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## SEC amends large shareholder reporting rules

On October 10, the SEC adopted long-awaited amendments to Regulation 13D-G under the Exchange Act, which requires beneficial owners of more than 5% of a class of voting equity securities registered under Exchange Act Section 12 to report their ownership on either a Schedule 13D or a Schedule 13G. The filings inform the market about acquisitions of securities that could allow filers to control or influence control over an issuer.

The amended rules shorten the filing deadlines for initial and amended Schedule 13D and 13G reports. The amendments also require reporting persons to submit their filings using a structured, machine-readable data language to improve the accessibility and usability of the disclosures.

The scope of the rule amendments is less far-reaching than those the SEC proposed last year. The SEC did not adopt a proposed amendment that would have treated holders of certain cash-settled derivative securities as beneficial owners of equity securities referenced by the derivative securities. Nor did the SEC adopt amendments specifying circumstances in which persons acting together may be deemed to form a “group” that is required to report beneficial ownership of all equity securities owned by each member.

The SEC instead has furnished guidance regarding the application of the current beneficial ownership reporting rules to an investor’s use of the specified types of cash-settled derivative securities. It also has issued guidance regarding the current legal standard for group formation and the types of shareholder engagement activities that will not give rise to group status and trigger filings on Schedule 13D or 13G.

The rule amendments will be effective on February 5, 2024. Initial compliance is deferred until September 30, 2024 for the revised Schedule 13G filing deadlines

and until December 18, 2024 for the structured data requirements applicable to all filings.

The SEC’s release (No. 34-98704) describing the amendments can be viewed [here](#).

### Summary of rule amendments

#### Revised Schedule 13D and Schedule 13G filing deadlines

The rule amendments shorten the filing deadlines and make other revisions to the filing requirements for persons reporting on Schedule 13D or the short-form Schedule 13G, including the following filers eligible to report on Schedule 13G:

- *qualified institutional investors (QIIs)*, which consist of specified types of institutions that invest in securities in the normal course of their business—including registered brokers or dealers, banks, insurance companies, registered investment companies and investment advisers, ERISA employee benefit plans and pension funds—and that acquire the securities in the ordinary course of business and not 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 a purpose or effect;
- *passive investors*, which are beneficial owners of more than 5% but less than 20% of a covered class that certify in the Schedule 13G that they did not acquire and do not hold the issuer’s securities 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 a purpose or effect; and
- *exempt investors*, which are beneficial owners of more than 5% of a covered class whose acquisition of beneficial ownership was not subject to

Section 13(d) (such as an investor who acquired beneficial ownership of an IPO issuer's securities before the issuer registered the class under Exchange Act Section 12).

### Revised initial filing deadlines

- *Schedule 13D*: Rule 13d-1(a) currently requires a holder of covered securities to file an initial Schedule 13D within 10 calendar days after acquiring beneficial ownership of more than 5% of the covered class. Rules 13d-1(e), (f), and (g) currently obligate investors who lose eligibility to use Schedule 13G to file a Schedule 13D within 10 calendar days after the event that causes loss of Schedule 13G eligibility.

The SEC has amended these rules to require a Schedule 13D to be filed within *five business days* after the initial acquisition of more than 5% of the covered class or after the loss of Schedule 13G eligibility. The SEC notes that, if the filing period extends over a weekend or a federal holiday, which are not "business days," a reporting person could have seven or more calendar days to file its initial Schedule 13D.

- *Schedule 13G*:
  - Qualified institutional investors – Under current Rule 13d-1(b), QIIs that beneficially own more than 5% of a covered class at the end of a calendar year are obligated to file an initial Schedule 13G within 45 calendar days after the end of that year. If beneficial ownership exceeds 10% of the class before the end of the calendar year, the initial Schedule 13G must be filed within 10 calendar days after the end of the first month in which beneficial ownership exceeds the 10% level, computed as of the last day of that month.

Amended Rule 13d-1(b) shortens the filing deadline for the initial Schedule 13G to *45 days after the end of the calendar quarter* in which, as of the end of the quarter, beneficial ownership exceeds 5%. Further, if beneficial ownership exceeds 10% of the class before the end of the calendar quarter, the amended rule requires the holder to file the initial Schedule 13G within *five business days* after the end of the first month in which beneficial ownership exceeds the 10% level, computed as of the last day of the month. The SEC highlights that the new quarter-end-based filing deadline aligns with the deadline for quarterly Form 13F reports filed by many institutional investment managers.

The SEC acknowledges that, as long as the holder's beneficial ownership position does not exceed 10% of the class, the new quarter-end-based filing deadline—like the calendar-year-end filing deadline under the current rule—will permit the holder to sell down its position to 5% or below on the last day of the reporting period and avoid a Schedule 13G filing. It expects, however, that the risk of such filing avoidance will be reduced under the amended rule because of the transaction costs and disruption to long-term investment strategies entailed in significantly changing equity positions multiple times a year.

- Passive investors – Rule 13d-1(c) currently requires passive investors to file an initial Schedule 13G within 10 calendar days after acquiring beneficial ownership of more than 5% of a covered class.

Amended Rule 13d-1(c) shortens the filing deadline for the initial Schedule 13G to *five business days* after the acquisition of such beneficial ownership.

- Exempt investors – Rule 13d-1(d) currently requires exempt investors to file an initial Schedule 13G within 45 calendar days after the end of the calendar year if, as of the end of that year, beneficial ownership exceeds 5% of a covered class.

Amended Rule 13d-1(d) shortens the filing deadline for the initial Schedule 13G to *45 days after the end of the calendar quarter* if, as of the end of that quarter, beneficial ownership exceeds 5% of the class.

### Revised amendment filing deadlines

- *Schedule 13D*: Rule 13d-2(a) currently requires a person that has filed a Schedule 13D to amend it "promptly" after any material change occurs in the information set forth in the initial filing or in the most recent amendment. The rule does not specify the number of days within which the amendment must be filed to be considered "prompt."

The SEC has amended Rule 13d-2(a) to delete the term "promptly" and require that an amendment be filed within *two business days* after a material change. The new deadline is consistent with the Form 4 filing deadline under Exchange Act Rule 16a-3 and generally accords with current market practice.

- *Schedule 13G:*

- All filers – Rule 13d-2(b) currently requires Schedule 13G filers to file an amendment within 45 calendar days after the end of each calendar year if there are any changes in the information reported in the previous filing.

Amended Rule 13d-2(b) changes this filing deadline to *45 days after the end of the calendar quarter* in which an amendment obligation arises.

- QIIs – Rule 13d-2(c) currently requires QIIs to file (i) an amendment to a Schedule 13G within 10 calendar days after the end of the month in which beneficial ownership first exceeds 10% of a covered class, computed as of the last day of the month, and (ii) additional amendments within 10 calendar days after the end of any month in which the QIIs increase or decrease their beneficial ownership by more than 5% of the class, computed as of the last day of the month.

Amended Rule 13d-2(c) changes these filing deadlines to *five business days* after the end of the month in which the amendment obligation arises.

- Passive investors – Rule 13d-2(d) currently requires passive investors to (i) file an amendment to their Schedule 13G “promptly” upon acquiring beneficial ownership of more than 10% of a covered class and (ii) “promptly” file additional amendments if they increase or decrease their beneficial ownership by more than 5% of the class.

Amended Rule 13d-2(d) changes these filing deadlines from “promptly” to *two business days* after the date on which an amendment obligation arises.

### Change of Schedule 13G amendment trigger to “material change”

Rule 13d-2(b) currently requires a person that reports on Schedule 13G to file an amendment each year if there has been “any change” in the information set forth in the previous filing. Under the amended rule, amendments to a Schedule 13G filing will be required if there is a “material change” to previously-filed information. The addition of an express materiality standard aligns the Schedule 13G amendment trigger with the filing trigger for Schedule 13D amendments.

### Extension of filing “cut-off” time

The amendments extend the cut-off time on the filing date to afford beneficial owners additional time to prepare and submit their Schedule 13D and 13G filings under the shortened filing timelines. The SEC has amended Rule 13(a) of Regulation S-T to provide that Schedule 13D and 13G filings, including any amendments, submitted to the SEC by direct transmission on or before 10:00 p.m. eastern time (rather than the current cut-off time of 5:30 p.m. eastern time) on a business day will be deemed filed on the same business day. This amendment will align the cut-off time for these filings with filings made under Exchange Act Rule 16a-3.

### Treatment of cash-settled derivative securities

#### SEC guidance on beneficial ownership standard.

Under Rule 13d-3, which provides standards for determining whether a person is a beneficial owner subject to Sections 13(d) and 13(g), holders of derivative securities settled in cash generally are not considered to beneficially own the equity securities in the covered class referenced by the cash-settled derivative security. The treatment of those derivative securities, such as call and security-based options, under Regulation 13D-G has been contentious because some holders reportedly have used positions in those securities to attempt to exert influence or control over the issuers of the reference securities.

The SEC did not adopt a proposed amendment to Rule 13d-3 that in specified circumstances would have treated a holder of a cash-settled derivative security, other than a security-based swap (SBS), as the beneficial owner of equity securities in the reference covered class. After considering comments on the proposal, the SEC opted instead to furnish guidance clarifying its current position on the application to those derivative securities of the beneficial ownership standards under existing Rule 13d-3.

The SEC affirmed that non-SBS derivative securities settled exclusively in cash generally are designed to represent only an economic interest in the reference covered class, which alone would not entail voting or investment power over the covered class necessary under Rule 13d-3 to create beneficial ownership of the class. The SEC noted, however, that beneficial ownership could arise in circumstances in which the holder of the cash-settled derivative security has voting or investment power over the reference

securities, or where the terms of the derivative security or transaction otherwise meet the rule's indicia of beneficial ownership.

Under the SEC's guidance, a holder of a non-SBS cash-settled derivative security may be deemed the beneficial owner of securities of the reference covered class under Rule 13d-3 in any of the following circumstances:

- to the extent that the cash-settled derivative security provides the holder, directly or indirectly, with exclusive or shared voting or investment power over the reference covered class through a contractual term of the derivative security or otherwise;
- to the extent that the cash-settled derivative security is acquired with the purpose or effect of divesting its holder of beneficial ownership of the reference covered class 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); or
- if from a derivative security that is nominally cash-settled, or from an understanding in connection with that derivative security, the holder (i) has a right to acquire beneficial ownership of securities of the reference class within 60 days or (ii) acquires the right to acquire beneficial ownership of securities of the reference class with the purpose or effect of changing or influencing the control of the issuer of the securities, or in connection with or as a participant in any transaction having such a purpose or effect, regardless of when the right is exercisable.

This guidance is similar to the guidance provided by the SEC in 2011 regarding the applicability of Rule 13d-3 to holders of security-based swaps.

#### Disclosure of derivative securities in Schedule 13D.

The SEC has amended Item 6 of Schedule 13D to specify expressly that 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 among the types of "contracts, arrangements, understandings, or relationships" relating to the issuer's securities that must be disclosed under the item. Even though cash-settled derivative securities may not be included in the calculation of beneficial ownership, the SEC explains that the Item 6 disclosure could provide information about the filer's overall economic exposure to the issuer, which it says may be associated with actions

the filer is expected to take with respect to the issuer and its securities.

## SEC guidance and rule amendments relating to groups

In another change to its proposal, the SEC issued guidance instead of rule amendments to identify the appropriate legal standard for determining whether multiple persons constitute a "group" required to file ownership reports. The SEC coupled its guidance on group formation with amendments to Rule 13d-5 to address related reporting matters.

### Guidance regarding group formation and shareholder engagement activities

**Requirements for group formation.** The SEC's guidance is based primarily on the language of Sections 13(d)(3) and 13(g)(3) stating that two or more persons constitute a group if they act as a partnership, syndicate, or "other group" for purposes of acquiring, holding, or disposing of securities of an issuer. In the SEC's view, group formation under the existing legal standard does not require an "express agreement" among two or more persons to act together, since those persons may agree informally or take concerted action without an express agreement to do so.

Some commenters on the proposal expressed concern that the SEC's proposed amendment of Rule 13d-5 to eliminate its reference to an "agreement" together with its interpretation of the statute could sweep within the group definition common types of shareholder engagement activities and discourage shareholders from communicating freely with each other or with an issuer's management because of the risk those communications could be sufficient to establish a group.

To address this concern, the SEC states in the adopting release that its interpretive position is not intended to "complicate shareholders' ability to independently and freely express their views and ideas to one another." The SEC emphasizes that a group could not be formed "without some type of an agreement, arrangement, understanding, or concerted action." Rather, according to the SEC, to show that a group has been formed, "the evidence must show, at a minimum, indicia, such as an informal arrangement or coordination in furtherance, of a purpose to acquire, hold, or dispose of" an issuer's securities.

**Shareholder engagement activities not implicating group formation.** The SEC's guidance indicates that, under this standard, the following shareholder engagement activities, *without the taking of other*

*actions*, would not result in the formation of a group among the participating shareholders:

- Two or more shareholders communicate with each other (whether in private or in a public forum and whether in oral or written form) regarding an issuer or its securities, including with respect to such topics as improvement of the issuer’s long-term performance, 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
- Two or more shareholders engage in discussions with an issuer’s management
- Shareholders jointly make recommendations to an issuer regarding the structure and composition of the issuer’s board of directors, so long as the recommendations do not involve an effort 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 submit a non-binding shareholder proposal to an issuer under Exchange Act Rule 14a-8 for presentation at a shareholder meeting
- A shareholder participates in meetings or other communications with an activist investor seeking support for its proposals to an issuer’s board of directors or its management, without consenting or committing to a course of action, such as the granting of irrevocable proxies or the execution of written consents or voting agreements (consistent with the SEC’s view that a shareholder who is a passive recipient of proxy solicitation activities, without more, would not be deemed a member of a group with persons conducting the solicitation)
- A shareholder issues an announcement or otherwise communicates its intention to vote in favor of an unaffiliated activist investor’s director nominees and the reasons why

#### Shareholder activity implicating group formation.

The SEC’s guidance clarifies that a group may be formed between a beneficial owner of a substantial block of a covered class that is or will be required to file a Schedule 13D and other market participants if:

- the blockholder intentionally communicates to other market participants (including investors) that such a filing will be made at a time when this information is not public, with the purpose of

causing the other persons to purchase shares of the same class; and

- one or more of the market participants make purchases of the same class as a “direct result” of the communication.

The SEC underscores that, depending on the facts and circumstances, the blockholder could be incentivizing the market participants to purchase the issuer’s shares before the Schedule 13D is filed, and that those purchases potentially could be deemed to have been undertaken by a group for the purpose of “acquiring” the shares within the scope of Section 13(d)(3).

#### Rule amendments relating to group reporting

In addition to issuing guidance on group formation, the SEC adopted amendments to Rule 13d-5, which specifies circumstances in which a person is deemed to have acquired beneficial ownership of a covered class reportable on Schedule 13D or 13G. When a group is considered to have been formed, the group will be deemed to own beneficially all of the securities owned by each member.

The SEC has amended Rule 13d-5 to provide expressly that, after a group has been formed, the group will be deemed to have acquired beneficial ownership of all additional securities of the covered class acquired by any group member. The amendment is intended to relieve the SEC or an affected party of having to prove that post-formation acquisitions of the covered class are attributable to the group. Any acquisitions resulting from intra-group sales or transfers of the securities would be excluded from this attribution.

The SEC notes that groups may form at a time when a class of equity securities is not yet registered under Exchange Act Section 12 or when the group members beneficially own 5% or less of the covered class. The SEC states that attribution to the group of post-formation acquisitions of the covered class by any group member will aid assessing whether a group intentionally tried to evade the reporting process, determining whether an amendment was due for a pre-existing Schedule 13D filing, and evaluating the availability of Section 13(d)(6)(B), which renders Section 13(d) inapplicable to exempt investors that acquire no more than 2% of a covered class within a 12-month period.

#### Structured data requirements for Schedule 13D and Schedule 13G filings

Filings on Schedules 13D and 13G are not currently submitted in a structured data language and therefore

are not machine-readable. Under the amended rule, all information on Schedules 13D and 13G other than exhibits—including quantitative disclosures, textual narratives, and identification checkboxes—must be filed using an XML-based language. Filers will have the option to submit filings directly to EDGAR in 13D/G-specific XML or to use a web-based reporting application developed by the SEC that will generate the Schedule in 13D/G-specific XML. The SEC indicates that its staff intends to develop electronic “style sheets” that, when applied to the XML data, will represent the data in human-readable form on EDGAR. To provide filers with time required to meet the structured data requirements, compliance will not be required until December 18, 2024, although the SEC encourages earlier voluntary compliance.

## Looking ahead

The current beneficial ownership reporting regime has long attracted criticism from some investors and issuers for a variety of perceived shortcomings, including excessively lengthy filing deadlines and the uncertain scope of the beneficial ownership concept. The SEC’s rulemaking represents a substantial effort to address many of these criticisms, although the final amendments represent a less ambitious modernization of the current framework than was foreshadowed by the rule proposal. The SEC’s consideration of comments regarding the potential amendments required it, as the agency indicates, “to ensure investors receive material information in a timely manner, while, at the same time, maintaining the balance between issuers of securities and the shareholders who seek to exert influence or control over issuers that Congress sought when enacting Section 13(d).”

Whatever the broader effect of the amendments on the market for corporate control, which will take time to unfold, current and prospective Schedule 13D and 13G filers should begin updating their reporting processes and systems to be in a position to meet the revised filing requirements. Both Schedule 13D and 13G filers will be affected by shorter filing deadlines, while Schedule 13G filers will need to review changes in beneficial ownership on a more frequent basis and prepare more frequent Schedule 13G filings to report material changes in previously-reported information. Schedule 13D filers who are required to provide disclosure about derivative securities in Item 6 of their reports will have to prepare that disclosure and monitor interests in the securities to report any material changes in amendments to the filings. In addition, all filers will

need to prepare for submission of their reports using 13D/G-specific XML.

Although the SEC has deferred initial compliance with the revised Schedule 13G filing deadlines and the structured data filing requirements, the shorter filing windows make it advisable to begin pursuing process changes at an early date.

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