

October 30, 2023

SEC Adopts Amendments to Section 13 Beneficial Ownership Reporting Requirements

By [Kellie Bobo](#), [Stephen Grant](#), [Jennifer Wisinski](#), [Marissa Corry](#) and [Taylor West](#)

On October 10, 2023, the Securities and Exchange Commission (“SEC”) adopted amendments to the requirements for beneficial ownership reporting on Schedules 13D and 13G under Section 13 of the Securities Exchange Act of 1934, as amended (the “Exchange Act”). These amendments (the “New Rules”) (i) accelerate filing deadlines for Schedules 13D and 13G, (ii) change the triggering event for amendments to Schedule 13G to a “*material* change in the information previously reported” from the current “*any* change in the information previously reported,” (iii) require Schedules 13D and 13G to be filed in structured, machine-readable data language and (iv) require reporting of cash-settled derivative securities under Item 6 of Schedule 13D. Additionally, the adopting release¹ (the “Adopting Release”) for the New Rules provides guidance on when holders of certain derivative securities are deemed to beneficially own the reference security, as well as guidance on when a “group” is formed for purposes of beneficial ownership reporting.

The New Rules represent the first amendment to the filing deadlines for Schedules 13D and 13G since 1968 and 1977, respectively. Although the New Rules meaningfully increase compliance burdens for Section 13 filers, they do not go as far as the SEC’s proposed rules from February 2022², which would have further accelerated filing deadlines and imposed rule changes, rather than guidance, concerning beneficial ownership of derivative securities and group formation.

Background

Sections 13(d) and 13(g) of the Exchange Act require public company stockholders who hold, directly or indirectly, more than 5% of a covered class of equity securities to publicly disclose such beneficial ownership (in addition to certain other information) in a Schedule 13D or Schedule 13G, as applicable.

Section 13(d) of the Exchange Act was first adopted by Congress in 1968 to protect stockholders from hostile takeovers by providing notice of significant stock accumulations. Section 13(d) applies if a stockholder takes an action that results in such stockholder holding over 5% of the issuer’s equity securities. As the acquisition requirement under Section 13(d) left a gap in the regulatory framework, Congress later enacted Section 13(g) which requires a stockholder to make a filing solely due to the stockholder’s status as a 5% beneficial owner and not as a result of any action on the part of the stockholder. Schedule 13G, which requires less disclosures than the Schedule 13D form, is only available to stockholders who meet one of the exemptions under Rule 13d-1.³ Schedule 13G is primarily intended to be used by “passive investors” who do not intend to control or change the control of the issuer. In some circumstances, previous Schedule 13G filers will lose their eligibility to report on Schedule 13G and will be required to file a Schedule 13D shortly after the event causing such ineligibility.⁴

¹ Modernization of Beneficial Ownership Reporting, Exchange Act Release Nos. 33-11253; 34-98704 (Oct. 10, 2023), available [here](#).

² Modernization of Beneficial Ownership Reporting, 87 Fed. Reg. 13846 (proposed Mar. 10, 2022) (to be codified at 17 C.F.R. pts. 232, 240), available [here](#).

³ 17 C.F.R. § 240.13d-1.

⁴ Under the New Rules, qualified institutional investors and passive investors who acquire “control” intent will be required to file a Schedule 13D within 5 business days of acquiring such intent, and passive investors who reach or exceed 20% beneficial ownership will be required to file a Schedule 13D within 5 business days of attaining such level of beneficial ownership.

HAYNES BOONE

These filers who switch to filing on Schedule 13D after losing Schedule 13G eligibility will also be subject to a “cooling off” period, during which they will not be able to vote their shares or acquire any additional shares.⁵

Generally, Section 13(d) imposes a continuous reporting obligation on the applicable filer as amendments are due *promptly* (which under the New Rules is defined as 2 business days) after a material change in the facts set forth on the previous Schedule 13D. Although a 1% increase or decrease in beneficial ownership is considered the standard threshold for materiality, the obligation to file a Schedule 13D amendment is not limited to acquisitions or dispositions. Indeed, certain changes in the disclosure narrative (e.g., a change in investment purpose) could also be deemed a material change requiring an amendment, as could a material change in the level of beneficial ownership caused by an involuntary change in circumstances, such as a reduction in the level of beneficial ownership resulting solely from an increase in the number of shares outstanding. By contrast, Section 13(g) imposes periodic reporting requirements, generally 45 days after year-end.

Please refer to the table below for detail regarding the changes to Schedule 13D and Schedule 13G under the New Rules.

Revised Filing Deadlines

	<u>Schedule 13D</u>		<u>Schedule 13G</u>	
	<u>Initial Filing</u>	<u>Amendment</u>	<u>Initial Filing</u>	<u>Amendment</u>
<u>Current Rule</u>	File within <u>10 days</u> of acquiring beneficial ownership of more than 5% or losing eligibility to file Schedule 13G.	File “ <u>promptly</u> ” after material change in facts set forth on previous Schedule 13D.	<u>Qualified Institutional Investors</u> ⁶ : File within (i) <u>45 days</u> after <u>calendar year-end</u> in which beneficial ownership exceeds 5%, and (ii) <u>10 days</u> after month-end in which beneficial ownership exceeds 10%.	<u>Qualified Institutional Investors</u> : File within (i) <u>45 days</u> after <u>calendar year-end</u> if <u>any</u> change from previous Schedule 13G (other than a change in % solely due to change in total shares outstanding), and (ii) <u>10 days</u> after month-end if <u>surpassing 10%</u> , and thereafter, <u>10 days</u> after month-end in connection

⁵ For a qualified institutional investor or passive investor who loses its eligibility to file on Schedule 13G due to a change in its investment intent, the cooling-off period will start at the time of the change in investment intent and end on the tenth day following the filing of the Schedule 13D. For a passive investor who loses its eligibility to file on Schedule 13G as a result of reaching a beneficial ownership level of 20% or more, the cooling-off period will begin when the passive investor reaches such level of beneficial ownership and extend through the tenth day after the Schedule 13D is filed. See 17 C.F.R. § 240.13d-1(e)-(f).

⁶ The term “Qualified Institutional Investors” refers to certain investors entitled to report on Schedule 13G instead of Schedule 13D in reliance upon Rule 13d-1(b), including a broker or dealer registered under Section 15(b) of the Exchange Act, a bank as defined in Section 3(a)(6) of the Exchange Act, an insurance company as defined in Section 3(a)(19) of the Exchange Act, an investment company registered under Section 8 of the Investment Company Act of 1940, an investment adviser registered under Section 203 of the Investment Advisers Act of 1940, a parent holding company or control person (if certain conditions are met), an employee benefit plan or pension fund that is subject to the provisions of the Employee Retirement Income Security Act of 1974, a savings association as defined in Section 3(b) of the Federal Deposit Insurance Act, 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, 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 related holding companies and groups. 17 C.F.R. § 240.13d-1(b)(1)(ii).

HAYNES BOONE

	<u>Schedule 13D</u>		<u>Schedule 13G</u>	
	<u>Initial Filing</u>	<u>Amendment</u>	<u>Initial Filing</u>	<u>Amendment</u>
			<p><u>Exempt Investors</u>⁷:</p> <p>File within <u>45 days</u> after <u>calendar year-end</u> in which beneficial ownership exceeds 5%.</p> <p><u>Passive Investors</u>⁸:</p> <p>File within <u>10 days</u> after acquiring beneficial ownership of more than 5%.</p>	<p>with a 5% change in ownership.</p> <p><u>Exempt Investors</u>:</p> <p>File within <u>45 days</u> after <u>calendar year-end</u> if <u>any</u> change from previous Schedule 13G (other than a change in % solely due to change in total shares outstanding).</p> <p><u>Passive Investors</u>:</p> <p>File (i) within <u>45 days</u> after <u>calendar year-end</u> if <u>any</u> change from previous Schedule 13G (other than a change in % solely due to change in total shares outstanding), and (ii) "<u>promptly</u>" after passing 10%, and thereafter, "<u>promptly</u>" after a 5% change in ownership.</p>
<u>Proposed Rule</u>	File within <u>five calendar days</u> of acquiring beneficial ownership of more than 5% or losing	File within <u>one business day</u> of material change.	<u>Qualified Institutional Investors</u> :	<u>Qualified Institutional Investors</u> :
			File within <u>five business days</u> after <u>month-end</u> in which	File within (i) <u>five business days</u> after <u>month-end</u> if there has been a <u>material</u>

⁷ The term "Exempt Investor" refers to persons holding beneficial ownership of more than 5% of a covered class at the end of the calendar year, but who have not made an acquisition of beneficial ownership subject to Section 13(d).

⁸ The term "Passive Investors" refers to beneficial owners of more than 5% but less than 20% of a covered class who can certify under Item 10 of Schedule 13G that the subject securities were not acquired or 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. These investors are ineligible to report beneficial ownership pursuant to Rules 13d-1(b) or (d) but are eligible to report beneficial ownership on Schedule 13G in reliance upon Rule 13d-1(c).

HAYNES BOONE

	<u>Schedule 13D</u>		<u>Schedule 13G</u>	
	<u>Initial Filing</u>	<u>Amendment</u>	<u>Initial Filing</u>	<u>Amendment</u>
	eligibility to file Schedule 13G.		<p>beneficial ownership exceeds 5%.</p> <p><i>Exempt Investors:</i></p> <p>File within <u>five business days</u> after <u>month-end</u> in which beneficial ownership exceeds 5%.</p> <p><i>Passive Investors:</i></p> <p>File within <u>five days</u> after acquiring beneficial ownership of more than 5%.</p>	<p>change from previous Schedule 13G (other than a change in % solely due to change in total shares outstanding), and (ii) <u>five calendar days</u> after exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership.</p> <p><i>Exempt Investors:</i></p> <p>File within <u>five business days</u> after <u>month-end</u> if there has been a <u>material</u> change from previous Schedule 13G (other than a change in % solely due to change in total shares outstanding).</p> <p><i>Passive Investors:</i></p> <p>File (i) within <u>five business days</u> after <u>month-end</u> if there has been a <u>material</u> change from previous Schedule 13G (other than a change in % solely due to change in total shares outstanding), and (ii) <u>1 business day</u> after exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership.</p>
<u>Final Rule</u>	File within <u>five business days</u> of acquiring beneficial ownership of more than 5% or losing	File within <u>two business days</u> of material change.	<p><i>Qualified Institutional Investors:</i></p> <p>File within (i) <u>45 days</u> after <u>calendar quarter-end</u> in which</p>	<p><i>Qualified Institutional Investors:</i></p> <p>File within (i) <u>45 days</u> after <u>quarter-end</u> if <u>material</u> change from previous</p>

HAYNES BOONE

	<u>Schedule 13D</u>		<u>Schedule 13G</u>	
	<u>Initial Filing</u>	<u>Amendment</u>	<u>Initial Filing</u>	<u>Amendment</u>
	eligibility to file Schedule 13G.		<p>beneficial ownership exceeds 5%, and (ii) <u>five business days</u> after <u>month-end</u> in which beneficial ownership exceeds 10%.</p> <p><u>Exempt Investors:</u></p> <p>File within <u>45 days</u> after <u>calendar quarter-end</u> in which beneficial ownership exceeds 5%.</p> <p><u>Passive Investors:</u></p> <p>File within <u>five business days</u> after acquiring beneficial ownership of more than 5%.</p>	<p>Schedule 13G (other than a change in % solely due to change in total shares outstanding), and (ii) <u>five business days</u> after <u>month-end</u> if surpassing 10%, and thereafter, <u>five business days</u> after <u>month-end</u> in connection with a 5% change in ownership.</p> <p><u>Exempt Investors:</u></p> <p>File within <u>45 days</u> after <u>quarter-end</u> if there has been a <u>material</u> change from previous Schedule 13G (other than a change in % solely due to change in total shares outstanding).</p> <p><u>Passive Investors:</u></p> <p>File within (i) <u>45 days</u> after <u>calendar quarter-end</u> if there has been a <u>material</u> change from previous Schedule 13G (other than a change in % solely due to change in total shares outstanding), and (ii) <u>2 business days</u> after passing 10%, and thereafter, within <u>2 business days</u> of a 5% change in ownership.</p>

EDGAR Filing Cutoff

The SEC currently requires most EDGAR filings (including Schedules 13D and 13G) to be submitted by 5:30 p.m. Eastern Time in order to be deemed filed on the same business day. Under the New Rules, the cutoff time for Schedules 13D and 13G will be extended to 10:00 p.m. Eastern Time, aligning with the cutoff time for Section 16 filings. This extended cutoff time will provide filers with additional time to obtain needed information

HAYNES BOONE

and prepare applicable Schedule 13D and Schedule 13G filings, lessening some of the burden of the accelerated filing deadlines under the New Rules.

Structured, Machine-Readable Data Requirement

Schedules 13D and 13G are currently required to be filed in an unstructured data format, which is not machine-readable. The New Rules require filers to file Schedules 13D and 13G in a structured, machine-readable format beginning December 18, 2024, although filers may continue to file exhibits in an unstructured data format. Voluntary compliance with this requirement will be permitted beginning December 18, 2023. This change, which will be facilitated by the financial printer or other such person preparing a filer's EDGAR filings, will make it easier for investors and other market participants to access, compile and analyze information in Schedules 13D and 13G submitted through EDGAR.

Derivative Securities

Item 6 of Schedule 13D

Item 6 of Schedule 13D requires the disclosure of certain contracts, arrangements, understandings and relationships with respect to the securities of the issuer either (i) among the reporting persons or (ii) between the reporting persons and any other person. The current rules set forth a non-exclusive list of the types of contracts, arrangements, understandings and relationships that should be disclosed under Item 6 of Schedule 13D. Although puts and calls are both included in the list of items to disclose under the current rule, other types of derivative instruments, such as cash-settled derivatives, are not mentioned. In the proposed rule release, the SEC mentioned concerns that the current rule could be interpreted as not requiring the disclosure of cash-settled derivatives under Item 6, given that (i) cash-settled derivatives represent a purely economic (rather than legal) interest in the issuer's securities, (ii) the issuer's securities are only used as a reference security and (iii) the cash-settled derivatives may not be offered, sold, or originated by the issuer.⁹ As such, under the New Rules, the SEC amended Rule 13d-101¹⁰ to explicitly require disclosure under Item 6 of Schedule 13D of *all* interests in derivative securities (including cash-settled derivative securities) that use an equity security of the issuer as a reference security. Further, the SEC clarified in the Adopting Release that this disclosure obligation arises regardless of whether such derivative security was originated, offered or sold by the issuer.

Guidance on Beneficial Ownership of Reference Securities

In the Adopting Release, the SEC declined to adopt a proposed rule that would have deemed holders of cash-settled derivative securities to beneficially own the underlying reference securities "if such person held the cash-settled derivative security with the purpose or effect of changing or influencing the control of the issuer of the class of equity securities, or in connection with or as a participant in any transaction having that purpose or effect," in response to numerous comments from market participants opposing the proposed rule. Instead, the SEC provided guidance on applying Rule 13d-3¹¹ to cash-settled derivative securities in line with the framework set forth in the SEC's Security-Based Swaps Release. Under this framework, holders of cash-settled derivative securities may be deemed to beneficially own the underlying reference securities under "discrete facts and circumstances," including the following:

⁹ Modernization of Beneficial Ownership Reporting, 87 Fed. Reg. 13846, 13874 (proposed Mar. 10, 2022) (to be codified at 17 C.F.R. pts. 232, 240).

¹⁰ 17 C.F.R. § 240.13d-101.

¹¹ 17 C.F.R. § 240.13d-3.

HAYNES BOONE

1. If, through a contractual term of the derivative security or otherwise, the holder of the derivative security, directly or indirectly, possesses exclusive or shared voting or investment power over the referenced security within the meaning of Rule 13d-3(a)¹²;
2. If the cash-settled derivative security is acquired with the purpose or effect of divesting its holder of beneficial ownership or preventing the vesting of beneficial ownership as part of a plan or scheme to evade the reporting requirements of Sections 13(d) or 13(g); or
3. If the holder has the right to acquire beneficial ownership of the referenced equity security within 60 days or, regardless of when the right is exercisable, if such holder obtains a right to acquire beneficial ownership of the referenced equity security *with the purpose or effect of changing or influencing the control of the issuer*, or in connection with or as a participant in any transaction having such purpose or effect.

Groups

Guidance on Group Formation

Although the SEC ultimately did not codify the definition of a “group” for purposes of beneficial ownership reporting in the New Rules, as it had originally proposed, the Adopting Release provides notable guidance on when two or more persons may be deemed to be a group under existing legal standards. Consistent with prior interpretations by the SEC and courts, the SEC noted that group formation does not require an express agreement, but that “depending on the particular facts and circumstances, concerted actions by two or more persons for the purpose of acquiring, holding or disposing of securities of an issuer are sufficient to constitute the formation of a group.” Further, the SEC reaffirmed that that two or more persons engaging in similar conduct is not necessarily conclusive because “indicia, such as an informal arrangement or coordination in furtherance, of a common purpose to acquire, hold, or dispose of securities of an issuer,” are required.

The SEC specifically stated in the Adopting Release that Sections 13(d)(3) and 13(g)(3) were intended to prevent circumvention of the disclosures required by Schedules 13D and 13G, and not to complicate stockholders’ ability to independently and freely express their views and ideas to one another. Accordingly, the SEC clarified that the following circumstances are not sufficient *on their own* to form a group:

- Two or more stockholders communicating with one another regarding an issuer or its securities (including discussions on *non-control*-related joint engagement strategies) without taking further action;
- Two or more stockholders engaging in discussions with an issuer’s management without taking further action;

¹² A person has “voting power” if such person, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise has or shares “the power to vote, or to direct the voting of,” a security. *See* 17 C.F.R. § 240.13d-3(a)(1). A person has “investment power” if such person, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise has or shares “the power to dispose, or to direct the disposition of,” a security. *See* 17 C.F.R. § 240.13d-3(a)(2).

HAYNES BOONE

- Stockholders jointly making recommendations to an issuer on board structure and composition where (i) no discussion of board expansion or individual directors occurs and (ii) there are no commitments, agreements or understandings among such stockholder concerning potential withholding of votes for, or voting against, management's director slate if the issuer does not implement the stockholders' recommendations;
- Stockholders jointly submitting a non-binding stockholder proposal pursuant to Rule 14a-8 for stockholder vote;
- Communications between a stockholder and an activist investor seeking support for its proposals without more, such as consenting or committing to a particular course of action; and
- A stockholder's announcement of its intention to vote for the director nominees of an unaffiliated activist investor.

However, the SEC noted in the Adopting Release that when a beneficial owner of a substantial block of a covered class of equity securities that is or would be required to file a Schedule 13D intentionally communicates to other market participants that it will be filing a Schedule 13D (to the extent such information is not yet public) with the intent of causing such persons to purchase additional securities of the same covered class and one or more such persons makes such a purchase, these parties are likely to be deemed a group.

Imputation of Acquisitions to Group

Consistent with current market practices, the New Rules clarify that although the acquisition of additional securities by a group member after the group's formation (including acquisitions on the same day the group is formed) will be imputed to the group as a whole and must be reported, this does not apply to intra-group sales or transfers after the group's formation.

Implications

Schedule 13D Investors Generally

All persons who purchase public company securities will need to be prepared to make, or otherwise amend, beneficial ownership filings in compliance with the deadlines set forth in the New Rules. Practically, this means that information about trading must be sent to persons in charge of preparing filings on a real-time basis, especially to meet the two business day deadline for amendments to Schedule 13D.

Investors should review the New Rules and the SEC's guidance on the treatment of cash-settled derivatives and consult with counsel to determine whether any changes are advisable to the investor's existing compliance and disclosure practices. Investors should carefully track their ownership of any cash-settled derivatives and ensure that such derivatives are disclosed under Item 6 of Schedule 13D and included in beneficial ownership, when appropriate.

Schedule 13D Activist Investors

The accelerated filing deadlines for Schedule 13D under the New Rules could impact the accumulation strategy of activist investors because there will be less time to acquire shares without public disclosure once the 5% threshold is crossed. After the 5% threshold is crossed, the issuer and other market participants will be on notice

HAYNES BOONE

of the campaign, and the issuer may adopt certain defense mechanisms to prevent a takeover, such as a poison pill. Furthermore, where an issuer has a poison pill in place, an activist will need to carefully consider whether its beneficial ownership of derivatives could result in it being deemed to beneficially own shares sufficient to trip the poison pill trigger even if the poison pill does not contain express derivative or acting in concert language.

Potential M&A Activity

Potential acquirors of a public company that take a minority stake will need to be mindful of the New Rules, and in particular the accelerated deadline for amendments following a material change in the Item 4 disclosure of a Schedule 13D. Where a person is already a Schedule 13D filing person (or was a Schedule 13G passive investor) and later determines to pursue acquisition of an issuer, the person will need to take into account the new deadlines and their potential impact on the acquisition strategy.

Poison Pills

Derivative securities have historically provided activist investors with a potential means to rapidly accumulate a large stake in a target issuer without requiring a Schedule 13D filing or necessarily triggering an issuer's poison pill due to positions that the reference security is not beneficially owned. In connection with concerns about the use of derivative instruments to influence or control the management of an issuer, many companies have drafted poison pills with more expansive definitions of "beneficial ownership" that expressly capture derivative instruments. However, it is currently unclear the extent to which Delaware courts will uphold the inclusion of derivative securities in poison pill provisions relating to beneficial ownership. The SEC's new guidance on the treatment of cash-settled derivatives could potentially reinforce such broad poison pill provisions and may make it more likely that courts will uphold such provisions in the future, which, together with the requirement to disclose cash-settled derivative securities on Item 6 of Schedule 13D, could make it harder for activist investors to evade poison pill triggers by means of holding derivative securities.

Issuers (and activists) should review specific language in existing poison pills to determine the impact of the New Rules on derivatives and group formation, especially as it relates to the determination of whether a person has crossed the trigger threshold in the poison pill.

Schedule 13G Filers

The New Rules significantly accelerate the deadline for initial Schedule 13G filings and increase the frequency of required Schedule 13G amendments for many filers. These changes will increase compliance costs for Schedule 13G Filers.

Compliance Dates

The New Rules will become effective 90 days after publication in the Federal Register. Compliance with the revised Schedule 13G deadlines will be required beginning September 30, 2024, and compliance with the structured, machine-readable data language requirements will be required beginning December 18, 2024. Compliance with the revised Schedule 13D deadlines and all other amendments will be required upon the effectiveness of the New Rules.

HAYNES BOONE

Conclusion

Although the New Rules reflect concessions from the SEC in response to comments on the proposed rule, they will meaningfully increase the burdens of beneficial ownership reporting. In advance of the compliance dates of the New Rules, investors should begin evaluating their existing internal processes and controls relating to tracking and reporting beneficial ownership. Further, in light of the guidance provided in the Adopting Release with respect to cash-settled derivatives and group formation, investors should carefully review their current filing and disclosure practices for responsive updates.

The Adopting Release for the New Rules can be found [here](#). For further information, please contact a member of the Haynes and Boone [Capital Markets and Securities Practice Group](#) or [Investment Management Practice Group](#).