

Final Rules Issued Amending SEC Schedules 13D and 13G Beneficial Ownership Reporting Requirements

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In this article, the authors discuss final beneficial ownership reporting rules adopted recently by the Securities and Exchange Commission.

In an effort to modernize beneficial ownership reporting under Section 13(d) and 13(g) of the Securities Exchange Act of 1934, the Securities Exchange Commission (SEC) recently adopted final rules (the Final Rules).¹ The Final Rules significantly depart, in many respects, from the rules the SEC originally proposed in February 2022 (the Proposed Rules).

Background

To provide market participants notice of significant acquisitions or potential changes in control of reporting companies, the SEC requires certain public filings. These Schedule 13D or Schedule 13G filings are required under Section 13(d) and 13(g) of the Exchange Act, and Regulation 13D-G for holders who beneficially own more than five percent of any class of securities registered under the Exchange Act. The reporting requirements apply to classes of four different types of equity securities as well as security-based swaps for which any of the four types of equity securities is the underlying security (each, a Covered Class).

Final Rules

Revised Filing Deadlines

- The initial Schedule 13D will be due five business days (previously ten days) after the date on which a person acquires

- beneficial ownership of more than five percent of a Covered Class of securities;
- The initial Schedule 13D will be due five business days (previously 10 days) by certain persons who become ineligible to report on Schedule 13G after the event that causes the ineligibility;
 - The initial Schedule 13G for Qualified Institutional Investors (QIIs)² and “Exempt Investors”³ will be due 45 days after the end of the calendar quarter in which beneficial ownership first exceeds five percent of a Covered Class;
 - The initial Schedule 13G for “Passive Investors”⁴ in lieu of Schedule 13D will be due five business days (previously 10 days) after the date on which they acquire beneficial ownership of more than five percent of a Covered Class;
 - The deadline for filing amendments to Schedule 13D pursuant to Rule 13d-2(b) is now two business days (from promptly after the triggering event) after the date on which a material change occurs;
 - The deadline for Schedule 13G amendments will be 45 days after the end of the calendar quarter in which a reportable change occurs (previously 45 days after the end of the calendar year in which the reportable change occurs);
 - The deadline for Schedule 13G amendments filed by QIIs will be five business days (previously ten days) after the end of the month in which beneficial ownership first exceeds ten percent of a Covered Class, and thereafter upon any deviation by more than five percent of the covered class, with these requirements applying if the thresholds were crossed at any time during a month; and
 - The deadline for Schedule 13G amendments filed by Passive Investors will be two business days after the date on which beneficial ownership exceeds ten percent of a Covered Class (previously promptly after the triggering event), and thereafter upon any deviation by more than five percent of such Covered Class.

Additionally, under the Final Rules, only a “material change” will trigger an amendment obligation to Schedule 13G filed under Rule 13d-2(b) (rather than “any change” under the current rules).

Further, the Final Rules extend the time-of-day deadline for Schedule 13D and 13G filings, and amendments thereto, to

10:00 p.m. eastern standard time (rather than 5:00 p.m. eastern standard time).

Guidance on Group Formation

In a departure from the Proposed Rules, the SEC did not adopt certain Rule 13d-5 amendments that would have tracked the statutory text of Section 13(d)(3) and (g)(3) to specify that two or more persons who “act as” a group for purposes of acquiring, holding, or disposing of securities are treated as a “group.” Instead, the SEC elected to issue guidance in the adopting release on certain common types of investor engagement activities that scope of activities that could give rise to group formation.

The adopting release recognized that neither the statutory language nor the SEC rules define the term “group.” According to the adopting release, the determination of whether two or more persons are acting as a group “depends on an analysis of *all the relevant facts and circumstances* and *not solely on the presence or absence of an express agreement*, as two or more persons may take concerted action or agree informally.”⁵

The adopting release presented the related guidance in question and answer format, listing the below situations where a Section 13(d) group would not be formed:

- Communications between two or more shareholders concerning a particular issuer, including topics relating to the improvement of the issuer’s long-term performance, changes in issuer practices, submissions, or solicitations in support of a nonbinding shareholder proposal, a joint engagement strategy (that is not control-related), or a “vote no” campaign against individual directors in uncontested elections.
- Shareholders engaging in discussions with an issuer’s management, without taking any other action.
- Shareholders jointly making recommendations to the issuer regarding the structure and composition of its board of directors, if (1) no discussion of individual directors or board expansion occurs, and (2) no communications are made, or agreements or understandings are reached, among the shareholders regarding the potential withholding of their votes to approve, or voting against, management’s

director candidates (so long as the issuer does not take steps to implement the shareholders' recommendations).

- Shareholders jointly submitting a nonbinding shareholder proposal for presentation at a shareholders' meeting.
- Communications between a shareholder and an activist that is seeking for its proposals to an issuer's board or management, if the shareholder does not consent or commit to a certain course of action.

On the other hand, the guidance states that a group is likely formed if a beneficial owner of a substantial block of a Covered Class that is or will be required to file a Schedule 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, and one or more of the other market participants make purchases in the same Covered Class as a direct result of that communication.

Effective Dates

The Final Rules will become effective 90 days after their publication in the Federal Register. Compliance with the revised Schedule 13G filing deadlines will be required beginning on September 30, 2024. Compliance with the structured data requirement for Schedules 13D and 13G will be required beginning on December 18, 2024. Compliance with the other rule amendments, including the deadlines for initial and amended Schedule 13D, will be required upon their effectiveness.

Implications

All market participants should welcome these changes as they reflect increased information symmetry among issuers and investors market alike. The Final Rules also better comport with changes in technology and developments in the financial markets, including reduced settling times of equity transactions.

Additionally, the shortening of the Schedule 13D and Schedule 13G filing deadlines will likely increase the burdens of beneficial ownership reporting. The new reporting deadlines may be more

challenging to meet in some instances, especially with respect to Schedule 13D filings. Investors that could be potential filers should adopt best practices that ensure proper systems are in place to ensure compliance with the new filing requirements.

However, the five-business-day Schedule 13D reporting deadline is a relatively moderate departure from the current 10-calendar-day reporting deadline, and is thus unlikely to cause a major shift in the broader beneficial ownership reporting paradigm.

Notes

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1. <https://www.sec.gov/files/rules/final/2023/33-11253.pdf>.

2. QIIs generally include registered brokers or dealers, banks, insurance companies, investment companies registered under Section 8 of the Investment Company Act of 1940, investment advisers registered under Section 203 of the Investment Advisers Act of 1940, a parent holding company or control person (if certain conditions are met), employee benefit plans and pension funds that are subject to the provisions of the Employee Retirement Income Security Act of 1974, savings associations, certain church plans, and certain non-U.S. institutions that are regulated by substantially comparable schemes as their U.S. counterparts, and related holdings and groups. *See* 17 C.F.R. 240.13d-1(b)(1)(ii). To be eligible to report on Schedule 13G, QIIs must have acquired a Covered Class in the ordinary course of business and not with the purpose nor with the effect of changing or influencing the control of the issuer, nor in connection with or as a participant in any transaction having such purpose or effect. 17 C.F.R. 240.13d-1(b)(1)(i).

3. The adopting release uses the term “Exempt Investor” to refer to “persons holding beneficial ownership of more than five percent of a Covered Class, but who have not made an acquisition of beneficial ownership subject to Section 13(d)” (e.g., persons who acquire their securities prior to the securities being registered under the Exchange Act, or persons who acquire no more than two percent of a Covered Class within a 12-month period).

4. The adopting release defines the term “Passive Investors” as beneficial owners of more than five percent but less than 20 percent of a Covered Class who can certify under Item 10 of Schedule 13G that the subject securities were not acquired and are not held for the purpose or effect of changing or influencing the control of the issuer of such securities and were not acquired in connection with or as a participant in any transaction having such purpose or effect.

5. Emphasis added.