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Changes to SEC Beneficial Ownership Reporting Requirements

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Securities and Capital Markets

The Securities and Exchange Commission (the "SEC") has accelerated the filing deadlines for beneficial ownership reporting under Sections 13(d) and 13(g) of the Securities Exchange Act of 1934 ("the Exchange Act"). Schedule 13D reports must be filed no later than the fifth business day after acquiring more than a 5% holding (shortened from ten calendar days), and material amendments must be filed within two business days. Schedule 13G filers must generally file within 45 days after the quarter in which a more than 5% holding is acquired, and certain Schedule 13G filers who beneficially own at least 10% of any equity security of a covered class must file additional amendments.

One of the concerns expressed about the previous Schedule 13D ten-day time period was that the owner could continue to acquire additional securities after triggering the disclosure threshold without notifying the market. Shortening the initial filing and amendment deadlines may have some effect on that behavior. At the very least, the market will learn sooner about large acquisitions, but rapid accumulations can still be made between the trigger and filing dates.

The SEC did not adopt the proposed rules that would have addressed the formation of "groups" and would have included some cash-settled derivatives in the definition of "beneficial ownership."[1] Instead, the SEC issued guidance on these issues.[2] The first issue relates to the circumstances under which two or more holders should be counted as a single person for purposes of filing an ownership report as a group. The second relates to the question of whether owners of cash-settled derivatives can ever have the requisite voting or investment power over the underlying securities. The guidance is described in Parts II and III below.

The effective dates for the new filing requirements are discussed in Section I.E below.

I. New Requirements for Schedules 13D and 13G Filings

A. Changes to Deadlines and Triggering Events

The table below summarizes the changes made to the deadlines for initial Schedules 13D and 13G filings (white rows) and amendments (gray rows). The SEC also added a materiality qualifier to the triggering event for amendments to Schedule 13G.

1 Proposing Release, February 10, 2022.
2 Adopting Release, October 10, 2023.

Filing or Amendment	Triggering Event	Current Deadline	New Deadline[3]
Schedule 13D			
Initial Schedule 13D Filing	Acquiring beneficial ownership of more than 5% of an equity security of a covered class, or Event that causes a person to become ineligible to report on Schedule 13G	10 calendar days	5 business days
Amendment to Schedule 13D	"Material" change in the facts set forth in the previous Schedule 13D	"Promptly"	2 business days
Schedule 13G[4]			
Initial Schedule 13G Filing for: ▪ Qualified Institutional Investor Owning Up To 10% ▪ Exempt Investor	Acquiring beneficial ownership of more than 5% of an equity security of a covered class	45 calendar days after the end of the first calendar year in which the investor owns more than 5% as of the last day of the year	45 calendar days after the end of the first calendar quarter in which the investor owns more than 5% as of the last day of the quarter

[3] For purposes of determining the filing deadlines, the SEC must receive the filing by the applicable number of days *after* the date of the triggering event. For example, if a triggering event occurs on a Monday, the first business day is the following Tuesday and the filing is due not later than the cut-off time on the following Monday (assuming that the only non-business days during this period are the Saturday and Sunday).

[4] Qualified Institutional Investors, Passive Investors and Exempt Investors, as described in Rules 13d-1(b), 13d-1(c) and 13d-1(d) respectively, can report on Schedule 13G in lieu of Schedule 13D.

Filing or Amendment	Triggering Event	Current Deadline	New Deadline[3]
Initial Schedule 13G Filing for: ■ Qualified Institutional Investor Owning More Than 10%	Acquiring beneficial ownership of more than 10% of an equity security of a covered class	10 calendar days after the end of the first calendar month in which the investor owns more than 10% as of the last day of the month	5 business days after the end of the first calendar month in which the investor owns more than 10% as of the last day of the month
Initial Schedule 13G Filing for: ■ Passive Investor	Acquiring beneficial ownership of more than 5% of an equity security of a covered class	10 calendar days	5 business days
Amendment to Schedule 13G for: ■ Qualified Institutional Investor ■ Passive Investor ■ Exempt Investor	As mentioned above, the SEC changed this triggering event to require an amendment if there are any "material" changes in the information previously reported on Schedule 13G	45 calendar days after the end of the calendar year, if there is "any" change at such year-end to the facts previously reported	45 days after the end of the calendar quarter, if there is a "material" change in the information previously reported on Schedule 13G (which may include any acquisition or disposition of 1% or more of the applicable securities)
Amendment to Schedule 13G for: ■ Qualified Institutional Investor Owning More Than 10%	Acquiring beneficial ownership of more than 10% of an equity security of a covered class, and thereafter, increases or decreases by more than 5%	10 calendar days after the end of the first calendar month in which the investor owns more than 10% as of the last day of the month Thereafter, 10 calendar days after the end of any calendar month in which the investor's ownership as of the last day of the month increases or decreases by more than 5%	5 business days after the end of the calendar month in which the investor owns more than 10% as of the last day of the month Thereafter, 5 business days after the end of any calendar month in which the investor's ownership as of the last day of the month increases or decreases by more than 5%

Filing or Amendment	Triggering Event	Current Deadline	New Deadline[3]
Amendment to Schedule 13G for: ▪ Passive Investor Owning More Than 10%	Acquiring beneficial ownership of more than 10% of an equity security of a covered class, and thereafter, increases or decreases by more than 5%	"Promptly" after the 10% ownership threshold is crossed Thereafter, "promptly" after the investor's ownership increases or decreases by more than 5%	2 business days after the 10% ownership threshold is crossed Thereafter, 2 business days after the investor's ownership increases or decreases by more than 5%

B. Extension to 10 p.m. Eastern Time Cut-off for Schedule 13Ds and 13Gs

Amended Rule 13(a)(4) of Regulation S-T extends the cut-off time for submitting a Schedule 13D or 13G filing or amendment from 5:30 p.m. Eastern time to 10:00 p.m. Eastern time on a given business day, making it consistent with the cut-off time for Section 16 and Form 144 filings.

C. Removal of Temporary Hardship Exemption for Late Schedule 13D and 13G Filings

The SEC amended Rule 201(a) of Regulation S-T to make the temporary hardship (which applies to unanticipated technical difficulties preventing the timely preparation and submission of an electronic filing) unavailable to Schedule 13D and 13G filings, including any amendments thereto. A late filer may still request a filing date adjustment under Rule 13(b) of Regulation S-T, which would be subject to the SEC Staff's determination as to whether granting such a request would be appropriate and consistent with the public interest and the protection of investors.

D. Structured Data Language Requirement for Schedule 13Ds and 13Gs

Schedules 13D and 13G must use a structured, machine-readable XML-based data language for quantitative disclosures, textual narratives and checkboxes, but not exhibits.

Schedule 13D and 13G filers can submit filings directly to EDGAR in XML, or use a web-based reporting application developed by the SEC to generate such schedule in XML.

E. Effective Date of Rule Changes

The revised Schedule 13D filing deadlines and the extended 10 p.m. Eastern time filing cut-off for Schedules 13D and 13G will take effect 90 days after the Adopting Release is published in the Federal Register.

The revised Schedule 13G filing deadlines will take effect on September 30, 2024.

The structured data requirement for Schedules 13D and 13G will take effect on December 18, 2024, though voluntary compliance may begin on December 18, 2023.

The SEC guidance related to certain cash-settled derivative securities and the interpretation of the concept of "group," as described below, is effective immediately.

II. Guidance on Group Status

The obligation to file a beneficial ownership report falls on "any person" who owns a security as described in Section 13(d) of the Exchange Act. This requirement can apply to more than one person acting collectively, as set forth in Exchange Act Section 13(d)(3), which provides:

> When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purposes of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for the purposes of this subsection.

Determining when two or more persons "act as a … group for the purposes" of exercising control of an issuer's securities has always raised difficult factual questions. Although the SEC sought to clarify the question by proposing to amend its rules, the SEC instead issued guidance. That guidance, however, will still sometimes require a careful examination of the facts.

The SEC made certain principles of group formation clear:

- Acting as a group does not "depend solely" on the presence of an express agreement; and
- Forming a group requires "some type of agreement, arrangement, understanding, or concerted action."

The SEC identified one particular fact situation it was most concerned with and a number of fact situations it was not. These examples may help in applying the principles.

The SEC expressed concern about a beneficial owner of a substantial block of securities that will be required to file a Schedule 13D disclosing that information to other market participants "with the purpose of causing" such persons to make purchases of those securities. The SEC explained its belief that such arrangements raise investor protection concerns regarding perceived unfairness and trust in markets. Critics of this practice have sometimes characterized it as "wolf pack activism," and the SEC seems to share some of those concerns. The SEC, however, did not address the issue directly, and some market participants would disagree about the prevalence and significance of this issue.

The SEC gave several examples of practices it believed would not create a "group" for purposes of beneficial ownership reporting. For example, the SEC does not believe two or more shareholders would be considered a "group" if they only:

- discuss improving an issuer's long-term performance, changing an issuer's practices or supporting a non-binding shareholder proposal "without taking any other actions;"
- talk with the issuer's management "without taking any other action;"
- jointly make a recommendation to an issuer regarding the structure and composition of its board of directors "that does not involve an attempt to convince the board to take specific actions;" or
- jointly submit a non-binding shareholder proposal, provided it does not include "springing conditions" such as an arrangement to vote against the issuer's director nominees if the proposal is not passed or implemented.

Similarly, the SEC does not believe a group is formed when, "without more," there is a:

- communication between a shareholder and "an activist investor" regarding a proposal to the issuer's board or management; or
- shareholder's announcement or communication stating that it intends to support "an unaffiliated activist investor's" director nominee.

Although these examples demonstrate an effort to encourage shareholder communications and engagement, they leave open the question of what additional behavior would nonetheless be sufficient to satisfy the definition of a "group." For example, it is implicit in the SEC's guidance that "concerted action" can exist in the absence of an agreement, arrangement or understanding, although the SEC has not delineated the circumstances in which this can occur.

III. Guidance on Cash-Settled Derivatives and Clarification to Item 6 of Schedule 13D

A. Does the Use of Certain Cash-Settled Derivatives Confer Beneficial Ownership of the Underlying Equity Securities?

Equity derivatives do not, in and of themselves, confer beneficial ownership.[5] In the Proposing Release, the SEC proposed to amend Rule 13d-3 of the Exchange Act to deem holders of certain cash-settled derivative securities with underlying equity securities (an "Underlying Equity Security") to be beneficial owners of the Underlying Equity Security.

A cash-settled equity derivative is a transaction entitling a party (the "long party" in the transaction) to a cash amount representing the economic return on the Underlying Equity Security in accordance with the terms of the derivative (in contrast to a physically-settled equity derivative, where the long party is entitled to receive shares evidencing the Underlying Equity Security). Generally, the long party has only economic exposure to the Underlying Equity Security, but not the power to vote or invest the security.

Rather than adopting the proposed rule, the SEC issued guidance (the "Equity Derivatives Guidance"). The Equity Derivatives Guidance formally extends the SEC's 2011 Securities Based Swap ("SBS") beneficial ownership reporting requirements[6] to cash-settled derivatives that are not SBS. Under the 2011 SBS Beneficial Ownership Release, if a long party to an SBS transaction obtained, pursuant to the terms of that transaction, the ability to direct the purchase, sale or voting of any Underlying Equity Securities that the short party may hold as part of hedging the transaction, the long party would be deemed to beneficially own such Underlying Equity Securities for purposes of Section 13(d). Market participants have long understood the SEC's concern, and standard derivatives documentation specifies that the long party obtains no such rights pursuant to an SBS (or other equity derivative) transaction.

Under the Equity Derivatives Guidance, the long party to a cash-settled derivative will similarly be deemed to beneficially own the Underlying Equity Security if the cash-settled derivative:

(1) confers voting and/or investment power in the Underlying Equity Security to the long party (or the long party otherwise acquires such power based upon the purchase or sale of the derivative);
(2) 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 under Section 13(d); or
(3) grants a right to acquire the Underlying Equity Security.

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[5] *See*, *e.g.*, *CSX Corp. v. Children's Inv. Fund Management (UK) LLP,* 654 F.3d 276, 288-310 (2d Cir. 2011).

[6] *Beneficial Ownership Reporting Requirements and Security-Based Swaps*, SEC Release No. 34-64628 (June 14, 2011) (the "2011 SBS Beneficial Ownership Release").

B. Amendment to Item 6 of Schedule 13D to Clarify Disclosure Requirements Regarding Derivative Securities

Item 6 of Schedule 13D requires disclosure of "any contracts, arrangements, understandings or relationships (legal or otherwise) . . . between [the filer of the Schedule 13D] and any person with respect to any securities of the issuer." The SEC amended Item 6 to expressly include derivative securities (including SBS).

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