

Memorandum

SEC Amends Schedule 13D and Schedule 13G Beneficial Ownership Disclosure Requirements

October 12, 2023

On October 10, 2023, the U.S. Securities and Exchange Commission (the “SEC”) adopted amendments to certain of its public company beneficial ownership reporting requirements. Among other things, the amendments will:

- Shorten the deadline for filing an initial Schedule 13D from 10 calendar days to 5 business days;
- Specify that amendments to a Schedule 13D must be filed within 2 business days after the date of a triggering event; and
- Require many initial Schedule 13Gs and certain amendments to Schedule 13Gs be filed within 45 days after the end of the applicable calendar quarter, rather than the end of the calendar year.

Amendments were also adopted relating to, among other things, disclosure of cash-settled derivative securities and a structured data filing requirement for Schedule 13D and Schedule 13G. The SEC’s [release](#) announcing these amendments also included guidance on the application of existing legal standards to whether cash-settled derivative securities confer beneficial ownership of the underlying reference security and whether certain common shareholder engagement activities constitute “group” action for purposes of Sections 13(d)(3) and 13(g)(3) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”).

Compliance Timeline

Compliance with the revised Schedule 13G filing deadlines will be required beginning on September 30, 2024. Compliance with the structured data filing requirement for Schedule 13D and Schedule 13G will be required on December 18, 2024. Compliance with the revised Schedule 13D filing deadlines and all other amendments adopted by the SEC will be required 90 days after publication of such amendments in the Federal Register. Guidance from the SEC included in the adopting release should be considered effective immediately.

Key Takeaways

ACCELERATED FILING DEADLINES FOR INITIAL AND AMENDED SCHEDULE 13DS AND SCHEDULE 13GS

Sections 13(d) and 13(g) of the Exchange Act have long required public filing of either a Schedule 13D or a Schedule 13G by persons who beneficially own more than 5% of a class of equity security specified in Rule 13d-1(i) under the Exchange Act (generally, voting securities registered under Section 12 of the Exchange Act and referred

to herein as a “covered security”). The amendments adopted by the SEC will, among other things, generally shorten the deadlines for filing both initial and amended beneficial ownership reports on Schedule 13D and Schedule 13G, as discussed in further detail in the table below. The SEC also extended the hours during which Schedule 13Ds and Schedule 13Gs, and amendments thereto may be filed electronically via the SEC’s Electronic Data Gathering, Analysis, and Retrieval (“EDGAR”) system and be deemed to have been filed on the same business day to 6:00 a.m. Eastern Time through 10:00 p.m. Eastern Time (previously such filings were not considered filed on the same business day after 5:30 p.m. Eastern Time). In addition, the SEC amended Rule 13d-2(b) under the Exchange Act, which applies to all Schedule 13G filers, to require quarterly updates to previously filed Schedule 13Gs to reflect “material changes” to the facts previously supplied (replacing a prior rule requiring annual updates upon “any change” in the facts previously reported).

Schedule 13Ds

	Current Schedule 13D	Amended Schedule 13D
Initial Filing Deadline	Within 10 calendar days after the date on which beneficial ownership of >5% of a covered security was acquired or eligibility to file on Schedule 13G was lost. Rules 13d-1(a), (e), (f), and (g).	Within five business days after the date on which beneficial ownership of >5% of a covered security was acquired or eligibility to file on Schedule 13G was lost. Amended Rules 13d-1(a), (e), (f), and (g).
Amendment Filing Deadline	Promptly after material change in the facts set forth in the previous Schedule 13D. Rule 13d-2(a).	Within two business days after the date of a material change in the facts set forth in the previous Schedule 13D. Amended Rule 13d-2(a).

Schedule 13Gs

	Current Schedule 13G	Amended Schedule 13G
Initial Filing Deadline	<u>Qualified institutional investors who file pursuant to Rule 13d-1(b) under the Exchange Act (“QIIs”)</u> : (i) 45 days after the first calendar year-end on which they held >5% beneficial ownership of a covered security or, (ii) if they held >10% beneficial ownership of a covered security prior to the end of such calendar year, 10 days after the first month-end on which they held >10%. Rule 13d-1(b).	<u>QIIs</u> : (i) 45 days after the first calendar quarter-end on which they held >5% beneficial ownership of a covered security or, (ii) if they held >10% beneficial ownership of a covered security prior to the end of such calendar quarter, five business days after the first month-end on which they held >10%. Amended Rule 13d-1(b).
	<u>Passive investors who file pursuant to Rule 13d-1(c) under the Exchange Act (“Passive Investors”)</u> : Within 10 days after acquiring beneficial ownership of >5% of a covered security. Rule 13d-1(c).	<u>Passive Investors</u> : Within five business days after acquiring beneficial ownership of >5% of a covered security. Amended Rule 13d-1(c).
	<u>Exempt investors who file pursuant to Rule 13d-1(d) under the Exchange Act (“Exempt Investors”)</u> : 45 days after the initial calendar year-end on which they held >5% beneficial ownership of a covered security. Rule 13d-1(d).	<u>Exempt Investors</u> : 45 days after the initial calendar quarter-end on which they held >5% beneficial ownership of a covered security. Amended Rule 13d-1(d).

	Current Schedule 13G	Amended Schedule 13G
Amendment Filing Deadline	<u>All Schedule 13G filers</u> : 45 days after any calendar year-end on which any change to the facts set forth in the previous Schedule 13G has occurred. Rule 13d-2(b).	<u>All Schedule 13G filers</u> : 45 days after any calendar quarter-end on which a material change to the facts set forth in the previous Schedule 13G has occurred. Amended Rule 13d-2(b).
	<u>QIIs</u> : 10 days after the end of the first month in which they held beneficial ownership >10% of a covered security at month-end. Thereafter, ten days after the first month-end on which their beneficial ownership, computed as of the last day of the month, increased or decreased by >5% of the relevant class of covered security. Rule 13d-2(c).	<u>QIIs</u> : Five business days after the end of the first month in which they held beneficial ownership >10% of a covered security at month-end. Thereafter, five business days after the first month-end on which their beneficial ownership, computed as of the last day of the month, increased or decreased by >5% of the relevant class of covered security. Amended Rule 13d-2(c).
	<u>Passive Investors</u> : Promptly after acquiring >10% beneficial ownership of a covered security. Thereafter, promptly following any 5% increase or decrease in beneficial ownership of such security. Rule 13d-2(d).	<u>Passive Investors</u> : Two business days after acquiring >10% beneficial ownership of a covered security. Thereafter, two business days after any 5% increase or decrease in beneficial ownership of such security. Amended Rule 13d-2(d).

CLARIFICATION OF DISCLOSURE REQUIREMENTS WITH RESPECT TO CERTAIN DERIVATIVE SECURITIES

Amendment to Schedule 13D. Item 6 of Schedule 13D currently requires beneficial owners to describe any contracts, arrangements, understandings or relationships they have with respect to any securities of the issuer. The SEC adopted an amendment to Schedule 13D, as codified in Rule 13d-101 under the Exchange Act, to clarify that the disclosure required by Item 6 is intended to include a description of all derivative securities held by the filer that use a covered security as their reference security, including cash-settled security-based swaps and other derivatives that are settled exclusively in cash.

SEC Guidance. The SEC considered, but ultimately rejected, proposed amendments that would have deemed certain holders of cash-settled derivative securities to be the beneficial owners of the underlying reference security for purposes of Rule 13d-3 under the Exchange Act. Instead of adopting such amendments, the SEC elected to provide guidance in its adopting release discussing how, under the current Rule 13d-3, persons using these types of derivative securities may be deemed to be beneficial owners of the underlying reference securities based on the same existing principles applicable to holders of other securities. The SEC’s guidance for cash-settled derivative securities, which is consistent with its 2011 guidance with respect to security-based swaps, is that holders of cash-settled derivative securities should be deemed to be the beneficial owner of the underlying reference security to the extent such derivative security, directly or indirectly, (i) confers voting or investment power over the reference security through contractual terms or otherwise; (ii) is used with the purpose or effect of divesting or preventing the vesting of beneficial ownership on the holder of the derivative security as part of a plan or scheme to evade beneficial ownership reporting requirements; or (iii) grants a right to acquire beneficial ownership of the

reference security within 60 days or the right to acquire beneficial ownership of the reference security with the purpose or effect of changing or influencing control of the issuer of the reference security or in connection with or as a participant in any transaction having such purpose or effect, regardless of when exercisable.

CLARIFICATION ON RULES REGARDING THE FORMATION OF GROUPS FOR SECTION 13 PURPOSES AND RELATED TOPICS

Rather than adopting certain previously proposed amendments to the rules regarding the circumstances under which two or more persons may coordinate and engage with an issuer without being subject to regulation as a group, the SEC issued guidance in its adopting release intended to provide clarity 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 adopting release clarifies the SEC’s position that “The determination 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.”

The SEC also gave examples of typical shareholder activities that, without further action, would not, in the SEC’s view, constitute multiple persons acting as a group for the purposes of Section 13(d)(3) or Section 13(g)(3) of the Exchange Act:

- Exchanging views or other types of dialogue with other shareholders, in oral or written form, not involving an intent to engage in concerted actions or other agreement with respect to the acquisition, holding, or disposition of securities, including discussions related to the long-term performance of an issuer or changes in issuer practices;
- Discussions among shareholders of submissions or solicitations in support of non-binding shareholder proposals or joint submissions of such proposals (provided there is no agreement to vote against director candidates nominated by the issuer’s management or other management proposals if such non-binding shareholder proposal is not included in the issuer’s proxy statement or, if passed, not acted upon favorably by the issuer’s board of directors);
- The formation of joint engagement strategies that are not control-related, or coordination of “vote no” campaigns against individual directors in uncontested elections;
- Engaging with other shareholders in an exchange of ideas and views with the issuer’s management, including jointly making recommendations to the issuer regarding the structure and composition of the issuer’s board of directors where (i) no discussion of individual directors or board expansion occurs and (ii) 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;
- Conversation, email, phone contact, or meetings between a shareholder and an activist investor that is seeking support for its proposals to an issuer’s board or management, without commitment to a course of

action (provided such shareholder does not engage in joint or coordinated publication of soliciting materials with such activist investor); and

- Announcements, public or private, of a shareholder's independently-determined voting intentions.

The SEC warned, however, that intentional communications by the beneficial owner of a substantial block of a covered security that is, or will be required to, file a Schedule 13D to other market participants that such a filing will be made (to the extent this information is not yet public) with the purpose of causing such market participants to make purchases in the same class of covered security may cause such blockholder and any market participants who made purchases as a direct result of such communication to become subject to regulation as a group.

NEW STRUCTURED DATA FILING REQUIREMENT FOR SCHEDULE 13D AND SCHEDULE 13G

The SEC adopted amendments that will require all Schedule 13D and Schedule 13G disclosures, except exhibits to such filings, be filed in EDGAR using a machine readable XML-based language specific to such filings. As is the case with other EDGAR XML filings, reporting persons will be able to, at their option, submit filings directly to EDGAR in such 13D/G-specific XML or use a web-based reporting application developed by the SEC that will generate the Schedule in 13D/G-specific XML in connection with the submission of the filing to EDGAR.

For further information regarding this memorandum, please contact one of the following:

NEW YORK CITY

Joseph H. Kaufman

+1-212-455-2948
jkaufman@stblaw.com

Karen Hsu Kelley

+1-212-455-2408
kkelley@stblaw.com

Jonathan Lindabury

+1-212-455-3342
jonathan.lindabury@stblaw.com

Jennifer L. Nadborny

+1-212-455-2814
jnadborny@stblaw.com

Kenneth B. Wallach

+1-212-455-3352
kwallach@stblaw.com

Bettina C. Elstroth

+1-212-455-7637
bettina.elstroth@stblaw.com

Neil Patel

+1-212-455-2172
neil.patel@stblaw.com

PALO ALTO

William B. Brentani

+1-650-251-5110
wbrentani@stblaw.com

Kelli Schultz

+1-650-251-5148
kschultz@stblaw.com

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