation S-T.	10 p.m. eastern time. Rule 13(a)(4) of Regulation S-T.	<u>All Schedule 13G Filers</u> : 5:30 p.m. eastern time. Rule 13(a)(2) of Regulation S-T.	<u>All Schedule 13G Filers</u> : 10 p.m. eastern time. Rule 13(a)(4) of Regulation S-T.

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<sup>1</sup> See SEC Release No. 34-98704, which can be found [here](#).

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<sup>2</sup> The proposal was made in SEC Release No. 34-94211 (the *Proposing Release*). Our prior alert discussing in detail the proposing release can be found [here](#).

<sup>3</sup> The term “Passive Investors” as used in the Proposing Release 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 and are not held for the purpose or effect of changing or influencing the control of the issuer of such securities and were not acquired in connection with or as a participant in any transaction having such purpose or effect. Amendments to Beneficial Ownership Reporting Requirements, Release No. 34-39538 (Jan. 12, 1998) [63 FR 2854, n.9 (Jan. 16, 1998)].

<sup>44</sup> The Qualified Institutional Investor category includes SEC-registered broker-dealers, SEC-registered investment advisers, certain banks, certain insurance companies, and certain other specified types of institutional and similar investors that acquire beneficial ownership of more than 5% of a class of equity securities in the ordinary course of business and without a control purpose.

<sup>5</sup> The term “Exempt Investor” as used in the Proposing Release 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). For example, persons who acquire all of their securities prior to the issuer registering the subject securities under the Exchange Act are not subject to Section 13(d). In addition, persons who acquire no more than 2% of a covered class within a 12-month period are exempted from Section 13(d) by Section 13(d)(6)(B). In both cases, however, those persons are subject to Section 13(g). Amendments to Beneficial Ownership Reporting Requirements, Release No. 34-39538 (Jan. 12, 1998) [63 FR 2854, n.8 (Jan. 16, 1998)]; see also Proposing Release at 13856, n.55.

<sup>6</sup> See *supra* note 1, at 128–29.

<sup>7</sup> *Id.* at 132–33.

<sup>8</sup> *Id.* at 131–39.

<sup>9</sup> As the final rule notes, group activity may be demonstrated by circumstantial evidence, *SEC v. Savoy*, 587 F.2d 1149, 1162, such as: (1) the presence of a common plan or goal, *Fin. Gen. Bankshares, Inc. v. Lance*, 1978 WL 1082, at \*9 (D.D.C. 1978); (2) “considerable dissatisfaction” with certain officers and a “desire to reduce” those officers’ role in company management, *Id.* at \*10; (3) strategy meetings with, among others, attorneys, *SEC v. Levy*, 706 F. Supp. 61, 70 (D.D.C. 1998); (4) a pattern of coordinated stock purchases, *Hollywood Realty Partners, LP v. Gotham Partners, LP*, 286 F.3d 613, 618 (2d Cir. 2002); (5) the solicitation of others to join the group, *Wellman v. Dickinson*, 682 F.2d 355, 363–64 (2d Cir. 1979); and (6) the existence of communications between and among group members. *Gen. Aircraft Corp. v. Lampert*, 556 F.2d 90, 95 (1st Cir. 1977).