

MAJOR CHANGES TO 13D-13G REPORTING ADOPTED BY SEC

Oct 12, 2023

On October 10, 2023, the SEC adopted final amendments to Section 13(d) reporting obligations, including:

- Significantly accelerating filing deadlines
- Extending the filing cut-off from 5:30 pm ET to 10 pm ET
- Requiring disclosure of interests in derivative securities that use the subject stock as a reference security
- Requiring the filing of 13D and 13Gs using an XML machine-readable data language

In addition, the SEC provided guidance on:

- The application of beneficial ownership rules to certain cash-settled derivatives; and
- The application of reporting principles for groups as well as some common types of shareholder engagement or activism

COMPLIANCE DATES

- 90 days after publication in the Federal Register – effective date of amendments
- September 30, 2024 – first date to comply with the revised Schedule 13G filing deadlines.
- December 18, 2024 – first date to comply with the structured data requirement for Schedules 13D and 13G.
- December 18, 2023 – first date 13D and 13G filers are permitted to begin voluntarily complying with the structured data requirement.

CHANGES FROM PROPOSED AMENDMENTS

In response to [forceful comments](#), the SEC pulled back from some elements of its [original proposed amendments](#):

- It slightly relaxed the filing deadlines from those originally proposed and will only require 13G amendments if a “material change” occurs.
- Instead of amending the definition of beneficial ownership, the SEC provided guidance on when holders of cash-settled derivatives (excluding security-based swaps (SBSs) for which similar guidance was previously provided in the Release No. 34-64628, Beneficial Ownership Reporting Requirements and Security-Based Swaps) may already be deemed beneficial owners.
- Instead of redefining groups (and the related exemption for ordinary course trades in derivatives), the SEC provided guidance on the application of existing law to group and shareholder engagement activities.

ACCELERATED FILING DEADLINES

The filing deadlines will be accelerated as follows:

For initial filings

- For 13D or converting from 13G to 13D due to change in eligibility, from 10 calendar days after the acquisition of more than 5% beneficial ownership, or from the date of losing eligibility to file on 13G, as applicable, to five business days.
- For 13G by “qualified institutional investors (QIIs)” or “exempt investors,” from 45 days after the end of the calendar year to within 45 days after the end of the calendar quarter in which beneficial ownership exceeded 5%.
 - The SEC noted that this timing aligns with 13F filing deadlines.
- For 13Gs by QIIs, from 10 days after month-end holding more than 10% to five business days after month-end.
- For 13G by “passive investors,” from within 10 calendar days after the acquisition of more than 5% to five business days.

For amendments

- For 13Ds, from “promptly” after the date of a material change to two business days.
- For 13Gs by all filers, from within 45 days after the end of the calendar year to within 45 days after the end of the calendar quarter in which a material change occurs – other than a change

in percentage owned resulting solely from a change in the number of shares of the class outstanding.

- The general obligation will now only be triggered by a “material change” instead of “any change” in previously reported information.
- The SEC declined to provide guidance on what would constitute a material change, but noted that the existing language in the rule states that increases or decreases of one percent or more of the class will be deemed “material.”
- For 13Gs by QIIs reporting beneficial ownership in excess of 10%, or deviations of more than 5%, from within 10 calendar days after month-end to five business days after month-end.
- For 13Gs by passive investors reporting beneficial ownership in excess of 10%, or deviations of more than 5%, from “promptly” to within two business days.

TIMING CONSIDERATIONS

The amendments clarify that:

- The term “business day” for purposes of Regulation 13D-G will mean any day, other than Saturday, Sunday, or a Federal holiday, from 12:00 a.m. to 11:59 p.m. eastern time.
- For purposes of determining the filing deadlines, the first day in the five (or two) business day count towards reaching the deadline is the business day after the date on which the applicable beneficial ownership reporting threshold is crossed (rather than the date of such the applicable transaction).

To ensure they obtain their EDGAR filer codes in a timely manner, the SEC cautioned that filers should begin the process of applying for codes before they become obligated to make a filing . Since SEC staff reviews all Form ID applications, filers should allow sufficient time for that review.

FILING DAY CUT-OFF TIME EXTENDED

Regulation S-T was amended to permit filings made on or before 10 pm ET to be credited as having been filed on that business day, instead of the current 5:30 pm ET cut-off. Even though the definition of “business day” for purposes of 13D-G encompasses an entire day, filings must be made in accordance with the times set forth in Regulation S-T in order to get credit for having been filed on that day.

The SEC eliminated the ability of 13D or 13G filers to request a temporary hardship exemption due to unanticipated technical difficulties; however, it notes that filers may request a filing date

adjustment under the same circumstances as the temporary hardship exemption would have provided.

SEC GUIDANCE ON TREATMENT OF CASH-SETTLED DERIVATIVE SECURITIES AS BENEFICIAL OWNERSHIP

The SEC elected not to amend Rule 13d-3 as proposed, which would have expressly deemed certain holders of cash-settled derivative securities as beneficial owners of the reference covered class of stock. Instead, it explained how the following three scenarios could result in “beneficial ownership” under existing rules through use of certain non-SBS cash-settled derivatives (Non-SBS Derivative):

- Where a Non-SBS Derivative provides its holder, directly or indirectly, with exclusive or shared voting or investment power over the reference covered class of stock through a contractual term of the derivative security or otherwise.
- Where the Non-SBS Derivative is acquired with the purpose or effect of divesting its holder of beneficial ownership of the reference covered class of stock 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).
- Even if the Non-SBS Derivative is nominally “cash-settled,” if it gives the holder (1) a right to acquire beneficial ownership of the equity security within 60 days or (2) the right to acquire beneficial ownership of the equity security with the purpose or effect of changing or influencing the control of the issuer of the security for which the right is exercisable, or in connection with or as a participant in any transaction having such purpose or effect, regardless of when the right is exercisable.

SEC GUIDANCE ON THE FORMATION OF GROUPS

The SEC decided not to adopt some of the proposed amendments addressing the formation of groups. Instead, it provided guidance, beginning at page 128 of the [SEC Adopting Release](#), on the operation of the existing rules to clarify that, among other matters, two or more persons who “act as” a group for purposes of acquiring, holding, or disposing securities may be treated as a group. The principal guidance comprises seven Q&As, beginning at page 133, addressing whether a group is formed in the following scenarios, in each case, subject to the particular facts and circumstances:

No group formed

- When shareholders communicate with each other about certain specified topics regarding an issuer or its securities, without such shareholders taking any other actions.
- When shareholders engage in discussions with management, without taking other action.

- When shareholders jointly make recommendations about the structure or composition of the board, absent certain specified actions.
- When shareholders jointly submit non-binding Rule 14a-8 proposals (without “springing conditions” such as an agreement to vote against board nominees or other management proposals if the non-binding proposal is not included in the proxy statement or, if passed, not acted upon favorably by the issuer’s board).
- Communications or meetings between a shareholder and an activist investor seeking the shareholder’s support, without more, such as consenting or committing to action.
- Announcement or a communication by a shareholder of its intention to vote in favor of an unaffiliated activist investor’s director nominees, without more.

Group potentially formed

- When a substantial holder required to file 13D intentionally communicates to other market participants (including investors) that such a filing will be made (to the extent this information is not yet public) with the purpose of causing such persons to make purchases in the same covered class of stock, and one or more of the other market participants make purchases in the same covered class as a direct result of that communication,

However, the SEC did adopt several amendments to Rule 13d-5:

- To specify that a group subject to reporting obligations under Section 13(d) or 13(g) will be deemed to acquire any additional equity securities acquired by a member of the group after the group’s formation.
- To carve out from paragraph (b)(1)(iii) and (b)(2)(ii) any intra-group transfers of equity securities – so that a group will not be deemed to have acquired beneficial ownership if a member of the group becomes the beneficial owner of additional shares of such stock through a sale by, or transfer from, another member of the group.
- Other technical changes.

DISCLOSURE OF DERIVATIVE SECURITIES

Item 6 of 13D is amended to make clear that a reporting person is required to disclose interests in all derivative securities that use a covered class as a reference security – including derivatives not originating with the issuer such as cash-settled SBS and other derivatives.

REQUIRED USE OF XML-BASED LANGUAGE

All disclosures, including quantitative data, textual narratives and identification checkboxes on 13D or 13G will be required to be filed using a structured, machine-readable data language, i.e., 13D/G-specific XML. Exhibits are excluded from this requirement. The purpose is to facilitate the access, compilation and analysis of information by investors and markets.

Filers are given the option to either submit filings directly to EDGAR in 13D/G-specific XML or use a web-based reporting application developed by the SEC that will generate the filing in 13D/G-specific XML.

RELATED PRACTICE AREAS

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MEET THE TEAM



R. Randall Wang

St. Louis

randy.wang@bclplaw.com

[+1 314 259 2149](tel:+13142592149)



Andrew S. Rodman

New York

andrew.rodman@bclplaw.com

[+1 212 541 1197](tel:+12125411197)

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