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# SEC Adopts Schedule 13D/G Amendments That Are Far Less Helpful to Investors Than Originally Expected

The SEC has approved [final amendments](#) to Schedule 13D and 13G beneficial ownership reporting. The Schedule 13D/13G beneficial reporting regime is supposed to provide good information to market participants, but years ago was overtaken by changes in technology and trading dynamics that resulted in some highly material information never being disclosed (e.g., large long positions in the form of cash-settled derivatives) and other highly material information being disclosed after a very long delay (e.g., common stock positions that could be well in excess of 5% of a public company's market capitalization). After 19 months of studying the issue, the SEC has announced a series of largely inconsequential changes that do very little to correct the imbalance or tardiness with respect to disclosure of investments in public companies by activist hedge funds and similar market participants. Among other things, the SEC:

- Adopted a five business-day deadline for initial Schedule 13D filings (instead of the proposed five calendar-day deadline). While a modest one to three-day improvement from the current 10 calendar-day deadline depending on the circumstances, activist investors still have up to a week to accumulate positions in target companies without public disclosure. Schedule 13G filing deadlines were also modified as noted below;
- Declined to expand the definition of beneficial ownership in Rule 13d-3 to make clear that holders of cash-settled derivative securities beneficially own the underlying reference equity securities if the derivatives are held with the purpose or effect of changing or influencing the control of the issuer of the reference securities; and
- Declined to amend Rule 13d-5 to remove the reference that persons must "agree" to act together to form a group before group disclosure is required. Except in limited circumstances, activist investors generally disclaim agreements in their activities with other stockholders in order to avoid group disclosure, and as a result of the SEC's actions, it is likely this widespread practice will continue. The SEC also included several Q&As to clarify that shareholder communication and engagement involving an exchange of ideas and views (alone and without more) would not form a group.

We provide more detail on the final rules below.

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## Accelerated Filing Deadlines and Filing Format

As set forth in more detail in the table below, initial Schedule 13D filings will be due within five business days after crossing 5% beneficial ownership (down from ten calendar days), and amendments within two business days of any material change (reflecting a codification of the SEC’s current interpretation of the requirement to file amendments “promptly”). Initial Schedule 13G filings by qualified institutional investors and exempt investors will be due within 45 days of quarter-end (instead of 45 days after year-end). Initial Schedule 13G filings by passive investors will be due within five business days of crossing 5% beneficial ownership (down from ten calendar days). Amendments to all Schedule 13G filings will be due 45 calendar days after the quarter-end in which any material change occurs (instead of 45 days after year-end). To facilitate meeting these deadlines, the final rules extend the daily cutoff for Schedule 13D and 13G filings to 10:00 p.m. Eastern time (from 5:30 p.m. Eastern time) and define “business day” as any day (other than a Saturday, Sunday or federal holiday) from 12:00 a.m. to 11:59 p.m. Eastern time. Schedules 13D and 13G will ultimately have to be filed using an XML-based format, but only after September 30, 2024.

SCHEDULE 13D FILERS	CURRENT DEADLINE	NEW DEADLINE
<b>Initial Filing</b>	Within 10 calendar days of acquiring more than 5%	Within 5 business days after acquiring more than 5%
<b>Amendments</b>	“Promptly” after any material change	Within 2 business days after any material change
SCHEDULE 13G FILERS	CURRENT DEADLINE	NEW DEADLINE
<b>Initial Filing</b>		
<b>Passive Investors</b>	Within 10 calendar days after the end of the month in which more than 5% was acquired	Within 5 business days after acquiring more than 5%
<b>Qualified Institutional Investors and Exempt (or Pre-IPO) Investors</b>	Within 45 calendar days after the end of the calendar year in which more than 5% was acquired	Within 45 calendar days after the end of the calendar quarter in which more than 5% was acquired (and, in the case of qualified institutional investors, was held as of month-end)
<b>Qualified Institution Investors Over 10%</b>	Within 10 calendar days after month-end in which beneficial ownership exceeds 10%	Within 5 business days after month-end in which beneficial ownership exceeds 10%
<b>Amendments</b>		
<b>All Investors</b>	“Any” changes must be reported within 45 calendar days after the calendar year	Any “material” changes must be reported within 45 calendar days after the end of the quarter in which they occurred
<b>Passive Investors Acquiring More than 10% or Changing Ownership by 5% or More</b>	Promptly after acquiring more than 10% or changing ownership by more than 5%	Within 2 business days after acquiring more than 10% or changing ownership by more than 5%
<b>Qualified Institutional Investors Acquiring More Than 10% or Changing Ownership by 5% or More</b>	Within 10 calendar days after the end of the month in which more than 10% was acquired or changing ownership by more than 5%	Within 5 business days after the end of the month in which more than 10% was acquired or changing ownership by more than 5%

## Derivative Securities

### Beneficial Ownership of Securities Underlying Cash-Settled Swaps

As noted, the SEC did not amend Rule 13d-3 as it had proposed, to deem holders of non-security-based swap (SBS), cash-settled derivative securities to be the beneficial owners of the reference equity securities if held with the purpose or effect of changing or influencing the control of the issuer of the reference securities, or in connection with or as a participant in any transaction having such purpose or effect. Instead, the SEC issued guidance that beneficial ownership of the underlying reference equity security may exist where a cash-settled derivative security:

- confers, directly or indirectly, exclusive or shared voting or investment power over the reference security through a contractual term of the derivative security or otherwise;
- is acquired with the purpose or effect of divesting its holder of beneficial ownership of the reference security or preventing the vesting of beneficial ownership as part of a plan or scheme to evade Section 13(d) or 13(g) reporting requirements; or
- grants (i) a right to acquire beneficial ownership of the equity security within 60 days or (ii) a right to acquire beneficial ownership of the equity security with the purpose or effect of changing or influencing the control of the issuer of the security, or in connection with or as a participant in any transaction having such purpose or effect.

The SEC's adopting release notes that non-SBS derivative securities settled exclusively in cash generally are designed to represent only an economic interest, but "discrete facts and circumstances" could confer beneficial ownership of the underlying reference security. Given this, typical cash-settled swaps without an option to settle in kind (commonly used by activists to build positions in target companies) will likely remain outside the calculation of beneficial ownership.

### Disclosure of All Derivative Securities Positions on Schedule 13D

The final rules revise Item 6 of Schedule 13D, as was proposed, to clarify that beneficial owners must disclose interests in all derivative securities that use the company's equity security as a reference security, including cash-settled derivative securities and securities-based swaps, whether or not originated, offered or sold by the company. Item 6 of Schedule 13D previously only explicitly referred to puts or calls.

## Groups

### Group Formation Based on Concerted Action

As noted above, the SEC chose not to adopt most of its proposed amendments to Rule 13d-5, including removing the reference that persons must "agree" to act together to form a group. Instead, the SEC issued guidance that under its existing rules an express agreement is not necessary to find that a group exists and that such determination should be a facts-and-circumstances analysis of whether two or more persons act together for the purpose of "acquiring," "holding" or "disposing of" securities of a company. The SEC confirmed that some minimum indicia of agreement (such as an informal arrangement or coordination) were needed to form a group.

In addition, to address concerns that even the SEC's proposal could chill shareholder engagement, the SEC issued a series of Q&As articulating the general concept that shareholder communication and engagement involving an exchange of ideas and views (alone and without more) would not form a group. Specifically, the Q&As state that none of the below would form a group:

- Shareholder discussions, whether private or public, alone and without more (which could include discussions that relate to improvement of the long-term performance of the company, changes in company practices, submissions or solicitations in support of a non-binding shareholder proposal, a joint engagement strategy (that is not control-related) or a "vote no" campaign against individual directors in uncontested elections);

- Engagement by two or more shareholders in discussions with company management, without taking any other actions;
- Joint recommendations by shareholders (regarding the structure or composition of the company's board) made in the context of a discussion that does not involve an attempt to convince the board to take specific actions through a change in the existing board membership or bind the board to take action;
- Joint submission of a non-binding shareholder proposal pursuant to Rule 14a-8;
- Conversations, email, phone contact or meetings between a shareholder and an activist investor seeking support for its proposals to a company's board or management, without more (though actions such as consenting or committing to a course of action or activities beyond these communications (such as joint or coordinated publication of soliciting materials) might be indicative of group formation); or
- An announcement or a communication by a shareholder of their intent to vote in favor of an unaffiliated activist's director nominees, without more.

Because the proposed amendments to Rule 13d-5 were not made, certain exemptions from group status that were proposed for Rule 13d-6 were also not adopted.

#### **Trading on "tipping" of a potential Schedule 13D filing**

The SEC did not adopt proposed amendments that would deem a group to exist where a Schedule 13D filer shares non-public information about an upcoming filing with the purpose of causing the tippee to make, and the tippee makes, purchases based on that information. The SEC instead issued a Q&A to this same effect, stating that if a blockholder that is required to file a Schedule 13D (or amendment) intentionally communicates to other market participants that such a filing will be made (to the extent this information is not public) with the purpose of causing others to make purchases in the same covered class of securities, and purchases were made as a direct result of the blockholder's information, these activities raise the possibility that all of such beneficial owners are a group.

#### **Technical amendments regarding group ownership of securities**

The final rules include technical revisions (mostly in line with the proposed rules) to clarify that a group acquires any securities acquired by a member of the group after its formation, and that intra-group transfers would not constitute an additional acquisition by the group.

#### **Compliance Dates**

The final rules are effective 90 days after publication in the Federal Register, except that (i) the revised Schedule 13G deadlines will apply starting September 30, 2024, and (ii) the requirement to file Schedules 13D and 13G in a new structured data, XML-based format will apply starting December 18, 2024.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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