

SEC Amends Section 13 Reporting Requirements

October 12, 2023

On October 10, 2023, the U.S. Securities and Exchange Commission adopted significant amendments to the rules governing beneficial ownership reporting under Sections 13(d) and 13(g) of the Securities Exchange Act of 1934. The amendments are intended to update reporting requirements for modern markets and reduce information asymmetries between large shareholders and the public. Most significantly, the amendments and related guidance from the SEC included in the adopting release:

- generally accelerate the filing deadlines for Schedule 13D and Schedule 13G and alter the amendment triggers for Schedule 13G filings;
- clarify the disclosure requirements with respect to derivative securities, including cash-settled derivative instruments;
- describe the circumstances under which two or more persons have formed a “group” that would be subject to beneficial ownership reporting requirements; and
- require that Schedules 13D and 13G be filed using a structured, machine-readable data language.

The key provisions of the amendments are further discussed below. The full text of the amendments, and related guidance, is available [here](#).

The amendments will become effective 90 days following publication of the adopting release in the Federal Register. Compliance with the revised Schedule 13G filing deadlines will be required beginning on September 30, 2024.¹ Compliance with the new structured data requirement for Schedules 13D and 13G will be required beginning on December 18, 2024 (with voluntary compliance permitted beginning December 18, 2023). Unlike the amendments, the SEC’s guidance included in the adopting release has immediate effect.

¹ For example, under Rule 13d-2(b), as amended, 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.

Background

The filing deadlines for Schedules 13D and 13G have not been updated since 1968 and 1977, respectively. Since then, the overall size and complexity of the equity trading markets have increased dramatically, securities settlement periods have shortened and technological advancements, such as the ability to submit filings electronically through the EDGAR system, have decreased the time needed to prepare and transmit filings under Section 13. Collectively, the amendments reflect the SEC's aim to enable shareholders to make more informed investment decisions and assist market participants in evaluating securities in a timely manner. The amendments and related guidance reflect comments received on the SEC's initial amendment proposal in February 2022, including the need to balance the market's demand for timely information with the administrative burden of accurately preparing filings. The amendments adopted by the SEC differ in several important respects from those proposed. The amendments and related guidance come on the heels of the latest in a series of [enforcement actions](#) on repeat Section 13(d) and Section 16(a) filing deficiencies, further demonstrating the SEC's focus on compliance with beneficial ownership reporting obligations.

Filing Deadlines

Among the most significant changes, the amendments generally accelerate the filing deadlines for Schedule 13D and Schedule 13G beneficial ownership reports. These changes closely resemble those set forth in the proposed amendments, although some deadlines were accelerated less than originally proposed. For a summary of the new filing deadlines applicable to Schedule 13D and Schedule 13G, as compared to the current deadlines, please refer to Annex A.

Schedule 13D

The amendments shorten the filing deadline for an initial Schedule 13D to five business days (from 10 calendar days) following when an investor acquires beneficial ownership of more than 5% of a class of equity securities or loses eligibility to file on Schedule 13G (while still subject to Section 13). Notably, the proposed amendments would have applied a five-calendar-day deadline.

The amendments require a Schedule 13D amendment to be filed within two business days following any material change in the facts reported in the previous Schedule 13D. Under the previous rules, such amendments were required "promptly" following a

material change, while the proposed amendments would have required Schedule 13D amendments to be filed within only one business day.

Schedule 13G

Initial Filing:

- For investors permitted to file on Schedule 13G because they are qualified institutional investors under Rule 13d-1(b), the amendments shorten the filing deadline for an initial Schedule 13G to either (i) 45 days after the calendar quarter-end in which beneficial ownership exceeds 5% of a class of equity securities or (ii) five business days after the month-end at which beneficial ownership exceeds 10% of a class of equity securities. Under the previous rules, qualified institutional investors were required to file an initial Schedule 13G within either (i) 45 days after the calendar year-end in which beneficial ownership exceeded 5% of a class of equity securities or (ii) 10 days after the month-end in which beneficial ownership exceeded 10% of a class of equity securities. For purposes of the amendments, ownership is only measured as of calendar quarter- or calendar month-ends, as applicable, rather than on any other dates during a quarter or month, as applicable.
- For passive investors permitted to file on Schedule 13G under Rule 13d-1(c), the amendments shorten the filing deadline for an initial Schedule 13G to five business days after the date at which beneficial ownership exceeds 5% of a class of equity securities. Under the previous rules, passive investors were required to file an initial Schedule 13G within 10 days after the date at which beneficial ownership exceeded 5% of a class of equity securities.
- For investors permitted to file on Schedule 13G because they are exempt investors under Rule 13d-1(d) (e.g., founders or pre-IPO investors), the amendments shorten the filing deadline for an initial Schedule 13G to 45 days after the calendar quarter-end in which beneficial ownership exceeds 5% of a class of equity securities. Under the prior rules, exempt investors were required to file an initial Schedule 13G within 45 days after the calendar year-end in which beneficial ownership exceeded 5% of a class of equity securities. For purposes of the amendments, ownership is only measured as of calendar quarter-ends rather than on any other dates during a quarter.

Amendments:

- For qualified institutional investors, the amendments require a Schedule 13G amendment within either (i) 45 business days after the calendar quarter-end in which a material change² occurred or (ii) five business days after the month-end in which beneficial ownership of a class of equity securities exceeds 10% or, thereafter, a

² The adopting release notes that the assessment of materiality for purposes of Schedule 13G amendments is to be based on Rule 13d-2.

5% increase or decrease in beneficial ownership of a class of equity securities occurred. The previous rules required a Schedule 13G amendment within either (i) 45 days after the calendar year-end in which any change occurred or (ii) 10 days after month-end in which the investor's beneficial ownership of a class of equity securities exceeded 10% or, thereafter, increased or decreased by more than 5%.

- For passive investors, the amendments require a Schedule 13G amendment within either (i) 45 days after the calendar quarter-end in which a material change occurred or (ii) two business days after beneficial ownership of a class of equity securities exceeds 10% or a 5% increase or decrease in beneficial ownership occurs. The previous rules required a Schedule 13G amendment within either (i) 45 days after calendar year-end in which any change occurred or (ii) promptly after the investor's beneficial ownership of a class of equity securities exceeded 10% or, thereafter, increased or decreased by more than 5%.
- For exempt investors, the amendments require a Schedule 13G amendment within 45 days after the calendar quarter-end in which a material change occurred. The previous rules required a Schedule 13G amendment within 45 days after the calendar year-end in which any change occurred.

Filing Cutoff Time

To provide additional time for filers to prepare and submit Schedules 13D and 13G, the amendments extend the filing deadline from 5:30 p.m. eastern time to 10:00 p.m. Eastern Time.

Cash-Settled Derivative Securities

The SEC did not adopt the proposed changes to Rule 13d-3 that would have expressly deemed a holder of cash-settled derivatives, other than security-based swaps, to be a beneficial owner of the reference equity securities if the holder holds the derivative with the purpose or effect of changing or influencing control of the issuer of the reference securities or in connection with or as a participant in any transaction having such purpose or effect. Instead, the SEC affirmed the applicability of existing Rule 13d-3 to determine beneficial ownership and provided a framework for analyzing whether holders of these securities are deemed beneficial owners of the reference covered class

for purposes of Rule 13d-3, consistent with the treatment of security-based swaps set forth in the Security-Based Swaps Release.³

The adopting release explains that a holder of a cash-settled derivative security may become a beneficial owner in the following circumstances:

- a cash-settled derivative provides its holder, directly or indirectly, with exclusive or shared voting or investment power, within the meaning of Rule 13d-3(a), over the reference-covered class through a contractual term of the derivative security or otherwise;
- the holder of a cash-settled derivative (i) has a right to acquire beneficial ownership of the equity security within 60 days or (ii) acquires the right to acquire beneficial ownership of the equity security with the purpose or effect of changing or influencing control of the issuer, or in connection with or as a participant in any transaction having such purpose or effect, regardless of when the right is exercisable; or
- a cash-settled derivative is acquired 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 of Section 13(d) or 13(g).

The amendments revised Item 6 of Schedule 13D to expressly require a reporting person to disclose derivative contracts, arrangements, understandings and relationships with respect to an issuer's securities, including cash-settled security-based swaps and other derivatives settled exclusively in cash. The amendments further clarify that the derivative security need not have originated with the issuer or otherwise be part of the issuer's capital structure for a disclosure obligation to arise.

"Group" Formation

Under Sections 13(d)(3) and 13(g)(3), when two or more persons act as a group for the purpose of acquiring, holding or disposing of securities of an issuer, that group is deemed a "person" who, if the applicable beneficial ownership threshold is met, will be subject to reporting obligations under Section 13. The amendments and accompanying guidance clarify the situations in which a group is formed, as well as the implications of certain events involving group members.

³ Beneficial Ownership Reporting Requirements and Security-Based Swaps, Release No. 34-64628 (June 8, 2011) [76 FR 34579 (June 14, 2011)], <https://www.sec.gov/files/rules/final/2011/34-64628.pdf>.

Express Agreement

The SEC did not adopt the proposed changes to Rule 13d-5(b), which would have removed the references to “agreement” in order to avoid the implication that an express or implied agreement among two or more persons is required to form a “group.” Instead, the adopting release states that the appropriate legal standard for determining whether a group is formed is found in Sections 13(d)(3) and 13(g)(3), and thus, no amendment to Rule 13d-5(b) is necessary. The SEC further notes that the standard generally is satisfied if two or more persons take concerted actions for the purpose of acquiring, holding or disposing of securities of an issuer and depends on the relevant facts and circumstances and not solely on the presence or absence of an express agreement.

In lieu of amendments to Rule 13d-5(b), and recognizing that the earlier proposal could have chilled shareholder engagement, the adopting release provides extensive guidance on the application of the current standard to common situations involving shareholder engagement activities and clarify that a “group” is not formed when:

- two or more shareholders communicate with each other regarding the 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;
- two or more shareholders engage in discussions with an issuer’s management without taking any other actions;
- shareholders jointly make recommendations to an issuer 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;
- shareholders jointly submit a non-binding shareholder proposal to an issuer pursuant to Rule 14a-8 for presentation at a meeting of shareholders;
- an activist investor engages with another shareholder seeking support for its proposals to an issuer’s board or management, such as consenting or committing to a course of action, without more; and
- a shareholder announces its independently determined intention to vote in favor of an unaffiliated activist investor’s director nominees, without more.

“Tipper-Tippee” Relationships

The SEC did not adopt proposed Rule 13d-5(b)(1)(ii), which would have provided that a “group” is formed between a person who shares information about an upcoming Schedule 13D filing that such person is or will be required to make (to the extent this information is not yet public and was communicated with the purpose of causing others to make purchases of securities of the same covered class) and a person who subsequently purchases securities of that class based on this information. Instead, the adopting release reiterates that no amendment to Rule 13d-5(b) is necessary and provides guidance that such “tipper-tippee” activities raise the possibility that these persons are acting as a “group” within the meaning of Section 13(d)(3). The adopting release further explains that the final determination as to whether a group is formed will depend upon the facts and circumstances, including (i) whether the purpose of the person’s communication with the other market participants was to cause them to purchase the securities and (ii) whether the market participants’ purchases were made as a direct result of the information shared by the person.

Acquisition of Additional Securities by a “Group” Member

The amendments adopt proposed Rules 13d-5(b)(1)(iii) and (b)(2)(ii), redesignated as Rules 13d-5(b)(1)(ii) and (b)(2)(i) and as slightly modified, to provide that if any member of a “group,” subject to reporting obligations under Section 13(d)(3) or Section 13(g)(3), becomes the beneficial owner of additional equity securities in a class at any time after the formation of the group (including acquisitions on the same day the group was formed), then the group will be deemed to have acquired beneficial ownership of those securities and will be required to report them.

Intra-“Group” Sales or Transfers

The amendments adopt proposed Rules 13d-5(b)(1)(iv) and (b)(2)(iii), redesignated as Rules 13d-5(b)(1)(iii) and (b)(2)(ii) and as slightly modified, to provide that a “group” will not be considered to have acquired beneficial ownership of additional equity securities if a member of the group becomes a beneficial owner of the securities through a sale or transfer from another member of the same group, including intra-group transfers on the same day but after the time the group was formed.

Passive Communications and Conduct Exemption

The SEC did not adopt proposed Rule 13d-6(c), which would have exempted certain actions taken by two or more persons from forming a group if those actions do not have the purpose or effect of changing or influencing control of an issuer and are not made in connection with or as a participant in any transaction having such purpose or effect. Proposed Rule 13d-6(c) was intended to avoid potentially chilling communications among shareholders or impeding shareholders’ engagement with issuers, especially in

connection with proposed Rules 13d-5(b)(1)(i) and (b)(2)(i). However, given that the SEC did not adopt the proposed amendments to Rule 13d-5, it did not adopt proposed Rule 13d-6(c).

Derivative Securities

The SEC did not adopt proposed Rule 13d-6(d), which would have deemed persons entering into derivatives in the ordinary course of their business not to have formed a group so long as the relevant agreement was not entered into with the purpose or effect of changing or influencing control of the issuer or in connection with or as a participant in any transaction having such purpose or effect. The SEC stated in the adopting release that since such instruments originate with third parties and such instruments do not confer on their holders any rights in respect of the issuer, they are not “securities of an issuer,” and therefore, Sections 13(d)(3) and 13(g)(3) are not implicated. Further, the SEC notes that a financial institution that enters into an agreement regarding the terms of a derivative security in the ordinary course of business would not be considered to have formed a “group” with a counterparty solely as a result of the agreement.

Structured Data Requirement

The amendments require that Schedule 13D and 13G filings use structured, machine-readable data language. Exhibits to Schedules 13D and 13G are allowed to remain unstructured.

Takeaways

As a result of the amendments adopted by the SEC, investors will be subject to earlier initial Schedule 13G and Schedule 13D filing deadlines and, in certain circumstances, more frequent amendments to those filings. Market participants should evaluate their internal policies and procedures to ensure that systems and controls are in place to facilitate compliance with the new reporting requirements.

* * *

Please do not hesitate to contact us with any questions.



Eric T. Juergens
Partner, New York
1 212 909 6301
etjuergens@debevoise.com



Matthew E. Kaplan
Partner, New York
1 212 909 7334
mekaplan@debevoise.com



Benjamin R. Pedersen
Partner, New York
+1 212 909 6121
brpedersen@debevoise.com



Nicholas P. Pellicani
Partner, London
+44 20 7786 9140
nppellicani@debevoise.com



Marc Ponchione
Partner, Washington, D.C.
+1 202 383 8290
mponchione@debevoise.com



William D. Regner
Partner, New York
+1 212 909 6698
wdregner@debevoise.com



Jeff Robins
Partner, New York
+1 212 909 6526
jlrobin@debevoise.com



Paul M. Rodel
Partner, New York
+1 212 909 6478
pmrodel@debevoise.com



Steven J. Slutzky
Partner, New York
+1 212 909 6036
sjslutzky@debevoise.com



Chris Gallucci
Associate, New York
+1 212 909 6216
cgallucc@debevoise.com



Ashley Yoon
Associate, New York
+1 212 909 6093
ayoon@debevoise.com

	Initial Filing		Amendment	
	<i>Current</i>	<i>New</i>	<i>Current</i>	<i>New</i>
Schedule 13D	10 days after (i) acquiring beneficial ownership of more than 5% or (ii) losing eligibility to file on Schedule 13G.	Five business days after (i) acquiring more than 5% beneficial ownership or (ii) losing eligibility to file on Schedule 13G.	Promptly after a material change.	Two business days after a material change.
Schedule 13G				
Qualified Institutional Investor	45 days after calendar year-end in which beneficial ownership exceeds 5%. 10 days after month-end in which beneficial ownership exceeded 10%.	45 days after calendar quarter-end in which beneficial ownership exceeded 5%. Five business days after month-end in which beneficial ownership exceeded 10%.	45 days after calendar year-end in which any change occurred. 10 days after month-end in which beneficial ownership (i) exceeded 10% or (ii) thereafter, increased or decreased by more than 5%.	45 days after calendar quarter-end in which a material change occurred. Five business days after month-end in which beneficial ownership (i) exceeded 10% or (ii) thereafter, increased or decreased by more than 5%.
Passive Investor	10 days after acquiring beneficial ownership of more than 5%.	Five business days after acquiring beneficial ownership of more than 5%.	45 days after calendar year-end in which any change occurred. Promptly after beneficial ownership (i) exceeded 10% or (ii) thereafter, increased or decrease by more than 5%.	45 days after calendar quarter-end in which a material change occurred. Two business days after beneficial ownership (i) exceeded 10% or (ii) thereafter, increased or decreased by more than 5%.
Exempt Investor (e.g., founder or pre-IPO investor)	45 days after calendar year-end in which beneficial ownership exceeded 5%.	45 days after calendar quarter-end in which beneficial ownership exceeded 5%.	45 days after calendar year-end in which any change occurred.	45 days after calendar quarter-end in which a material change occurred.