

Client Alert: SEC Amends Schedules 13D and 13G Beneficial Ownership Reporting Rules and Filing Requirements

Publications

October 24, 2023

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On October 10, 2023, the U.S. Securities and Exchange Commission (the “SEC”) adopted final rule amendments (the “Final Rules”) that implement various changes to the reporting and filing requirements under Regulation 13D-G^[1] promulgated under the Securities Exchange Act of 1934, as amended (the “Exchange Act”).^[2] The Final Rules (1) accelerate certain filing deadlines for Schedules 13D and 13G, (2) extend the filing “cut-off” time for Schedules 13D and 13G from 5:30 p.m. eastern time to 10:00 p.m. eastern time on business days, (3) impute acquisitions of beneficial ownership by a group member to the entire group following the group’s formation, (4) clarify Schedule 13D disclosure requirements with respect to derivative securities and (5) require that Schedules 13D and 13G be filed using a structured, machine-readable data language. In addition, the Adopting Release provides guidance regarding the application of the current beneficial ownership reporting rules to an investor’s use of certain cash-settled derivative securities, and the application of the current legal standard found in Sections 13(d)(3) and 13(g)(3) of the Exchange Act to certain common types of shareholder engagement activities.

Information about key compliance dates is provided in the section below entitled “Effective Date and Compliance Dates.”

Rule Amendments at a Glance

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

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|----------------------------|---|--|--|--|
| | | | beneficial ownership of more than 5%. Rule 13d-1(c). | beneficial ownership of more than 5%. Rule 13d-1(c). |
| Amendment Filing Deadline | Promptly after the triggering event. Rule 13d-2(a). | Within 2 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>QIIs:</u> 10 calendar days after month-end in which beneficial ownership exceeds 10% or there is, 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 exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership. Rule 13d-2(d).</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>QIIs:</u> 5 business days after month-end in which beneficial ownership exceeds 10% or there is, as of the month-end, a 5% increase or decrease in beneficial ownership. Rule 13d-2(c).</p> <p><u>Passive Investors:</u> 2 business days after exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership. Rule 13d-2(d).</p> |
| Amendment Triggering Event | Material change in the facts set forth in the previous Schedule 13D. Rule 13d-2(a). | Same as pre-amended rule. | <p><u>All Schedule 13G Filers:</u> Any change in the information previously reported on Schedule 13G. Rule 13d-2(b).</p> <p><u>QIIs & 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>QIIs & Passive Investors:</u> Same as pre-amended rule.</p> |
| Filing “Cut-Off” Time | 5:30 p.m. eastern time. Rule 13(a)(2) of Regulation S-T. | 10:00 p.m. eastern time. Rule 13(a)(4) of Regulation S-T. | <u>All Schedule 13G Filers:</u> 5:30 p.m. eastern time. Rule 13(a)(2) of Regulation S-T. | <u>All Schedule 13G Filers:</u> 10:00 p.m. eastern time. Rule 13(a)(4) of Regulation S-T. |
| Filing Format | HTML or ASCII format. EDGAR Filer Manual. | Machine-readable, XML-based language specific to Schedules 13D | <u>All Schedule 13G Filers:</u> HTML or ASCII format. EDGAR Filer Manual. | <u>All Schedule 13G Filers:</u> Machine-readable, XML-based language specific to |

Guidance Updates at a Glance

Treatment of Cash-Settled Derivative Securities

- Beneficial ownership of cash-settled derivative securities may be required to be reported in cases in which such derivative security:
 - o Confers voting and/or investment power;
 - o 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; and
 - o Grants a right to acquire an equity security.

Group Formation Legal Standard

- The appropriate legal standard for determining whether a group is formed is set forth in Sections 13(d)(3) and 13(g)(3) of the Exchange Act.
 - o “When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer.”
- Rule 13d-5(b)(1) does not serve as a substitute for, or otherwise narrow, the legal standard set forth in Sections 13(d)(3) and 13(g)(3) of the Exchange Act.
- Certain communications with other shareholders about the governance of the issuer may not result in the formation of a group under new guidance.
- A beneficial owner could be found to be part of a group with a third party to which it communicates non-public information about such beneficial owner’s forthcoming Schedule 13D filing if (x) the beneficial owner intends to cause the third party to purchase the class of securities subject to the Schedule 13D filing and (y) the third party in fact purchases such securities.

Background

Sections 13(d) and 13(g) of the Exchange Act, along with Regulation 13D-G promulgated thereunder,^[3] require persons or groups who own or acquire beneficial ownership of more than 5% of certain classes of equity securities^[4] to publicly file reports with the SEC. Persons or groups subject to such beneficial ownership reporting requirements make their reports on either Schedule 13D or, if they are eligible, on a short form Schedule 13G.

Persons or groups are eligible to use the short form Schedule 13G only if they fall into one of the following categories:

- Rule 13d-1(b): A Qualified Institutional Investor^[5] that has acquired more than 5% of a covered class of equity securities in the ordinary course of the person's 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.
- Rule 13d-1(c): A person or group that beneficially owns more than 5% but less than 20% of a covered class of equity securities that are held in the ordinary course of business and were not acquired and are not held for the purpose of or with the effect of changing or influencing the control of the issuer of the securities and were not acquired and are not held in connection with or as a participant in any transaction having that purpose or effect (collectively, "Passive Investors").
- Rule 13d-1(d): An Exempt Investor^[6] that, as of the end of any calendar year, is or becomes the beneficial owner of more than 5% of a covered class of equity securities.

Amendments to Regulation 13D-G

1. Shorter Filing Deadlines for Initial Schedules 13D and 13G

Rules Prior to Amendments

Rule 13d-1 had required persons or groups to file an initial Schedule 13D within 10 calendar days after acquiring beneficial ownership of more than 5% of a covered class of equity securities. In addition, if a person or group previously filed a Schedule 13G but subsequently loses its eligibility to

use Schedule 13G, Rules 13d-1(e)–(g) had required such person or group to file an initial Schedule 13D with the SEC within 10 calendar days of losing such eligibility.

To the extent a person or group is eligible to file Schedule 13G instead, the initial filing deadlines for Schedule 13G had been:

- Qualified Institutional Investors: Within 45 calendar days after the end of the calendar year in which the person or group beneficially owns more than 5% of a covered class of equity securities as of the last day of such calendar year; provided, that if such person or group beneficially owns more than 10% of a covered class of equity securities prior to the end of the calendar year, the deadline accelerates to within 10 calendar days after the end of the first month in which the person or group beneficially owns more than 10% of such securities as of the last day of such month.^[7]
- Passive Investors: Within 10 calendar days after the person or group acquires beneficial ownership of more than 5% of a covered class of equity securities.^[8]
- Exempt Investors: Within 45 calendar days after the end of the calendar year in which the person or group beneficially owns more than 5% of a covered class of equity securities as of the last day of such calendar year.^[9]

Amended Rules

The Final Rules shorten the initial filing deadline for Schedule 13D to **5 business days** after the date of the acquisition of 5% or more of a covered class of equity securities from within 10 calendar days of such acquisition.^[10] This change aligns with Congress's amendment to Section 13(d)(1) of the Exchange Act in Section 929R of the Dodd-Frank Act, which granted the SEC the authority to shorten the deadline for filing an initial Schedule 13D.

The Final Rules also shorten the initial filing deadlines for Schedule 13G as follows:

- Qualified Institutional Investors: Within 45 calendar days after the end of the **calendar quarter** in which the person or group beneficially owns more than 5% of a covered class of equity securities on the last day of such **calendar quarter**; provided, that if such person or group beneficially owns more than 10% of a covered class of equity securities prior to the end of the **calendar quarter**, the deadline is accelerated to within **5 business days** after the end of the first month in which the person or group beneficially owns more than 10% of such securities on the last day of such month.
- Passive Investors: **5 business days** after date that the person or group acquires beneficial ownership of more than 5% of a covered class of equity securities.

- Exempt Investors: Within 45 calendar days after the end of the **calendar quarter** in which the person or group beneficially owns more than 5% of a covered class of equity securities as of the last day of such **calendar quarter**.

The SEC indicated that it adopted the foregoing amendments due to the technological advancements and developments in the financial markets in the decades since the initial Schedules 13D and 13G filing deadlines were first implemented, so that material information can be disseminated into the market in a manner that is considered timely by modern standards. The SEC also indicated that it expects that shortening the deadlines for filing an initial Schedule 13G will help reduce the risk that Qualified Institutional Investors and Exempt Investors will “sell down their positions before the end of the year and avoid reporting altogether.”^[11] Furthermore, the new filing deadlines for Schedule 13G for QIIs and Exempt Investors are aligned with the current deadlines for filing Form 13F.

2. Filing Deadlines for Amendments to Schedules 13D and 13G

Rules Prior to Amendments

Rule 13d-2(a) has not imposed a firm deadline by when an amendment to Schedule 13D must be filed. Instead, the rule provides that an amendment must be filed “promptly.” The SEC did not specifically define “promptly”, leaving some question as to the actual deadline.

For Schedule 13G, Rule 13d-2(c) had required Qualified Institutional Investors to file an amendment within 10 calendar days after the end of the first month in which their beneficial ownership exceeds 10% as of the last day of such month and, to the extent the 10% threshold was previously reached, also within 10 calendar days after the end of the first month in which their beneficial ownership increases or decreases more than 5% as of the last day of such month.^[12] Separately, Rule 13d-2(d) had required Passive Investors to file an amendment to Schedule 13G “promptly” upon acquiring more than 10% of the subject securities and, to the extent the 10% threshold was previously reached, also “promptly” after their beneficial ownership increases or decreases more than 5%.^[13] And for all Schedule 13G filers (which, for the avoidance of doubt, is in addition to the foregoing requirements), an amendment must be filed within 45 calendar days after the end of the calendar year in which a reportable change to the information set forth in the Schedule 13G occurs.

Amended Rules

Pursuant to the Final Rules, amendments to Schedule 13D will now be due **2 business days** following the date of the change giving rise to the amendment, thereby removing any uncertainty associated with the “promptly” standard.

The Final Rules shortened the filing deadlines under (a) Rule 13d-2(c) for Qualified Institutional Investors to **5 business days** after the end of the first month in which their beneficial ownership

exceeds 10% as of the last day of such month and, to the extent the 10% threshold was previously reached, **5 business days** after the end of the first month in which their beneficial ownership increases or decreases more than 5% as of the last day of such month and (b) Rule 13d-2(d) for Passive Investors to **2 business days** after acquiring more than 10% of the subject securities and, to the extent the 10% threshold was previously reached, also **2 business days** after their beneficial ownership increases or decreases more than 5%. In each case the SEC indicated that it believes it is appropriate to accelerate the filing deadlines for the same reasons discussed above for the filing of the initial Schedules 13D and 13G. The amendment to Rule 13d-2(d) also maintains the consistency in filing deadlines between Schedule 13D filers and Passive Investors.

The Final Rules also shorten the deadline for filing an amendment to Schedule 13G under Rule 13d-2(b) to within 45 days after the end of the calendar quarter in which the change giving rise to the amendment occurs, mirroring the changes made to the new filing deadline for an initial Schedule 13G.

3. Triggering Events for Amendments to Schedules 13D and 13G

Rules Prior to Amendments

Under current rules, an amendment to Schedule 13D must be filed if “any material change occurs in the facts set forth in the Schedule 13D.”^[14] Rule 13d-2(a) provides that such material changes are not limited to acquisitions, but also include any material changes in the disclosure narrative contained in Schedule 13D and any material changes in the amount of beneficial ownership caused by the issuer of the subject securities (e.g., an increase in the aggregate number of subject securities outstanding that causes the filer’s relative beneficial ownership to materially decrease).

In contrast, Rule 13d-2(b) had provided that an amendment to Schedule 13G must be filed if there were “any changes” in the previously reported information as of the end of the calendar year, other than a change in the amount of beneficial ownership resulting solely from a change in the number of subject securities outstanding.

And as discussed in the preceding section, Qualified Institutional Investors and Passive Investors must file an amendment to Schedule 13G pursuant to Rule 13d-2(c) and Rule 13d-2(d), respectively, if their beneficial ownership exceeds 10% (for QIIs, measured as of the last day of a month) and, thereafter, if their beneficial ownership increases or decreases by more than 5% (for QIIs, measured as of the last day of a month).

Amended Rules

No changes were made to the triggering language for an amendment to Schedule 13D or an amendment to Schedule 13G pursuant to Rules 13d-2(c)–(d). However, the Final Rules revised Rule 13d-2(b) to expressly include a materiality standard for such changes that will trigger a requirement

to file an amendment to Schedule 13G. As a result, amendments to Schedule 13G will more closely align with the standard for amendments to Schedule 13D.

4. Imputation of Group Member Acquisitions on Group

The Final Rules include new Rules 13d-5(b)(1)(ii) and 13d-5(b)(2)(i), which expressly provide that a group under Section 13(d)(3) of the Exchange Act or under Section 13(g)(3) of the Exchange Act, respectively, is deemed to have acquired beneficial ownership of the subject securities that any group member acquires beneficial ownership of on or after the date the group is formed. As a result, the SEC (or other affected party) will no longer need to prove that a post-formation acquisition of beneficial ownership by a group member is attributable to the group.

However, the Final Rules also include new Rules 13d-5(b)(1)(iii) and 13d-5(b)(2)(ii) to clarify that intra-group transfers of equity securities will not be deemed to be acquisitions of beneficial ownership pursuant to new Rules 13d-5(b)(1)(ii) and 13d-5(b)(2)(i).

5. Disclosure Requirements Regarding Derivative Securities

Pursuant to Item 6 of Schedule 13D, filers are required to “[d]escribe any contracts, arrangements, understandings or relationships (legal or otherwise) among the persons named in Item 2 [of Schedule 13D] and between such persons and any person with respect to any securities of the issuer.” Item 6 includes a non-exclusive list of examples of items to be disclosed, and such list had not expressly included cash-settled derivative securities.

To remove any doubt as to whether the scope of Item 6 includes cash-settled derivative securities, the Final Rules amend Item 6 of Schedule 13D to expressly state that derivative contracts, arrangements, understandings, and relationships with respect to an issuer’s securities, including cash-settled security-based swaps and other derivatives which are settled exclusively in cash, must be disclosed.

Additional Amendments Relating to Regulation 13D-G Filings

1. Filing “Cut-Off” Time

Rules Prior to Amendments

Regulation S-T governs the preparation and submission of documents filed electronically on the SEC’s EDGAR system, including Schedules 13D and 13G. Pursuant to Rule 13(a) of Regulation S-T, if Schedules 13D or 13G are filed after 5:30 p.m. eastern time on a day during which filings can be made on EDGAR, such filing shall be deemed filed on the next business day.

If a filer experiences unanticipated technical difficulties that prevent the timely submission of a Schedule 13D or Schedule 13G, it can obtain a temporary hardship exemption under Rule 201 of Regulation S-T by submitting a paper copy of the filing under cover of Form TH. The filer can

separately request, and the SEC may grant, a filing date adjustment under Rule 13(b) of Regulation S-T if the technical difficulties prevent the timely submission are beyond the filer's control.

Amended Rules

The filing "cut-off" time for Schedules 13D or 13G under Rule 13(a) of Regulation S-T will be extended from 5:30 p.m. eastern time to 10:00 p.m. eastern time on days during which filings can be made on EDGAR, to help filers comply with the new accelerated filing deadlines for Schedules 13D and 13G. If a Schedule 13D or Schedule 13G is filed after 10:00 p.m. eastern time, it will be deemed filed on the next business day.

In connection with the extended "cut-off" time, the Final Rules also amend Rule 201(a) of Regulation S-T to remove the ability to obtain a temporary hardship exemption for Schedules 13D or 13G. This is consistent with how the SEC handles filings made pursuant to Section 16 of the Exchange Act (e.g., Forms 3, 4 and 5), which also can be submitted until 10:00 p.m. eastern time. Filers of Schedules 13D and 13G will still be able to request a filing date adjustment under Rule 13(b) of Regulation S-T.

2. Filing Data Language

Rule Prior to Amendment

The EDGAR Filer Manual had required Schedules 13D and 13G to be filed electronically on EDGAR using either HTML or ASCII format. Neither of these formats allow for Schedules 13D or 13G to be machine-readable, which generally adds a layer of difficulty for investors to compile and analyze such information as compared to other EDGAR filings that use a machine-readable data language (e.g., filings made pursuant to Section 16 of the Exchange Act).

Amended Rule

To help improve the accessibility and usability of Schedules 13D and 13G, the SEC adopted amendments to the EDGAR Filer Manual to require such filings to be made using an XML-based language specific to Schedules 13D and 13G. The new language will be used for all disclosures in such filings, except for any attached exhibits to a filing (which can continue to use an unstructured data language). It is worth noting that the SEC did not mandate XBRL with Schedules 13D and 13G—only a new XML-based language.^[15]

New Guidance Relating to Regulation 13D-G

1. Cash-Settled Derivative Securities

Pursuant to the definition of "beneficial ownership" under Rule 13d-3, certain types of derivative securities are counted towards a person's or group's beneficial ownership.^[16] Generally, a derivative security must be settled in kind or otherwise convey a right to acquire an equity security,

and either (i) the right to exercise or convert the derivative security must occur within 60 days of the determination date or (ii) the holder acquired the derivative security for the purpose or with the effect of changing or influencing control of the issuer.

The SEC had proposed^[17] adding a new Rule 13d-3(e) that would have deemed holders of cash-settled derivatives securities (other than security-based swaps) to be beneficial owners of the underlying equity securities if such person or group “holds the derivative security with the purpose or effect of changing or influencing the control of the issuer of such class of equity securities, or in connection with or as a participant in any transaction having such purpose or effect.”^[18] The SEC indicated that one rationale behind this proposed amendment was that a holder of cash-settled derivative securities could potentially influence “the voting, acquisition or disposition of any shares the counterparty [to the derivative transaction] may have acquired in a hedge, proprietary investment or otherwise.”^[19] In other words, the holder of a large interest in cash-settled derivative securities could potentially exert control over the subject issuer through an unrelated third party, and such control would fall outside the purview of Regulation 13D-G. Further, the SEC indicated that because a cash-settled derivative security could be amended into a security-settled derivative security, or directly converted into a subject security, in each case by amendment or otherwise, holders of such cash-settled derivative securities could periodically use their economic positions to influence the issuer or its shareholders to engage them in discussion about the direction of the issuer.

In the Adopting Release, the SEC declined to adopt new Rule 13d-3(e). However, the SEC provided clarifying guidance on the treatment of cash-settled derivative securities under existing rules that is consistent with the SEC’s guidance on the treatment of security-based swaps. As stated by the SEC in 2011, security-based swaps under “our existing regulatory regime may require the reporting of beneficial ownership” in cases in which a security-based swap (1) “confers voting and/or investment power (or a person otherwise acquires such power based on the purchase or sale of a security-based swap),” (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,” or (3) “grants a right to acquire an equity security.”^[20] Likewise, the SEC stated in the Adopting Release that it also considers the three-factor analytical framework to be instructive for assessing whether the underlying equity securities to a cash-settled derivative security may be deemed beneficially owned by the holder of the cash-settled derivative security. Accordingly, a holder of cash-settled derivative securities would be wise to apply this existing framework and consider the particular facts and circumstances surrounding the form, strategy, and purpose of its ownership of such cash-settled derivative securities when considering its filing obligations under Regulation 13D-G.

2. Group Formation Legal Standard

Sections 13(d)(3) and 13(g)(3) of the Exchange Act provide a standard by which the actions of two or more persons are required to report their collective beneficial ownership of securities of an issuer

as “group.” Such sections do not expressly require that two or more persons have an agreement among each other for a group to exist. Separately, Rule 13d-5(b)(1) provides that a group is formed for purposes of Sections 13(d)(3) and 13(g)(3) of the Exchange Act “[w]hen two or more persons agree to act together for the purpose of acquiring, holding, voting or disposing of equity securities of an issuer . . . as of the date of such agreement” (emphasis added).

The SEC proposed amendments to Rule 13d-5(b)(1) to more closely track the language of Sections 13(d)(3) and 13(g)(3), which it indicated would help clarify that “a group does not depend solely on the presence of an express agreement” and that Rule 13d-5(b)(1) is not intended to narrow the standard set out in Sections 13(d)(3) and 13(g)(3) of the Exchange Act.^[21] The SEC also proposed adding a new subsection to Rule 13d-5(b)(1) that would have deemed (1) a person who shares non-public information about its upcoming Schedule 13D filing with the purpose of causing others to make purchases of such subject securities and (2) persons who subsequently purchase such subject securities based on the tipped information, to be a group within the meaning of Section 13(d)(3) of the Exchange Act. However, the SEC declined to adopt each of the foregoing amendments to Rule 13(d)-5(b)(1).

Instead, the SEC provided in the Adopting Release clarifying guidance about the standard applicable to the formation of a group under Sections 13(d)(3) and 13(g)(3) of the Exchange Act, including activities that may impact the governance of an issuer. This guidance is summarized below:

1. **Reiteration of Legal Standard:** The appropriate legal standard for determining whether a group is formed is set forth in Sections 13(d)(3) and 13(g)(3) of the Exchange Act, and Rule 13d-5(b)(1) does not serve as a substitute for the legal standard set forth in Sections 13(d)(3) and 13(g)(3) of the Exchange Act.
2. **Simple Communications Do Not Result in a Group:** A group is not formed when two or more shareholders communicate with each other regarding an issuer or its securities, without taking any other actions.
3. **Simple Communications with Issuer Management Do Not Result in a Group:** A group is not formed when two or more shareholders engage in discussions with an issuer’s management, without taking any other actions.
4. **Certain Recommendations Regarding Issuer Governance Do Not Result in a Group:** A group is not formed when shareholders jointly make recommendations to an issuer regarding the structure and composition of the issuer’s board of directors where (x) no discussion of individual directors or board expansion occurs and (y) no commitments 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 if the issuer does not take steps to implement the shareholders’ recommended actions.
5. **Joint Submissions of Rule 14a-8 Shareholder Proposals Do Not Result in a Group:** A group is not formed if shareholders jointly submit a non-binding shareholder proposal to an issuer pursuant to Exchange Act Rule 14a-8 for presentation at a meeting of shareholders, and the joint conduct is

limited to the creation, submission and/or presentation of such proposal.

6. **Taking Calls with Activists Do Not Result in a Group:** A group is not formed if a shareholder communicates by email or phone, or has a meeting with, an activist investor that is seeking support for its proposals to an issuer’s board or management, without taking any other actions.

7. **Announcing Voting Support Does Not Result in a Group:** A group is not formed if a shareholder announces or communicates its intention to vote in favor of an unaffiliated activist investor’s director nominees, without taking any other actions (except for voting in favor of such nominees).

8. **Tippling About Schedule 13D Status May Result in a Group:** If a beneficial owner of a substantial block of securities is required to file a Schedule 13D, such requirement to file a Schedule 13D is not yet public, and such person intentionally communicates to other market participants that such filing will be made with the purpose of causing such persons to make purchases of the subject securities, a group may be formed between (x) such beneficial owner and (y) any other market participant that makes purchases of the subject securities as a direct result of the beneficial owner’s communication, depending on the particular facts and circumstances.

Effective Date and Compliance Dates

The Final Rules will become effective 90 days after publication of the Adopting Release in the Federal Register. Compliance with the Final Rules will be required at such time, except as set forth below:

- Compliance with the machine-readable data language requirement for Schedules 13D and 13G is not required until December 18, 2024, but filers can begin to voluntarily comply with such requirement beginning on December 18, 2023; and
- Compliance with the revised Schedule 13G filing deadlines under Rules 13d-1 and 13d-2 will not be required until September 30, 2024.

Footnotes

[1] For purposes herein, “Regulation 13D-G” refers to title 17, part 240 of the Code of Federal Regulations, in which 17 CFR 240.13d-1 through 13f-1 are published.

[2] Modernization of Beneficial Ownership Reporting, Release Nos. 33-11253; 34-98704 (October 10, 2023), available at <https://www.sec.gov/files/rules/final/2023/33-11253.pdf> [hereinafter, the “Adopting Release”].

[3] Unless otherwise noted, all references to “Rules” hereunder (e.g., Rule 13d-1) are to 17 CFR 240.13d-1 through 13f-1.

[4] Rule 13d-1(i) defines “equity securities” subject to Regulation 13D-G as “any equity security of a class which is registered pursuant to section 12 of [the Exchange Act], or any equity security of any insurance company which would have been required to be so registered except for the exemption contained in section 12(g)(2)(G) of [the Exchange Act], or any equity security issued by a

closed-end investment company registered under the Investment Company Act of 1940; Provided, Such term shall not include securities of a class of non-voting securities.”

[5] “Qualified Institution Investor” or “QII” refers to institutional investors qualified to report on Schedule 13G, in lieu of Schedule 13D and in reliance upon Rule 13d-1(b). Such persons or groups include: (i) a broker or dealer registered under Section 15 of the Exchange Act, (ii) a bank as defined in Section 3(a)(6) of the Exchange Act, (iii) an insurance company as defined in Section 3(a)(19) of the Exchange Act, (iv) an investment company registered under Section 8 of the Investment Company Act of 1940, (v) a person registered as an investment adviser under Section 203 of the Investment Advisers Act of 1940 or under the laws of any state, (vi) a parent holding company or control person (if certain conditions are met), (vii) an employee benefit plan or pension fund that is subject to the provisions of the Employee Retirement Income Security Act of 1974 (or other state or local government pension plans or endowment funds), (viii) a savings association as defined in Section 3(b) of the Federal Deposit Insurance Act, (ix) a church plan that is excluded from the definition of an investment company under Section 3(c)(14) of the Investment Company Act of 1940, (x) non-U.S. institutions that are the functional equivalent of any of the institutions listed in Rules 13d-1(b)(1)(ii)(A) through (I), so long as the non-U.S. institution is subject to a regulatory scheme that is substantially comparable to the regulatory scheme applicable to the equivalent U.S. institution, and (xi) related holding companies and groups.

[6] “Exempt Investor” refers to persons holding beneficial ownership of more than 5% of a covered class, but who have not made an acquisition of beneficial ownership subject to Section 13(d) of the Exchange Act. For example, persons who acquire all of their securities prior to the issuer registering the subject securities under the Exchange Act (i.e., before the company is public or registered its securities under Section 12 of the Exchange Act) are not subject to Section 13(d) of the Exchange Act. In addition, persons who acquire no more than 2% of a covered class within a 12-month period are exempted from Section 13(d) of the Exchange Act (see Section 13(d)(6)(B) of the Exchange Act). In both cases, however, those persons are subject to Section 13(g) of the Exchange Act.

[7] Rule 13d-1(b)(2).

[8] Rule 13d-1(c).

[9] Rule 13d-1(d).

[10] The Final Rules also newly-define the term “business day,” which was not previously a defined term in Regulation 13D-G. Under Rule 13d-1(i), a “business day” will be “any day, other than Saturday, Sunday, or a Federal holiday, from 12:00 a.m. to 11:59 p.m.” Under this formulation, the business day after the acquisition of 5% or more is “Day 1” on the 5-day clock. See Adopting Release at 38 n. 136.

[11] Adopting Release at 70.

[12] Rule 13d-2(c) further provides that, once an amendment to Schedule 13G has been filed reflecting beneficial ownership of 5% or less of the subject securities, no additional filings are required pursuant to Rule 13d-2(c).

[13] Rule 13d-2(d) further provides that, once an amendment to Schedule 13G has been filed reflecting beneficial ownership of 5% or less of the subject securities, no additional filings are required pursuant to Rule 13d-2(d).

[14] Rule 13d-2(a).

[15] Adopting Release at 269 (“We believe that 13D/G-specific XML is more suitable than XBRL for Schedules 13D and 13G because it facilitates the use of a fillable form that should result in a lower cost of complying with the structured data requirement compared to XBRL, particularly for smaller and infrequent filers.”)

[16] See Rule 13d-3(d)(i)(A).

[17] As used herein, “Proposing Release” refers to Modernization of Beneficial Ownership Reporting, Release Nos. 33-11030; 34-94211 (Feb. 10, 2023), available at <https://www.sec.gov/files/rules/proposed/2022/33-11030.pdf>.

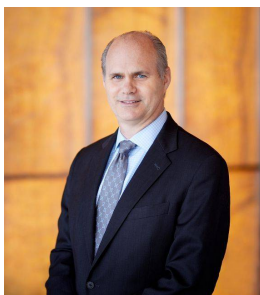
[18] Proposing Release at 55.

[19] *Id.* at 56.

[20] Beneficial Ownership Reporting Requirements and Security-Based Swaps, Release No. 34-64628 (June 8, 2011), available at <https://www.sec.gov/files/rules/final/2011/34-64628.pdf>.

[21] Proposing Release at 77–78.

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