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LEGAL UPDATES

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# SEC Adopts Amendments to Beneficial Ownership Reporting Rules

On October 10, 2023, the Securities and Exchange Commission (SEC) adopted amendments to the reporting requirements relating to beneficial ownership. The SEC's full adopting release related to these rules can be found [here](#), and a related summary Fact Sheet from the SEC is available [here](#). As outlined below, the amendments (i) shorten the deadlines to file for initial and amended Schedule 13D and 13G filings, (ii) require Schedule 13D and 13G filings to be made using a structured, machine-readable data language, (iii) clarify the application of Schedule 13D's disclosure requirements to derivative securities (including cash-settled derivative securities) that use the issuer's equity securities as a reference security, and (iv) provide guidance regarding the application of the current beneficial ownership reporting rules to certain types of shareholder engagement activities.

The SEC noted that filing deadlines in the current rules went into effect more than 50 years ago and stated the amendments were intended to “[update] Schedules 13D and 13G reporting requirements for modern markets, [ensure] investors receive material information in a timely way, and [reduce] information asymmetries” in light of the intervening technological advancements and development of the financial markets.

## Accelerated Schedule 13D deadlines

Sections 13(d) and 13(g) of the Securities Exchange Act of 1934 (the Exchange Act) require a beneficial owner of more than 5% of a covered class of equity securities to file either a Schedule 13D or a Schedule 13G, as applicable. A non-exempt investor with control intent is required to file a Schedule 13D. Exempt Investors<sup>[1]</sup> and investors without a control intent, such as Qualified Institutional Investors and Passive Investors,<sup>[2]</sup> are required to file on Schedule 13G. The SEC believes that a shorter filing deadline will increase

timeliness of the disclosure of material information, thereby improving market transparency and helping investors make better informed decisions.

Prior to these amendments, the deadline for making an initial Schedule 13D filing was 10 calendar days after an investor becomes a 5% beneficial owner of a covered class (or after an investor that had previously filed on Schedule 13G loses its Schedule 13G eligibility). Amendments to 13D filings simply had to be made “promptly” following a material change.

The new rules shorten the initial filing deadline from 10 calendar days to five business days. Further, the new rules require amendments made to the Schedule 13D filing to be filed within two business days of a material change in previously reported information, i.e., two days after the triggering event, rather than “promptly after the date on which a material change occurs” as under the prior rule.

#### *Compliance deadline*

These amendments generally become effective on February 5, 2024 (90 days after the date of their publication in the Federal Register), with compliance with the new Schedule 13D filing deadlines required on and after that date. As discussed further below, however, the SEC provided later compliance dates for the revised Schedule 13G filing deadlines (September 30, 2024) and the new structured data requirement for Schedule 13D and 13G filings (December 18, 2024).

#### **Accelerated Schedule 13G deadlines**

The SEC adopted amendments that shorten the Schedule 13G filing to disclose beneficial ownership with timelines dependent on the type of investor. Investors may fall within one of three categories:

##### **Exempt investors (persons specified in Rule 13d-1(d))**

Exempt investors must file their initial Schedule 13G within 45 days after the calendar quarter-end if, as of the end of that quarter, the investor’s beneficial ownership exceeds 5% of a covered class. This new rule aligns initial Schedule 13G filings deadlines with the Form 13F filing deadline.

The prior deadline required an initial filing by 45 days after the calendar year-end in which the 5% threshold was exceeded.

##### **Qualified institutional investors (QIIs) (persons specified in Rule 13d-1(b))**

Like exempt investors, QIIs must file their initial Schedule 13G within 45 days after quarter-end if, as

of the end of that quarter, the investor's beneficial ownership exceeds 5% of a covered class. This new rule aligns initial Schedule 13G filings deadlines with the Form 13F filing deadline.

If a QII's beneficial ownership exceeds 10% of a covered class (computed as of the last day of the month), QIIs are required to file an initial Schedule 13G filing within five business days after the end of the first month in which the QII's beneficial ownership exceeds 10%.

The prior deadline required an initial filing by 45 days after the end of the calendar year in which the 5% threshold was exceeded and 10 calendar days after the end of the month in which the 10% threshold was exceeded.

Passive investors (persons specified in Rule 13d-1(c))

Passive investors must file their initial Schedule 13G within five business days after the date on which the investor acquired beneficial ownership that exceeds 5% of a covered class.

The prior deadline required an initial filing within 10 calendar days after the 5% threshold was exceeded.

For all Schedule 13G filers, a quarterly amendment to a Schedule 13G filing is required only if a "material change" occurs to the information previously reported. The amendment must be filed within 45 days after the calendar quarter-end in which the material change occurred. This change replaces the previously undefined deadline of making a filing "promptly."

For QIIs and passive investors, an amendment to a Schedule 13G filing is required upon exceeding 10% beneficial ownership or if there was a 5% increase or decrease in beneficial ownership. This rule remains unchanged from the prior rule.

QIIs' amendment filing deadline is five business days after month-end upon exceeding 10% beneficial ownership or if there was a 5% increase or decrease in beneficial ownership.

Passive investors' filing deadline is two business days upon exceeding 10% beneficial ownership or, thereafter, if there was a 5% increase or decrease in beneficial ownership.

All Schedule 13G filers must have submitted their amendments by direct transmission commencing on or before 10 p.m. Eastern time on the due date.

*Compliance deadline*

Compliance with the revised Schedule 13G filing deadlines under Rules 13d-1 and 13d-2 will not be required until September 30, 2024.

**Structured data requirements for Schedules 13D and 13G**

Currently, the EDGAR Filer Manual requires electronic filing of Schedules 13D and 13G in HTML or ASCII format, unstructured data languages which are not machine-readable.

With the intention of making information contained in these disclosures easier for investors and other market participants to access, compile, and analyze, the SEC's amended rules will require that Schedules 13D and 13G be filed using a structured, machine-readable (XML-based) data language. Filers will be able to choose between submitting filings directly to EDGAR in the SEC's new 13D/G-specific XML or utilizing a web-based reporting application developed by the SEC that will generate the filings in the required 13D/G-specific XML (similar to the approach the SEC has utilized in transitioning filings on Form 13F, Form D, and Section 16 beneficial ownership reports on Forms 3, 4, and 5 to mandatory structured XML filing). The SEC also stated its staff intends to develop electronic "style sheets" that, when applied to the reported XML data, will represent that data in "human readable" format.

All information disclosed on Schedules 13D and 13G other than exhibits, including quantitative disclosures, textual narratives, and identification checkboxes, must follow this new requirement. Exhibits to Schedules 13D and 13G may continue to be filed in non-structured format.

*Compliance*

Compliance with this new structured data requirement for Schedules 13D and 13G is not required until December 18, 2024. Early compliance is welcomed by the SEC and filers may begin to voluntarily comply starting December 18, 2023.

**Compliance dates table**

<b>Newly adopted rule change</b>	<b>Effective date</b>
New Schedule 13D Deadlines	February 5, 2024 [90 days after publication in the Federal Register]
New Schedule 13G Deadlines	September 30, 2024
New Structured Data (XML-based)	December 18, 2024 (voluntary compliance is

Requirements for Schedules 13D and 13G	permitted beginning December 18, 2023)
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**Accelerated Schedules 13D and 13G overview table**

Issue	Current schedule 13D	New schedule 13D	Current schedule 13G	New schedule 13G
<b>Initial filing deadline</b>	Within 10 calendar 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).	<b>QIIs &amp; exempt investors:</b> 45 calendar days after calendar year-end in which beneficial ownership exceeds 5%. Rules 13d-1(b) and (d).  <b>QIIs:</b> 10 calendar days after month-end in which beneficial ownership exceeds 10%. Rule 13d-1(b).  <b>Passive investors:</b> Within 10 calendar days after acquiring beneficial ownership of more than 5%. Rule 13d-1(c).	<b>QIIs &amp; exempt investors:</b> 45 calendar days after calendar quarter-end in which beneficial ownership exceeds 5%. Rules 13d-1(b) and (d).  <b>QIIs:</b> Five business days after month-end in which beneficial ownership exceeds 10%. Rule 13d-1(b).  <b>Passive investors:</b> Within five business days after acquiring beneficial ownership of more than 5%. Rule 13d-1(c).
<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).	<b>All Schedule 13G filers:</b> Any change in the information previously reported on Schedule 13G. Rule 13d-2(b).  <b>QIIs &amp; passive investors:</b> Upon exceeding 10%	<b>All Schedule 13G filers:</b> Material change in the information previously reported on Schedule 13G. Rule 13d-2(b).  <b>QIIs &amp; passive investors:</b> Same as

			beneficial ownership or, thereafter, a 5% increase or decrease in beneficial ownership. Rules 13d-2(c) and (d).	current Schedule 13G: upon exceeding 10% beneficial ownership or, thereafter, a 5% increase or decrease in beneficial ownership. Rules 13d-2(c) and (d).
<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).	<p><b>All Schedule 13G filers:</b> 45 calendar days after calendar year-end in which any change occurred. Rule 13d-2(b).</p> <p><b>QIIs:</b> 10 calendar days after month-end in which beneficial ownership exceeded 10% or, thereafter, there was, as of the month-end, a 5% increase or decrease in beneficial ownership. Rule 13d-2(c).</p> <p><b>Passive investors:</b> Promptly after exceeding 10% beneficial ownership or, thereafter, a 5% increase or decrease in beneficial ownership. Rule 13d-2(d).</p>	<p><b>All Schedule 13G filers:</b> 45 calendar days after calendar quarter-end in which a material change occurred. Rule 13d-2(b).</p> <p><b>QIIs:</b> Five business days after month-end in which beneficial ownership exceeds 10% or, thereafter, a 5% increase or decrease in beneficial ownership. Rule 13d-2(c).</p> <p><b>Passive investors:</b> Two business days after exceeding 10% beneficial ownership or, thereafter, a 5% increase or decrease in beneficial ownership. Rule 13d-2(d).</p>

			2(d).	
<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.	<b>All Schedule 13G filers:</b> 5:30 p.m. Eastern time. Rule 13(a)(2) of Regulation S-T.	<b>All Schedule 13G filers:</b> 10 p.m. Eastern time. Rule 13(a)(4) of Regulation S-T.

**Inclusion of "cash-settled" derivative securities within Schedule 13D beneficial ownership**

In addition, the SEC sought to clarify disclosure requirements under Schedule 13D with respect to cash-settled derivative securities. While the SEC did not adopt proposed amendments to Rule 13d-3(e) to automatically deem holders of cash-settled derivative securities to be beneficial owners of the underlying reference securities, the SEC decided instead to provide additional guidance illustrating the circumstances in which cash-settled derivatives may be deemed to confer beneficial ownership under the existing provisions of Rule 13d-3(e) (similar to guidance the SEC previously provided for Security-Based Swaps (SBS)).

While holders of cash-settled derivatives generally are not considered beneficial owners of the reference securities under current Rule 13d-3, the SEC’s new guidance seeks to clarify three circumstances in which non-SBS cash-settled derivatives may confer such beneficial ownership:

1. The non-SBS cash-settled derivative confers voting or investment power: If the 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, the holder of that derivative security may become a beneficial owner of the reference equity security.
2. The non-SBS cash-settled derivative is utilized as part of a plan or scheme or evade disclosure on Schedule 13D or 13G: To the extent a non-SBS cash-settled derivative security is acquired with the purpose or effect of divesting or preventing the vesting of beneficial ownership in the holder of the derivative as part of a plan or scheme to evade Schedule 13D or 13G reporting requirements, the derivative security may be viewed as a contract, arrangement, or device within the meaning of those terms as used in Rule 13d-3(b). The holder of such a cash-settled derivative may therefore be deemed a beneficial owner under Rule 13d-3(b)
3. The non-SBS cash-settled derivative grants a right to acquire beneficial ownership: Under Rule 13d-3(d)(1) generally, a person is deemed a beneficial owner of an equity security if the person (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. The SEC pointed out that this definition of beneficial ownership applies regardless of the origin of the right to acquire the equity security – even where such a right originates in a derivative security that is nominally “cash-settled,” or from an understanding entered into in connection with that derivative security.

It should also be noted that while the proposal to add a new paragraph (e) to Rule 13d-3 to automatically deem holders of cash-settled derivative securities to be beneficial owners of the underlying securities was not adopted, the SEC recently reopened the comment period for the proposal to adopt new Rule 10B-1, which would require public disclosure of SBS positions that exceed certain thresholds. This rule would require reporting of security-based swap positions over the reporting thresholds to “promptly” disclose the required information on a new Schedule 10B.

Additionally, the SEC amended Item 6 of Schedule 13D to clarify its intention that, while cash-settled derivatives may not be included in the calculation of total reportable beneficial ownership, derivative contracts, arrangements, understandings, and relationships with respect to an issuer’s securities, including cash-settled security-based swaps and other derivatives that are settled exclusively in cash, are nevertheless among the types of “contracts, arrangements, understandings, or relationships” relating to the issuer’s securities that must be disclosed under Item 6.

### **New SEC guidance concerning group formation under Rule 13d-5**

The SEC also provided new guidance concerning when two or more persons will be deemed to have formed a “group” for purposes of ownership disclosures on Schedule 13D or Schedule 13G pursuant to Rule 13d-5. Under existing Rule 13d-5(b), “when two or more persons agree to act together for the purpose of acquiring, holding, voting, or disposing of securities of an issuer,” the group formed will be deemed to have acquired beneficial ownership of all equity securities owned by any members of the group for purposes of Sections 13(d) and 13(g) of the Exchange Act. Accordingly, all equity securities beneficially owned by any member of the group will be subject to the reporting requirements of Schedule 13D or Schedule 13, even if an individual member beneficially owns less than 5% of the applicable class.

The SEC had originally proposed amendments to Rule 13d-5(b) to “codify” 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” is enough to result in the formation of a “group” for purposes of Exchange Act Sections 13(d) and 13(g). In response to concerns expressed by commenters that these proposals

could result in much uncertainty that could prompt litigation over whether communications between parties rise to the level of “group” formation under the statute, as well as the principle that some form of agreement or concerted action is needed to form a “group,” the SEC elected not to adopt these rules as proposed.

Instead, in the final release the SEC (i) pointed out that whether two or more persons have formed a group as contemplated by Exchange Act Sections 13(d)(3) and 13(g)(3) depends on a determination of whether they acted together for the purpose of “acquiring,” “holding,” or “disposing of” securities of the issuer and (ii) emphasized its view that such determinations depend on an analysis of all relevant facts and circumstances and not solely on the presence or absence of an express agreement, since the persons involved “may take concerted action or agree informally.”

The SEC also included a series of questions and answers in the release to provide guidance on the application of this standard to “certain common shareholder engagement activities.” In particular, this guidance emphasized the SEC’s position that if an investor intentionally communicates non-public information about its upcoming Schedule 13D filing to other market participants, and one or more persons then purchase the issuer’s securities based on that information, the investor and any such market participants that made purchases could potentially become subject to regulation as a group. The final determination as to whether a group is formed between the investor and the other market participants will depend upon the facts and circumstances, including (i) whether the purpose of the investor’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 investor.

The SEC’s guidance also provided several examples of shareholder engagement practices that it believed would not constitute formation of a “group” pursuant to current legal standards under Sections 13(d)(3) and 13(g)(3), including:

shareholders communicating with each other to discuss improvements to an issuer’s long-term performance; changes in issuer practices, submissions, or solicitations in support of a non-binding shareholder proposal, a joint engagement strategy not related to “control” of the issuer, or a “vote no” campaign against individual directors in uncontested elections, not involving an intent to engage in any other concerted actions;

shareholders engaging together in discussions with the issuer’s management, without taking any other actions;

shareholders jointly making recommendations to an issuer regarding the structure and composition of its board without attempting to convince the board to take specific actions through a change in the existing board membership or to bind the board to take action;

shareholders jointly submitting a non-binding shareholder proposal pursuant to Rule 14a-8, without the inclusion of other "springing conditions" described in the SEC's release;

shareholders' communications with an activist investor regarding its proposals to an issuer's board or management (without taking certain additional, concerted actions with the activist in support of such proposals); and

a shareholder's announcement or communication of its intention to vote in favor of an unaffiliated activist investor's director nominees, without more.

The SEC also approved amendments to Rule 13d-5 to clarify that (A) any acquisition of beneficial ownership by a group member after the date of group formation is an acquisition of beneficial ownership by the group and (B) intra-group transfers of securities by group members do not constitute a new acquisition of beneficial ownership by the group.

### **What this means to you**

Issuers should consider a number of matters in preparing for compliance with these new requirements, including:

Advanced planning to comply with the faster initial reporting required by Schedule 13D, including determination of whether a fund is required to file a Schedule 13D or is permitted to file a Schedule 13G.

Schedule 13G filers, including QIIs, exempt investors, and passive investors will need to update their compliance processes to evaluate whether there have been any "material changes" during each calendar quarter, within 45 calendar days of quarter-end.

Advanced planning regarding the use of derivative securities and the clear requirement that their use is required to be disclosed on pursuant to Item 6 of Schedule 13D going forward.

Use caution when engaging in activities that could create a "group." While the SEC chose to issue guidance rather than adopt new rules to define "group" status, the discussion in the release indicates

that the SEC is focused on this issue and that interactions between activist funds can still trigger group formation.

**Contact us**

Husch Blackwell's Securities & Corporate Governance team will continue to monitor these changes and their implications. Should you have any questions, please do not hesitate to contact Steven Barrett, Andrew Spector, Brian Wetzstein, Blake Heyer, or your Husch Blackwell attorney.

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[1] The SEC defines "exempt investors" for this purpose as persons having beneficial ownership of more than 5% of a covered class of equity securities, but who have not made an "acquisition" of beneficial ownership subject to Section 13(d) of the Act (such as significant pre-IPO investors).

[2] The SEC defines "passive investors" for this purpose as beneficial owners of more than 5% but less than 20% of a covered class of securities, who can certify under Item 10 of Schedule 13G that their subject securities were not acquired, and are not held for, the purpose or effect of changing or influencing control of the issuer (and were not acquired in connection with or as a participant in any transaction having such purpose or effect).