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## Public Company Update

# SEC Adopts Rules Modernizing Beneficial Ownership Reporting

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On October 10, 2023, the U.S. Securities and Exchange Commission (the “SEC”) adopted final rules modernizing the beneficial ownership reporting requirements pursuant to Sections 13(d) and 13(g) of the Securities Exchange Act of 1934.<sup>1</sup> As with the recent cybersecurity rules, the final beneficial ownership amendments represent a scaled-back version of the initially proposed rules. The main thrust of the amendments is shortening the filing deadlines for initial and amended beneficial ownership reports filed on Schedules 13D and 13G, with Schedule 13D filings now being due within five business days rather than 10 calendar days. The accelerated filing deadlines will result in public companies and their investors being informed more quickly about certain changes in beneficial ownership positions in a company’s securities.

### Current Regime

As currently constructed, Sections 13(d) and 13(g) and the related rules require investors to report their beneficial ownership on Schedule 13D or Schedule 13G if they own more than five percent of a Section 12 registered equity security (referred to hereafter as a “covered class”). Investors that beneficially own more than five percent of a covered class must file a long form Schedule 13D within 10 calendar days of such acquisition. Certain investors who fit within the exemptions set forth in Rule 13d-1 are eligible to file a short form on Schedule 13G in lieu of a Schedule 13D. For qualified institutional investors and exempt investors, Schedule 13G is generally due 45 days after the calendar year end for the year in which the investor acquired ownership. For passive investors, Schedule 13G is due within 10 days following the acquisition of more than 5% of the covered class.

If certain changes occur in an investors’ percentage of beneficial ownership, holders must file amendments to their Schedule 13D or Schedule 13G filings, as applicable. Schedule 13D filers must also “promptly” file an amendment if a material change in the information presented occurs. Schedule 13G filers must file an annual amendment 45 days following year-end to reflect *any* changes in the prior filing not attributable to a

<sup>1</sup> Modernization of Beneficial Ownership Reporting, Securities Act Release No. 33-11253; Exchange Act Release No. 34-98704 (adopted Oct. 10, 2023) [hereinafter *Final Rule*], <https://www.sec.gov/files/rules/final/2023/33-11253.pdf>.

change in the aggregate number of shares outstanding. Finally, Schedule 13G filers who hold over 10% of a covered class are required to file amendments before year-end in certain circumstances.

### **New Regime**

Pursuant to the amended rules, the deadlines for initial and amended Schedules 13D and 13G will be compressed. For a comparison of the new regime versus the current regime, please see Annex A.

#### *Schedule 13D*

Under the final rules, initial Schedule 13D filings must be filed within five *business* days of the date on which (1) an investor's beneficial ownership of an issuer's covered class exceeds 5% or (2) the investor becomes ineligible to utilize short form Schedule 13G.<sup>2</sup>

Furthermore, Schedule 13D filers will have two *business* days to file an amended Schedule 13D after the occurrence of a material change.

#### *Schedule 13G*

A qualified institutional investor or exempt investor must file its initial Schedule 13G within 45 *calendar* days of the end of the calendar quarter in which the qualified institutional investor or exempt investor trips the 5% threshold.<sup>3</sup> If a qualified institutional investor initially acquires greater than 10% beneficial ownership, its initial Schedule 13G filing will instead be due within five *business* days following month-end. If a qualified institutional investor subsequently increases its ownership above 10% or thereafter has a greater than 5% fluctuation in its beneficial ownership, it must file an amended Schedule 13G within five *business* days following month-end.

A passive investor must file its initial Schedule 13G five *business* days from the date it acquires more than 5% of the issuer's covered class.<sup>4</sup> Thereafter, such filers will have two *business* days to file an amended Schedule 13G if they acquire more than 10% beneficial ownership or after that have a greater than 5% increase or decrease in their beneficial ownership.

With respect to all Schedule 13G filers, the final rule accelerates the deadline for all other amendments to Schedule 13G and specifies a materiality standard for changes triggering an amended filing. The final rule accelerates the amendment deadline for Schedule 13G filers to within 45 *calendar* days following the end of a calendar quarter in which a "material" change occurs.

### **Extension of Filing Deadline**

The final rules enable filers to submit Schedule 13Ds and 13Gs before 10 p.m. ET on a given business day rather than by the current (and standard) 5:30 p.m. ET deadline in order to receive that business day as the filing date.

<sup>2</sup> The SEC further clarified that it must receive the Schedule 13D filing by 10 p.m. ET on the 5<sup>th</sup> business day after the obligation arises in order for the filing to be considered timely (i.e., the date on which the obligation arises does not count towards the five business day calculation).

<sup>3</sup> See footnotes 12 and 13 of the Final Rule for the definitions of "qualified institutional investors" and "exempt investors".

<sup>4</sup> See footnote 16 of the Final Rule for the definition of "passive investors".

## Treatment of Derivative Securities

The final rules amend Item 6 of Schedule 13D to clarify that a person is required to disclose interests in *all derivative securities* that use an issuer's equity security as a reference security, including cash-settled options. The adopting release also provides guidance on the applicability of current Rule 13d-3 to cash-settled derivative securities (other than security-based swaps).

## Group Formation

In the adopting release, the SEC provided guidance on how to make the "group" determination for purposes of Sections 13(d)(3) and 13(g)(3), rather than adopt the proposed amendments to Rule 13d-5. However, the final rules include certain related amendments regarding attribution of group members' acquisition of additional equity securities and intra-group transfers.

## Other Changes

The final rules require all non-exhibit disclosures— quantitative, narrative and checkboxes alike— on Schedules 13D and 13G to be presented in a structured, machine-readable data language. Filers will be able to submit filings on EDGAR either in 13D/G-specific XML or utilizing a web-based platform provided by the SEC that will generate the required 13D/G-specific XML upon filing.

## Timing

The rules will be effective 90 days after publication in the Federal Register. However, filers will have until September 30, 2024 to comply with the revised Schedule 13G filing deadlines and until December 18, 2024 to comply with the structured data requirements.

### Annex A<sup>5</sup>

Issue	Current Schedule 13D	New Schedule 13D	Current Schedule 13G	New Schedule 13G
<b>Initial Filing Deadline</b>	Within 10 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).	<p><u>QIs &amp; Exempt Investors</u>: 45 days after calendar year-end in which beneficial ownership exceeds 5%. Rules 13d-1(b) and (d).</p> <p><u>QIs</u>: 10 days after month-end in which beneficial ownership exceeds 10%. Rule 13d-1(b).</p> <p><u>Passive Investors</u>: Within 10 days after acquiring beneficial</p>	<p><u>QIs &amp; Exempt Investors</u>: 45 days after calendar quarter-end in which beneficial ownership exceeds 5%. Rules 13d-1(b) and (d).</p> <p><u>QIs</u>: Five business days after month-end in which beneficial ownership exceeds 10%. Rule 13d-1(b).</p>

<sup>5</sup> Replicated from the Final Rule.

Issue	Current Schedule 13D	New Schedule 13D	Current Schedule 13G	New Schedule 13G
			ownership of more than 5%. Rule 13d-1(c).	<u>Passive Investors:</u> 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).	<p><u>All Schedule 13G Filers:</u> Any change in the information previously reported on Schedule 13G. Rule 13d-2(b).</p> <p><u>QIs &amp; Passive Investors:</u> Upon exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership. Rules 13d- 2(c) and (d).</p>	<p><u>All Schedule 13G Filers:</u> Material change in the information previously reported on Schedule 13G. Rule 13d-2(b).</p> <p><u>QIs &amp; Passive Investors:</u> Same as current Schedule 13G: Upon exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership. Rules 13d- 2(c) and (d).</p>
<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><u>All Schedule 13G Filers:</u> 45 days after calendar year-end in which any change occurred. Rule 13d-2(b).</p> <p><u>QIs:</u> 10 days after month-end in which beneficial ownership exceeded 10% or there was, as of the month- end, a 5% increase or decrease in beneficial ownership. Rule 13d- 2(c).</p> <p><u>Passive Investors:</u> Promptly after</p>	<p><u>All Schedule 13G Filers:</u> 45 days after calendar quarter-end in which a material change occurred. Rule 13d-2(b).</p> <p><u>QIs:</u> Five business days after month-end in which beneficial ownership exceeds 10% or a 5% increase or decrease in beneficial</p>

Issue	Current Schedule 13D	New Schedule 13D	Current Schedule 13G	New Schedule 13G
Filing "Cut-Off" Time			exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership. Rule 13d- 2(d).	ownership. Rule 13d-2(c).  <u>Passive Investors:</u> Two business days after exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership. Rule 13d- 2(d).
	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.	All Schedule 13G Filers: 5:30 p.m. eastern time. Rule 13(a)(2) of Regulation S-T.	All Schedule 13G Filers: 10 p.m. eastern time. Rule 13(a)(4) of Regulation S-T.



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