

# SEC Proposes Significant Amendments to Section 13 Reporting Requirements and Deadlines

February 16, 2022

On February 10, 2022, the U.S. Securities and Exchange Commission (the “SEC”) proposed significant amendments to the rules governing beneficial ownership reporting under Sections 13(d) and 13(g) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”). The proposed amendments are intended to, among other things, update reporting requirements for modern markets; reduce information asymmetries between activist investors, other shareholders and the public; and improve the timeliness of Schedule 13D and Schedule 13G filings. The amendments, if adopted, would:

- shorten the filing deadlines for both initial and amended Schedule 13D and 13G filings;
- amend the definition of “beneficial ownership” to include ownership of certain cash-settled derivative securities;
- clarify the circumstances under which a “group” is deemed to exist for purposes of beneficial ownership reporting obligations; and
- require that Schedules 13D and 13G be filed using a structured, machine-readable data language.

The key provisions of these proposed amendments are further discussed below. The full text of the proposed amendments is available [here](#).

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## Background

Sections 13(d) and 13(g) of the Exchange Act, along with Regulation 13D-G, generally require an investor that beneficially owns more than 5% of a covered class of equity securities<sup>1</sup> to report its ownership, along with certain other information, by filing a

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<sup>1</sup> Under Rule 13d-1(i), “equity security” means any voting equity security: (i) which is

Schedule 13D or, if it qualifies, a Schedule 13G. The current deadlines for the initial filing of a Schedule 13D or a Schedule 13G, which have not changed since the Exchange Act sections requiring them were enacted in 1968 and 1977, have been criticized by lawmakers, watchdog groups, companies, and lawyers as being too long in light of current markets and technologies.

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## Filing Deadlines

Among the most significant changes, the SEC's proposed amendments would accelerate the filing deadlines for Schedule 13D and Schedule 13G beneficial ownership reports.

- **Initial filing of Schedule 13D:** An initial Schedule 13D filing currently must be made within 10 days after the date an investor becomes the beneficial owner of more than 5% of a class of equity securities or loses eligibility to file on Schedule 13G (and remains subject to Section 13). The proposed amendments would shorten the deadline to five days.
- **Amendments to Schedule 13D:** An amendment to Schedule 13D currently must be filed "promptly" following the occurrence of any material change in the facts reported in the previous Schedule 13D. While the term "promptly" has not been defined under the Exchange Act, the SEC has noted that "[a]ny delay beyond the date the filing reasonably can be filed may not be prompt."<sup>2</sup> The amended rules would require any amendment to Schedule 13D to be filed within one business day after the triggering event.
- **Initial filing of Schedule 13G:** The filing deadline for an initial Schedule 13G filing depends on the exemption from Schedule 13D that an investor is relying upon.
  - For investors permitted to file on Schedule 13G because they are qualified institutional investors under Rule 13d-1(b), an initial Schedule 13G filing currently must be filed within 45 days after the calendar year-end at which beneficial ownership exceeds 5% of a class of equity securities (measured as of the end of the calendar year). Under the proposed amendments, this deadline would be accelerated to five business days after the month-end at which beneficial ownership exceeds 5% (measured as of the end of the month).

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registered pursuant to Section 12 of the Exchange Act; (ii) of any insurance company which would have been required to be so registered, except for the exemption under Section 12(g)(2)(G) of the Exchange Act; or (iii) issued by a closed-end investment company registered under the Investment Company Act of 1940.

<sup>2</sup> *In re Cooper Laboratories*, Exchange Act Release No. 34-22171 (June 26, 1985).

- For passive investors permitted to file on Schedule 13G under Rule 13d-1(c), an initial Schedule 13G currently must be filed within 10 days after the date at which beneficial ownership exceeds 5% of a class of equity securities. Under the proposed amendments, this deadline would be accelerated to five days after the date at which beneficial ownership exceeds 5%.
- For investors permitted to file on Schedule 13G because they are exempt investors under Rule 13d-1(d), an initial Schedule 13G filing currently must be filed within 45 days after the calendar year-end in which beneficial ownership exceeds 5% of a class of equity securities. Under the proposed amendments, this deadline would be accelerated to five business days after the month-end in which beneficial ownership exceeds 5%.
- **Amendments to Schedule 13G:** The filing deadlines and triggering events for amendments to Schedule 13G also vary depending on the exemption on which the investor is relying.
  - For qualified institutional investors, amendments to Schedule 13G currently are required (i) within 10 days after the month-end at which beneficial ownership exceeds 10% or, thereafter, within 10 days after the month-end at which beneficial ownership changes by 5% or more and (ii) within 45 days after calendar year-end if there were any changes in the number of securities owned (and such changes were not previously reported on Schedule 13G). Under the proposed amendments, amendments to Schedule 13G would be required (i) within five days after crossing the 10% threshold or, thereafter, within five days after beneficial ownership changes by 5% or more and (ii) within five business days after the end of a month in which a material change in the information previously reported on Schedule 13G occurred.<sup>3</sup>
  - For passive investors, amendments to Schedule 13G currently are required (i) “promptly” after beneficial ownership exceeds 10% or, thereafter, “promptly” after beneficial ownership changes by 5% or more and (ii) within 45 days after calendar year-end if there were any changes in the number of securities owned (and such changes were not previously reported on Schedule 13G). Under the

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<sup>3</sup> The rule proposal release does not provide guidance as to what “material” means in the context of Schedule 13G. For reference, under Rule 13d-2(a), in the context of amendments to Schedule 13D, a “material change” includes, but is not limited to, an acquisition or disposition of 1% or more of the class of securities, and SEC guidance provides that even changes to beneficial ownership resulting solely from a change in the aggregate number of outstanding securities can trigger an amendment obligation (see Compliance and Disclosure Interpretations, Exchange Act Sections 13(d) and 13(g) and Regulation D-G Beneficial Ownership Reporting, 103.08).

proposed amendments, amendments to Schedule 13G would be required (i) within one business day after crossing the 10% threshold or, thereafter, within one business day after beneficial ownership changes by 5% or more and (ii) within five business days after the end of a month in which a material change in the information previously reported on Schedule 13G occurred.

- For exempt investors, amendments to Schedule 13G currently are required 45 days after calendar year-end if there were any changes in the number of securities owned (and such changes were not previously reported on Schedule 13G). Under the proposed amendments, amendments to Schedule 13G would be required within five business days after the end of a month in which a material change in the information previously reported on Schedule 13G occurred.
- **Filing cutoff time:** To provide additional time for filers to prepare and submit Schedules 13D and 13G, the proposed amendments would extend the filing cutoff time from 5:30 p.m. eastern time to 10:00 p.m. eastern time.

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## Cash-Settled Derivative Securities

Under Rule 13d-3 and related SEC guidance, cash-settled derivatives (which provide the holder with economic exposure, but not the right to receive the underlying security) do not confer beneficial ownership on the holder.<sup>4</sup> New proposed Rule 13d-3(e) would provide that a holder of cash-settled derivatives, other than security-based swaps, will be deemed a beneficial owner of the reference securities if such person holds the derivatives with the purpose or effect of changing or influencing the control of the issuer of such class of equity securities, or in connection with or as a participant in any transaction having such purpose or effect. This expanded definition of “beneficial owner” could also potentially result in additional persons being subject to Section 16 under the Exchange Act.<sup>5</sup>

The proposed amendments would also revise Item 6 of Schedule 13D to clarify that a person is required to disclose interests in all derivative securities that use the issuer’s equity security as a reference security, including cash-settled security-based swaps and other derivatives settled exclusively in cash. The proposed amendments to Item 6 would

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<sup>4</sup> At least one case found, however, that cash-settled total return swaps did confer beneficial ownership where they were a device used to evade Section 13 reporting requirements. See *CSX Corp. v. The Children’s Inv. Fund Mgmt.*, 562 F. Supp. 2d 511 (S.D.N.Y. 2008).

<sup>5</sup> Under Rule 16a-1(a)(1), 10% holders under Section 16 are defined as persons deemed 10% beneficial owners under Section 13(d) and the rules thereunder.

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.

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## Group Formation

Under Sections 13(d)(3) and 13(g)(3) of the Exchange Act, when two or more persons act as a group for the purpose of acquiring, holding, or disposing of securities of an issuer, such group shall be deemed a "person" who, if the applicable beneficial ownership threshold is met, will be subject to reporting obligations under Section 13. To provide clarity on what actions and relationships form a "group," the proposed amendments would clarify when a "group" is formed in the following circumstances:

- **Lack of an express agreement:** The proposed amendments would revise Rule 13d-5(b) to remove the current references to "agreement" in order to avoid the potential implication that an express or implied agreement among two or more persons is required to form a "group."
- **"Tipper-Tippee" relationships:** The proposed amendments would provide that, when a person shares non-public information about an upcoming Schedule 13D filing by such person with the purpose of causing others to make purchases, and the recipient of this information subsequently purchases the issuer's securities based on the information, those persons will be deemed to have formed a "group" which, if the applicable ownership threshold is met, will be deemed to acquire, and be required to report, beneficial ownership of the securities purchased.
- **Acquisition of additional securities by a member of a "group":** The proposed amendments would provide that a "group" subject to reporting obligations under Section 13(d)(3) or Section 13(g)(3) will be deemed to have acquired beneficial ownership of equity securities in a class if any member of the "group" becomes the beneficial owner of additional equity securities of such class after the date of the "group's" formation. These amendments could result in additional or different reporting obligations for other "group" members, such as the "group" becoming ineligible to report on Schedule 13G and triggering an obligation to file on Schedule 13D instead.
- **Intra-"group" sales or transfers:** The proposed amendments would provide that a "group" will not be deemed to have acquired beneficial ownership of additional equity securities if a member of the "group" becomes the beneficial owner of such equity securities through a sale by, or transfer from, another member of the "group."

- **Passive communications and conduct:** The proposed amendments would provide that two or more persons will not be deemed to have formed a “group” solely on the basis of communicating with each other, where those communications are undertaken without the purpose or effect of changing or influencing control of the issuer, or in connection with any transaction having such purpose or effect. The amendments would also provide that two or more persons will not be deemed to have formed a “group” solely because of their concerted actions related to an issuer or its equity securities, as long as such persons are not directly or indirectly obligated to take such actions.<sup>6</sup>
- **Derivative securities:** The proposed amendments would provide that a financial institution entering into an agreement governing the terms of a derivative security will not be deemed to have formed a “group” with another person solely as a result of such agreement if it is a *bona fide* purchase and sale agreement entered into in the ordinary course of business without the purpose or effect of changing or influencing control of the issuer, or in connection with any transaction having such purpose or effect.

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## Structured Data Requirements

The proposed amendments would require that Schedule 13D and Schedule 13G be filed using a structured, machine-readable data language specific to such filings. Both schedules would be required to be structured in this specific language, though exhibits would remain unstructured.

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The public comment period for the proposed amendments summarized above will remain open for 60 days following publication of the proposing release on the SEC’s website or 30 days following publication of the proposing release in the Federal Register, whichever is longer.

Please do not hesitate to contact us with any questions.

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<sup>6</sup> Examples of such obligations may include a cooperation agreement or a joint voting agreement.

**NEW YORK**



Eric T. Juergens  
etjuergens@debevoise.com



Matthew E. Kaplan  
mekaplan@debevoise.com



Peter J. Loughran  
pjloughran@debevoise.com



Nicholas P. Pellicani  
nppellicani@debevoise.com



William D. Regner  
wdregner@debevoise.com



Steven J. Slutzky  
sjslutzky@debevoise.com

**WASHINGTON, D.C.**



Maayan G. Stein (Law Clerk)  
mstein2@debevoise.com



Marc Ponchione  
mponchione@debevoise.com