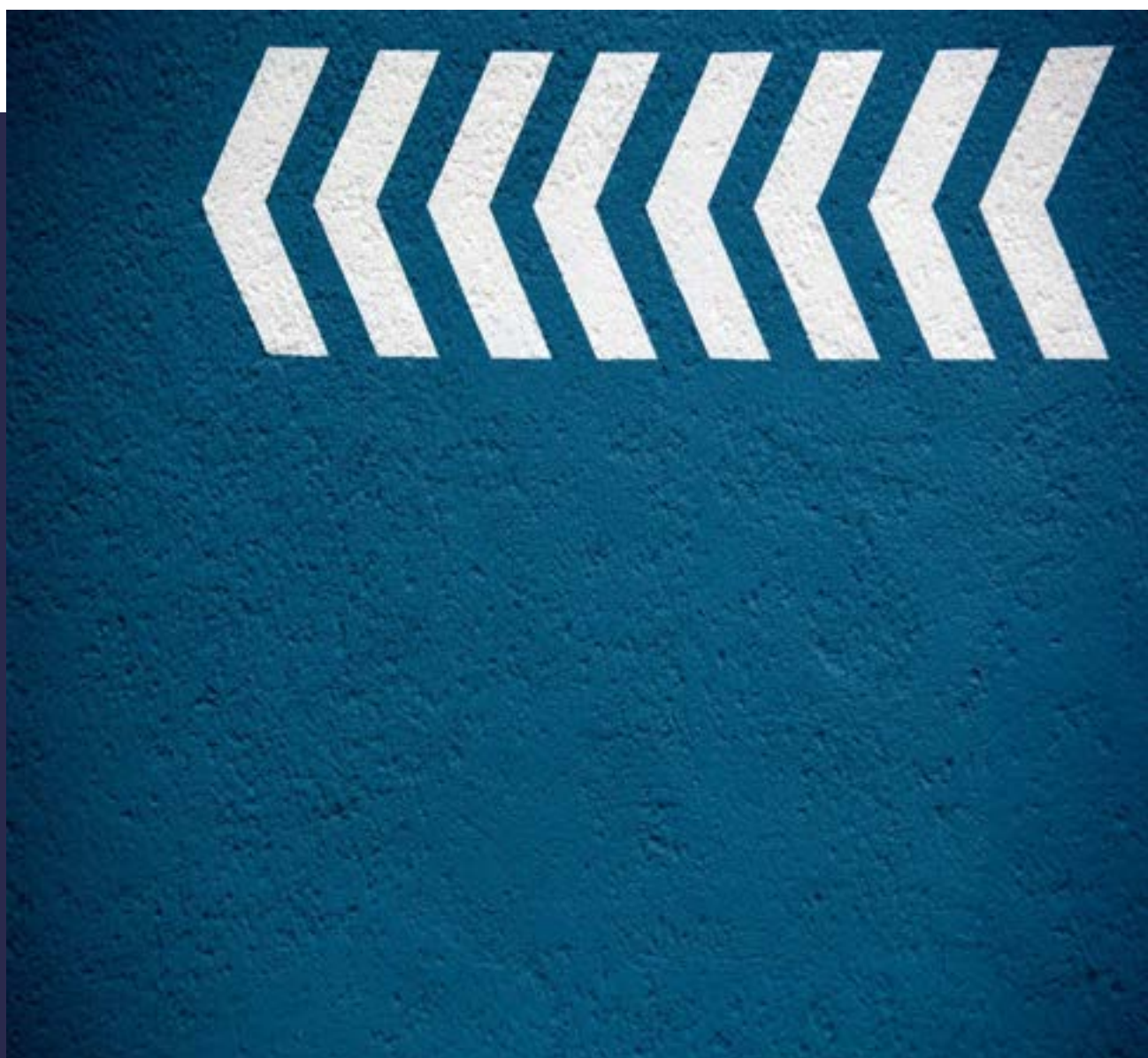


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SEC Beneficial Ownership Reporting



1. Overview

On October 10, 2023, the U.S. Securities and Exchange Commission (“SEC”) adopted a final rule to modernize its beneficial ownership reporting requirements under Sections 13(d) and 13(g) of the Securities Exchange Act of 1934, as amended (“Exchange Act”)¹. The SEC’s reasoning for these changes was to update the reporting requirements that had not been changed for decades but needed to be in light of subsequent technological advances. The Adopting Release generally shortens the filing deadlines for initial and amended beneficial ownership reports filed on Schedules 13D and 13G. It also extends the daily filing cut-off time and requires the use of structured, machine-readable data language. While the Adopting Release did not include the two most controversial proposals regarding group formation and cash-settled derivatives—which, in fact, had little to do with technology changes—it did provide new guidance on those two important issues.

Key compliance dates:

Schedule 13D filings:
90 days after publication
in the Federal Register

Schedule 13G filings:
September 30, 2024

Structured data
requirement:
December 18, 2024

2. Beneficial ownership filing deadlines

The Adopting Release accelerated many of the beneficial ownership filing deadlines.

Schedule 13D reporting requirements

A person or group that acquires more than 5% beneficial ownership of a covered class of equity securities must publicly report that ownership with an initial Schedule 13D filing. As adopted, the accelerated deadline for Schedule 13D initial filings is within five business days of acquiring more than 5% beneficial ownership—or losing eligibility to file using Schedule 13G. The prior rule allowed for filing within ten calendar days, and the SEC’s original proposal would have shortened the deadline to five calendar days.

The adopting release requires an amended 13D filing within two business days of a material change in the facts on the initial or prior 13D filing. The prior rule merely required the filing to be made “promptly,” and the original proposal would have required amended filings within one business day.

Schedule 13G reporting requirements

Certain investors may be permitted to file the “short form” beneficial ownership statement using Schedule 13G if they meet the relevant criteria for a passive investor, a qualified institutional investor (“QII”), or an exempt investor.

¹ SEC, “Modernization of Beneficial Ownership Reporting,” SEC Rel. No. 33-11253 (Oct. 10, 2023) (“Adopting Release”).

Passive investors

To qualify, a passive investor must not:

1. have acquired the securities for the purpose of influencing the control of the issuer;
2. directly or indirectly beneficially own 20% or more of the class of securities; and
3. be reporting as a QII.

Passive investors must file an initial 13G filing within five business days after passing the 5% threshold; previously, they had ten calendar days, and the original proposal was five calendar days.

Previously, passive investors had to file an amended 13G for “any change” of facts within 45 days after the end of the calendar year in which the change occurred, whereas now they will have to file an amended 13G for a “material change” within 45 days after the end of the quarter in which the material change occurred. Passive investors must now file a 13G amendment within two business days after they exceed 10% beneficial ownership or, thereafter, have a 5% increase or decrease in beneficial ownership.

Qualified institutional investors

To qualify as a QII, an investor must:

1. be an enumerated type of institutional investor;
2. acquire the securities in the ordinary course of business and not for the purpose of influencing the control of the issuer; and
3. promptly notify anyone on whose behalf it holds that security if that person or group needs to report under Section 13(d).

QII's must file an initial 13G within 45 days after the end of the calendar quarter in which their beneficial ownership exceeds 5%, whereas previously they had 45 days after the end of the calendar year. QIIs must now also file an initial 13G within five business days after the end of a calendar month in which their beneficial ownership exceeds 10%, whereas before they had ten calendar days.

Previously, QIIs had to file an amended 13G for “any change” of facts within 45 days after the end of the calendar year in which the change occurred, whereas now they will have to file an amended 13G for a “material change” within 45 days after the end of the quarter in which the material change occurred.

QIIs must also file an amended 13G within five business days after the month-end in which beneficial ownership exceeds 10% or, thereafter, if they have a 5% increase or decrease in beneficial ownership; previously they had ten calendar days to do so.

Exempt investors

To qualify as an exempt investor, a person must not previously have made an acquisition subject to Section 13(d) of the Exchange Act. This exemption is generally limited to persons who acquired all or most of the securities prior to an initial public offering or similar transaction or that have acquired no more than 2% of that class of security within a 12-month period. Exempt investors must file an initial 13G within 45 days after the end of the quarter in which their beneficial ownership exceeds 5%. Exempt investors will have to file an amended 13G for a material change within 45 days after the end of the quarter in which the material change occurred.

Extended filing cut-off time

The Adopting Release extended the daily EDGAR cut-off time for Schedule 13D and 13G filings from 5:30 PM to 10:00 PM ET.

The following tables summarize the new requirements for filing Schedules 13D and 13G.

Schedule 13D	Previous requirement	New requirement
Initial filing deadline	Within 10 calendar days of exceeding 5% threshold	Within five business days of exceeding 5% threshold
Amendment triggering event	Material change	(No change)
Amendment filing deadline	"Promptly"	Within two business days

Schedule 13G	Previous requirement	New requirement
Initial filing deadline	QII: Within 45 calendar days of year-end of exceeding 5% or 10 days of month-end of exceeding 10% Passive: 10 calendar days after exceeding 5% Exempt: Within 45 calendar days of year-end of exceeding 5%	QII: Within 45 calendar days of quarter-end of exceeding 5% or five business days of month-end of exceeding 10% Passive: Five business days after exceeding 5% Exempt: Within 45 calendar days of quarter-end of exceeding 5%
New material change triggering event	All 13G filers: any change 45 days after year-end	All 13G filers: material change within 45 days after quarter-end
Ownership change reporting	QII: Within 10 calendar days after month-end of exceeding 10% or, thereafter, there was a 5% increase or decrease as of month-end Passive: Promptly after exceeding 10% or, thereafter, if there was a 5% increase or decrease	QII: Within five business days after month-end of exceeding 10% or, thereafter, if there was a 5% increase or decrease as of the month-end Passive: two business days after exceeding 10% or, thereafter, if there was a 5% increase or decrease

Structured data requirement

Currently, the EDGAR Filer Manual requires Schedules 13D and 13G to be filed electronically on the Commission's EDGAR system using either HTML or ASCII format. Because these are both unstructured data languages, which the SEC indicates makes it more difficult for other market participants to access, the Adopting Release requires firms that file Schedule 13D or 13G to submit them using XML or a web-based reporting application developed by the Commission that will then generate the XML format. Firms have until December 18, 2024, to comply with this requirement

3. New guidance on group formation

For the purpose of beneficial ownership reporting under Sections 13(d) and (g) of the Exchange Act, "When two or more persons agree to act together for the purpose of acquiring, holding, voting or disposing of equity securities of an issuer, the group formed thereby shall be deemed to have acquired beneficial ownership."² The SEC had proposed to amend Rule 13d-5 so that when anyone disclosed to other persons that a 13D filing would be made if any of those persons subsequently purchased that security, then they would automatically be deemed to have formed a group. The proposal would also have removed from Rule 13d-5 the requirement that an "agreement" be made by two or more persons for a group to be formed and essentially replaced that with any time there was concerted action among two or more persons. As a result of significant negative comments, the Adopting Release did not include these proposed changes to Rule 13d-5 but instead reverted to Sections 13(d) and 13(g) (which do not make mention of an "agreement") as the controlling standard to determine the formation of a group.

The Adopting Release reaffirmed that two or more persons taking similar actions is not alone sufficient to evidence group formation, clarifying instead that formation of a group requires "at a minimum, indicia, such as an informal arrangement or coordination in furtherance, of a common purpose to acquire, hold, or dispose of securities of an issuer."³ This requires the analysis of all relevant facts and circumstances, and the Adopting Release provides a series of questions and answers that give additional guidance for determining the formation of a group.

The Adopting Release indicates that the following circumstances do not count as group formation for purposes of Section 13:

- The exchange of views among investors or with management without evidence of an intent to engage in concerted action.
- Joint shareholder recommendations regarding the structure and composition of the issuer's board of directors when there is no discussion of individual directors, and no commitments or understandings are made about supporting or opposing management's board candidates unless the issuer takes certain

2 17 CFR 240.13d-5(b)(1).

3 Adopting Release, *supra* note 1, at 132.

Group formation requires some form of concerted action by two or more parties to demonstrate a formal or informal agreement has been made to influence or exercise control over the issuer.

steps.

- Shareholders jointly submit a non-binding shareholder proposal pursuant to Rule 14a-8.
- A shareholder meeting email, phone call or other form of communication with an activist investor seeking support for its proposals without the shareholder consenting or otherwise committing to a certain course of action.
- A shareholder's mere announcement or other communication of their intention to vote in favor of an activist investor's nominees for board membership.⁴

While this guidance is generally understood by markets, the Adopting Release does raise a potential concern regarding group formation in situations where a "tippee" subsequently purchases the referenced security after learning from another investor (the "tipper") that it has purchased shares of an issuer. In those cases, the SEC's facts and circumstances guidance indicates the tippee could be considered part of a group with the tipper if the purpose of the communication was to cause the tippee to purchase the security and if the purchase was made as a direct result of the communication. Given that the SEC would potentially be reviewing these circumstances after the fact, it may be difficult for the tippee to demonstrate how its eventual purchase of the security was not the result of any prior communication that it received.

4. New guidance on cash-settled derivatives

Item 6 of Schedule 13D requires beneficial owners to describe any contracts, arrangements, understandings or relationships 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.⁵ The SEC was concerned that Item 6 was being interpreted as not covering instruments conveying mere economic or synthetic exposure to the issuer's equity securities. The Adopting Release clarifies that all cash-settled derivative contracts related to an issuer's securities, including cash-settled security-based swaps, must be disclosed under Item 6 of Schedule 13D.

The SEC's original proposal would have required that ownership of cash-settled derivatives, excluding securities-based swaps ("SBS"), be counted towards beneficial ownership if the investor held the derivative with a control purpose. However, the Adopting Release only requires cash-settled derivatives that provide the holder with voting or investment power over the underlying security to be reported as beneficial ownership. Echoing the criteria used in the SEC's 2011 SBS guidance, the Adopting Release applies the following three tests to determine beneficial ownership on the part of the holder of a cash-settled derivative:

1. The cash-settled equity derivative provides a person, directly or indirectly, with exclusive or shared voting and/or investment
4. Id. at 132-139.
5. 17 CFR 240.13d-101, Item 6.

Cash-settled derivatives must be included in Schedule 13 filings, but do not evidence beneficial ownership absent an express right to exert control over the underlying security.

power over the reference equity security through a contractual term of the derivative or otherwise;

2. The cash-settled equity derivative is acquired with the purpose or effect of divesting or preventing the vesting of beneficial ownership as part of a plan or scheme to evade the beneficial ownership reporting requirements; or
3. The holder of the cash-settled equity derivative has a right to acquire the reference equity security within 60 days or holds the right with the purpose or effect of changing or influencing control of the issuer of the security.⁶

5. Additional rule changes

Footnote 22 of the Adopting Release summarizes a number of additional technical amendments, including the following:

- Changing the title of Rule 13d-5 from “Acquisition of securities” to “Acquisition of beneficial ownership”;
- Revising 17 CFR 240.13d-5(a) (“Rule 13d-5(a)”) to conform the text to the new title;
- Designating current Rule 13d-6 as new 17 CFR 240.13d-6(a) (“Rule 13d-6(a)”);
- Redesignating current 17 CFR 240.13d-5(b)(2) (“Rule 13d-5(b)(2)”) as new 17 CFR 240.13d-6(b) (“Rule 13d-6(b)”);
- Rescinding in its entirety Rule 13d-7 because Congress already repealed the statutory requirements under Sections 13(d)(1), (d)(2), (g)(1), and (g)(2) for beneficial owners to deliver a copy of a Schedule 13D or 13G, and any amendments thereto, to the issuer of the covered class and any national securities exchanges where such equity securities are listed;
- Making conforming amendments to Schedules 13D and 13G to remove the notes in those Schedules that refer to Rule 13d-7 and its requirements;
- Correcting incorrect cross-references in Item 8 of Schedule 13G; and
- Replacing the gender-based pronouns used in Rules 13d-1, 13d-3, 13d-6, 13d-101, and 13d-102 with gender-neutral phrases and making additional conforming edits to the surrounding text as necessary.⁷

6 Beneficial Ownership Reporting Requirements and Security-Based Swaps, Release No. 34-64628 (June 8, 2011), at 11-12.

7 Adopting Release, *supra* note 1, at 13.

6. Compliance dates

In response to numerous comments expressing concerns about compliance burdens, the SEC extended the compliance deadline for certain parts of the new reporting requirements. Compliance with the revised Schedule 13G filing deadlines won't be required until September 30, 2024. Compliance with the structured data requirement for Schedules 13D and 13G will be required beginning on December 18, 2024, although the SEC welcomed early adoption. Compliance with the other amendments, including for initial and amended Schedule 13D filings, will be required upon the effective date (i.e., 90 days after publication of the Adopting Release in the Federal Register).

Beneficial ownership modernization rule's key compliance dates:

- Schedule 13G filings: September 30, 2024;
- Structured data requirements for 13D&G: December 18, 2024; and
- Initial and amended Schedule 13D filings: 90 days after publication in the Federal Register.

7. Practical considerations

Firms should take the following recommended actions in light of the new beneficial ownership reporting rules:

1. Firms should review and update their 13D and 13G compliance framework, as many more filings may be needed and under much shorter deadlines, which could be as short as two business days.
2. For firms that own cash-settled derivatives, they should carefully review whether their standard contracts include any contractual terms that grant them voting or other powers over the control of the underlying securities. These contracts should be carefully reviewed to determine whether retaining any such rights would result in them needing to make a beneficial ownership filing.
3. Firms should consider updating or instituting communications policies when interacting with activist investors to ensure that they do not inadvertently make any commitments or communications that would result in the formation of a group.



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